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ANTI-BULLYING STRATEGIES: IS A LEGISLATIVE APPROACH THE BEST SOLUTION?

by Aifric O Byrne

LL.M. LONG THESIS
COURSE: Human Rights Law
PROFESSOR: Renata Uitz, Eszter Polgari
Central European University
1051 Budapest, Nador utca 9.
Hungary

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EXECUTIVE SUMMARY

This thesis will compare a number of different approaches that have emerged in recent years in response to the problem of bullying in schools. In this manner, it will compare the legislative and policy-based strategies imposed by the jurisdictions of New Jersey, British Columbia, and Ireland, to see how they measure against the hypothesis of this thesis:

> A legislative anti-bullying model is preferable to a policy approach as it is more capable of preventing school bullying. Furthermore, that a legislative approach will more effectively balance all the co-existing human rights involved in school bullying, due to the multitude of legal considerations that would underpin the creation of such laws.

In addressing the issue of bullying, this thesis will adopt a human rights-based perspective, and assess the advantages of phrasing bullying as a violation of such. It will analyse the human rights most affected by the problem of bullying, and draw out the key rights shared by both victim and bully, which must be acknowledged and protected by any successful anti-bullying strategy. These rights are the following:

- The right of education.
- The right to freedom for torture, inhuman or degrading treatment.
- The right to development.
- The right to respect for private and family life.

Based upon this research, this thesis will develop a set of four questions against which to measure the benefits and drawbacks of the three jurisdictions forming the basis of the comparison of this thesis. These questions are the following:

1. Are there effective procedures in place for protecting victims and preventing bullying?
2. How do these approaches deal with the rights of all students to develop in a safe and inclusive school environment?
3. Are schools in the jurisdictions capable of dealing with cyberbullying?
4. How may one rely on such structures in order to invoke their human rights and bring a bullying case before the law?

This thesis will continue by introducing the anti-bullying approaches in existence in jurisdictions of New Jersey, British Columbia, and Ireland. It will lay out the background context in each of the jurisdictions underpinning the creation of the individual approaches, and the particular features of each model. The jurisdictions will then be measures against the aforementioned questions. A thorough analysis of such will reveal that the hypothesis of this thesis; that a legislative anti-bullying approach is preferable to a policy based approach, has not been proven. It will furthermore discover that the second limb of the hypothesis; that a legislative approach can more effectively balance all the co-existing human rights involved in school bullying, has similarly not been proven by the jurisdictions that have informed this thesis. However, a number of conclusions can be drawn from the comparison through the application of the aforementioned questions, which may address a number of real life problems which jurisdictions may face in the choice an application of a modern, successful, anti-bullying strategy.

THESIS INTRODUCTION

Bullying became the subject of scientific studies for the first time in the 1970s.[1] Since then, our awareness, and our condemnation of the problem has grown increasingly. As society's understanding of bullying has developed, so too have our attempts to deepen our understanding and ultimately, to counter-act it. Society's growing conception of bullying has been spurred onwards by political reactionism, partly as a consequence of the media's spotlight on the subject in recent years. A small number of highly publicised cases of teen suicides resulting from unaddressed, or insufficiently addressed incidents of bullying have prompted many jurisdictions to reassess their legal frameworks, culminating in a wave of specifically created anti-bullying legislation and policies informing schools and authorities of their legal duties and responsibilities towards children who are bullied. The changing social response has altered both social and legal perceptions of bullying, from merely a part of "growing up," to a discourse on whether bullying is a violation of fundamental the human rights of the child. The aim of this thesis is to compare three different approaches used to address the particular problem of high school bullying; a legislative, policy, and policy backed by legislation approach, to ultimately make an argument for better anti-bullying legislation as it relates to human rights.

The jurisdictions that will inform this comparison are New Jersey, British Columbia, and Ireland, as they represent three different possible approaches in addressing high school bullying.

[1] María Victoria Carrera & Renée DePalma & María Lameiras, "Toward a More Comprehensive Understanding of Bullying in School Settings" Educ Psychol Rev (2011) 23:479–499 pg 480

The State of New Jersey has undoubtedly one of the strictest, most comprehensive pieces of anti-bullying legislation world-wide. As one of the forerunners in the United States in enacting anti-bullying legislation, its Anti-Bullying Bill of Rights of 2010 built upon existing legislation in response "to an epidemic of bullying, cyberbullying and suicides affecting public schools across the country."[2] The legislation created standardized rules which bind all the schools in the region to rigorous, comprehensive reporting procedures. The Anti-Bullying Bill aims to "strengthen standards for preventing, reporting, investigating, and responding [to bullying in order to]… reduce the risk of suicide among students,"[3] with mandatory reporting techniques to ensure that even a single perceived incident that may be regarded as bullying, will be reported and investigated.[4]

The British Columbian approach differs from its New Jersey counter-part, taking the form of a policy campaign backed up by legislation. Just as with the New Jersey Anti-Bill of Rights, a legal obligation provides that each school must create and make available their own individual codes of conduct outlining bullying types of behaviour and the consequences of such behaviour. Such obligation are supplemented by policy in the form of the British Columbian 10-point strategy entitled ERASE Bullying (Expect Respect And a Safe Environment),[5] which include comprehensive training for all stake-holders involved in combating bulling, advanced online reporting techniques, resources for schools and parents, and increased com-

[2] "Recently Concluded Cases," New Jersey Council of Local Mandates, accessed 16th July, 2013 http://www.state.nj.us/localmandates/recent/

[3] "Overview of Amendments to Laws on Harassment, Intimidation, and Bullying," State of New Jersey Department of Legislation, pg 2, accessed 16th July, 2013 http://www.state.nj.us/education/students/safety/behavior/hib/overview.pdf

[4] See provisions outlined in the March 2012 amendment of Section 3 of P.L.2002, c.83 (C.18A:37-15) http://www.njleg.state.nj.us/2012/Bills/PL12/1_.PDF

[5] "ERASE Bullying," ERASE Bullying, accessed 16th July 2013 http://www.erasebullying.ca/

munity partnerships. Instead of a uniformed approach to be adopted in all schools, the ERASE policy tacitly acknowledges that there is "no one standard for what a school culture should look or feel like."[6] Each school is obliged under legislation to come up with its own approach that addresses bullying, yet such approaches may vary depending on the differing needs of the schools in the district.

The Irish position mirrors the British Columbian approach to some extent insofar as the State places a legal obligation upon schools to create individual written codes of behaviour with which students must abided. The Education Welfare Act 2003[7] defines the school board of management as holding primary responsibility for ensuring that children's school needs are met, on thus responsibility appears to fall to each school to define and consider the types of behaviour are considering as bullying, and the consequences that will ensue from engaging in such behaviour. Such an obligation has been recently reiterated through the "Anti-Bullying Procedures for Primary and Post Primary Schools,"[8] of September, 2013. Although the creation of specific anti-bullying policies and legislation is an area under debate in the Irish government at the moment, as of yet there are no set of laws that a school is obliged to follow in response to bullying. Thus, apart from defining student codes of conduct, schools are free to deal with incidents of bullying as they see fit, and are not obliged to act in accordance with any statutory framework.

[6] "ERASE, The Three C's – Culture," ERASE Bullying, accessed 16th July 2013 http://www.erasebullying.ca/safe-schools/safe-schools-3cs.php

[7] Education (Welfare) Act, 2000, Number 22 of 2000, § 10 (2000)

[8] "Anti-Bullying Procedures for Primary and Post Primary Schools" Department of Education and Skills, September 2013: http://www.education.ie/en/Publications/Policy-Reports/Anti-Bullying-Procedures-for-Primary-and-Post-Primary-Schools.pdf accessed 18th November 2013

In comparing these three different approaches in order to draw observations on the benefits and drawbacks of each position, I will begin by setting out the definitions and context that such comparisons will be based upon. These definitions will be used to focus the thesis on addressing solely the problem of bullying in relation to public high-school students, and will suggest and justify a definition of bullying against which this thesis shall be measures. During the argument of this definition, this thesis will address the particular problem of cyberbullying as a method of bullying, which will later play a particularly important role in assessing the relative advantages and disadvantages of each approach. After creating the context through which one may consider bullying for the terms of this thesis, I will proceed to create a human rights evaluative structure against which the three jurisdictions may be assessed. The structure will identify the rights holders and the specific rights that may be involved in defining bullying as a violation of human rights. Informed by this structure, I will create a series of questions against which the three jurisdictions shall be compared, and draw certain conclusions and observations therefrom. The questions that will inform the comparison are the following:

1. *Are there effective procedures in place for protecting victims and preventing bullying?*

2. *How do these approaches deal with the rights of all students to develop in a safe and inclusive school environment?*

3. *Are schools in the jurisdictions capable of dealing with cyberbullying?*

4. *How may one rely on such structures in order to invoke their human rights and bring a bullying case before the law?*

Based upon this research, I will use my findings address my hypothesis; that a legislative approach will prove more effective than a policy-based approach in preventing bullying, and protecting the rights of victims from bullying, and furthermore, that a legislative model will more effectively balance all the co-existing human rights involved in school bullying, due to the multitude of legal considerations that would underpin the creation of such laws. I will use my findings on these issues to highlight some of the real life problems which the approaches in these three jurisdictions are unable to address, thus discovering what is missing, and whether alternative methods are available in solving these specific problems.

CHAPTER 1 - DEFINITIONS AND CONTEXT OF BULLYING

This chapter is primarily aimed at setting out the context and definitions that will form the basis from which this thesis will compare the three separate anti-bullying approaches. It will set the confines of comparison by addressing the age group and school setting that concern us. This chapter will continue by setting out what bullying is, and the causes and consequences of bullying behaviour. It will suggest and justify a definition of bullying that may be used to inform this thesis, while drawing the reader's attention to the changing forms of bullying connected to advances in modern technology.

PART I: WHAT ARE THE DEMOGRAPHICS THAT CONCERN US?

This thesis will consider exclusively the situation of adolescents in a high school environment operating as a public school underneath the authority of the State. The limited scope seeks to avoid the multitude of consequent considerations which would attach themselves to younger children in a primary school environment. With younger children, for example, defining bullying behaviour from aggressive behaviour may not always be clear, and the role of the School in addressing such aggressive behaviour amongst younger children differs dramatically from confronting an atmosphere of bullying which may prevail in higher schools. Furthermore, the impetus which has sparked most major reforms, or debate on reforms in the jurisdictions that will be examined (i.e. the risk or fear of student suicide) is an issue not generally associated with younger children. This is not to say that such risks in no way exist, but moreso that studies on the impact of bullying on children with a younger age-group that have generated most political reform in these jurisdictions are less documented than that of older

children or adolescents,[9] and thus for the benefit of this thesis I will focus on the adolescent age group, as the main target group of most of the research, legislation and policy informing the comparison that will be made.

A distinction has also been made between public and private high schools, for the simple reason that it is not altogether clear the extent to which private schools are bound by legislation or policy pertaining to public schools. The approaches outlined by the three jurisdictions forming the comparison of this thesis, deliberately exclude private schools from the scope of application of the anti-bullying plans. Thus, this thesis will make a similar distinction.

PART II: WHAT IS BULLYING?

As society develops its awareness of bullying types of behaviours, our understanding of what constitutes as bullying is also in constant development and indeed expansion. Bullying can take the form of many different types of actions. It can be physically abusive behaviour, such as various form of violence, hitting, pushing, or shoving someone. It can be emotional, for example, excluding someone from a peer group, disrespecting or teasing someone, jeering or laughing at someone. Bullying can also be physical, involving kicking, and hitting, or threatening someone with violence.[10] While it is not possible to describe a complete list of forms through which bullying may manifest, bullying behaviour can be broken down in to the six categories, compromising of verbal abuse, physical abuse, gesture (through which victims

[9] "Bullying Among Young Kids," Australian Government Crime Prevention Unit, 2003, accessed 26/11/13 http://www.yarrileess.eq.edu.au/home/ngilm6/Positive/Positive%20PDF/Bullying+Teachers.pdf

[10] Claire P. Monks and Peter K. Smith, "Definitions of bullying: Age differences in understanding of the term, and the role of experience" British Journal of Developmental Psychology (2006), 24, 801–821

may be intimidated by threatening gestures, or even frightening looks), exclusion, extortion (whereby bullies will demand money or possession from a victim), and cyberbullying behaviour.[11]

The motivations which cause bullying are almost as diverse as the means themselves. The Trinity College Anti-Bullying Centre in Dublin, Ireland breaks down the causes of bullying in to four general headings: caused by the constitution of the bully themselves, stemming from the home life of the bully, the school environment, or wider society in general.[12] Bullying caused by the general constitution of the child suggests that the child is naturally inclined, for many different possible reasons to inflict power and aggression over others. The home life of the bully may contribute to the development of bullying behaviour if, for example, the child is granted too much freedom, or subject to inconsistent discipline by the adults in charge. There may be a lack of love and care directed towards the child, or the bully may be subjected to cruelty or excessive physical punishment, or witness violent behaviour, either physical or emotional on the part of adults. The school environment will frequently have a role to play in allowing the development of an atmosphere of bullying to occur. This may be as a result of inconsistent or inflexible school rules, inadequate supervision in classrooms or recreational areas, poor staff training or morale, or punishments which are abusive, humiliating, or too harsh for the students involved. Finally, simple exposure to wider society in general, such as regularly watching violence on the television or through video games, may pro-

[11] M. O'Moore & L.McGuire "School Bullying: Key Facts" A.B.C. Anti-Bullying Centre, Trinity College Dublin, (material posted to author from A.B.C. Anti-Bullying Centre, Trinity College Dublin)

[12] M. O'Moore & L.McGuire "School Bullying: Key Facts" *supra*

voke aggressive behaviour in children and adolescents, particularly when their home life or neighbourhood regularly mirror violent or aggressive behaviour.[13]

Notwithstanding our current knowledge of bullying, it is perhaps true to say that until relatively recently, bullying has been regularly cast aside as a "normal phase of development and that it teaches pupils to toughen up"[14] as a harmless rite of passage commonplace in the school experiences of many children. The dramatic change in popular opinion over the last few decades has been for a number of reasons. To name but a few, we as a public are made increasingly aware of the extreme consequences that may befall victims of bullying. The media's interest of bully horror stories, such as the tragic student suicides of the Amanda Todd and Tyler Clementi[15], and coverage of high profile court cases, a recent example of which being the Steubenville trial in Ohio,[16] have shown the public how that bullying behaviour can escalate in to crimes of sexual assault, rape and may even reach such intensity as to drive students to commit suicide. Bullying is now widely known to cause stress, anxiety, depression, substance abuse, aggression, sleeping problems, lower school attendance rate, deteriora-

[13] M. O'Moore & L.McGuire "School Bullying: Key Facts" *supra*

[14] "Anti-Bullying Procedures on Primary and Post Primary Schools" Department of Education and Skills, September 2013, (see in particular references to preconceptions that must be challenged at pg 21)

[15] For news stories relating to the suicides of Tyler Clementi and Amanda Todd, please access:

"Tyler Clementi," The New York Times, last modified March 16th 2012, accessed 26th of November, 2013 http://topics.nytimes.com/top/reference/timestopics/people/c/tyler_clementi/index.html,

"B.C. Convenes Anti-Bullying Conference One Months After Amanda Todd's Suicide," CTV.news, last modified 13th November, 2012, accessed 26th of November, 2013 http://www.ctvnews.ca/canada/b-c-convenes-anti-bullying-conference-one-month-after-amanda-todd-s-suicide-1.1035938

[16] "Steubenville Rape Case Brings Lessons in Social-Media Sexting and Cyberbullying," News Channel 5, last updated 30th March, 2013, accessed 25th of June, 2013 http://www.newsnet5.com/dpp/news/local_news/steubenville-rape-case-brings-lessons-in-social-media-sexting-and-cyberbullying

tion in school work, stomach and bower problems, panic attacks, feelings of isolation,[17] and as seen above, in extreme cases it may even cause attempts of suicide.

Furthermore, the work of researchers such as Dan Olweus,[18] have taken bullying outside the realm of inevitable childish behaviour and forced it to be addressed as a "pressing social issue which must be taken seriously and be systematically addressed by the schools/school authorities and society at large."[19] Research in many Western countries have uncovered just how pervasive a problem bullying, and although statistics differ from state to state, from school to school, it can now be said with some certainty that statistics constantly emerging from inside and outside Europe "confirm that school bullying and violence is an international problem."[20] To give some perspective for the benefit of our forthcoming comparison, last year in 2012 in New Jersey, reports state that 71.3% of students felt "insulted or demeaned by their peers", with 28.6% of students feeling fear over physical or emotional harm or damage to their personal property.[21] 1 in 3 Canadian teenage students have recently reported being the target of

[17] M. O'Moore & L.McGuire "School Bullying: Key Facts" *supra*

[18]See for example, D. Olweus, "Bullying at school: What we know and what we can do" Oxford: Blackwell Publishers, 1993. See also D. Olweus, & S. Limber, "Blueprints for violence prevention: Bullying Prevention Program" Institute of Behavioral Science, University of Colorado, Boulder, USA, 1999

[19] "Olweus Bullying Prevention Program," http://www.clemson.edu/olweus/history.htm accessed 26/11/13

[20] Dr. Mona O Moore "A Guiding Framework for Policy Approaches to School Bullying and Violence", Trinity College Dublin, (an online copy is published via http://www.oecd.org/ireland/33866844.pdf, accessed 26th November, 2013)

[21] "Bullying in New Jersey Schools Spike Over Previous School Years", N.J.com, last modified 3rd October, 2012, accessed 26th November, 2013
http://www.nj.com/news/index.ssf/2012/10/bullying_in_nj_schools_spikes.html

bullying,[22] and in a study of 870,000 Irish school-going children, approximately 23% have suffered bullying at some point in time.[23]

As a consequence, the quest to understand and abolish bullying has become an issue at the forefront of many national and international forums. Not only have many politicians weighed in on the debate,[24] but even the United Nations have begun to reflect upon the gravity and harms associated with the act.[25] With a great many pieces of international legislation that underscore the rights of a child to learn and exist in an environment that fosters education, respect, and safety, such as the UN Convention on the Rights of the Child 1989, the UN Covenant on Economic, Social and Cultural Rights (CESCR), the UN General Assembly Declaration on the Rights of the Child 1959, there can be no doubt that the consequences and the impact that bullying may have on its victims creates a problem which may be expressed as a human rights issue and violation, and has been increasingly considered as such.

