

Curtin Law School

**The Use of a Rights-based Approach to Address Juvenile Violence in Australian
Schools: From Policy to Practice**

Stephen Monterosso

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Abstract

While school violence is an issue that is of a longstanding historical nature, increased levels of lethality evident in episodic school violence in contemporary society has generated collective concern. Australia is hardly immune from this escalation of severity although fatalities as a result of habitual domestic school violence have been fortuitously infrequent, unlike in several overseas locations.

The motivation for this thesis is twofold. An opportunity is taken to address the issue of juvenile violence in school settings from an Australian viewpoint grounded in restorative justice practise and methodology, which will be combined with augmentation of juvenile human rights that fortify such an approach. This binary solution represents the focus of the thesis.

In order to recommend appropriate disciplinary management policy for use in Australian schools, doctrinal research which allows the identification of shortcomings in existing law and policy will be combined with reform oriented, non-doctrinal methodology utilising inductive reasoning that allows for the introduction of evidence to support legal change and worthwhile policy reform. A uniform Commonwealth initiated policy structure has been suggested following an analysis of the shortcomings inherent in existing punitive disciplinary regimes spanning entry level restorative interventions to more formalised processes designed to address more serious incidents of juvenile violence in Australian school settings.

To achieve this aim, the existing Australian juvenile justice and education law and policy was examined in order to establish the current status of essential human rights safeguards and contemporary disciplinary regimes, including the use of non-traditional disciplinary solutions in both domains. Australia's performance in the safeguarding of juvenile human rights was also investigated during this background research. This analysis of existing structures and processes provided the appropriate background for the development of an appropriate framework for the implementation of a uniform

rights-based restorative justice disciplinary management regime for use in Australian schools.

The message from this thesis is that mitigation of school violence for the benefit of school safety generally, in addition to interrupting the schoolyard to jail yard pathway so often undertaken by at-risk juvenile offenders, can be achieved with a uniform, more sophisticated, modern approach to disciplinary management of schools that upholds the human rights of juveniles who represent some of Australian society's most important yet vulnerable members.

Declaration

To the best of my knowledge and belief this thesis contains no material previously published by any other person except where due acknowledgement has been made.

This thesis contains no material that has been accepted for the award of any degree or diploma in any university.

Signature:

Date:

Acknowledgments and Dedications

More than three decades after completion I can still easily place myself back in childhood and adolescent school surroundings. The images, sounds and smells, particularly on day one of each year, are vivid and rich with colour and meaning despite the lengthy passage of time.

While my own school experiences were enjoyable, rewarding and free of violence, the same cannot be said for many others. Graphic images of school atrocities in overseas locations are sadly becoming commonplace in contemporary society. Australian schools are, in the main, relatively violence free of school violence, yet increased levels of exposure to harm, not least through the medium of the internet, have elevated school violence to a worryingly prominent position in Australian society. Yet it occurred to me that, as with juvenile and indeed adult justice solutions, existing punitive school disciplinary regimes are not effective in addressing the causes of violent acts or conducive to creating and maintaining safe school environments.

Earlier research in the area of restorative justice combined with an interest in the field of human rights led me to begin a journey toward finding a better solution that would be both respectful of human rights and more effective in addressing the causes of violence in schools. Whilst restorative justice measures do exist in Australian schools, there is a need for a more comprehensive and uniform approach to their use. The additional and significant benefit of interrupting the often travelled path of juvenile offenders from the schoolyard to the jail yard for wider societal benefit was also an aim of the research.

The PhD journey is necessarily long and arduous but the burden is considerably eased by the generosity of colleagues, family and friends. Mine has been no exception. Firstly, I would like to thank many colleagues who provided me with encouragement and advice at the beginning of my research, including Kevin Brown, Dr Jennifer Westaway, Dr Robert Guthrie, Dr Prafula Pearce, Anna Bunn and the late Dr Pauline Sadler. I would

also like to thank the various Heads of School at Curtin Law School (and its predecessor the School of Business Law), Professors Glenton Barton and Paul Fairall who were kind enough to support my study leave applications, while the administrative support provided by our office professional staff was first class. Thank you one and all.