[22] "Canadian Bullying Statistics," Canadian Institute of Health Research, last modified 28th September, 2012, accessed 26th November, 2013 http://www.cihr-irsc.gc.ca/e/45838.html#2

[23] M. O'Moore & L.McGuire "School Bullying: Key Facts" *supra*

[24] See for example: Dan Rafter, "Romney v. Obama: Bullying," HRC Blog, October 2012. See in particular the emphasis on comments of Barack Obama on the need to combat bullying http://www.hrc.org/blog/entry/romney-v.-obama-bullying accessed 25th June, 2013

[25] See for example the Committee on the Elimination of Discrimination against Women, List of issues and questions with regard to the consideration of periodic reports: New Zealand, 2012, accessed 06th March, 2013 www2.ohchr.org/english/bodies/cedaw/docs/AdvanceVersions/CEDAW-C-NZL-Q-7-Add1.pdf. Furthermore, note the focus on bullying in the 2012 Universal Periodic Review of Finland. CRC/C/FIN/CO/4, para. 54, as seen in the Human Rights Council Working Group on the Universal Periodic Review, Thirteenth session,

PART III: THE DEFINITIONS USED TO DESCRIBE BULLYING

The definitions used to describe bullying vary, with different disciplines tending to focus on different aspects of the problem. Psychologists and researchers tend to frame the issue in terms of repeated patterns of behaviour coupled with intent to harm. Dr. Dan Olweus defines bullying as when a person 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."[26]

Many other psychological or researcher definitions echo these sentiments, and generally pertain to relationships of power imbalance, and of repeated or patterned aggressive behaviour.[27] The American Psychology Association, for instance defines bullying as "intentions to cause harm, repeated incidences of harm, and an imbalance of power between perpetrator and victim".[28]

[26]Anti-Bullying Concepts, "Bullying Definition," quoting Dr. Dan Olweus from "Bullying at School: What We Know and What We Can Do" Malden, Massachusetts: Blackwell Publishers Inc. http://www.antibullyingconcepts.com/index-6d.html accessed 06th May, 2013

[27] See María Victoria Carrera & Renée DePalma & María Lameiras *supra,*

[28] Sanda Graham, "Bullying: A Module for Teachers," American Psychology Association http://www.apa.org/education/k12/bullying.aspx, accessed 06th May, 2013.

For further reading, please see Dena T. Sacco, Katharine Silbaugh, Felipe Corredor, June Casey and Davis Doherty, "An Overview of State Anti-Bullying Legislation and Other Related Laws," The Kinder and Braver World Project: Research Series, 23rd February, 2012 http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State_Anti_bullying_Legislation_Overview_0.pdf accessed 25th March, 2013

Legislative definitions of bullying may vary from psychological definitions in certain focal points. The Department of Education of the United States remarks on some of the differences in US State bullying definitions;

> [s]ome state laws focus on specific actions (e.g., physical, verbal, or written), some focus on the intent or motivation of the aggressor, others focus on the degree and nature of harms that are inflicted on the victim, and many address multiple factors.[29]

Alternatively, the Irish Guidelines on Countering Bullying Behaviour in Primary and Post Primary Schools 1993, designed to assist Irish schools in creating their own anti-bullying policy define bullying focus on objectively on the specific action, defining bullying as "repeated aggression, verbal, psychological or physical conducted by an individual or group against others."[30] To allow greater comparative scope for this thesis I will define bullying as the intentional infliction of harm by one student on to another through an unfixed variety of means with the aim of asserting control, pain or humiliation on to that person. The rationale for this definition will now be examined.

PART IV: BREAKING DOWN THE DEFINITION:

The first aspect of this definition will focus on the intentional infliction of harm, as opposed to unintentionally harm. This is possibly the most restrictive point in the short definition of bullying. While it seeks to avoid unfairly casting a student as a bully without them having requisite intention for bullying behaviour, it is concurrently possible to imagine situations

[29] "A*nalysis of State Bullying Laws and Policies*," U.S. Department of Education, 2011. Cited from Dena T. Sacco, Katharine Silbaugh, Felipe Corredor, June Casey and Davis Doherty, "An Overview of State Anti-Bullying Legislation and Other Related Laws," *Supra*

[30] "Guidelines on Countering Bullying in Primary and Post Primary Schools," Irish Ministry of Education, September 1993. See in particular section 2.

whereby acts which are not intended as bullying may be perceived as such by those on the receiving end of the action. One example of this may be found in the impersonal, removed nature of text messages or emails found with cyberbullying. Nemours, a non-profit organisation aimed at promoting the health of children, described the impersonal nature of "text messages, IMs, and emails" as making it "very hard to detect the sender's tone — one person's joke could be another's hurtful insult."[31]

Alternatively, horse play in the school yard may subsequently cause harm or pain to a child, but such results are not automatically due to bullying, to the aggressive desire to wield power over another student. Yet in pre-empting future comments which will be made over the course of this thesis on the need to strike balance between the right of a child to be given space to develop their personality, to make mistakes without a constant fear of reproach or as being cast as a bully, I believe that the actual intention of the bully to inflict pain or suffering on to their victim is a necessary limitation that any balanced anti-bullying legislative definition must concede to. Furthermore the possibility of a bully escaping responsibility under the veil of an argument of unintended actions is generally unlikely. The same abovementioned website concedes; "a repeated pattern of emails, text messages, and online posts is rarely accidental".[32]

This thesis will restrict itself to an examination of high school bullying, and will not, for lack of space and need for clarity, consider bullying between students and adult teachers, or work

[31] "Cyberbullying," KidsHealth.org, last modified January 2013, accessed 06th November 2013 http://kidshealth.org/PageManager.jsp?dn=KidsHealth&lic=1&ps=107&cat_id=171&article_set=65413

[32] *Supra*

place bullying. Although such relations can indeed express dynamics of bullying behaviour, it is not the focus of this thesis so has not been included in the definition.

By adopting a flexible definition of the "means" of bullying, this thesis is given the scope to acknowledge the connection between bullying, and the advances in modern technology which may influence it. A massive shift is discernable from what we understand as traditional types of bullying such as physical abuse, name calling and social exclusion, to what is known as "cyberbullying", a particularly insidious form of bullying where actions take place via online or electronic means, such as the use of social platforms, mobile phones, emails or text messages. Cyberbullying can be defined as the "an aggressive, intentional act carried out by a group or individual, using electronic forms of contact, repeatedly over time against a victim who cannot easily defend him- or herself."[33] It differs from traditional forms of bullying for a number of reasons. As Vandesboch et. al assert:

> With cyberbullying, it is not necessarily the case that the victim is harassed repeatedly. A defamatory website, for example, will often stay online for a longer period of time and can, moreover, be read by many individuals. A spoken insult, by contrast disappears from the moment it is uttered, and is only heard by those present at the time.[34]

The major difference between traditional forms of bullying and cyberbullying is the ease at the dissemination, and anonymity with which insulting or derogatory statements can be circulated. As one anti-bullying resource explains:

[33] P.K. Smith, J. Mahdavi, M. Carvalho, & N. Tippett, "An Investigation into Cyberbullying, its Forms, Awareness and Impact, and the Relationship Between Age and Gender in Cyberbullying" Research Brief No. RBX03-06 London: DfES. As seen in Mona O'Moore, Steven James Minton, "Cyberbullying, The Irish Experience", Handbook of Aggressive Research Behaviour, 2009 Nova Science Publishers Inc. ISBN: 978-1-60471-583-1

[34] H. Vandesboch, K. Van Cleemput, D. Mortelmans, & M. Walrave, "Cyberpesten bij jongeren in Vlaanderen [Cyberbullying amongst youngsters in Flanders]" Brussels viWTA, 2006. As seen in Mona O'Moore, Steven James Minton "Cyberbullying, The Irish Experience" *supra*

> The big difference between writing a nasty message on a toilet door and posting it on the internet is that the latter can potentially be seen by a limitless audience almost immediately and remains available on the web even if it is later removed.[35]

The consequence of the shift from traditional face-to-face bullying, to the creation of an online, mostly anonymous cyber-playground, means that taunting and bullying no longer stops at the gates of the school yard. Bullying now follows children in to their homes, their bedrooms, and their private family lives. In a study done by the Cyberbullying Research Centre from 2004 until 2010, 50% of young people claim to have experienced some type of cyberbullying, with "10 to 20 percent experience[ing] it regularly."[36] Cyberbullying as a mode of bullying has received almost unprecedented attention in the growing corpus of anti-bullying literature, with many believing that its increase is due to relevant technology becoming ever more readily accessible by children,.[37] It is reported that approximately 20 million active Facebook users are minors,[38] with one million of these have reported being "harassed, threatened, or subjected to other forms of cyberbullying on the site"[39] in 2011.

The problem that schools face when attempting to deal with cyberbullying is not an easy one, as the issue implies certain legal rights, the negotiation and balancing of which is particularly difficult. Although cyberbullying is one of the most pressing concerns for many anti-bullying

[35] "Cyberbullying," Bully4u.ie, accessed 26th November, 2013 http://bully4u.ie/cyberbullying/

[36] "Cyber bullying Statistics", Bullying Statistics, accessed 26th November, 2013 http://www.bullyingstatistics.org/content/cyberbullying-statistics.html

[37] Ken Rigby, Peter K. Smith, "Is school bullying really on the rise?" Soc Psychol Educ (2011) 14: pg 449

[38] "Five million Facebook users are 10 or younger", Consumer Reports News, last modified May 10th, 2011, accessed 26th November, 2013 http://www.consumerreports.org/cro/news/2011/05/five-million-facebook-users-are-10-or-younger/index.htm

[39] "That Facebook Friend Might be 10 Years Old, and Other Troubling News" Consumer Reports Magazine, last modified June 2011, accessed 14th March, 2013 http://www.consumerreports.org/cro/magazine-archive/2011/june/electronics-computers/state-of-the-net/facebook-concerns/index.htm

plans of action, the implications of a child's right to privacy are of integral importance in formulating a school's duty to intervene that allows authorities to realistically deal with the problems posed by harassing emails, and text messages. Legislation that attempts to deal with this increasingly prevalent form of bullying must respect the negative duties imposed by the right of respect for private life, thus restrict the school's authority's to interfere with the child's privacy, save within permissible statutory limitations. An invasion of the victim's right to private life occurs upon incidences of cyberbullying. However, the bully's right to privacy in relation to correspondence must be balanced against the vindication of the right of the victim, and weighed against the duty of the school to intervene and investigate allegations of cyberbullying. While international law grants the bully the right to respect for private life, such a right may be "appropriately overruled from time to time on paternalistic grounds."[40] There may be permissible limitations to the right of privacy when poised against the ultimate aim of protecting the rights of others, *i.e.* preventing, or addressing cyberbullying.

Therefore, the problem of cyberbullying appears to be of such extent, that it must be addressed in any legislative or policy approach to bullying. Indeed, the three jurisdictions upon which this thesis is based make a particular effort to deal with the issue. It is a problem to which solutions encompasses many different legalistic issues, and indeed competing holders of rights. As such, in terms of the definition that this thesis is arguing for, by leaving undefined the means through which one student may bully another, space is given for schools to address the fast developing technological landscape that students are increasingly accessing.

[40] Andrew Davis, "Do Children have Privacy Rights in the Classroom?" Studies in Philosophy and Education 20:3 245–254, 2001. Pg 246

To complete the breakdown of the suggested definition, by phrasing bullying as an attempt to assert control, pain or humiliation on to another student, I wish to focus on the actual intention of the bully to engage in bullying behaviour. Thus, a bully may still be culpable even where he or she does not succeed, for reasons such as the fortitude of the would-be victim, or intervening bystanders, in asserting such control, pain or humiliation on to another student. Such interpretation may increase the capacity of schools to address a culture of bullying within their confines.

Finally, I have intentionally avoided referring to the frequency of aggressive behaviour as a precondition for establishing bullying. Past research and definitions have shown a preference for insisting on a repeated pattern of aggression before finding behaviour complained of can be considered as breaching the threshold of bullying. As the Irish Working Group on Bullying assert, interpretations of bullying as repeated behaviour help contextualise bullying as part of a "continuum of behaviour,"[41] and thus dealing with the issue be understood as requiring more long term solutions, than the punishment of a single incident. Furthermore, the need for multiple occasions of bullying may guard against once off incidents of bullying type behaviour, where intentions or meanings may be misinterpreted, such as the above illustration of the informality of text messages resulting in potentially misconstrued messages. However, as cyberbullying is becoming an increasingly invasive problem for Irish students and schools, the impact of once-off incidences of bullying cannot be undermined. Bullying, even if it occurs just once, can have devastating effects on an individual, and may constitute all the elements of bullying such as intention to inflict harm, control, pain or humiliation on to another

[41] Report of the Anti-Bullying Working Group to the Minister for Education and Skills, "Action Plan on Bullying," January 2013, accessed 26th November, 2013 http://www.education.ie/en/Publications/Education-Reports/Action-Plan-On-Bullying-2013.pdf

student. Therefore, due to the gravity that can arise from a single incident of bullying, particularly in the circumstances of cyberbullying which may encompass a virtually limitless audience, I have avoided describing the minimum frequency before bullying types of behaviour can be identified as "bullying".

CONCLUSION

This chapter has addressed some of the basic points upon which this thesis shall be based. The limited confines upon which a comparison will be made has been established, by justifying a focus on public, state-funded high schools. The problem of bullying has been considered from the point of view of the causes, and consequences associated with it. A definition of bullying as the 'intentional infliction of harm by one student on to another through an unfixed variety of means, with the aim of asserting control, pain or humiliation on to that person' has been argued. In justifying this definition of bullying, this thesis has introduced the problem of cyberbullying, which will become a particular point of focus for in the jurisdiction comparison.

CHAPTER 2 - BULLYING AS A HUMAN RIGHTS ISSUE?

We have been introduced to the problem of bullying, and have begun to understand the causes and consequences of allowing bullying types of behaviour to be inflicted upon a victim. We now have some understanding of what may cause bullying – the home life of the child, the school, society in general, or even the nature of the bully themselves, and are aware that victims risk suffering from low self esteem, high school dropout rate and lower productivity, depression, anxiety, or even suicide as a result. Given the statistics which illustrate the preva-

lence of the problem of bullying in New Jersey, British Columbia, and Ireland, and indeed in innumerable other jurisdictions worldwide, it is perhaps unsurprising that researchers, activists and politicians, have begun to frame bullying as a violation of the fundamental human rights of children, committed to them by other children.

This chapter will examine the reformulation of bullying as an infringement of the human rights of the victim. It will essentially argue and establish why we should see bullying as a human rights issue, and illustrate the benefits that can be drawn by legislatures, policy makers, and wider society from adopting such an approach. Once an argument for reformulating bullying as a human rights violation has been established, I will extract and analyse the fundamental rights and freedoms of the victim, and also of the bully, which are implicit in a re-conceptualisation of bullying as an abuse of human rights. I will outline certain international legislative declarations and covenants which bolster this human rights approach, enshrining within them the rights of the victim to education, to live in an environment free from harm to their development, and to be free from torture, cruel, inhumane or degrading treatment, or indeed the fear therefrom.

While any anti-bullying approach based in human rights will normally be victim focused, regard must be had for counter-veiling rights of the bully. A consideration of the bully's human rights does not trump the rights of the victim, but they will play an important role during the course of this thesis of establishing the limits of anti-bullying legislative acts and policy. In particular, attention will be paid to the right to full development of personality of the bully in the school environment and the right of respect for private life as a concern when addressing cyberbullying.

1. ESTABLISHING BULLYING AS A HUMAN RIGHTS ISSUE

Why should we define bullying as a human rights issue? What is the benefit of such an approach? Can we justify interpreting bullying as a human rights issue?

Essentially, in assessing the advantages of conceptualizing bullying within a human rights framework, we must ask what impact an anti-bullying human rights approach can make on efforts by a State to reduce and tackle bullying in their schools. As Michael Greene writes, we are concerned with whether;

> ...(t)he placement of such civil and human rights infractions under the rubric of bullying impedes or facilitates effective remedies to specific infractions as well as the promotion of just school climates and human rights in general.[42]

A human rights approach is to the overall benefit of society if it enhances or enables State authorities to deal more efficiently, more thoroughly, with cultures of bullying within their jurisdictions. A human rights approach may have a direct impact on, or directly increase the duties and responsibilities of the school as those responsible in primarily guaranteeing the welfare of children under their authority. As Greene explains, the traditional conception and definitions associated with bullying by States and Schools would most likely broaden, as a human rights approach may consider bullying in a far more expansive, comprehensive manner than previously framed, considering the interplay of the co-existing rights and the concurrent actors associated with the bullying process. Bullying is being considered as a peer-to-peer problem for the purposes of this thesis, and thus the infringements of human rights are taking place essentially by students to students. However, a human rights-based approach

[42] Michael B. Greene, "Bullying in Schools: A Plea for a Measure of Human Rights" Journal of Social Issues, Vol. 62, No. 1, 2006, pp. 66

would oblige States to intervene despite the horizontal nature of the problem, as it would place the obligation on the State to realize and protects the rights of students which risk becoming extinguished through a pervasive school atmosphere of bullying. Furthermore, while many State definitions of bullying focus on the actions of the bully, a human rights approach would "promote a human or civil rights discourse" and focus attention on the "underlying norms that produce or facilitate the hostile environment in which such behaviours occur."[43] It would necessitate a deeper response than perhaps previously engaged in by schools, as not only the symptoms, but also the source, and the culture created by bullying, would be necessarily addressed by any school policy or legislation.

Thus we have a number of reasons for interpreting bullying as a violation of human rights, but can we justify this re-conceptualisation practically? By acknowledging one of the basic functions of the law as being the protection of the rights of the weak from abuse by the strong, by ascertaining that some of the most fundamental, established and recognised rights of the child are infringed upon through the process of victimisation and bullying, I would argue for the notion of a human rights-focused anti-bullying discourse as an instructive advancement in anti-bullying theory and practice. The work of Dr. Dan Olweus, one of the one of the most influential theorists of anti-bullying techniques supports this view, as he writes that "it is a fundamental democratic or human right for a child to feel safe in school and to be spared the oppression and repeated, intentional humiliation implied in peer victimization or bullying.[44]" Furthermore, the United Nations has increasingly phrased the problems of cyber-

[43] *Supra*

[44] D. Olweus, (2001) "Peer harassment: A critical analysis and some important issues," 2001, pg 11 – 12 , in J. Juvonen & S. Graham (Eds.), *Peer harassment in school* (pp. 3–20). New York: Guilford. As seen in Michael B. Greene, "Bullying in Schools: A Plea for Measure of Human Rights" *Journal of Social Issues, Vol. 62, No. 1, 2006, pp. 63--79*

bullying and homophobic bullying as a violation of the fundamental human rights of the child. The Convention on the Elimination of All Forms of Discrimination against Women's (CEDAW) questionnaire on the periodic report on New Zealand, underlines its "grave concern[s]" of "bullying of teenage girls at school, via text messages or the Internet."[45] Similarly, the 2012 Universal Period Review of Finland expressed the CRC's alarm at the "widespread sexual and gender-based harassment against girls and bullying, including on the Internet and via mobile phones.[46]" The UN Secretary-General Ban Ki-Moon, following a similar route, has described homophobic bullying as "a moral outrage, a grave violation of human rights and a public health crisis."[47]

By considering that laws exist to protect the vulnerable and weak from abuse of the strong, by accepting the almost world-wide acceptance of Declarations and Conventions enshrining the specific rights of the child which are to be protected and nurtured by the State and Guardians, and by acknowledging the general trend of international recognition of the severity and gravity of bullying as a direct infringement of the human rights of the child, this thesis asserts that there is an arguable point to be made for establishing bullying as a violation of the human rights of the child.