The contribution of supervisors and co-supervisors to a project the size of a doctorate is immense. I have been fortunate enough to have received the benefit of outstanding academic supervision from Dr Dale Pinto who generously agreed to step into the breach on my behalf, Dr Sally Varnham and most of all the incomparable Dr Joan Squelch, without whom this thesis would surely not have been completed. Sincere thanks to you all. Family sacrifice over the course of doctoral studies is customary. In my case I would like to dedicate this thesis to my immediate family – parents Frances and Joe, siblings Rosemarie, Vincent and Leanne, daughters Isabella, Siena and Cara and especially my wife Tracy, without whom this endeavour would not have been possible on so many levels.

Table of Contents

ABSTRACT.....	II
DECLARATION.....	IV
ACKNOWLEDGMENTS AND DEDICATIONS	V
TABLE OF CONTENTS.....	VII
CHAPTER 1: INTRODUCTION.....	1
1.1 Introduction.....	1
1.2 Statement of the Problem.....	2
1.3 Research Objects	3
1.4 Background/Context	4
1.5 Conceptual Framework.....	9
1.6 Research Questions	12
1.7 Research Aims	12
1.8 Methodology	13
1.9 Document Analysis	14
1.10 Relevance and Significance of the Study	15
1.11 Outline and Structure	15
CHAPTER 2: DEFINITIONS AND THE NATURE OF JUVENILE SCHOOL VIOLENCE IN AUSTRALIA.....	18
2.1 Introduction.....	18
2.2 Defining Juvenile	18
2.3 Doli Incapax and the Legal Definition of Juvenile	20
2.3.1 Doli Incapax in Australian Law	20
2.3.2 Criticisms of Doli Incapax.....	22
2.3.3 Age Range Relevant to Thesis.....	24
2.4 The Concept of Violence Including Juvenile Violence	24
2.4.1 Base Definition of Violence	25
2.4.2 Definition of Violence Expanded	26
2.4.3 World Health Organization Definition of Violence.....	28
2.4.4 Collective and Relational Violence.....	30
2.4.5 Violence Typology Conclusion	31
2.5 The Nature of Juvenile Violence in Australia.....	32
2.5.1 Introduction	32
2.5.2 Statistical Status of Juvenile Violence in Contemporary Australian Society ..	32
2.5.3 Impact of Juvenile Violence on Australian Society	35
2.6 Causal and Risk Factors Associated with Juvenile Violence	37
2.6.1 Introduction	37
2.6.2 Biological Factors.....	38
2.6.3 Psychological and Behavioural Indicators	40
2.6.4 Familial Influences.....	41
2.6.5 Community and Societal Factors.....	43
2.6.6 The Impact of Binge Drinking.....	46
2.7 Defining School Violence.....	47
2.7.1 Introduction	47
2.7.2 School Violence as a Contemporary Societal Concern.....	48

2.7.3	Conceptual Analysis of School Violence	49
2.7.4	Effectual School Violence Typology	52
2.8	Causal Factors Associated With School Violence.....	54
2.8.1	Introduction	54
2.8.2	Impact of Teaching Staff.....	55
2.8.3	Familial Disengagement, Connectedness and Peer Influences	56
2.8.4	Wider Community and Societal Influences.....	58
2.9	School Violence in the Australian Jurisdiction.....	58
2.9.1	Introduction	58
2.9.2	Insufficiency of School Violence Data in Australia.....	60
2.9.3	Australian Capital Territory	61
2.9.4	New South Wales.....	62
2.9.5	Queensland	64
2.9.6	South Australia	66
2.9.7	Tasmania	67
2.9.8	Victoria.....	68
2.9.9	Western Australia	70
2.10	Conclusion	77
CHAPTER 3: THE HUMAN RIGHTS OF JUVENILES IN AUSTRALIA AND THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD INCLUDING DOMESTIC AND INTERNATIONAL CASE STUDIES ... 79		
3.1	Introduction.....	79
3.2	The Development of Stand-alone Legal Systems for Dealing With Juvenile Offenders	80
3.2.1	Historical Context	80
3.2.2	Introduction of Restorative Justice and Diversionary Options	83
3.3	The Notion of Human Rights	85
3.3.1	Introduction	85
3.3.2	International Human Rights Instruments.....	87
3.3.3	Legal Responsibility for Human Rights in Australia.....	89
3.4	The Children’s Human Rights Movement.....	91
3.4.1	Historical Context.....	91
3.5	Children’s Rights Under International Legal Instruments.....	94
3.5.1	The United Nations Convention on the Rights of the Child.....	94
3.5.2	Jurisprudence and Legislation Relevant to the Convention on the Rights of the Child in Australia.....	98
3.5.3	Scepticism About and Opposition to the Convention on the Rights of the Child	101
3.5.4	Other International Instruments Relevant to the Treatment of Children and Juveniles	103
3.6	Specific Rights Provided by the Convention on the Rights of the Child with Particular Focus on Participation and Best Interests.....	106
3.6.1	Introduction	106
3.6.2	General Rights	106
3.6.3	The Right to an Education.....	107
3.6.4	Rights Relevant to Those Experiencing Difficulty	107
3.6.5	Juvenile Justice, Proportionality and Diversion.....	108
3.6.6	Freedom of Expression	109
3.6.7	Freedom From Degrading and Cruel Treatment and Appropriate Minimum Age Requirements.....	110

3.6.8	Participation.....	111
3.6.9	Best Interests Principle.....	112
3.6.10	Australia’s Human Rights Performance with Respect to the Convention on the Rights of the Child.....	116
3.7	Jurisprudence Relevant to Juvenile Rights	118
3.7.1	Introduction	118
3.7.2	Celebrated International Decisions	118
3.7.3	Australian Human Rights Case Law	120
3.8	Summary of Key Issues, Trends or Developments in Jurisprudence Relevant to Children and Juvenile Rights.....	131
3.9	Conclusion	132
CHAPTER 4: DOMESTIC LAW AND POLICY RELEVANT TO SCHOOL VIOLENCE INCLUDING HUMAN RIGHTS IMPLICATIONS.....		134
4.1	Introduction.....	134
4.2	The Legal Framework of Juvenile Justice Within Australia	135
4.2.1	Introduction	135
4.2.2	Australian Capital Territory	139
4.2.3	New South Wales.....	140
4.2.4	Northern Territory.....	142
4.2.5	Queensland	143
4.2.6	South Australia	145
4.2.7	Tasmania	147
4.2.8	Victoria.....	148
4.2.9	Western Australia	150
4.3	General Observations on Domestic Juvenile Justice Legislation in Australia....	151
4.3.1	Introduction	151
4.3.2	Emerging Issues in Juvenile Justice in Australia.....	153
4.4	Education as a State Matter Under the <i>Constitution</i>	154
4.5	Overview of Education Policy and Legislation Relevant to School Violence in Australia	158
4.6	The National Safe Schools Framework.....	159
4.6.1	Leadership Commitment	161
4.6.2	Supportive and Connected School Culture.....	161
4.6.3	Policies and Procedure	162
4.6.4	Professional Learning.....	162
4.6.5	Positive Behaviour Management.....	162
4.6.6	Engagement, Skill Development and Safe School Curriculum	163
4.6.7	Focus on Student Wellbeing.....	163
4.6.8	Early Intervention and Targeted Student Support.....	163
4.6.9	Partnerships with Families and Community.....	164
4.7	Definitional Implications in Education Policy and Legislation Relevant to School Violence	165
4.8	School Violence Education Law and Policy Structure in Australia.....	167
4.8.1	Introduction	167
4.8.2	Australian Capital Territory	168
4.8.3	New South Wales.....	170
4.8.4	Northern Territory.....	172
4.8.5	Queensland	173
4.8.6	South Australia	175
4.8.7	Tasmania	177