[45] Committee on the Elimination of Discrimination against Women, List of issues and questions with regard to the consideration of periodic reports: New Zealand, 2012: www2.ohchr.org/english/bodies/cedaw/docs/AdvanceVersions/CEDAW-C-NZL-Q-7-Add1.pdf accessed 6th June, 2013

[46] CRC/C/FIN/CO/4, para. 54, as seen in the Human Rights Council Working Group on the Universal Periodic Review, Thirteenth session, Finland 2012, Geneva, 21 May - 4 June 2012

[47] "Secretary General, In Message to an Event on Ending Sexuality-Based Violence, Bias, Calls Homophobic Bullying "A Moral Outrage, A Grave Violation of Human Rights"" Secretary-General SG/SM/14008 HR/5080, 8th December 2011: http://www.un.org/News/Press/docs/2011/sgsm14008.doc.htm accessed 26th November 2013.

2. THE RIGHTS AT STAKE

As this thesis is concerned specifically with the realm of peer-on-peer bullying, the right-holders which will be focused upon are children. Thus, this thesis will not consider the similarly important rights of the family, or the teachers involved, as such rights are not the focus of this comparison. This section will extract the rights of the victim, and illustrate how, in a human rights framework, limitations to legislation or policy are obliged to consider certain rights of the bully. Although perhaps our instinct is to consider in isolation the needs of the victims to be protected against the negative impact and aggression of the bullies, laws and policy focused on school-bullying will appreciate that the bullies in question are children themselves, and thus are also considered as weak and vulnerable in the eyes of the law.

Bullies by their very virtue of being children are rights holders, and deserving of protection, nurture and care from the State and guardian authorities, such as schools. This universality of protection is explained in the preamble of the CRC, which notes that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[48] A child does not lose his or her status of protection because they have engaged in bullying, but also deserve State protection and vindication of their individual rights to development, to privacy.

Therefore, in order to discover what rights are in question when considering anti-bullying legislation, this thesis will examine the rights at issue as they relate to both victim and bully.

[48] United Nations Convention on the Rights of the Child, 1989, Preamble

An examination of these rights will ensure that all children are enabled to receive an education, and are made feel safe and secure in their learning environments, while providing space for a child to feel at liberty to express their views on the world, to engage in trial and error with a view to fully developing their personality, without an over-straining fear of stigmatization or punishment. Balancing these considerations is the difficult task which legislative and policy responses must address, and which approaches we must compare in order to recognise their accomplishments and failures.

I will outline some of the international declarations, conventions, and covenants which guarantee to the child the right to a productive educative environment, which encompasses space for the child to develop, and which protects the mental and physical wellbeing of the victim. I will outline the right of development within the environment of the school, as well as comment on the right of privacy which is of particular relevance in terms of anti-cyber bullying legislation and policies.

As this thesis is focused on the capacities, duties and obligations of schools, it can be said with certainty that their primary duty is to provide education to students. Bullying, and the creation of a bullying culture and atmosphere hinders the effective impartment of education, and thus is justifiably a right to be examined in the human rights framework of bullying. The legal importance of the child's right of education cannot be over-emphasised, and plays part of almost all major international agreements governing the human rights and freedoms of citizens. The Universal Declaration of Human Rights (UDHR), the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (CESCR), and the Convention on the Rights of the Child all refer to the right of education as a key aspect of the child's development.

To examine the contours of the right to education from the point of view of international human rights law, the Universal Declaration of Human Rights is a valid starting point. Adopted against the aftermath of Second World War, the document declares the inherent rights due to all persons. Article 26 of the UDHR expressly recognises that "(e)veryone has the right to education... [and furthermore]...[e]ducation shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms." This indicates that the educational development of the child is not merely academic, but multi-layered experience which should be designed to foster the child's capacity to develop to their full potential, in to responsible adults capable of respecting the rights of others.

The expansion of the concept of education in to a legal right owed to each child, urges Governments to see it as a "vehicle for development,"[49] which plays part of a "humanistic mission"[50] that goes over and above mere academic functions. Such approach has now been solidified in to the corpus of international treaties, laws, and State duties. From Article 2, Protocol 1 of the European Convention on Human Rights,[51] to the ratification of a number of subsequent Conventions, including the ICCPR, and the CESCR, (the creation of both giving an element of substance to the UDHR) as well as the Convention on the Rights of the Child itself, weight has been increasingly given to the concept of State obligations to provide children not only with education, but an education conducive to the empowerment and development of the nature of the child. Article 13 of the CESCR, for example, enshrines the right of universal education as "directed to the full development of the human personality and the sense of its dignity."[52] The General Comment on Article 13 reveal the United Nation's opinion that education is the vital tool in the process of development and empowerment of the child; an "indispensable means of realizing other human rights,"[53] reflecting somewhat Article 18 of the ICCPR, which speaks of the education in a moral sense received by children.[54]

[49] Report of the Special Rapporteur on the right to education, Vernor Muñoz Villalobos, Mission to Mongolia (1–8 October 2009), A/HRC/14/25/Add.3 / 17 May 2010: http://daccess-dds ny.un.org/doc/UNDOC/GEN/G10/133/94/PDF/G1013394.pdf?OpenElement accessed 06th March, 2013

[50] "Annual Report on the Right to Education," United Nations General Assembly, A/67/310, 2012

[51] Article 2, Protocol 1 of the European Convention on Human Rights: *"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions"*

[52] International Covenant on Economic, Social and Cultural Rights 1976, Article 13

[53] General Comment No. 13: The Right to Education (Art. 13 CESCR), Office of the High Commissioner of Human Rights, E/C.12/1999/10

As such, one could argue that bullying, with consequences such as "loss of friendships, feelings of isolation and hopelessness, loneliness, unhappiness, lack of self-esteem and disruptions to learning"[55] which may reach levels of obstructing the empowerment and development of the child, is a direct infringement not only to the right to education but furthermore to the right of development of the child.

The Convention of the Rights of the Child was instigated by world leaders after their consensus that children, as distinct in their particularly vulnerable position from adults, "often need special care and protection that adults do not."[56] Consequently, a specific convention to protect the particular rights of the child, and to reinforce their position as rights holders was formed.[57] In this vein, while Article 28 lays down the child's basic right to education,[58] Article 29(1) goes further by supporting the holistic nature[59] of the right, linking it (using language similar to that used by the ICESCR and UDHR) to the development of "personality,

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[54] International Covenant on Civil and Political Rights Article 18: "The States Parties to the present Covenant undertake to have respect for the liberty of parents ... to ensure the religious and moral education of their children in conformity with their own convictions."

[55] See K. Bosworth, (1999)." Factors associated with bullying behavior in middle school students," Journal of Early Adolescence, 19, 341–362. See also D. Espelage, K. Bosworth, & T. Simon, (2000) "Examining the social context of bullying behaviors in early adolescence" Journal of Counseling and Development, 78, 326–333.

[56] "20 Years of the Convention on the Rights of the Child," UNICEF, About the Convention, http://www.unicef.org/rightsite/237_202.htm accessed 7th March, 2013

[57] *Id* (see for example "The leaders also wanted to make sure that the world recognized that children have human rights too…")

[58] Article 28, United Nations Convention on the Rights of the Child 1989

[59] "The Aims of Education", General Comment on the Convention on the Rights of the Child, The United Nations High Commissioner of Human Rights, CRC/GC/2001/1: http://www.unhchr.ch/tbs/doc.nsf/%28symbol%29/CRC.GC.2001.1.En?OpenDocument (see in particular par.12 " … article 29 (1) insists upon a holistic approach to education…") accessed 7th March, 2013

talents and mental and physical abilities … respect for human rights… [and] cultural identity, language and values."[60]

The United Nations revisited the CRC in 2001,[61] delivering an exhaustive general comment on the CRC's interpretation of the right to education - once again giving it a central role within the spectrum of children's rights as a multi-functional tool, essential to the development of the child. It expressed the need for education to be empowering, and places expectations on States to create systems that are capable of teaching children not only academic, but life skills, including the "ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life."[62]

Thus, there has been significant development from the starting concept of the rights of children to have access to education and an education system. Through deepened understanding of education as a tool for development and personal growth of the child, the duty has developed on States to provide children with an education environment that is respectful and nurturing of a multitude of other rights. This obligation goes over and above the right of access of children to a suitable education. As a UNESCO and UNICEF publication on a human-rights approach to education explains:

[60] Article 29 (1)(a - c), Convention on the Rights of the Child 1989

[61] "The Aims of Education", General Comment on the Convention on the Rights of the Child, The United Nations High Commissioner of Human Rights, *supra*

[62] Paragraph 9, *Supra*,

> The right to education must be understood as incorporating respect for children's identity, their right to express their views on all matters of concern to them, and their physical and personal integrity.[63]

As such, a learning environment must be created which is inclusive, nurturing, and respectful of all the rights of the child must be formed.

What is of fundamental importance when considering the ICCPR, the CESCR and the CRC is that, as opposed to the UDHR, these Conventions are legally binding instruments and therefore, signatory States are bound to comply by their contents. The ICCPR and ICESCR, known cumulatively as the 'International Bill of Rights', both contain certain UN mechanisms for monitoring and for enforcement. In addition, the first Optional Protocol of the ICCPR, which allows for "communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant"[64] to be considered by the Human Rights Committee, has created a platform for individuals, including children, to complain of violations to their ICCPR rights. Not only can complaints be directly raised, but the fulfilment each State's human rights obligations and commitments are subject to periodic review by the 47 members of the Human Rights Council.[65] The review, which looks to "prompt, support, and expand the promotion and protection of human rights"[66] offers technical assistance and

[63] "A Human-Rights Based Approach to Education for All," United Nations Children's Fund/ United Nations Educational, Scientific and Cultural Organization, 2007, ISBN: 978-92-806-4188-2

[64] Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI) http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx accessed 28th November 2013

[65] "Basic Facts about the UPR", Office for the High Commissioner of Human Rights, http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx accessed 28th November 2013

[66] *Supra*

shares best practices with States aid and enhance their capacity to deal effectively with human rights challenges in their jurisdiction.[67]

Furthermore, the existence of the Convention of the Right of the Child not only binds countries who have ratified the Convention to follow policies which conform to the general and specific obligations set forth in the UNCRC, but also, upon incorporation in to domestic law, allows "individual children to bring proceedings before national courts, based solely on alleged violation of the UNCRC which affect them."[68] Just as with the ICCPR and the CESCR, a Committee on the Rights of the Child exists to monitor the compliance by member states of their CRC obligations, reviews the situation of children within member state territory, makes recommendations, and hosts "annual thematic discussions on issues that affect children."[69] The Committee has specifically raised attention to the issue of prejudice-driven school bullying in the past, and thus adds yet a further layer of protection to the rights of education and development held by children in the context of a human-rights based approach to bullying.[70]

Regional human rights mechanisms, such as the European Convention on Human Rights (ECHR), remain no less important today in the enforcement of the child's right to education in law. As with the ICCPR and the ICESCR, the articles of the ECHR were not originally

[67] *Supra*

[68] Andrew Bainham, "Children – The Modern Law" Jordan Publishing Limited 2005, *3rd ed.* Pg 67

[69] "Human Rights Enforcement of the United Nations," ESCR-net, last modified 3rd August 2012, http://www.escr-net.org/docs/i/405650 accessed 21st Sept 2013

[70] See for example, "Response to the list of issues raised in connection with the consideration of the third and fourth periodic report of the United Kingdom of Great Britain and Northern Ireland," Committee on the Rights of the Child, Forty-ninth Session, 15 September – 3 October 2008, CRC/C/GBR/4

drafted with children in mind, only "two of its articles … [being] directly relevant to their developmental needs."[71] Drafted in 1950, some two years after the ratification of the UDHR, it mirrors its international predecessor's approach to children as rights holders, predominantly granting them rights "not because they are children but because they are persons and all persons enjoy the rights and freedoms guaranteed by the Convention."[72] Consequently, as with all international treaties prior to the CRC, the Convention has a lack of detail on the specific needs children as opposed to citizens of the world.

In terms of education, Article 2 of Protocol No. 1 of the ECHR appears to provide a two-fold approach to the right which is inherently negative in construction. It encompasses a right "*not to be denied* access to pre-existing educational facilities or an effective education"[73] with deference given to the parental rights to raise their children in line with their own "religious and philosophical convictions[74]", thus focusing more on the "*freedom of* education…rather than the social and cultural *right to* education entailing a positive obligation on the part of the State."[75]

However, while the wording of the protocol may appear to be more limited than the weight granted to the right education of the United Nations Conventions, the actual case law of

[71] L. Goldthorpe & P. Monro, "Child Law Handbook – Guide to Good Practice" Law Society Publishing 2005, pg 3

[72] Andrew Bainham, "Children – The Modern Law" *Supra* pg 82

[73] L. Goldthorpe & P. Monro "Child Law Handbook – Guide to Good Practice" *Supra* pg 218

[74] Article 2 of Protocol No. 1, European Convention for the Protection of Human Rights

[75] Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn, Leo Zwaak, "Theory and Practice of the European Convention on Human Rights," Intersentia 2006, 4th ed. pg 896

Strasbourg presents a different story. The seminal *Belgian Linguistics Case* of 1968 explained that the negative formulation of the right does not mean that there is not a positive obligation on the State to provide education as a right to all children. It states that:

> A "right" does exist, it is secured, by virtue of Article 1 (Art. 1) of the Convention, to everyone within the jurisdiction of a Contracting States.[76]

The ECHR has constantly been described as a "living document,"[77] and as such, decisions such as *Campbell and Cosans,*[78] and *Catan*[79] have considered the right of education to be associated with the intellectual and personal development as well as the future success of the child. Considering that the rights of the ECHR, and thus specifically the right to education can be invoked directly by children,[80] it remains a valuable standard by which we can measure the State's duty to provide a child with education.

Overall, it is beyond argument that the right to education is enshrined in practically every major international convention referring to the cultural and fundamental rights of the child. Not only can we adduce that each child has the right to access education, but that such education is firmly interpreted in terms closely associated with the developmental and holistic needs of the child. As such, a child not only has the right to education, but the right to an education environment which develops and nurtures other rights implicit in the function of the

[76] *Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium v. Belgium*, (Merits, par 3), nos. 1474/62, 1677/62, 1691/62, 1769/63 1994/63, and 2126/64, 23rd July 1968

[77] *Tyrer v. UK*, no. 5856/72, 25th April 1978

[78] *Campell and Cosans v. UK*, nos. 7511/76, and 7743/76, 25th February 1982

[79] *Catan and Others v. The Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, 19 October 2012.

[80] P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, "Theory and Practice of the European Convention on Human Rights," *Supra* pg 896

right to education. Education has been interpreted through the UDHR, the ECHR, the ICCPR, CESCR, and CRC as a tool, as a medium through which the child shall become empowered and develop in to a functioning, balanced adult in accordance with the rights and responsibilities due to all members of society. Thus, it can therefore be concluded that the right to education, with the interplay of the overarching right to development are fundamental rights held by children. Such rights stemming from extensive international obligations create a strong corresponding state duty ensure the effective realization of these rights. As UNESCO and UNICEF outline, a state has three levels of obligations in this regard. It must fulfil the right to education by making it effective and accessible by all children, respect the right of education by avoiding the implementation of any measure which would prevent the access to effective education, and protect the right of education by removing the barriers to education imposed by culture or community.[81]

Bullying, and the effect that it can have on the reception of education, and the empowered development of a child, may very well be argued as a violation of human rights. A human rights evaluative structure will certainly consider education and development as key aspects that must be placed at the core of anti-bullying legislative or policy efforts. How such considerations are managed in the case of our three jurisdictions will be seen in the forthcoming chapter.

[81] "A Human-Rights Based Approach to Education for All," United Nations Children's Fund/ United Nations Educational, Scientific and Cultural Organization, 2007, ISBN: 978-92-806-4188-2

The State is obliged to enable each child receive an education conducive to their humanistic development, but must also ensure as an ancillary obligation implicit within this right: that within this space children exist without fear of physical or psychological pain caused by the effects of bullying. The right to an existence free from physical or mental ill-treatment is an internationally recognised fundamental right due to all persons, although wording and context may differ depending on the framing of the right by different Conventions. Bullying can manifest itself in the physical abuse of the victim, or through pervasive mental abuse which can have serious and long lasting effects on the child. Due to the severity of the possible consequences of bullying, and the obligation of the State to provide an environment conducive to education and development, the duty to ensure respect for the rights of children to be free from torture and ill-treatment may fall within the obligations of the State, in creating and maintaining an education environment.

Over the past century, the prohibition of torture has achieved the position of deeply moral status of customary law[82] as a norm of *jus cogens*[83] and worldwide proscription is "clear from

[82] Restatement (Third) of Foreign Relations Law of the United States 102, 702 (Recognizing Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment as Part of Customary Law). Cited from Louis-Philippe F. Rouillard, "Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum" 21 Am. U. Int'l L. Rev. 9 2005 pg 17

[83] Robert K. Goldman, "Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture," 12 Am. U. Hum. Rts. Brief 1 (2004) (observing that every State owes to all other countries the obligations to prohibit torture, and this prohibition is "a peremptory norm embodying a fundamental standard that no state can contravene"). Cited from Rouillard, "Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum" *supra* pg 14

both international humanitarian law and international human rights law perspectives."[84] The UDHR, ICCPR, ECHR, as well as the specific United Nations Convention against Torture (UNCAT) all prohibit torture in absolute terms. While most incidents of bullying will not reach the international standards of severity of "torture" per se, the prohibition of torture is a multilayered concept including levels of ill-treatment, and inhuman and degrading treatment

– levels regularly applicable to situations of severe bullying. As such, the minimum degree which torture, inhuman, degrading or ill-treatment must attain before violating international obligations are not fixed, and may depend on a myriad of factors. As a report from the Office of the High Commissioner of Human Rights states:

> the difference between these different qualifications, torture, cruel, inhuman and degrading treatment or punishment or ill-treatment depends on the specific circumstances of each case and is not always obvious.[85]

The Strasbourg approach, for example, look specifically at the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.[86] The OHCHR report similarly accounts for the age, status, gender, or vulnerability of the victim, as well as the cumulative effect of the environment, in considering the severity of the act.[87] Identifying the applicable state obligations to protect children from physical or mental abuse, arising under the umbrella heading of torture is of

[84] Rouillard "Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum" *supra* pg 12

[85] "Interpretation of Torture in light of the Practices and Jurisprudence of international Bodies" OHCHR report, http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf

[86] See *Costello-Roberts v. the United Kingdom*, no. 13134/87, 25 March 1993, § 30, Series A no. 247-C, and *A. v. the United Kingdom*, 100/1997/884/1096, 23 September 1998, § 20, *Reports of Judgments and Decisions* 1998-VI

[87] "Interpretation of Torture in light of the Practices and Jurisprudence of international Bodies" OHCHR report *supra*

significance in assessing the efficiency of anti-bullying legislation in extreme cases where bullying has gone beyond mere playground teasing, and has violated the physical, or emotional integrity of the victim.