4.8.8	Victoria.....	178
4.8.9	Western Australia	179
4.9	General Observations on Education Policy and Law in Australia Relevant to School Violence.....	181
4.10	Overview of Domestic Parental Responsibility Legislation in Australia	182
4.10.1	Introduction	182
4.10.2	Australian Capital Territory	183
4.10.3	New South Wales.....	185
4.10.4	Northern Territory.....	186
4.10.5	Queensland	187
4.10.6	South Australia	189
4.10.7	Tasmania	190
4.10.8	Victoria.....	191
4.10.9	Western Australia	192
4.11	The Status of Essential Human Rights Safeguards in Legislation and Policy Relevant to School Violence in Australia.....	193
4.11.1	Introduction	193
4.11.2	Best Interests Principle.....	195
4.11.3	Participation.....	197
4.11.4	Natural Justice, Due Process and Procedural Fairness.....	199
4.11.5	Juvenile Justice, Proportionality and Diversion.....	200
4.12	Conclusion	203
CHAPTER 5: A RIGHTS-BASED RESTORATIVE JUSTICE APPROACH FOR AUSTRALIAN SCHOOLS – A FRAMEWORK FOR IMPLEMENTATION		
206		
5.1	Introduction.....	206
5.2	A Rights-based Approach	207
5.2.1	Defined.....	207
5.2.2	Structure	209
5.2.3	Shortcomings	210
5.3	The Juvenile-oriented Rights-based Approach	211
5.3.1	Defined.....	211
5.3.2	Structure	211
5.3.3	Participation in a Restorative Justice Approach to Juvenile School Violence	212
5.3.4	Best Interests of the Child in a Restorative Justice Approach to Juvenile School Violence.....	214
5.4	The Notion of Restorative Justice	216
5.4.1	Introduction	216
5.4.2	Suppositions that Underpin the Restorative Justice Framework	217
5.4.3	The Development of the Restorative Justice Movement.....	217
5.4.4	The Concept of Restorative Justice.....	219
5.4.5	Benefits of Restorative Justice.....	220
5.4.6	Criticisms of Restorative Justice.....	223
5.5	Restorative Practices in the Juvenile Criminal Justice System: The Australian Experience	226
5.5.1	Cautioning	227
5.5.2	Conferencing	227
5.5.3	Australian Capital Territory	229
5.5.4	New South Wales.....	230

5.5.5	Northern Territory.....	230
5.5.6	Queensland	230
5.5.7	South Australia	231
5.5.8	Tasmania	231
5.5.9	Victoria.....	232
5.5.10	Western Australia	233
5.5.11	Trends in Juvenile Justice Conferencing in Australia	233
5.6	Australian Schools and the Use of Restorative Justice Practices	235
5.6.1	Existing Formalised School Disciplinary Management	236
5.6.2	Conferencing in Australian Schools.....	237
5.6.3	Lessons Learned From Conferencing in Australian Schools.....	242
5.7	Linkages Between Restorative Justice in the Juvenile Criminal Justice System and in Schools.....	244
5.7.1	Synergies Between Schools and Criminal Justice Systems.....	246
5.7.2	Behavioural Change in At-risk Juvenile Offenders	247
5.7.3	Broader Community Implications.....	252
5.7.4	Punishment Regimes.....	256
5.7.5	Broader Society Implications	259
5.7.6	Selected Examples of Collaboration Between Juvenile Justice and Education Agencies	262
5.8	Challenges in the Implementation of Restorative Practices in Australian Schools	263
5.9	The Development of a Framework for the Implementation of a Rights-based Uniform Approach to Discipline Management in Australian Schools Grounded in Restorative Justice Practices.....	268
5.9.1	Background Discussion.....	268
5.9.2	A Framework for Implementation	273
	<i>a. Primary or Universal Intervention.....</i>	<i>274</i>
	<i>b. Secondary or Targeted Intervention.....</i>	<i>275</i>
	<i>c. Intensive or Tertiary Response.....</i>	<i>276</i>
5.9.3	Implementation Structure	276
	<i>a. Commitment.....</i>	<i>277</i>
	<i>b. Shared Vision.....</i>	<i>277</i>
	<i>c. Responsive and Effective Practices</i>	<i>278</i>
	<i>d. Implementation, Transition Management and Best Practice.....</i>	<i>279</i>
	<i>e. Staff Development.....</i>	<i>280</i>
5.9.4	School Violence Discipline Management Implementation Strategies	281
	<i>a. Problem Solving Circles.....</i>	<i>281</i>
	<i>b. Peer Mediation.....</i>	<i>283</i>
	<i>c. Peer or Accountability Panels</i>	<i>284</i>
	<i>d. Conferencing.....</i>	<i>285</i>
5.9.5	Essential Procedures and Undertakings	288
5.10	Incorporation of Restorative Justice Practice and Procedure into Australian School Discipline Management Structures	290
5.11	Conclusion	293
CHAPTER 6: THESIS OVERVIEW, HUMAN RIGHTS IMPLICATIONS, KEY FINDINGS, RECOMMENDATIONS AND CONCLUSION		295
6.1	Thesis Overview	295
6.2	Human Rights Implications For the Implementation of a Uniform Rights-based Restorative Justice Framework For Use in Australian Schools.....	299