Before drawing on what can be learned from international conventions, it is important to note that for the purpose of this thesis, the prohibition of torture and ill-treatment shall be examined only in respect of its horizontal application, i.e. the duty that exists upon the State to protect an individual from the acts of another private individual. Universally accepted international obligations prohibit States from engaging directly in the torture or ill treatment of its citizens vis-à-vis a vertical model whereby citizens claim their rights against the State. However, as thesis concerns the rights of children to receive an education without fear of torture, or ill-treatment from bullies, thus from their peers and not from representatives of the school institution itself, we must examine the application of the right in its horizontal form.

Such third-party effect obligations are not recognised universally in every international document prohibiting torture. The UN Human Rights Council has expressly provided that public authorities must protect citizens by law against prohibited acts of torture "...whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."[88] Thus the ICCPR encompasses a horizontal (or privately enforceable) prohibition of torture. The case law of the ECHR reveals a similar approach.[89] However, the United Nations Convention against Torture restricts the application of its provisions to a purely vertical structure, and relates to torture committed "by or at the instigation of or with the consent or

[88] General Comment 20, Article 7, Human Rights Committee, (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 30 (1994), (para. 2)

[89] *Dordevic v. Croatia*, no. 41526/10, 24th July, 2012

acquiescence of a public official or other person acting in an official capacity."[90] As such, the Convention will not be directly relevant for this thesis.

A general starting point on the prohibition of torture can be found within Article 5 of the UDHR, which states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The same wording is echoed by the ICCPR in article 7 and the ECHR article 3. In defining torture, inhuman and degrading treatment as a violation of the adolescent rights in terms of bullying, we must establish whether specific traits of bullying can be seen to cumulatively attain the minimum international levels of severity.

Bullying is widely considered as a basic imbalance of power between perpetrator and victim,[91] and as our definition has shown us, can be inflicted in many different ways, either by "indirect (i.e. isolation, exclusion, non-inclusion) or direct (open attacks) [means]."[92] It therefore contains both physical and mental elements, and a victim need not simply suffer physical abuse at the hands of his or her bullies, in order to be seen to have suffered inhuman or degrading treatment.

[90] Article 1.1, United Nations Convention Against Torture 1984,

[91] See A. Pikas, "New Developments of Shared Concern Methods," School Psychology International 23(3) (2002): 307–326, D. Farrington, "Understanding and Preventing Bullying. Crime and Justice," The University Chicago Press Vol. 17, 1993, pp.381-458. Cited from Ayeray Medina Bustos, "Human Rights Abuses: Bullying from Insults to Torture," Draft Conference Paper from the 1st Global Conference "Bullying and the Abuse of Power: From Playground to International Relations," Session 1, 2009

[92] Bustos, "Human Rights Abuses: Bullying from Insults to Torture" *supra* pgs 1 – 2.

It is widely accepted that the infliction of mental suffering can reach the severity of torture, inhumane, or degrading treatment.[93] The ECHR has acknowledged the infliction of mental suffering as amounting to ill-treatment or degrading treatment, particularly when continuously applied to the individual. For example, in *Đorđević v. Croatia*,[94] actions including the vandalizing of property, spitting, hitting and pushing, and severe taunting were tantamount to degrading and inhuman treatment under Article 3 of the ECHR. In *Kalashnikov v. Russia*,[95] and reiterated in a number of subsequent Strasbourg cases on Article 3,[96] the Court acknowledged that "feelings of fear, anguish and inferiority capable of humiliating and debasing"[97] can create a level of mental suffering that finds itself the object of the Article 3 prohibition on torture. As such emotional responses are generally present with victims of bullying, we can interpret the prohibition of torture, inhuman and degrading treatment as covering the mentally abusive aspect of bullying.

This progressive approach to the concepts of torture, inhuman and degrading treatment gives the victims of bullying a hard, internationally recognised right to rely upon. International law has established that the duty on the State to protect victims from infringements of their mental and physical integrity is not merely a negative obligation upon the State and State actors to refrain from such a human rights violation, but also enforces a "positive obligation to exercise 'due diligence' in securing the enjoyment of human rights against violations by non-state

[93] CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment UN Human Rights Committee (HRC), 10 March 1992,

[94] *Đorđević v. Croatia supra* (2012)

[95] *Kalashnikov v. Russia*, no. 47095/99, 15th July, 2002

[96] See *Dordevic v. Croatia supra*, *Hurtado v. Switzerland*, no. 17549/90 28 January 1994, opinion of the Commission, § 67, Series A no. 280, and *Wieser v. Austria*, no. 2293/03, 22 February 2007, § 36

[97] *Ireland v UK*, no. 5310/71, 18th January 1978, par. 167

actors."[98] This principle moves away from the traditional vertical obligations of the State in regards to the application of human rights norms, and instead places an explicit obligation on the State, and subsequently the public schools as representatives of the State, to intervene when bullying attains the sufficient levels of severity to qualify as torture, inhuman or degrading treatment.

PART III: THE RIGHT OF DEVELOPMENT

This thesis has previously argued that any of anti-bullying legislation or policy cannot be effectively formed in a vacuum that fails to consider the rights of the bully. As has been previously asserted, this is due to the fact that the bully does not forfeit his or her rights as a human being upon acting on bullying impulses. Thus, the two broad rights which emerge when assessing the rights of the bully within a human-rights framework of bullying, is the right to development (as seen implicitly within the right of education) and the right to respect for private life, which arises in particular cases regarding cyberbullying legislation. These are rights which are equally held by victims of bullying, insofar as they are rights due and held by all children. However, the right to development and to respect for private life have a particular role to play in balancing any structuring of a school's obligations towards preventing bullying, insofar as they effectively act as limitations to the school's power to act.

The right to development is at the core of anti-bullying legislative analysis, from the point of view of the bully and the victim simultaneously - just as the victim retains the right to the full

[98] The case of *Velasquez Rodriguez v. Honduras,* (Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988). 29th July, 1989) demonstrates this principle, as cited in the report summary of "*Not Only the State: Torture by Non-State Actors,"* REDRESS, modified May 2006, accessed 08th March, 2013, http://www.irct.org/Files//Filer/IPIP/training/Torture_by_Non-State_Actors-Primer.pdf,

development of his or her personality within the frame of the right to education, so too does the bully. While bullying has been recognised as a practice capable of hindering the certain development processes in victims, few studies have focused on the harm that over-zealous bullying definitions can have on the bully. Over-inclusive definitions leading to perhaps the unmerited application of the title "bully" on to adolescents may risk unnecessarily negative effects on the development of the child in question. As one early resource on the anti-bullying movement asserts:

> By defining bullying so broadly, the anti-bullying movement risks pathologizing behaviors that, however unpleasant, are in some sense normal parts of growing up and learning how to interact in the world. And this may not be in the long-term interest of either the bullies or the bullied.[99]

The school environment has been established as of fundamental importance in a child's development. As seen above, most international documents such as the UDHR, the ECHR, ICCPR and CESCR, and the CRC acknowledge either explicitly or through their subsequent interpretation that education is a 'vehicle' for the development, the evolution of the child in to fully-functioning adult, in learning important life skills and developing a civic-centred personality.

While 'development' has not been of itself recognised as a stand-alone right, the International Bill of Rights and the Convention on the Rights of the Child both contain heavy references to the right of development of the child generally "as a feature of another right or obligation,"[100]

[99] "America's Youth," ed. Roman Espejo, Opposing Viewpoints Series, Greenhaven Press, 2003

[100] Douglas Hodgson, "The child's right to life, survival and development," The International Journal of Children's Rights 2: 369 – 394, 1994 pg 385

essential to the "product of the fulfillment of other children's rights."[101] For example, Article 1 of the both the ICCPR and the CESCR upholds the right to self-determination as encompassing the right to freely pursue social and cultural development.[102] Article 13 of the CESCR expressly recognises that education shall be directed to the "full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms."[103] The CRC reads the right of development in to Article 14 (freedom of thought, conscience and religion), Article 19 (protection from abuse and neglect), Article 24 (primary health care and a safe and healthy environment), Articles 28 and 29 (education and vocational training) and Article 31 (leisure, recreational, cultural and artistic activities).[104]

Thus the right to development plays a role in every child's right to self-determination. "Development" sits at the core of the right to education, of the realisation of each child's sense of human dignity. A child's right to think and speak freely, inextricably linked with his or her right to the development of their personality must be realised without overarching fear of unmerited reprisals or punishment. It is the right of each child to an educative or recreational environment that protects and nurtures the development of the child without imposing unnecessary restraints on that development.

[101] *Supra*

[102] Article 1 of the International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 1966, Article 1 of the International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI) 1966

[103] Article 13, International Covenant on Economic, Social and Cultural Rights

[104] Douglas Hodgson, "The child's right to life, survival and development," *supra* pg 386

Thus, as both bully and victim, have the right to develop his or her personality, this right cannot be fettered by overly-inclusive interpretations of bullying. The definitions of bullying used by three jurisdictions must acknowledge the dual ownership of this right. To overlook the right of each child to develop their social personality by unjustifiably or prematurely tarring them with the brush of "bully" will infringe a myriad of rights such as free speech and the right to safe school environment. As with all the other rights that comprise the human rights framework, a balance must be found between the competing State duties of creating an environment where bullying is not tolerated while understanding each child's right to develop, to make mistakes, to learn and to grow.

PART IV: THE RIGHT TO RESPECT FOR PRIVATE LIFE.

The right to respect for private life is a right that is shared by both victim and bully. It differs from the previous rights in the following manner; the right to education, to freedom from fear of torture, inhuman or degrading treatment, to development, are all children's rights generally manifesting in the public sphere. School authorities are first and foremost in the primary position to realise these rights when children are on school grounds, and have the dominant duty to engage and deal with incidents of bullying which threaten the fulfillment of these rights. Thus, while the responsibilities of the school are somewhat clear in regards to bullying that takes on the school property, the sphere of school responsibility is not so clear when bullying takes place off school grounds. The duty on a school to investigate incidences where spatial and/or temporal links with the school are lacking must be understood in terms of the right to respect for private life. In this manner, the victim has the right of privacy, which manifests in the right not to have undue interferences with their private life due to invasive cyberbullying.

However, the bully simultaneously shares the right to respect for private and family life insofar as he or she is protected from undue interferences with his or her personal life, or correspondences. Thus the right poses a dual obligation and limitation on the capacity and duty of the school to act in such circumstances of cyberbullying

The importance of the right to respect for private life cannot be underestimated. It is described as "one of the most important human rights issues of the modern age."[105] International law protects the right under a multitude of treaties. Taking the Universal Declaration of Human Rights again as a starting point, Article 12 states that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Article 17 of the ICCPR uses identical terminology, while Article 16 of the CRC protects the privacy of the child in the similar terms, not only protecting the child from arbitrary interferences, but simultaneously prohibiting unlawful interferences with his or her privacy, family, home or correspondence.

Article 8 of the ECHR presents an interesting modification of the formulation of the right. As with the UDHR, ICCPR and CRC, the first limb of the Article 8(1) protects the family life, home and correspondence of the individual. However, the second limb of the article lays out the circumstances where the right may be restricted. Article 8(2) allows in strictly limited circumstances, interference with the right. Such interferences include when "necessary in a

[105] David Banisar, Simon Davies, Wayne Madsen, Michael Kassner, Ronnie Breckheimer, & Shauna Van Dongen. "Privacy and Human Rights; An International Survey of Privacy laws and Practice" Global Internet Liberty Campaign: http://gilc.org/privacy/survey/intro.html accessed 9th March, 2013

democratic society … public safety … prevention of disorder or crime, for the protection of health or morals,"[106] and importantly, for the protection of the rights and freedoms of others.

The task that States are facing as concerns cyberbullying is not an easy one. Discovering the boundaries through which a School Authority may intervene when bullying takes place off-school grounds, in an online setting between students is certainly not clear. One can conclude without doubt that anti-bullying legislation and policies are bound to respect the right to respect for private life. While different Conventions enunciate the right in different manners, all key documents may be construed to limit the right of the School from interfering with private life and online correspondence, save when justified by outweighing considerations such as "...the protection of health or morals, or for the protection of the rights and freedoms of others."[107] This is the key balance that anti-bullying legislation must strike, and is fraught with a number of practical limitations. How can schools engage with students who are involved in off-campus, on-line bullying? How can schools investigate bullying that takes place on social networking sites, or on through text messages? Unless the State can create a solution that can overcome these and other practical barriers, the potency of their anti-bullying approaches may be greatly reduced. How the three jurisdictions address this issue is of great import, and will be examined at a further point.

[106] Article 8 par 2, European Convention on Human Rights

[107] *Supra*

This chapter has outlined the need for, and the benefit of a human-rights focused approach to bullying. It has commented that such an approach would implicitly address not only the symptoms, but also the root of the problem. It would address four major rights, found in all major Conventions – the right to education and development, the right to freedom from torture, inhuman or ill treatment, and the corresponding rights of the bully to development, and to respect for private life. Based upon this framework, I will extract four pressing concerns against which all three jurisdictions will be compared. They are as follows:

1. *Are there effective procedures in place for protecting victims and preventing bullying?*
2. *How do these approaches deal with the rights of all students to develop in a safe and inclusive school environment?*
3. *Are schools in the jurisdictions capable of dealing with cyberbullying?*
4. *How may one rely on such structures in order to invoke their human rights and bring a bullying case before the law?*

The following chapter will reintroduce the three jurisdictions informing this comparison, the reasons they have been chosen, and offer insight in to each of their context of creation. It will proceed to address these questions, before drawing on what we can learn comparatively from three different approaches.

CHAPTER 3 - THE ANTI-BULLYING STRUCTURES OF THE THREE JURISDICTIONS, AND A HUMAN-RIGHTS FOCUSED ANALYSIS OF THEIR RESPECTIVE APPROACHES

This chapter will lay out the differing anti-bullying approaches of New Jersey, British Columbia, and Ireland and will consist of three parts. It will begin with an outline of why these particular jurisdictions have been chosen for the purposes, and give some insight in to their respective contexts of creation. The general solutions advanced by each jurisdiction will be laid out. The chapter will continue by comparing these three jurisdictions against the questions extracted from the human-rights framework established in chapter two. The chapter will conclude by acknowledging certain pitfalls which anti-bullying legislation and policy must strive to avoid, and furthermore, what advantages can be gained from the different approaches.

PART I: THE CHOICE OF JURISDICTION, THE CONTEXT OF CREATION, AND THE APPROACHES EXAMINED.

As described before, this thesis will compare the anti-bullying legislation of New Jersey, the policy backed by legislation approach of British Columbia, and the anti-bullying policy approach adopted by Ireland. Each of the three structures represents a different angle from which to evaluate the problem of bullying as a human rights issue and serve to highlight different issues, problems, and solutions that may arise within the three models in terms of creating an efficient system of bullying prevention. The jurisdictions sit on something of a spectrum, spanning from the "strongest, toughest anti-bullying law"[108] of New Jersey, to the indi-

[108] "Factsheet for the Anti-Bullying Bill of Rights", Garden State Equality http://njbullying.org/documents/FactsheetfortheAnti-BullyingBillofRights.pdf accessed 28th November 2013

vidually tailored school policies backed by legislation of British Columbia, towards the non-legislative guidelines laid out by Ireland.

I. NEW JERSEY

The rationale for focusing on the State of New Jersey as part of an anti-bullying legislative comparison is that it claims to be one of the strictest legislative examples of anti-bullying laws implemented worldwide. The creation of the current model was prompted in response to a series of unfortunate incidents of teenage suicides[1092] attributed to cyberbullying, and thus the legislation is worth examination as it makes a particular effort to address this difficult issue. The awareness of the risk of bullying-motivated suicide is evident throughout the Bill, which declares that it is created in "response to an epidemic of bullying, cyberbullying and suicides affecting public schools across the country."[110] However, it may be argued that such a hardened legislative response conversely aim to protect the potential liability of the school against a claim of failure to adequately react to incidences of bullying.

The New Jersey anti-bullying legislation was first introduced in 2002,[111] on the crest of a wave of similar legislation sweeping across the United States. In 1999 Georgia enacted the first anti-bullying legislation of America, largely in response to reports that bullying was a

[109] See for example the introduction to the New Jersey Anti-Bullying Bill of Rights Act, P.L. 2010, Chapter 122 stating "In 2010, the chronic persistence of school bullying has led to 25 student suicides across the country, including in New Jersey..." furthermore, "this act will help to reduce the risk of suicide among students and avert not only the needless loss of a young life, but also the tragedy that such loss represents to the student's family and the community at large"

[110] "Recently Concluded Cases," New Jersey Council of Local Mandates: http://www.state.nj.us/localmandates/recent/ accessed 16th July, 2013

[111] "Factsheet for the Anti-Bullying Bill of Rights", Garden State Equality, *supra*

root cause of the Columbine Shootings,[112] whereby two high school students shot and killed a teacher, and 12 other students, before committing suicide themselves. As is stands today, all American States, with the exception of Montana,[113] have created specific anti-bullying legislation. Although the exact motivation for the enactment of the New Jersey legislation is unclear, there are a number of stimuli which appear to be common to the general American trend. Firstly, there is increasing attention paid to the concept of bullying as a violation of human rights, and recognition that bullying based on distinctions such as race, disability, or sexual orientation is a form of discrimination.[114] Consequently, there is a social and political expectation of a governmental response, particularly when tragedies such as teen suicides caused by school bullying have occurred. Furthermore, it could be argued that such legislation has been designed partly to shield States from potential liability claims taken against them, for the failure of public schools to adequately confront the problem of school bullying.

The New Jersey legislation of 2002 set out a comprehensive statutory definition of bullying,[115] and established the detailed duties of public school authorities in responding to report-

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[112] Dena T. Sacco, Katharine Silbaugh, Felipe Corredor, June Casey and Davis Doherty, "*An Overview of State Anti-Bullying Legislation and Other Related Laws*" 23rd February 2012, The Kinder & Braver World Project: Research Series *supra*

[113] Sameer Hinduja, & Justin W. Patchin, "A Brief Review of State Cyberbullying Laws and Policies," Cyberbullying Research Centre US. July 2013" http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State_Anti_bullying_Legislation_Overview_0.pdf accessed 28th November, 2013

[114] Dear Colleague Letter, Office of the Assistant Secretary, Department of Education Office for Civil Rights, October 26th 2010 http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html (last accessed 25th March, 2013) "*School districts may violate these civil rights statutes and the Department's implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees."*

[115] Article 2 , New Jersey Laws, AB 1874, Article 2: "Harassment, intimidation or bullying" means any gesture or written, verbal or physical act taking place on school property, at any school-sponsored function or on a school bus that: a reasonable person under the circumstances should know will have the effect of harming a

ed or perceived incidents of bullying.[116] Yet in 2007, despite anti-bullying legislation structure firmly in place, a New Jersey student successfully sued the State for the failure of his school in adequately respond to the bullying and discrimination he had suffered. The New Jersey Supreme Court in L.W. v. Toms River Regional Schools Board of Education[117] decided unanimously that despite the existence of the 2002 Act, there was a "cause of action against a school district for student–on-student harassment based on an individual's perceived sexual orientation, if the school district's failure to reasonably address that harassment has the effect of denying to that student any of a school's accommodations, advantages, facilities or privileges.

One of the consequences of this decision was the creation of the current New Jersey anti-bullying legislative structure. The "Anti-Bullying Bill of Rights Act" established in 2011 was drafted as an extension to the pre-existing 2002 legislation. Its aim was to "strengthen the standards and procedures for preventing, reporting, investigating and responding to incidents of harassment, intimidation and bullying of students that occur on school grounds and off school grounds under specified circumstances."[118] Effectively, the New Jersey legislation has created standardized rules which bind all the schools in the region to rigorous, comprehensive reporting procedures. The Anti-Bullying legislation aims to "strengthen standards for preventing, reporting, investigating, and responding [to bullying in order to]... reduce the risk of

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student or damaging the student's property, or placing a student in reasonable fear of harm to his person or damage to his property; or b. has the effect of insulting or demeaning any student or group of students in such a way as to disrupt or interfere with the school's educational mission or the education of any student."

[116] Article 3, 2002 New Jersey Laws, AB 1874

[117] *L.W. v. Toms River Regional Schools Board of Education*, 21st February, 2007 (A-111-05)

[118] "Guidance for Schools on Implementing the Anti-Bullying Bill of Rights Act," New Jersey Department of Education, December 2011, pg 8: http://www.nj.gov/education/students/safety/behavior/hib/guidance.pdf accessed 28th March, 2013

suicide among students,"[119] with mandatory reporting techniques to ensure that even a single perceived incident that may be regarded as bullying, will be reported and investigated without exception by an upwards chain of command.[120] Apart from thoroughly responding to any hint of bullying in a school's environment, the intense reporting structure also conversely reduces the potential liability of a New Jersey school, should a student attempt to take a case claiming that bullying has not been reasonably dealt with by school authorities.

The Act makes a focused attempt to deal with cyberbullying in very broad terms, as one of the major issues which prompted calls for a stronger political response to the problem of bullying. The suicide of university student Tyler Clementi was a leading cause of this demand for reform.[121] Clementi jumped to his death from a New Jersey bridge in 2008 after his roommate used a webcam to film and a sexual encounter between Clementi and another male, and invited other students to watch the video stream.[122] Thus, the 2011 Act included a specific cyberbullying provision which relate to any act of "electronic communication," defined as (but not limiting to) communication via telephones, mobile phones, computers, or pagers.[123] The acts of punishable cyberbullying can take place on or off school grounds, as long as the effect of the communication could be reasonably seen to cause physical or mental harm to the student, create a hostile education environment, or infringe with the rights of stu-

[119] "An Overview on Amendments to Laws Relating to Harassment, Intimidation and Bullying" New Jersey Department of Education, pg2: http://www.state.nj.us/education/students/safety/behavior/hib/overview.pdf accessed 25th November, 2013,

[120] See the amendments to Section 3 of P.L.2002, c.83 (C.18A:37-15) outlined in March 2012: http://www.njleg.state.nj.us/2012/Bills/PL12/1_.PDF accessed 25th November, 2013

[121] "Factsheet for the Anti-Bullying Bill of Rights", Garden State Equality, *supra*

[122] The Tyler Clementi Foundation, http://www.tylerclementi.org/tylers-story/, accessed 28th March, 2013

[123] Section 11 of the Anti-Bullying Bill of Rights P.L. 2010, Chapter 122, as amending Section 2 of P.L.2002, C.83

dents at school.[124] Furthermore, the act applies to any series of incidents or a single incident, which have the effect of substantially disrupts the ordinary operation of the school or the rights of students. Thus, the Act has given schools with arguably a very sweeping power to intervene in allegations of cyberbullying where the rights of the student, such as that of respect for private life, have been violated, when neither act, nor impact directly concerns or relates to the school.

II. BRITISH COLUMBIA

British Columbia differs from many of its Canadian counter-parts, in that it has not enacted specific anti-bullying legislation, but rests a comprehensive policy structure on top of existing legislative requirements. In the year between 2012 and 2013, almost all Canadian Provinces enacted such legislation. Ontario,[125] Quebec,[126] New Brunswick,[127] Manitoba,[128] Alberta[129]

[124] Section 11 of the Anti-Bullying Bill of Rights *supra*

[125] "Bill 13 – Accepting Schools Act," Legislative Assembly of Ontario, http://ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2549 accessed 10th November, 2013

[126] "Bill no.56 – Act to Prevent and Stop Violence Occurring in Schools," Assemblie Nationale du Quebec, http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-56-39-2.html accessed 10th November, 2013

[127] "An Act to Amend the Education Act 2012," New Brunswick, http://www.gnb.ca/0062/acts/BBA-2012/Chap-21.pdf accessed 10th November, 2013

[128] "The Public Schools Amendment Act (Safe and Inclusive Schools)," Legislative Assembly of Manitoba, https://web2.gov.mb.ca/bills/40-2/b018e.php#Explanatory%20Note accessed 10th November, 2013

[129] "Bill 3 – Education Act," Legislative Assembly of Alberta, http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_28/session_1/20120523_bill-003.pdf accessed 10th November, 2013

and Nova Scotia[130] have all enacted such specific anti-bullying laws. Explanatory notes across each piece of legislation generally refer to the perceived increase of bullying in Canadian schools, and to the long-lasting effects of such behaviours on victims and also bystanders as a motivation for their enactment. The Government of British Columbia did respond to this societal wave demanding governmental reaction, yet through the means of a flexible, yet comprehensive strategy program. The Province has resisted the general Canadian trend to enact specific bullying and cyberbullying legislation, instead chooses to utilise a comprehensive policy plan backed by more general legislative requirements found in the School Act, 1996. Perhaps the justification for this decision is discernable in a quote from the British Columbian Attorney General, Suzanne Anton:

> this is not just about laws – it's about a fundamental societal change to erase bullying on all fronts and create a world where kids feel free to report bullying and teachers and parents know how to recognize and address bullying.[131]

British Columbia does not simply wish to punish and deter instances of bullying, but it is aiming to achieve a "fundamental societal change"[132] in relation to bullying. Thus, the Province has set itself rather a large task, and the fear may be that goals of such a magnitude, which are notoriously difficult to achieve on a short term basis, may leave many students without sufficient protection in the interim period.

[130] "Promotion of Respectful and Responsible Relationships Act 2012," Nova Scotia Legislature http://nslegislature.ca/legc/bills/61st_4th/3rd_read/b030.htm accessed 10th November, 2013

[131] "Amanda Todd's Mother Wants B.C. Bullying Laws after Action on Rethaeh Parsons," Sasha Nagy, HuffingtonPost.ca, last modified 8th September 2013 (http://www.huffingtonpost.ca/2013/08/09/carol-todd-cyberbullying_n_3728366.html) accessed 21st November, 2013

[132] "Amanda Todd's Mother Wants B.C. Bullying Laws after Action on Rethaeh Parsons" Sasha Nagy, *Supra*

Just as with New Jersey, a legal obligation exists providing that each school must create, maintain and make available their own individual codes of conduct outlining bullying types of behaviour and the consequences of such behaviour. Such obligations have been in existence and have been added to since the British Columbian School Act of 1996.[133] There are in addition a number of pieces of legislation which underpin the obligations of British Columbian schools in relation to their duties to respond to bullying. Amongst these are The Constitution Act,[134] the Multiculturalism Act,[135] the Human Rights Code,[136] and the Provincial Standards for Codes of Conduct, as laid out in the Schools Act.[137] These obligation are supplemented by the British Columbian 10-point strategy entitled ERASE Bullying (Expect Respect And a Safe Environment),[138] which include comprehensive training for all stake-holders involved in combating bulling, advanced online reporting techniques, resources for schools and parents, and increased community partnerships. The ERASE policy tacitly acknowledges that there is "no one standard for what a school culture should look or feel like,"[139] and the British Columbian approach allows for a certain level breathing space for the diversity of needs and tactics usable by schools in dealing with different bullying behaviours. As opposed to a uniformed set of rules applicable in all circumstances regardless of the peculiarities surrounding each allegation of bullying, a policy approach allows schools the flexibility of approaching each incident of bullying as a separate and unique incident.

[133] "Revised Statutes of British Columbia," School Act 1996: http://www.bced.gov.bc.ca/legislation/schoollaw/revisedstatutescontents.pdf accessed 28th November, 2013

[134] *The Constitution Act* (1982)

[135] *The Multiculturalism Act* (RSBC 1996) c.321

[136] *Human Rights Code, R.S.B.C.* 1996, c. 210

[137] Sections 85(1.1) 168 (2) (s.1), *School Act*, 1996

[138] ERASE Bullying: http://www.erasebullying.ca/

[139] "The Three C's – Culture" ERASE Bullying, http://www.erasebullying.ca/safe-schools/safe-schools-3cs.php accessed 28th November, 2013

As with New Jersey, the province of British Columbia has made a targeted attempt to address the problem of cyberbullying in schools. The Canadian Prime Minister Stephen Harper has referred to the possible enactment of national cyberbullying legislation within the next year,[140] yet British Columbia has refrained from enacting specific legislation to govern this area. Instead, it has invested in extensive policy approaches to curb the growing problem. The story of the suicide of British Columbian teenager Amanda Todd, who endured years of schoolyard and cyberbullying from her peers, became the sad and unfortunate catalyst for an immense social reawakening to the problems of bullying in October 2012.[141] As a result, a number of recent high profile anti-bullying conferences have taken place in British Columbia, and a series of legal reforms are being tentatively introduced by Premier Christy Clarke. These reforms, which will be examined later, include extensive teacher-development plans, and anonymous online reporting techniques to allow students discreetly report incidences of school bullying and cyber bullying to a special trained, district-bullying coordinator.[142] The combination of legislation and policy used by British Columbia as an anti-bullying structure is still in its early days of application, and thus there is room for an element of speculation as to how its approach may function in the future.

[140] "Canada to get new cyberbullying legislation" CBC News, modified 26th September 2013, http://www.cbc.ca/news/canada/manitoba/canada-to-get-new-cyberbullying-legislation-in-fall-1.1869752 accessed 10th November, 2013

[141] "B.C. Convenes Anti-Bullying Conference One Month After Amanda Todd's Suicide" CTVnews., last modified 13th November, 2013 http://www.ctvnews.ca/canada/b-c-convenes-anti-bullying-conference-one-month-after-amanda-todd-s-suicide-1.1035938 accessed 10th November, 2013

[142] "ERASE Policy," ERASE Bullying, http://www.erasebullying.ca/policy/policy.php accessed 10th November 2013

III. IRELAND

Ireland as of yet has still not introduced any specific legislation targeted at bullying, but rests on a series of recommendations and guidelines as set out by the Department of Education and Skills, (the most recent of which were introduced in September 2013[143]) , and indirect legal obligations similar to the Canadian model.[144] Students hold a number of Constitutional rights, while schools have:

> [d]uties and responsibilities under a number of national laws including under the Equal Status Acts and the Safety, Health and Welfare at Work Act as well as their duties and responsibilities under the common and criminal law.[145]

As with the other jurisdictions, a number of highly publicised teen suicides arising from cyberbullying have sparked public outrage, and prompted State authorities to debate the possibility of introducing specific anti-bullying legislation to tackle the problem. Although such calls have been resisted to date, all primary and post primary schools are required to have internal anti-bullying policies in place by the end of 2014.[146] In a move towards the same direction as the New Jersey and British Columbia, schools are required to prescribe reporting and investigative procedures, with anti-bullying procedures that must expressly deal with

[143] Anti-Bullying Procedures for Primary and Post Primary Schools" Department of Education and Skills, September 2013: http://www.education.ie/en/Publications/Policy-Reports/Anti-Bullying-Procedures-for-Primary-and-Post-Primary-Schools.pdf accessed 18th November 2013

[144] "Bullying in Schools," Citizens Information, http://www.citizensinformation.ie/en/education/primary_and_post_primary_education/attendance_and_discipline_in_schools/bullying_in_schools_in_ireland.html accessed 10th November, 2013

[145] "Action Plan on Bullying" Report of the Anti-Bullying Working Group to the Minister of Education and Skills, January 2013: http://www.education.ie/en/Publications/Education-Reports/Action-Plan-On-Bullying-2013.pdf accessed 11th November, 2013

[146] Circular issued by the Irish Department of Education and Skills, 2013 http://www.education.ie/en/Circulars-and-Forms/Active-Circulars/cl0045_2013.pdf

cyberbullying.[147] The lack of any hardened rules which require a heightened, and uniform approach and moreover, commitment to protection to be taken by all school authorities, may prove to be a solid argument for the development of an increased legislative approach to the issue. Although no such legislation has to date been put forth, it was an issue under consideration by the Anti-Bullying Working Group.[148] Thus, a comparative human rights evaluation of three different possible approaches may give law makers some insight in to the possible advantages and pitfalls of anti-bullying legislation, should the Irish Government advance the issue further.

PART II: A HUMAN RIGHTS COMPARISON OF THE THREE JURISDICTIONS:

We now have some idea of the backdrop of each structure, and the reasons why the three jurisdictions are being compared against each other. The next section of this chapter will compare the different approaches under the four different questions that arose from the human-rights framework of Chapter Two. As this thesis has argued for bullying to be considered as a violation of human rights, and has illustrated some of the rights that are in question when a human rights-focused approach is taken to bullying, this comparison will illustrate the benefits and drawbacks associated with each approach in terms of their practical, every-day application. It will examine whether the hypothesis of this theses; that a legislative anti-bullying model is preferable to a policy approach as it is more capable of preventing school bullying.

[147] "Child Protection Procedures for Primary and Post Primary Schools," Department for Education and Skills, 2011, http://www.education.ie/en/Schools-Colleges/Information/Child-Protection/cp_procedures_primary_post_primary_2011.pdf accessed 11th November 2013

[148] "Action Plan on Bullying" Report of the Anti-Bullying Working Group to the Minister of Education and Skills, January 2013 *Supra*

Furthermore, that it will more effectively balance all the co-existing human rights involved in school bullying, due to the multitude of legal considerations that would underpin the creation of such laws.

I. ARE THERE EFFECTIVE PROCEDURES IN PLACE FOR PROTECTING VICTIMS AND PREVENTING BULLYING?

Essentially, in order for any anti-bullying approach to sufficiently protect the rights of the victim, the procedure must be effective. There is no one definitive breakdown of how such effectiveness may be measured. Ryan and Smith, in their article chronicling the effectiveness of over thirty anti-bullying approaches in Canada, assess effectiveness in terms of efficacy and dissemination.[149] In this sense, efficacy may be evaluated as the capacity to cause an effect. One may look at the level of detail prescribed in an anti-bullying method, whether such method may be replicated, how it may measure and control certain types of behaviour, and whether there are long-term follow-up plans and outcomes. The effectiveness criteria is based on the results of the efficacy criteria, and seeks to establish the results when delivered under "real world conditions", while dissemination relates to costs, availability of materials, monitoring and evaluating tools *etc*[150]. Other researchers such as Dane and Schneider assess effectiveness on the grounds of adherence, exposure, quality of delivery, participant responsive-

[149] W. Ryan and J. D. Smith, "Antibullying Programs in Schools: How Effective are Evaluation Practices?" Society for Prevention Research 2009, Prev Sci, DOI 10.1007/s11121-009-0128-y http://chasqueweb.ufrgs.br/~danilo.blank/Ryan%20-%20Antibullying%20Programs%20in%20Schools%20-%20Prev%20Sci%202009.pdf accessed 18th November, 2013

[150] W. Ryan and J. D. Smith, "Antibullying Programs in Schools: How Effective are Evaluation Practices?" Su*pra*

ness, and program differentiation.[151] This thesis will assess the effectiveness of each program in terms of simply how such legislation protects the rights of the child being bullied, considering both short term and long term possibilities of success.

New Jersey appears to be the forerunner in terms of protecting the rights of the children who are bullied. A number of steps were key in this regard. Firstly, with the introduction of the Anti-Bullying Bill of Rights, New Jersey expanded its anti-bullying legislative protection to all students who are bullied for any reasons whatsoever. This was a change to the pre-2011 position, where students were protected once bullying was motivated by traditional causes of discrimination, such as origin, race, sexual orientation etc.[152] Legislative protection now applies to any series of incidents, or isolated incident of bullying[153] that have the effect of "physically or emotionally harming a student … or placing a student in reasonable fear of physical or emotional harm to his person or ... has the effect of insulting or demeaning any student or group of students."[154] In contrast to many other statutory or psychological definitions of bullying, the acknowledgement of a single incident as capable of establishing bullying is a firm position taken by the State. It indicates that the State of New Jersey is seeking to prevent such behaviours from developing in to more serious accusations of bullying. Such an approach is in line with a human-rights framework approach of bullying, in the sense that it strongly protects the rights of children to be free from torture, inhumane or degrading treatment.

[151] A.V. Dane & B.H. Schneider, "Program Integrity in Primary and Early Secondary Prevention: Are Implementation Effects out of Control? Clinical Psychology Review (1998), 18, 23–45, cited from W. Ryan and J.D. Smith *supra* 2009

[152] "Factsheet for the Anti-Bullying Bill of Rights", Garden State Equality, *supra* .

[153] Anti-Bullying Bill of Rights *supra,* section 11

[154] *Supra*, section 11 (a), (b)

The Act furthermore applies when a "hostile educational environment"[155] has been created, or when the rights are infringed due to an interference with a student's education.[156] Such an approach again coincides with a human-rights framework of bullying, as it seeks to preserve the right of students to receive an education, and furthermore seeks to protect against the creation of an environment where students do not feel comfortable, safe, or nurtured. Such strong protection of the victim's rights may come at the expense of the right of all children to development in the school environment; an issue which will be examined at a further point in this chapter. Finally, the legislation provides for rigorous and comprehensive reporting techniques on all incidents or suspicions of bullying. As the New Jersey Factsheet on the Anti-Bullying Bill or Rights describes,

> (t)he bill sets deadlines for incidents of bullying to be reported, investigated and resolved. Teachers and other school personnel will have to report incidents of bullying to principals on the same day as the incidents. Principals will have to inform parents on the same day as the incidents. An investigation will have to begin within one school day of an incident and be resolved within 10 school days of an incident.[157]

The investigation of each incident is a rigorous affair, with bi-annual and annual reporting of all those involved in each incident, and all steps taken, to the Superintendent of the Schools, and the Department of Education. Such reporting techniques combined with compulsory bullying-focused teacher training, the existence of an in-school bullying specialist, and an awareness raising week at the beginning of each school year, undoubtedly make great efforts to not only deal with incidences of bullying, but to pre-empt and prevent them from even occurring.