6.2.1	Introduction	299
6.2.2	The Incorporation of Essential Rights-based Tenets in a Restorative Justice in Schools Framework	300
6.3	Key Findings.....	308
6.3.1	Insufficiency of Accessible Data Relevant to Domestic Australian School Violence	308
6.3.2	Limited Influence of International Law Safeguards in the Domestic Australian Legal Landscape	309
6.3.3	Inconsistency in Implementation of International Safeguards in Domestic Australian Education Law and Policy	309
6.3.4	Although Ad Hoc in Practice to Date, Restorative Justice is a Legitimate Disciplinary Management Strategy in Australian Education Law and Policy	310
6.4	Recommendations	311
6.4.1	Quantitative Research into the Extent of Juvenile School Violence in the Australian Setting	311
6.4.2	Due Deference to The Convention for The Rights of the Child and Other International Instruments.....	311
6.4.3	Consistent, Repeatable and Sustainable Restorative Justice Methodology and Practice in Australian Schools	312
6.4.4	Adoption of Model Uniform Law and Policy Restorative Justice Initiatives in Australian Schools Grounded in a Rights-based Approach	312
6.5	Concluding Statement	313
	<i>BIBLIOGRAPHY.....</i>	314
	<i>APPENDIX 1</i>	345

Chapter 1: Introduction

1.1 Introduction

Juvenile violence is an increasingly visible and alarming issue that warrants global concern.¹ The increased rates and severity of juvenile violence across the world have elevated the problem into an extremely visible and topical issue in contemporary society. Examples include violence perpetrated by gangs, juveniles in street locations and significantly for the purposes of this thesis, in school settings.² As a consequence, increased focus on schools is warranted, as they are both physical locations where violent juvenile acts are perpetrated, and systems that create or exacerbate violence amongst those within.³

This research will focus on the nature of juvenile violence and its association with schools, which remain conspicuous settings in which juvenile violence is perpetrated and controlled. The importance of school safety therefore cannot be undersold, as schools must habitually address the issue mindful of the influence of legal procedure and institutions that have an interest in ensuring the safety of juveniles who represent among the most vulnerable members of society. The influence of human rights obligations adds further complexity to the school violence issue and requires the adoption of rights-based discipline law and policy that respects and upholds Australia's international obligations when formulating appropriate responses to the diverse issue of violent juvenile behaviour. This chapter articulates the statement of the problem, research objects, background/context, research questions, research aims, methodology, document analysis, and the relevance and significance of the study.

¹ World Health Organization, *World Report on Violence and Health* (2002), 25
<http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf?ua=1>.

² Ibid.

³ See 2.7 below for a discussion on school violence and school settings in which violent juvenile acts can occur, in addition to systems that can create and exacerbate violence through relationship conflict, for example.

1.2 Statement of the Problem

Juvenile violence⁴ is not restricted by race, gender, status, political, minority or geographical boundaries. In dealing with juvenile violence, states and agencies including the criminal justice and education systems are empowered to administer appropriate responses to juvenile offenders. School-based discipline management has traditionally embraced a punitive approach that upholds customary zero tolerance methods to address the issue of school violence through the use of suspension, exclusion and other sanctions which can no longer be considered sound or appropriate in contemporary society.