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[155] *Supra*, section 11 (c)

[156] *Supra*, section 11 (d)

[157] "The Anti-Bullying Bill of Rights Factsheet" Garden Equality State, *supra*

Thus, New Jersey anti-bullying approach is comprehensive and detailed. The language used by the Act is definitive and precise, as is to be expected from any piece of legislation. As such, there are no particular difficulties in understanding the obligations of a school when bullying is at issue. Indeed, the legal status of these obligations leaves no question as to the requirement of a school to take the definitive, predefined routes of action. Such surety of language and duty is of benefit in protecting the rights of students under many headings, as it forces schools to prioritise the fight against bullying.

However, the effective application Anti-Bullying Bill of Rights necessitates not only a great amount time given by professionals working in these schools, but also financial investments on a number of grounds. It is at this point where the actual effectiveness of the Bill comes in to question.[158] Data recorded by the New Jersey Department of Education reveal that schools claimed approximately $5 million in reimbursements, in response to the anti-bullying laws established in 2011. Funding has only been made available by New Jersey for 20% of these costs.[159] A study recorded by the New Jersey School Association in 2012, revealed that out of the of 35.9% schools which responded to its survey, 88% claimed that the Bill had created unanticipated additional costs for the schools, with 74% of schools stating that the Bill has resulted in additional, unbudgeted costs for supplies and materials.[160] Thus, it appears that the

[158] On this point, it is noted that the attorney for Sayer Rosenstain, a child brought a case against a New Jersey school district for unaddressed or ineffectively school bullying, claimed that anti-bullying laws are only effective if they are "enforced and adequately funded". For more information, see "National School Boards Association, Legal Clips, 10/3/12," available from http://www.njbullying.org/legalissues.htm accessed 23rd November, 2013

[159] "N.J. Shortchanges Schools on Anti-Bullying Grants," Diane D'amico, modified 5th July 2012: http://www.pressofatlanticcity.com/news/breaking/n-j-shortchanges-schools-on-anti-bullying-grants/article_27abe348-c6fc-11e1-92aa-0019bb2963f4.html accessed 15th November, 2013

[160] "Anti-Bullying Amendments, NJSBA Position and Preliminary Results," School Board Notes, modified 13th March, 2012: http://www.njsba.org/sb_notes/20120313/hib.html accessed 15th November, 2013

ambition of the Act may have outweighed its practical benefit. If schools are unable to fund their legal obligations to provide teacher training, comprehensive reporting and investigation, or the labour hours to effectively deal with bullying, then they are unable to protect the rights of students from bullying in the manner through which the anti-bullying legislation envisaged. Furthermore, not only is the effectiveness of such protection compromised, but students are left in a somewhat vicarious position where there is no real policy in place as a non-legal alternative. Thus, the financial inability to meet the legislative requirements may create a gap in the protection that the Act can adequately deliver to students. Until funding is obtained to achieve the outstanding 80% of costs associated with this legislative approach, the actual effective protection of the child's right to education, to a nurturing education environment, and to a school experience free from torture, inhuman or degrading treatment, may be somewhat limited.

In comparison to New Jersey, this thesis has suggested that the British Columbian is perhaps the most holistic approach of the three jurisdictions. Its goals are long-term focused, and its ultimate aim is to change society's attitude towards bullying. With a policy that has such a long-term focus, the effectiveness of such holistic efforts is questionable in the short term. The ERASE plan has not been long enough in existence to comment on whether the aim of comprehensive sociological change has been effective, but we can determine to some extent the effectiveness of its short term attempts to combat bullying.

Two of the main components of the ERASE strategy which appear particularly effective in preventing and responding to short-term problems of bullying, are the online-anonymous reporting procedure, and the introduction of a "safe school coordinator" in every school district.[161] The online reporting procedure serves not only students who are victims of on-campus or off-campus bullying, but also encourages those who have witnessed bullying to anonymously report the behaviour, including information on the school and school-class (if applicable) where the behaviour is taking place. The anonymity of the procedure allows students to report bullying with less fear of social stigma or reprisals from peers, and as a consequence teachers may possibly obtain a more realistic account of what is occurring between students of a school. Thus, the tool is effective insofar as it safeguards the victim's right to private life, both in the sense that the reporter's identify is kept anonymous, yet infringements of the personal life of the victim, caused by off-campus cyberbullying can be reported and addressed. The reports sent by students are monitored by the safe schools district co-ordinator, who maintains direct contact with the Ministry of Education, community partners, and co-ordinates the multi-level teacher training, on the basis of these complaints and general issues.[162] The successful utilization of the reporting tool in combination with the monitoring oversight should allow teachers to respond to unperceived incidences of bullying, thus safeguarding the rights of children to receive an education in a nurturing educational environment, free from torture, inhuman or degrading treatment.

[161] "ERASE Policy", ERASE Bullying http://www.erasebullying.ca/policy/policy-erase.php accessed 15th November, 2013

[162] "Premier Announces Erase Bullying Strategy" B.C. Newsroom, modified 1st June 2013: http://www.newsroom.gov.bc.ca/2012/06/premier-announces-erase-bullying-strategy.html accessed 18th November, 2013

Despite its lack of legislative sanctions, the first year of the Strategy has enjoyed some limited success. An ERASE Strategy fact sheet released in September 2013 details that in the first year of its existence the ERASE website (which is designed specifically for students, adults, and teachers) received a total of 113,000 hits.[163] The online reporting procedure has been launched, and over 4000 stakeholders such as the public, teachers and educators, police, youth mental health workers, child protection workers, have already received specific multi-level training.[164] There are over 60 coordinators in place, reaching the target of one for every school district in British Columbia, and specific teacher professional-development days in relation to bullying have taken place, in accordance with the strategy.[165] Thus, it appears that the British Columbian province have installed a rather efficacious strategy, and importantly; appear to be on target with the goals laid out in the ERASE plan. Comments made by Dr. Shelley Hymel, a British Columbian Professor and expert on the issue of bullying indicate that the schools who prioritise anti-bullying measures, see a general decrease of bullying somewhere within the region of 20%.[166] Therefore, despite all the efforts taken, the reporting tools designed the intensive training of community partners, approximately 80% of bullying still continuing in British Columbian schools.

However, the goals of British Columbia are deliberately set as long-term, with the end result to be an evasion of the very factors that combine to create bullying behaviours in the first place. The short term effectiveness of bullying prevention, and the protection of the victim's

[163] "Progress on the ERASE Bullying Strategy," ERASE Bullying Factsheet, http://yte.educ.ubc.ca/files/2013/07/EraseBullying_Factsheet_Sept42013.pdf accessed 18th November, 2013

[164] *Supra*

[165] *Supra*

[166] "Is the Anti-Bullying Message Getting Through?" Mark Gollom, CBC News, modified 26th September, 2013: http://www.cbc.ca/news/canada/is-the-anti-bullying-message-getting-through-1.1869810 accessed 18th November, 2013

rights of education, privacy, and freedom from a fear of torture, inhuman or degrading treatment, are undoubtedly important aspects for the jurisdiction to monitor. However the initial 20% reduction in bullying rates and indeed the on-track status of the ERASE training plan would indicate that the Strategy is on course for perhaps achieving the ambitious societal change it has set out to attain. Part of this success may be down to the language of the ERASE Strategy website, which sets out much of the information forming the basis of the Strategy in clear and accessible terms. Thus students are encouraged to follow the application of the Strategy, and are made fully aware of the duties of the school to provide a safe, inclusive, and bully-free environment.

As an interesting comparison to the New Jersey model, the British Columbian approach functions without such heavy reliance on financial aid from the State. The ERASE strategy costs somewhere in the region of just over $1 million;[167] approximately one fifth of the cost of the New Jersey Anti-Bullying Bill of Rights scheme. The obligations on British Columbian schools to investigate and respond to bullying are phrased in a flexible manner without legislative, pre-defined procedures. Thus, the strategy may overcome the emerging flaw of the New Jersey approach, whereby if schools do not have the labour hours or resources to follow up bullying in the pre-defined procedural manners, incidences of bullying may go unreported. Ultimately, the novel approach to tackling cyberbullying and the integrated training of many community partners organised by those in direct reception of the anonymous bullying complaints, may overcome the perceived disadvantages associated with a lack of legislation, and allow for a flexible, yet State-supported solution to bullying.

[167] "School-Led Anti-Bullying Efforts Share in $1 Million," B.C. Newsroom, 27th February 2013 http://www.newsroom.gov.bc.ca/2013/02/school-led-anti-bullying-efforts-share-in-1-million.html accessed 18th November 2013

The Irish model, as was only released in September 2013 and has not as of yet been fully implemented. The Anti-Bullying Procedures, drafted to guide each school in the creation and implementation of their anti-bullying policy, can be assessed from the point of view of potential efficiency of protection, but any hard data is not possible to withdraw at this point in time. As such, it cannot be effectively compared to the other two jurisdictions in terms of a notable decrease in bullying, nor costs associated with its application.

The Procedures reiterates the long-standing obligation that schools must have a fully drafted code of behaviour, with an anti-bullying procedure established within the framework of their overall code.[168] Certain positive similarities exist between the Irish approach and the other two models, such as the intention to work "with and through the various local agencies in countering all forms of bullying and anti-social behaviour."[169] Specific procedures are quite thoroughly prescribed for noting, recording, reporting, and investigating perceived instances of bullying, which should go to some lengths to protect the right of a child to freedom from torture, inhuman or degrading treatment resulting from bullying and harassment. The effectiveness of all measures is subject to ongoing evaluation, and as such schools are not expected to stick to their own prescribed procedures if it appears that the approaches taken are ineffective. Indeed, schools are encouraged to find flexible solutions that can adapt and change to meet the needs of the bullying problems. Thus, the creation of a specific and tailored educational environment may protect the rights of a child to receive an education, which concurrently is conducive to the child's rights of development.

[168] As arising from s 23(3) Education (Welfare) Act, 2000

[169] "Anti-Bullying Procedures for Primary and Post Primary Schools" Department of Education and Skills, September 2013: http://www.education.ie/en/Publications/Policy-Reports/Anti-Bullying-Procedures-for-Primary-and-Post-Primary-Schools.pdf accessed 18th November 2013

However, the language used by the Procedures in outlining the duties of the School takes at certain times, a rather broad and loose form. Presumably, this plays part is of the effort to allow for the development of a flexible, individualised approach to be taken by each school. Yet, this thesis argues that perhaps such language may at times be too vague. In terms of providing effective protection to students, it must be borne in mind that schools have been legally obliged to create such codes of conduct since the early 2000s. The Anti-Bullying Working Group report, upon who's research the Procedures were largely underpinned, have suggested that it is possible that not all schools have understood such a requirement.[170] The aim of the 2013 Procedures are to modernize the existing anti-bullying guidelines, to reinforce the existence of the requirements, and support schools in creating and implementing effective practices.[171] Yet the lack of specific legislative backdrop or unified, nationwide strategy may result in the dilution of the over-all impact that the Procedures may hope to have.

The decision to avoid the implementation of specific anti-bullying legislation is directly dealt with by the Working Group. Fears that such legislation would fail to allow for a community based-response, and questions over whether legal sanctions against bullies are an appropriate anti-bullying approach have been raised. Such concerns are understandable. However, the issue remains that there may be a general lack of impetus engaging schools in to prioritising their legal responsibility to combat bullying. There are no specific anti-bullying coordinators, such as with British Columbia. There is no prescribed bullying awareness week, such as New Jersey, and only time will tell whether Irish schools do interpret implement the Procedures in

[170] "Action Plan on Bullying" Report of the Anti-Bullying Working Group to the Minister of Education and Skills, January 2013 *Supra*

[171] *Supra*

a way that effectively protects the victims of bullying, and prevents the endemic problem from occurring.

Thus, on the basis of the foregoing comparison, it appears that the following conclusion can be drawn in relation to the effectiveness of a legislative anti-bullying in comparison to policy-centred approaches. The New Jersey Anti-Bullying Bill of Rights appears to be the strongest model on paper for protecting the rights of the victim, yet this approach may have faltered in the expansiveness of its obligations. As opposed to placing the school's duties and obligations on a policy basis, the precision of language and the express legislative requirements laid out in the act have sidelined other possibilities for dealing with incidences of bullying. Thus, despite the uniformity that anti-bullying legislation can offer to victims of bullying, the legal status of the procedures do not possess the inherent flexibility found in the British Columbian and Irish approach which allow these approaches to respond to the actual needs of the victim. In practical terms, the New Jersey may have bounds its own hands in restricting its capacity to efficiently protect the rights of victims in relation to bullying through a procedure that, at present, it cannot afford to fully implement.

The British Columbian and Irish policy based models understand that a bullying solution does not come in the shape of a "one size fits all" structure. British Columbia has equipped school districts with a number of tools which will allow schools to become informed of the bullying occurring within and beyond its walls, be it traditional or cyberbullying forms, in circumstances where students may have otherwise been disinclined to report such occurrences. Such innovation may play an active role in protecting the victim's rights to education, development, privacy, and a school environment free from torture, inhuman or degrading treatment. While the Irish approach contains the same flexibility as the British Columbian

strategy, it has not offered educators with the any new tools or means to deal with the problem. While the Irish government has prioritised addressing the problem of bullying, the broad language of its Procedures application may fail to provoke schools in to effectively addressing and prioritising the problem. As such, it can be concluded that while there are benefits and drawbacks to all three approaches, the British Columbian strategy both obliges schools to prioritise bullying through the use state-supported initiatives, yet allows schools a flexibility to respond to bullying in an adaptive manner. In this sense, it may be the most effective strategy in protecting the rights of the victim from bullying.

II. HOW DO THESE APPROACHES DEAL WITH THE RIGHTS OF ALL STUDENTS TO DEVELOP IN A SAFE AND INCLUSIVE SCHOOL ENVIRONMENT?

An aspect which must be considered as an extension to the effectiveness of any anti-bullying approach is the balance that such an approach strikes with the rights of other students to development. In considering anti-bullying approaches within a human rights framework, the right of development was illustrated as one held by both bully and victim. This right requires that students are given space to space to think freely, speak freely, to make mistakes without an overly inhibitive or restrictive fear of reprisals, to be provided with an educational environment conducive to the full development of their personality. Furthermore, this thesis has previously illustrated some of the many reasons as to why bullying may occur. Sometimes it is due to deficiencies in the home and family life of the bully, others because the bully is victimised themselves in other environments. In order for an approach to effectively deal with the problem bullying, some of these root causes, such as lack of self-esteem, lack of discipline, must be addressed. To singularly utilize punitive methods for addressing bullying, without dealing with the causes of such bullying behaviour may serve to stigmatize a child by identifying them solely in terms of aggressive, bullying behaviour. Such a stigmatization may

infringe on the child's rights of development, of privacy and respect for private life, particularly when those branded with the title dispute the claim against them. Furthermore, the long-term effectiveness of a model which seeks to punish and stigmatize bullies as opposed to nurture and reform may be questionable in terms of effectively dealing with a culture of bullying within a school. As such, an anti-bullying approach must tread the line between protecting victims' rights, avoiding stigmatization of the bully, and ensuring that the rights of all children to development, is maintained.

The New Jersey model maintains perhaps the most aggressive approach in addressing the problem of bullying. The language of the Anti-Bullying Bill of Rights speaks actively of the 'fight' against bullying and strongly refers to the suicides that have taken place as a result of the behaviour.[172] There is an enumeration of different grounds of behaviour through which students may merit punishment, suspension or expulsion.[173] Policies are described as outlining prohibitive behaviour, disciplinary techniques feature strongly throughout the act, and alternative approaches such counselling given a particularly background role. When interpreted in such a context, the rights of students to a nurturing educational environment, conducive to the full development of their personalities does not appear to be the focus of this of this piece of legislation.

A number of drawbacks to such approach are discernible. Firstly, the language and content of the Act fail to properly address the multi-layered problem of bullying. It appears to view the

[172] For further information please see section 2 of the Anti-Bullying Bill of Rights *supra*

[173] For example, section 10 of the Anti-Bullying Bill of Rights states that "Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school."

issue in terms of black and white, as simple as victim and aggressor, and displays no desire to understand the underlying causes and problems through which a child's bullying behaviour may manifests. While students may still be culpable for the negative effects flowing from their act of bullying, responding to such an act through a more nuanced approach to the problem may safeguard the right of development to which all students are due. The bully, as a child, is owed a duty by schools to nurture his or her personality, development and growth, and as such may be owed a duty of intervention through alternative arrangements when it appears that his or her behaviour is symptomatic of low self-esteem, troubled family life, or consequential bullying in other environment. Yet in contrast to this, there are stringent obligations on the part of New Jersey schools to deal with the symptoms of bullying through the concepts of punishment and deterrence, with a far lesser emphasis placed on reform, nurture, and positive change. Furthermore, the rigid reporting techniques whereby the merest perception of bullying is subject to thorough investigation treads a thin line between protection and stigmatization of students, and can quickly amount to an unjust infringement of the rights of private and family life. An example of this arose in July 2012, when a New Jersey School district publicly withheld the distribution of diplomas to two senior class presidents, on the grounds that their graduation speech may possibly have been in violation of the State's anti-bullying policy. The graduation speech was found upon thorough investigation, (including interviews of everyone named therein as to whether they felt 'victimised') not to have been bullying behaviour, and the students have since demanded an apology for the district "unfairly labelling them as bullies."[174]

[174] "New Jersey District Temporarily Withheld Two Seniors' Diplomas Because Graduation Speech may have Violated State's Anti-Bullying Law," Legal Clips, modified 12th July, 2012: "http://legalclips.nsba.org/2012/07/12/new-jersey-district-temporarily-withheld-two-seniors-diplomas-because-graduation-speech-may-have-violated-states-anti-bullying-law/ accessed 18th November, 2013

A report issued by the New Jersey Anti-bullying Task Force in February 2013, which monitors the implementation of the Bill, called for school administrators to be allowed greater discretion and flexibility "in deciding when to launch full-scale inquiries into allegations of harassment."[175] It had been perceived that the requirements of the Bill, in obliging school administrators to investigate every single potential incident of bullying, greatly detracted from resources, delayed sanctions for those who were found to have bullied, and if one reads between the lines, launched in to full investigations of incidences which may not have had at all the requisite composites to qualify as bullying behaviour. Two years after its implementation, hints towards mistrust for the overly aggressive New Jersey approach have begun to arise. Such an approach fails to grapple with the sources of problems which create bullying, thus denying the bully the opportunity for development, nurture, and reform. It may sometimes stigmatize students with the title of bully, consequently detracting from the creation of an inclusive educational environment. And in terms of effectiveness, such overly stringent reporting and investigation procedures in no way relieve the hefty financial burden already felt by certain New Jersey schools. Whether the legislator can adapt the Bill to such acknowledge such findings is a future issue to be aware of with the New Jersey approach.