Although there is a wide body of literature on juvenile violence,⁵ there is a paucity of research on the issue from an Australian perspective, particularly that of school-based violence. Since 2000, there has been only one major study on the issue and this research was restricted to secondary schools in New South Wales.⁶ There is seemingly, however, a growing incidence of juvenile violence in schools combined with escalating community concerns. Although there is no current national statistical data on the nature and extent of school violence,⁷ a few small-scale studies⁸ as well as media reports and anecdotal information suggest a growing incidence of violence in Australian schools.⁹

⁴ For the purposes of this study 'juvenile' will be used interchangeably with 'youth', 'child', 'children' etc. and will generally be used to describe those persons aged 18 years or less. This age limit will provide more scope for analysis given the recent change in school commencement age in Western Australia under the *School Education Act 1999* (WA) s 5, which will see many students complete secondary school aged 18 rather than 17 as was the case previously. 'Violence' will be used to describe physical and or emotional force used against another resulting in harm of some type. These definitions are subject to further discussion which will be provided in Chapter 2. Similarly, 'behaviour' and 'discipline' management will also be used interchangeably since many school related policies utilise either description in policy documentation.

⁵ See, eg, J W Burfeind and D J Bartusch, *Juvenile Delinquency An Integrated Approach* (Jones and Bartlett, 2006), S Guarino-Ghezzi and E J Loughran, *Balancing Juvenile Justice* (Transaction, 2005), K Seifert, *Youth Violence Theory, Prevention and Intervention* (Springer, 2012), J S Hoffman, *Youth Violence, Resilience and Rehabilitation* (LFB Scholarly Publication, 2004), J Oliver, *Juvenile Violence in a Winner-Loser Culture: Socio-Economic and Familial Origins of the Rise in Violence Against the Person* (Free Association, 1995).

⁶ A C Grunseit, D Weatherburn and N Donnelly, 'School Violence and its Antecedents: Interviews with High School Students' (New South Wales Bureau of Crime Statistics and Research, 2005).

⁷ Measurement of the amount or rate of school violence in Australia is not the purpose of this thesis.

⁸ See, eg, L Trimboli, 'Assaults on School Premises in NSW 2005-2009' (Brief Issue Paper No. 50, New South Wales Bureau of Crime Statistics and Research Crime and Justice Statistics Bureau, 2010).

⁹ See, eg, 'Almost 400 Suspensions for Weapons in NSW Schools', *ABC News* (online), 26 April 2009 <[http://www.abc.net.au/news/2009-04-26/almost-400-suspensions-for-weapons-in-nsw-](http://www.abc.net.au/news/2009-04-26/almost-400-suspensions-for-weapons-in-nsw)

This escalation demands that education agencies adopt a more holistic approach to the management of school violence.

Further, an approach to the issue that is also cognisant and respectful of essential human rights obligations would be appropriate. A rights-based approach¹⁰ which draws upon essential human rights safeguards requires the development of laws, practices, and procedures to safeguard entitlements while providing the opportunity to address the violation of rights or indeed their denial is the preferred approach espoused in this thesis.

1.3 Research Objects

The primary object of this thesis, therefore, is to examine the nature of juvenile violence in Australian schools from a rights-based perspective with a view to shaping and influencing school discipline policy to address and mitigate school violence. The main argument to be advanced in this thesis is that adopting a rights-based approach in the development of juvenile school violence disciplinary policy and practice will lead to more informed and appropriate strategies and models for the management of violent juvenile behaviour in Australian schools. The thesis will also examine the question of how a rights-based approach is accommodated within the prism of education law, policy and practice. This approach will be grounded in restorative justice methodology and practice and underpinned by essential human rights as they apply to juveniles, which is an area deemed inadequate by the Australian Human Rights Commission in its most recent submission to the United Nations Committee on the Rights of the Child with particular emphasis on the need for improvement in Australia's legal protective mechanisms for juvenile human rights.¹¹ In particular, the thesis will argue that the best

schools/1662712>, 'Dramatic Increase in School Suspensions', *ABC News* (online), 17 June 2009 <<http://www.abc.net.au/news/2009-06-17/dramatic-increase-in-school-suspensions/1323050>>, 'Boy Stabbed in Schoolyard at St Patrick's College, Shorncliffe', *News.com.au* (online), 15 February, 2010 <<http://www.news.com.au/national/boy-stabbed-in-schoolyard-at-st-patricks-college-shorncliffe/story-e6frfkvr-1225830429705>>. See also 2.9 below for a discussion on episodic school violence in the Australian jurisdiction.