As may be expected with the British Columbian approach, the policy makers have adopted a more understanding approach to bullying and its causes. As such, the strategy imposed is more coherent with the developmental rights of children. The ERASE website is no less committed than its Bill of Rights counterpart to eradicating the problem of bullying, but the

[175] "New Jersey Anti-Bullying Task Force says School Administrators Needs More Discretion in Harassment Bullying Investigations," Legal Clips, modified 2nd July, 2012 http://legalclips.nsba.org/2013/02/07/new-jersey-anti-bullying-task-force-says-school-administrators-need-more-discretion-in-harassmentbullying-investigations accessed 18th November, 2013

language used by each approach differs hugely. ERASE, when speaking about a 'bully', states that:

> Bullying is about power, and power is something that some children will naturally want to experiment with. Some kids may use bullying as a way to enhance their social power and protect their prestige with their peers. Some kids actually use bullying to deflect taunting and aggression that is directed toward them – a form of self protection.[176]

Thus, although the State stands strongly against the idea of bullying as a rite of passage, it does accept that bullying is an aspect of behaviour that children are naturally drawn towards, which occurs for many different reasons. With this understanding of bullying in place, the fear of overly retributive school reprisals or stigmatization is lessened, as students are depicted as naturally drawn to experimenting with their own personality and self-development. Such awareness may allow those in charge to deal with an incident of bullying in a way which aims to consider the root causes of bullying through alternate or nurturing means. The ERASE website displays bullying as a multi-layered, complex problem, stating that "bullying and aggression is often a cry for help."[177] Parents are encouraged to maintain a calm, open-minded dialogue with their children, and are advised to be mindful in discovering the root cause of their child's behaviour, be it a family divorce, lack of confidence, victim of bullying themselves, or spending too much time alone.[178]

Fundamental to the British Columbian procedure is an inherent flexibility described above, which allows each school to address incidences bullying in a manner which is most coherent with its internal school culture. Such flexibility is safeguarded against abuse through certain

[176] "Bullies and Bystanders," ERASE Bullying http://www.erasebullying.ca/bullying/bullying-bb.php accessed 28th November, 2013

[177] "Parents," ERASE Bullying http://www.erasebullying.ca/parents/parents.php accessed 25th November, 2013

[178] "Parents," ERASE Bullying http://www.erasebullying.ca/parents/parents-what-talk.php accessed 25th November, 2013

underlying obligations to report and respond to bullying, and although the School Policy guidelines which will govern this area are not yet available, it appears that Schools will not be obliged to follow one blanket procedure for each incident. Furthermore, with 20% of the training through the ERASE program targeted at community partners such as mental health workers and child-welfare workers,[179] it appears on the clear that the Strategy has made a face of the strategy has made a distinct effort to prioritise developmental procedures over punitive approaches. As such, the rights of all children, bully or victim, to development, and to a nurturing educational environment are protected and maintained. From what we can see two years on, the ERASE strategy has stressed the need for a school to be a place of inclusion, where students can speak, grow, and experiment with their developing personality without undue restraint It has given schools the capacity address bullying through understanding, thus making specific efforts to avoid stigmatization; and to deal with root causes of bullying, thus acknowledging the interplaying rights of development of the bully. It does appear to stand up to its reputation as a holistic anti-bullying model.

The Irish approach is similar to the British Columbian approach, in that it appears to advocate for an inclusive, nurturing school environment, an understanding approach to the problem of bullying, and guards against the stigmatization of students involved in bullying. The Procedures describe as a key aim, the creation of:

> [a] positive school culture and climate that is welcoming of difference and diversity and is based on inclusivity and respect. A school policy on bullying is most effective when supported by a positive school climate which encourages respect, trust, care, consideration and support for others.[180]

[179] "Premier Announces Erase Bullying Strategy" B.C. Newsroom, *supra*

[180] "Anti-Bullying Procedures for Primary and Post Primary Schools" s*upra.* Section 6, "Key Principles of Best Practice"

The positive tones and formulations seen throughout the Procedures suggest the creation of an environment where children can grow and develop, with freedom to speak and to think without overly restrictive fear of punitive sanctions. As with the British Columbian model, a key aspect of the Irish Procedure is a flexibility that allows schools to respond to bullying in a manner conducive to each school environment. While procedures are in place for reporting occurrences of bullying, there appears to be some discretion in the hands of designated teachers in assessing whether certain behaviour qualifies as bullying or not. A consequence of this aspect of the strategy is again, the positive impact that such an approach can have on the creation of an inclusive and accepting educational environment, which respects the child's right to development, and allows children to grow without overarching fears of reprisals.

Furthermore, the Procedures make great efforts to underline throughout its policy, the need for schools to avoid the stigmatization of students as bullies, and assert an understanding of the multi-layered problem that is bullying. In a manner similar to the British Columbian model, it acknowledges the multiple causes which may motivate a child to bully others. Apart from a general lack of empathy towards others, tendency towards aggressiveness, and other such symptoms commonly associated with bullying, the Procedure outlines that it is common to find that "pupils who engage in bullying behaviour may also have been bullied themselves."[181] It notes that a lack of confidence and low self-esteem are common factors amongst bullies. As such, it avoids the New Jersey typecasting of bullies and victims. Furthermore, in terms of avoiding an ethos of stigmatization, the Irish approach acknowledges that "pupils who engage in bullying behaviour do not always intend to bully or may not recognise the

[181] "Anti-Bullying Procedures for Primary and Post Primary Schools..." *supra,* section 4, "Characteristics Associated with Bullying"

potential negative impact of their words and actions on others."[182] As such, a school culture of support and inclusion is advised.

In contrast to the New Jersey approach, the Irish strategy is acutely aware that any programme implemented by schools cannot deal solely with victims, but must also address the needs of those children who bully. As this thesis has previously explained, this is an important demonstration of safeguarding the right to development, which is held by all school children. It identifies as a core aim the development of a "programme of support for those affected by bullying behaviour and for those involved in bullying behaviour."[183] As such, the investigating, reporting, and responding to bullying is expressly focused on resolving issues, and restoring relationships. The Procedure expressly advises against resolutions which seek to apportion blame, as opposed to reconciliation, thus choosing a nurturing approach which favours self-development over punitive sanctions. Thus, with the over-all aim of the Procedure to be the creation of a positive, inclusive, respectful school climate and culture, with flexible procedures, a deep understanding of the underlying causes of bullying, and with the emphasis on resolution, as opposed to punishment, the Irish model strongly supports the rights of all children to development. It makes efforts to avoid undue stigmatization of the students as bullies, and seeks the establishment of an atmosphere conducive to education, nurture, and tolerance.

Thus, how these three jurisdictions balance the right of development held by all students differs greatly. The New Jersey model may be criticized as failing to provide students with an

[182] *Supra*

[183] "Anti-Bullying Procedures for Primary and Post Primary Schools..." *supra,* section 5, "A School's Anti-Bullying Policy"

inclusive and nurturing environment. The Act somewhat myopically views bullying in simple terms of good and bad, which has the effect of reducing the bully's right to development to nil, and may effectively prevent any meaningful work to be done to actually reduce the existence of bullying in a school culture. The rigid, aggressive New Jersey legislation may eventually be forced to develop more discretionary, policy-like features to avoid what may be undue infringements on a child's right of development. In this aspect, the New Jersey approach may learn from the British Columbian and Irish models, which are particularly focused on the creation of a shared and nurturing educational environment. They display significant empathy towards the underlying causes of bullying, and place emphasis on addressing these causes, as opposed to punishing the symptoms of bullying. In this manner, the flexible, policy models display a greater capacity to respect the right of development.

III. ARE SCHOOLS IN THE JURISDICTIONS CAPABLE OF DEALING WITH CYBER BULLYING?

Cyber bullying has been raised throughout this thesis as an endemic problem of particular concern to all three jurisdictions in question. And indeed, New Jersey, British Columbia, and Ireland, have all undertaken certain distinct efforts in tackling the issue. However, the approaches taken by the jurisdictions vary in terms of involvement and impact, and will now be compared with a view as to their capacity to protect the rights of the victim, and their viability in terms of respecting the limitations of privacy rights.

The definition for bullying used by this thesis was the ‘intentional infliction of harm by one student on to another through an unfixed variety of means with the aim of asserting control,

pain or humiliation on to that person.' In justifying such a definition, it was argued that by leaving unfixed the "means" of bullying, schools are given a greater scope to respond to the changing modes of cyberbullying. Including cyberbullying as an aspect under the school's anti-bullying responsibility places certain implications on the scope of duties imposed upon the school to prevent and address occurrences of bullying. It expands the school's responsibility towards students from outside the traditional classroom and school-yard environments, and in to the pockets and homes of students. Thus, any anti-bullying strategies that wish to address cyberbullying must reflect this widened scope of duty if they intend to effectively address cyberbullying as a school bullying problem. To define the extent of school responsibility is important, as more and more victims have invoked the civil liability of schools "deemed responsible for failing to take steps to prevent the hostile behaviour."[184] By clearly laying out the extent of the school's responsibility to intervene in cases of cyberbullying, schools are making clear the extent to which they can protect the victim's private life from interference, as well setting legally permissible limits for how deeply the school may intervene with the privacy rights of other students. This balance is important, as arguments of privacy rights and freedom of speech have increasingly been invoked in the Courts by students who claim that schools have conducted over-broad interferences with their personal life, particularly where allegations of cyberbullying are concerned.[185] As the Attorney General of New Jersey recently stated at a cyberbullying conference addressing exactly this issue, "You

[184] Des Butler, Sally Kift & Marilyn Cambell, "Cyber Bullying In Schools and the Law: Is There An Effective Means of Addressing the Power Imbalance" Murdoch University Electronic Journal of Law, (2009) Vol 16, No 1: http://elaw.murdoch.edu.au/index.php/elawmurdoch/article/view/24 accessed 23rd November 2013

[185] Cases such as: *Kowalski V. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011), *D.J.M. v. Hannibal Public School District #60*, 647 F.3d 754 (8th Cir. 2011)

want policies that will protect children, but also will survive the [legal] scrutiny that it will inevitably be exposed to.‘‘[186]

In New Jersey, cyberbullying was the cause of the 2007 amendment[187] to the New Jersey anti-bullying legislation, which now defines “electronic communication” as including (but not limiting to) telephone, mobile phone, computer, or pager. It furthermore adds electronic communication in to the scope of bullying behaviours addressed by the legislation.[188] It does not, however actually elaborate on how cyberbullying may differ in definition from face-to-face bullying, nor offer any insight on how to identify behaviour that qualifies as bullying in the online sphere. The State has prescribed schools with an exceptionally wide scope of duties to respond to incidences of bullying. It expands a school's duty to intervene when bullying takes place off schools grounds which “substantially disrupts or interferes with the orderly operation of the school or the rights of other students.”[189] The second clause of this section suggests that the school may be responsible to investigate claims of bullying that may not have any nexus with the school, presumably apart from the fact that both victim and perpetrator are students and the personal rights of the victim are affected. In the context of cyberbullying, as it generally takes place outside the school, the extent to which the school is legally capable of investigating allegations conducted without any real nexus to the school environ-

[186] “At Cyberbullying Conference, Experts and Educators Try to Define Line between Texting and Trouble” NJSpotlight, modified 25th April, 2013 http://www.njspotlight.com/stories/13/04/24/at-cyberbullying-conference-experts-and-educators-try-to-define-line-between-texting-and-trouble/ accessed 24th November, 2013

[187] “Anti-Bullying Bill of Rights” *supra*, section 2: http://www.njleg.state.nj.us/2010/Bills/A3500/3466_R1.HTM accessed 24th November, 2013

[188] “Anti-Bullying Bill of Rights” *supra*, section 11.2

[189] *Supra*

ment is questionable, as there must be some limitation based on the privacy rights held by bullies. Over-broad definitions of cyberbullying covering any 'electronic communication' which fail to define what cyberbullying *is*, and over-broad expectations of school interventionism without any discernible nexus between the alleged "bullying" and the school itself may impose unrealistic burdens upon the school district. As one example states, such a definition could interpret a text message from a boyfriend to a girlfriend (both students of the same school) reading "I'm dumping you for your best friend, Suzy, because I like blondes better than redheads" as bullying, punishable under the Anti-Bullying Act by suspension or expulsion from school.[190] Furthermore, it serves only to give victims a false sense of trust in the capacity of a school to protect infringements on their private life, and to protect them from torture, inhuman or degrading treatment which does not possess a nexus to the functioning of the school.

The British Columbian ERASE strategy is more specific than the New Jersey counterpart, and defines cyberbullying as "taunting or humiliation through social media sites (Facebook, Twitter, etc.) or the Internet, cruel websites targeting specific youth, humiliating others while playing online games, verbal or emotional bullying through chat rooms, instant message or texting, posting photos of other youth on rating websites, etc."[191] The scope of duty according to the British Columbian legislators is more limited in this respect, restricting the school's capacity to intervene to situations where unacceptable behaviour that takes place at school or "in other circumstances where engaging in the activity will have an impact on the school en-

[190] "Why Time Magazine is Wrong about New Jersey's Cyberbullying Laws," Frank LoMonte, Student Press Law Centre, modified 12th September, 2012 http://www.splc.org/wordpress/?p=2594 last accessed 28/06/13

[191] "Bullying Types," ERASE Bullying http://www.erasebullying.ca/bullying/bullying-types.php accessed 28th November, 2013

vironment."[192] This approach demands that that there is a distinct nexus between the act and the school environment in order for the school responsibility to be invoked. Such an approach makes a certain effort to set realistic parameters to the school's capacity to intervene and protect the rights of students, while considering the acceptable circumstances of interference with the privacy rights of other students. Such an approach furthermore reflects the case law established by both Canadian and American jurisdictions which insists that bullying "causes substantial disruption to the learning environment, or...created a poisoned or hostile environment for any student,"[193] before a school's capacity to involve itself arises. By defining the scope a school's responsibility in more moderate terms, the reasonable expectations of the school's duty to act are made clearer, more foreseeable and enforceable. And as such, the realistic legal capacity of a school to protect a victim from cyberbullying is better understood.

The Irish approach is perhaps the most troublesome of the three jurisdictions, due to the lack of structure or detail offered on how, when, and under what circumstances a school may respond to cyberbullying. The strategy does flag cyberbullying as a particular concern, and insists that each school consider the problem within the confines of their individual definition on bullying. However, in comparison to the other jurisdictions, the Irish strategy provides no real insight in to the roles and duties of the school in terms of its capacity to investigate claims of cyberbullying. As such, the precise protection that a student or victim can expect to receive from the school, where their right of privacy have been invaded by cyberbullying is left unclear and consequently, difficult to enforce. Furthermore, due to the lack of clarity as to

[192] Sec. 6, Provincial Standards for Code of Conduct Order, *School Act*, sections 85(1.1) 168 (2) (s.1)

[193] Shaheen Shariff and Dianne L. Hoff: "Cyber bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace," International Journal of Cyber Criminology, (Jan 2007), Vol 1 Issue 1, pg 100 http://www.cybercrimejournal.com/shaheenhoff.pdf accessed 25th November, 2013

the permissible limits of such interventionism, the privacy rights of other students may be impinged upon if schools take an overbroad interpretation of their duty to protect under the heading of cyberbullying.

The strategy does include cyberbullying as within the scope of a school's concerns, and provides for the once-off publication of an "offensive or hurtful public message, image or statement on a social network site or other public forum where that message, image or statement can be viewed and/or repeated by other people"[194] as an exception to the general definition of bullying as a repeat pattern of behaviour. In addressing the problem of cyberbullying, schools are merely told that the "best way to address cyberbullying is to prevent it happening in the first place."[195] As such, schools should raise awareness on educating students on "appropriate online behaviour, how to stay safe while on-line and also on developing a culture of reporting any concerns about cyberbullying." Yet with cyberbullying posed as an increasingly problematic issue for many schools, this effort instinctively feels as if it will fall short of practical demands. Students are, in general, a largely tech-savvy social group.[196] They are in most cases aware of what cyberbullying is, and how social networking sites function. Thus, awareness raising on safe online behaviour can only go so far when new forms of on-line communication are developed on an increasingly regular basis. It may be that cyberbullying prevention strategies are aspect which the Irish Procedures must be particularly conscious of in evaluat-

[194] "Anti-Bullying Procedures for Primary and Post Primary Schools" *supra*, section 2, "Definition and Types of Bullying"

[195] *Supra*, section 6, "Key Principles of Best Practice"

[196] "What is Cyberbullying?" STOP Cyberbullying, http://stopcyberbullying.org/what_is_cyberbullying_exactly.html accessed 24th November, 2013

ing and updating their modes of addressing bullying, as the current model possibly fails to effectively protect the rights of the victim and bully, implicit within this problem.

Thus, all three jurisdictions have responded in different ways to the issue of cyberbullying, yet the problem remains to some extent, a troublesome issue to resolve. The New Jersey legislation creates a duty of intrusive school interventionism in circumstances where the personal rights of the student have been harmed without any clear school nexus. With prescribed investigative duties of the school which clash with privacy rights of students in unresolved legal situations, the New Jersey cyberbullying legislation may fail to efficiently protect the rights of victims, while concurrently impinge on the privacy rights of suspected bullies. The British Columbian approach has attempted to set the confines of the school's duty to intervene, and requires an identifiable nexus with the bullying and disruption of school life. Such a position makes a clear effort to balance the rights held by both victims and bullies. The Irish approach is particularly noteworthy in this comparison as it fails to outline the circumstances and steps that may be taken by schools in cases of cyberbullying. The Irish strategy creates no real link between the school-nexus, and online off-campus behaviour. Effectively, it leaves responsibility up to individual schools to negotiate this legal myriad of competing and shared rights of students. This thesis ultimately suggests that the British Columbian approach provides the most balanced and legally viable option out of the three jurisdictions examined. The legislation underpinning the ERASE strategy acknowledges the different rights in place, without compromising on efforts to best protect the victim from unwelcome invasions of privacy, and from bullying reaching levels of torture, inhuman and degrading treatment.

IV. HOW MAY ONE RELY ON SUCH STRUCTURES IN ORDER TO INVOKE THEIR HUMAN RIGHTS AND BRING A BULLYING CASE BEFORE THE LAW?

If the structures laid out by these jurisdictions do not sufficiently protect students from bullying, a victim may have to rely on other ways to assert their various rights against a school through the form of legal action. Although this thesis has acknowledged bullying as a horizontal issue, causes of action brought by victims against individual bullies are not the object of this area of comparison. Such claims may be better understood in the context of the relevant criminal law of each jurisdiction. Instead, this thesis is focused on the duties of the School prevent and respond to bullying in the form of a vertical human-rights based obligation. As such, this section instead seeks to ascertain the likelihood of success and ease at which a victim may bring a legal claim against a school or school district, for their failure to protect the victim from bullying.

The United States have a large corpus of liability cases taken by victims as a result of a school's failure to prevent bullying.[197] Such cases have seen success in district and federal courts. In the New Jersey courts, a number of decisions and settlements over the past few have illustrated that a finding of such a liability on the part of schools exists as a distinct possibility.[198] This thesis has suggested that the New Jersey legislation was drafted to contain a

[197] "More Bullying Cases Have Parents Turning Towards the Courts," Natalie DiBlasio, USATODAY, modified 11th September, 2012: http://usatoday30.usatoday.com/news/education/story/2011-09-11/bullying-lawsuits-parents-self-defense-courts/50363256/1 accessed 28th November, 2013

[198] See for example: *L.W. v. Toms River Regional Schools Board of Education*, 21st February, 2007 (A-111-05), "$4.2 Million Settlement for Student Paralyzed by Bully," NBC News, modified 19th April, 2012 http://usnews.nbcnews.com/_news/2012/04/19/11289813-42-million-settlement-for-student-paralyzed-by-bully, "AG: Old Bridge School District to Pay $75K to Settle Bullying and Harrassment Case," NJ.com, modified 18th September, 2013:

certain insulating element which seeks to prevent schools from liability in claims of damages arising from a failure to prevent bullying. Such immunity arises through adherence to the rigorous reporting and investigation techniques prescribed for in the act. Once these procedures are effectively adhered to, the liability of the school if such bullying continues is essentially closed. Section 13 of the act expressly crystallizes this immunity:

> A member of a board of education or a school employee who promptly reports an incident of harassment, intimidation or bullying, to the appropriate school official designated by the school district's policy, or to any school administrator or safe schools resource officer, and who makes this report in compliance with the procedures in the district's policy, is immune from a cause of action for damages arising from any failure to remedy the reported incident.[199]

However, the wording of this immunity clause conversely opens up space for a cause of action for victims, where the specifically outlined procedures and obligations have not been expressly complied with. As seen previously in the course of this chapter, there are perhaps a number of existing occasions where a school is unable or unwilling to meet the legislative requirements imposed by the Act. Thus it is in these instances where victims have the opportunity to invoke the school's failure to uphold its legislative obligations towards a victim

To bring a claim before the New Jersey courts, there are certain common found in each claim for a school's liability in its failure to protect a victim from bullying. Firstly, it appears that

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http://www.nj.com/news/index.ssf/2013/09/ag_old_bridge_school_district_to_pay_75k_to_settle_bullying_and_harassment_case.html accessed 23rd November, 2013

[199] "Anti-Bullying Bill of Rights Act 2010" *supra*, section 13(c): A member of a board of education or a school employee who promptly reports an incident of harassment, intimidation or bullying, to the appropriate school official designated by the school district's policy, or to any school administrator or safe schools resource officer, and who makes this report in compliance with the procedures in the district's policy, is immune from a cause of action for damages arising from any failure to remedy the reported incident.

by there must a level of awareness on behalf of the schools that bullying was occurring.[200] Furthermore, any efforts (if at all) taken by the school to counteract this bullying must have been inefficient.[201] With the introduction of the Anti-Bullying Bill of Rights, victims may find it even easier to successfully bring such a case, as Section 13 of the Act effectively places the school's liability on the line if procedures are not complied with. Although it is perhaps too early to tell how claims of bullying occurring after the introduction of Act will be decided, it appears that section 13, in conjunction with the inability of many schools to adhere to such procedure will give student a high probability of success in bring forth a claim where their school has failed to prevent bullying from occurring.

The British Columbian approach, as with the New Jersey approach, identifies the failure of a school to sufficiently and effectively deal with bullying of which it is aware of, as a common aspect in bringing a claim against a school before a court.[202] Despite its lack of specific anti-bullying legislation, causes of action can arise in a number of ways before the Court, either through anti-discrimination legislation, or through negligence, by establishing a breach of duty of care. A number of cases have been brought before the British Columbian courts in the

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[200] See for example, the aforementioned cases and settlements:
L.W. v. Toms River Regional Schools Board of Education, 21st February, 2007 (A-111-05),
"$4.2 Million Settlement for Student Paralyzed by Bully," NBC News, modified 19th April, 2012
http://usnews.nbcnews.com/_news/2012/04/19/11289813-42-million-settlement-for-student-paralyzed-by-bully,
"AG: Old Bridge School District to Pay $75K to Settle Bullying and Harrassment Case," NJ.com, modified 18th September, 2013:
http://www.nj.com/news/index.ssf/2013/09/ag_old_bridge_school_district_to_pay_75k_to_settle_bullying_and_harassment_case.html accessed 23rd November, 2013

[201] See other such descriptions of claims, cases and settlements which identify these two criteria: "New Jersey Student Sues School Districts over Alleged Bullying," HuffingtonPost, modified 18th March, 2013 http://www.huffingtonpost.com/2013/03/18/new-jersey-student-sues-school-bullying_n_2901661.html, accessed 24th November, 2013, and *L.W. v. Toms River Regional Schools Board of Education supra*

[202] See for example *School District No. 44 (North Vancouver) v. Jubran*, 2005 BCCA 201 (CanLII), and *JT v. School Distric*t No. 36, 2010 BCHRT 299

past have generally rooted claims for unaddressed bullying into a specific type of discrimination (*i.e.* the victim was bullied for perceived sexual orientation,[203] or for mental and/or physical disabilities[204]). Such cases have typically been brought under the BC Human Rights Code[205], and have pinned schools with the failure to provide a "safe and respectful school experience",[206] or an "educational environment free from discriminatory harassment."[207] However, the Human Rights Code only specifically covers 13 areas of discrimination, including their "race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age (applies to persons 19 to 64 years of age), and unrelated criminal or summary convictions."[208]Thus, students who are bullied for reasons unrelated to these headings will be unable to rely on the Code to bring a claim against their schools.

The alternative is to bring a case against a school for a breach of duty of care. As part of the ERASE strategy, stronger codes of conduct governing the responsibilities and duties of each school are due to be drafted. Official updates released from the Ministry of Education in early 2013[209] reveal that these Codes are still under way, thus the precise duty of care of the

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[203] *School District No. 44 (North Vancouver) v. Jubran*, 2005 BCCA 201 (CanLII)

[204] *JT v. School District* No. 36, 2010 BCHRT 299

[205] Human Rights Code RSBC 1996, c 210

[206] JT v. School District No. 36, 2010 BCHRT 299

[207] *School District No. 44 (North Vancouver) v. Jubran*, 2005 BCCA 201 (CanLII)

[208] See a summary of the legislation found Appendix E of the British Columbian Ministry of Education "Safe, Caring and Orderly Schools" Guide http://www.bced.gov.bc.ca/sco/guide/scoguide.pdf#page=61 accessed 25th November, 2013

[209] "Factsheet Update on the Erase Bullying Strategy," B.C. Newsroom, 27th February, 2013 http://www.newsroom.gov.bc.ca/ministries/education/factsheets/factsheet-update-on-the-erase-bullying-strategy.html accessed 28th November, 2013

schools and school districts is still unknown. Somewhat worryingly, the codes are to be designed in line with existing laws that prohibit discrimination, and thus confine themselves to "race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, age, sex or sexual orientation."[210] This is in contrast to the New Jersey approach which now relies on a legally established definition of bullying as discrimination based on any characteristics whatsoever of the victim. Whether or how such a restriction may hamper a victim who does not fit in a predefined category of discrimination from bringing a case before the British Columbian courts is a question which may be addressed in the future.

If a victim in Ireland wishes to make a case against a school for failing in their duties to prevent bullying, the main cause of action appears to be a claim in negligence. To establish such a claim, a victim would have to demonstrate firstly, that a duty of care existed between student and school, secondly, that this duty was breached, and thirdly, that there was causation between the breach, and the injury suffered by the victim.

The Irish Supreme Court case of *Murphy v. County Wexford VEC*[1211] is an illustration of the judicial acknowledgment of the standards of care that exist between students and their teachers and schools. Essentially, the duty of care owed to each student is a "standard based on a reasonable person in loco parentis, rather than that of a reasonable teacher,"[212] although this

[210] *Supra*

[211] *Murphy v. County Wexford VEC* [2004] IESC 49.

[212] Brian Hallissey "Schools, Bullying and the Law of Negligence," Irish Law Times 2013, 31, 91-96

expansive standard has been subject to some criticism by Irish scholars.[213] The same year, in *Mulvey v. McDonagh*,[214] the Court accepted a definition of bullying as a:

> [r]epeated aggression, verbal, psychological or physical conducted by an individual or group against others. Isolated incidents of aggressive behaviour, which should not be condoned, can scarcely be described as bullying. However, when the behaviour is systematic and ongoing, it is bullying.[215]

Such an interpretation, if upheld today, would exclude once-off incidences of cyberbullying from being considered as bullying under the ambit of bullying that the school is obliged to prevent.

Due to a lack of legislation and case law in the area, the precise duty of care itself is undefined, and thus satisfying the second criteria, *i.e.* showing that a breach has occurred, may be troublesome. The limitations on this duty are important, as they will dictate the possibility of success for a victim who has been bullied in circumstances outside of the traditionally understood spatial and temporal scope of school authority. The English case of *Bradford-Smart v. West Sussex County Council*[216] saw the Court of Appeal hesitant to extend this duty of care outside the school grounds save in exceptional (and undefined) circumstances. Instead, the Court was satisfied that the school authorities had taken a well-balanced and sensible approach to preventing bullying within the grounds of the school, and as such, the school could not be found liable for off-campus bullying. Such a decision may be of guidance to the Irish

[213] See for example, Quill, Torts in Ireland, 3rd ed. (Dublin: Gill & McMillan, 2009) pp.85–86

[214] *Mulvey v McDonagh* [2004] 1 I.R. 497.

[215] The Court, in doing so, was accepting the definition of bullying as laid out by the Department of Education, *Guidelines on Countering Bullying Behaviour in Primary and Post-Primary Schools*, (Dublin: Stationary Office, 1993). Accepted in *Mulvey v. McDonagh* at pg 505

[216] *Bradford-Smart v. West Sussex Council Council* [2002] ELR 139 (CA)

Courts should a similar claim be brought before them. However, it is equally possible that the Irish judiciary may undertake a less restrictive approach in establishing limitations of the duty of care, especially considering the increasing attention that bullying is receiving in political and social fora, and the newly published reformulation of school duties in this area.

Thirdly, the victim will also have to establish a causal connection between the bullying suffered and the failure of the school to intervene. This will be a sizeable hurdle for any victim seeking to bring forth a claim in negligence, due to the "floodgates" fear in allowing such a connection be established in the first place. The connection may be especially difficult to establish in cases of off-campus cyberbullying. As one scholar notes, "the mere fact that the bully and the victim attend the same school would not be sufficient to bring the matter within the duty of care of the school"[217]

Thus, without specific anti-bullying legislation governing the obligations of the school in this area, the potential success of a negligence claim based on the failure of a school to prevent bullying will be strongly based on the specific circumstances of each claim. The closer the spatial and temporal connections are between the bullying, the victim and the school, and the greater the failure of the school to prevent bullying, the more likely a victim's chance for success may be.

Thus, it is possible for victims in all three jurisdictions to bring a legal claim against a school for failing to provide adequate protection from bullying. Although the New Jersey legislation

[217] Butler et al, "Cyber Bullying in Schools and the Law: Is There an Effective Means of Addressing the Power Imbalance?" Murdoch University Electronic Journal of Law (June 2009) Vol.16 Issue 1, 84 (Cited from Brian Hallissey "Schools, Bullying and the Law of Negligence" supra)

has made a particular effort indemnify schools from legal claims, the difficulties that some schools have in fulfilling their investigation and reporting obligation, may leave them liable to a claim for damages under section 13 of the Anti-Bullying Bill of Right. The British Columbian and Irish approaches are similar, insofar as no specific anti-bullying legislation is in place. In British Columbia, a number of cases have succeeded in invoking the school's liability in relation to the alleged discrimination which they allowed to occur on school grounds. An alternative route through claiming a breach of duty of care may also arise, although such a claim may be affected by the pending Codes of Conduct which are being drafted at present by the British Columbian Ministry of Education. The Irish case law that does appear on the issue appears to root a victim's claim through a defined course of negligence, insofar as victims may claim for a breach of the duty of care owed to them by their school. However, the existing precedent may pose particular problems in terms of cyberbullying, due to the difficulties of establishing causation, and indeed a nexus between the school and off-campus cyberbullying incidences. Therefore, it is not possible to specify with any certainty as to which of the jurisdictions is most likely to uphold a claim of damages for the failure of a school to prevent bullying. Every case will be decided in accordance to its specific facts and merits, and a more substantive answer is not perhaps possible at present.

CONCLUSION

This chapter has introduced and developed the comparison between the three jurisdictions. It justified the choice of jurisdictions, and outlined the context of creation of each approach. The chapter offered insight in to the substance of each jurisdiction's strategy of combating bullying within its schools. It proceeded to compare these jurisdictions under a number of heading that had previously been established over the course of this thesis, which allowed the

jurisdictions to be measures from within the framework of a human rights-based approach to bullying.

In concluding the comparison between jurisdictions, it is timely to recall the hypothesis for which this thesis is based upon; that a legislative anti-bullying model is preferable to a policy approach as it is more capable of preventing school bullying. Furthermore, that it will more effectively balance all the co-existing human rights involved in school bullying, due to the multitude of legal considerations that would underpin the creation of such laws.

It cannot be said with any firm conclusion that a legislative approach is a particularly preferable model in preventing bullying, over an approach based on policy backed by legislation or a more simple policy approach. Furthermore, the anti-bullying legislation addressed in this thesis proved to be the weakest jurisdiction out of the three in terms of balancing the shared and competing human rights implicit in an anti-bullying effort. Thus, the hypothesis of this thesis was not proven on either point. What has been shown instead is that the inherent inflexibility of a legislative strategy is a particular impediment to the success of its approach, in restricting its capacity to adapt and address different circumstances of bullying. In this manner, anti-bullying structure may prove unable to effectively protect the rights of education, and the provision of a nurturing educational environment. The rights of development and of respect to private and family life can equally be invoked. Alternatively, it has been shown that a legislative framework is advantageous in other ways, insofar as it asserts with clarity the obligations, duties and expectations on a school when called upon to address the problem of bullying. In this manner, students are aware of the legal capacity of schools to protect their various rights, and prevent bullying. However, others students may find an unjustified infringement with their rights of privacy and development should these obligations not be bal-

anced in a coherent legal manner. In this sense, the lack of legal status of policy directions may diminish the protection a victim can expect to rely upon from their school, as in some cases, the precise causes of action may be unknown. As a result, this thesis can conclude that there is no one perfect approach, either legislative or policy-based to prevent bullying, protect the rights of victims, and balance the shared and competing rights of other students of a school.

THESIS CONCLUSION

This thesis set out to prove the hypothesis: a legislative anti-bullying model is preferable to a policy approach as it is more capable of preventing school bullying; furthermore, that it will more effectively balance all the co-existing human rights involved in school bullying, due to the multitude of legal considerations that would underpin the creation of such laws. Over the course of this thesis, it was discovered that this was not the case. However, it has offered many insights in to the reformulation of bullying as a violation of human rights, and created a rights-based framework for understanding the a human-rights formulation of bullying, and against which an analyses of alternative anti-bullying approaches could be conducted. The main findings of this thesis will be summarised.

In creating and contextualising the issue of bullying within this thesis, a definition of bullying was established and justified. The definition for bullying was thus set as the intentional infliction of harm by one student on to another through an unfixed variety of means with the aim of asserting control, pain or humiliation on to that person. As means of justification, this thesis recognised the need for an international infliction of harm, as opposed to unintentional, as a necessary prerequisite for a finding of bullying. The rationale for this approaches was rooted largely in the right of development of the child. As such, the definition intentionally avoided overly-inclusive formulations of bullying, which may have the effect of stigmatizing children with the title of bully, which subsequently could lead to unjustified infringements with the right to private and family life. The "means" of bullying were left deliberately open, to acknowledge and allow for the changing scope of technology to be considered on a progressive basis. This is justified by the concerns over cyberbullying which are held by all three

jurisdictions. The definition again stressed the need for an requisite intention to bully, by including the aim of "asserting control, pain or humiliation" on to another student. Finally, this definition justified the intentional omission of outlining the minimum frequency through which an act may be justified as reaching the requisite level to be considered as bullying. Although policy arguments could be raised in favour or against such a proposition, the particular focus of this thesis on the issue of cyberbullying justified a definition which recognised the severity that could arise from a single incident of bullying in this context.

This thesis proceeded to propose for the formulation of bullying as a violation of human rights. It justified this proposition on a number of grounds. For one, it argued that such a conception would be to the advantage of society if it enhanced or enabled State authorities to deal more efficiently, more thoroughly, with cultures of bullying within their jurisdictions. The consequences of a human-rights based perception of bullying were outlined, as including a broader ambit of school duties in responding and dealing with issue, and a changing discourse as to the problems associated with bullying. International support for such a reformulation was outlined.

Thus, after justifying the formulation of bullying as an issue capable of consideration through a human rights discourse, this thesis proceeded to extract the rights associated with the problem. Although these rights were primarily those of the victim, it was acknowledged that aspects of these rights were shared with the bully also. The rights in question were:

- The right of education.
- The right to freedom for torture, inhuman or degrading treatment.
- The right to development.
- The right to respect for private and family life.

These four rights were outlined, examined, and analysed from their points of application to both victim and bully. International Declarations and Conventions, and case law which created the modern understanding of these rights were elucidated in a manner that demonstrated the development of these rights and their potential application in a formulation of bullying from the point of view of human rights . As such, a human rights-based framework was established, through which four questions were drawn, which would create the basis of comparison between the jurisdictions of New Jersey, British Columbia, and Ireland. These questions were the following:

1. *Are there effective procedures in place for protecting victims and preventing bullying?*
2. *How do these approaches deal with the rights of all students to develop in a safe and inclusive school environment?*
3. *Are schools in the jurisdictions capable of dealing with cyberbullying?*
4. *How may one rely on such structures in order to invoke their human rights and bring a bullying case before the law?*

Thus, the hypothesis of this thesis was put to test, and results of the comparison demonstrated that the hypothesis was, for the most part, unproven. Legislative anti-bullying approaches suffer from significant drawbacks which policy-based approaches, due to their non-legally binding nature, are able to overcome. Thus, the protection offered to children through a legislative model may not be any more effective in ensuring the right of education, and in creating a nurturing educational based environment, than policy-based approaches. Furthermore, the legislative approach of New Jersey did not appear to grant the same consideration to holders of shared or competing rights, as the policy-based models tended to. Yet despite the hypothesis for this thesis proving untrue, a significant amount of comparative information was drawn

on the real life problems facing the application of all three approaches, and the alternative solutions that may be available to the jurisdictions of New Jersey, British Columbia, and Ireland.

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