¹⁰ Chapter 5 will define and expand upon a rights-based approach to be adapted for use with juveniles.

¹¹ Chapter 5 of the thesis will discuss the notion of restorative justice and human rights including a rights-based approach tailored for use with juveniles. Chapters 3 and 6 of the thesis will further discuss the response of Australia to the United Nations Committee on the Rights of the Child.

interests and participation¹² of juveniles in accordance with international human rights standards is important in effective and appropriate school disciplinary management regimes to address the multifaceted difficulty of violent juvenile behaviour. This will in turn contribute to reductions in episodic school violence in Australian school settings and interrupt the ‘schoolyard to jail yard’ journey so often navigated by violent juveniles.

1.4 Background/Context

Violent acts involving young people remain among the most concerning examples of contemporary violence.¹³ Death, injury and disability perpetrated by and against young people continue to significantly affect societies in social and economic terms.¹⁴ The statistics are sobering as they reveal that more than 500 young people die each day internationally as a consequence of interpersonal violence, with males perhaps not unexpectedly at higher risk than females, particularly in the area of homicide.¹⁵ For each death there are estimated to be 20–40 cases of non-fatal injury. Undoubtedly a major global concern, juvenile violence involving death, disability and, as a corollary, a reduction in quality of life, places considerable strain on health and welfare services, has a negative effect on productivity, disrupts essential services, escalates fear in communities and generally has a detrimental effect on society.¹⁶

Examples of juvenile violence are many and varied and include homicides, assaults, sexual offences, bullying and gang violence that can affect not only victims but also families and communities alike. A multifaceted problem, youth violence should not be disassociated from other types of behavioural difficulties because youth violence does not exist in a vacuum.¹⁷ Participation by juveniles in nonviolent criminal acts, alcohol and drug abuse, truancy, driving offences and dispersal of sexually transmitted diseases

¹² Chapter 3 of the thesis will discuss at length the notions of the best interests of the child and participation in accordance with international human rights obligations.

¹³ World Health Organization, *World Report on Violence and Health*, above n 1.

¹⁴ *Ibid.*

¹⁵ World Health Organization, *Youth Violence and Alcohol Fact Sheet* (2006), 1 <http://www.who.int/violence_injury_prevention/violence/world_report/factsheets/ft_youth.pdf?ua=1>.

¹⁶ World Health Organization, *World Report on Violence and Health*, above n 1.

¹⁷ P Benson and E Roehlkepartain, ‘Youth Violence in Middle America’ (1993) 3(1) *Midwest Forum* 3.

amongst others illustrate the diversity in at-risk juvenile behaviour, although this may not necessarily follow as many violent youths exhibit little or no other significant behavioural problems. Equally, not all juveniles with behavioural problems are or become violent.¹⁸

The various, salient risk factors associated with youth violence cannot be underplayed. Prominent amongst these indicators are individual aspects such as birth complications, impulsiveness, alcohol and drug use, low intelligence, personality and behavioural problems, with males being the dominant sex involved in juvenile violence.¹⁹ Equally, relationship factors such as poor, erratic and harsh parenting (often in single parent households), meagre family bonding and cohesion, low socio-economic status and large numbers of siblings are often combined with the familiarisation and acceptance of expectations and beliefs that serve to reinforce and tolerate the use of violence by juveniles within family structures.²⁰ The early learning experiences of juveniles within such difficult family environments can, as a result, contribute to an escalation into violent behaviour. Moreover, even where violence is not modelled within the home, a lack of familiarity with norms and social controls in concert with deficient parental monitoring and restraint can also encourage the use of violence by juveniles. The economic stress and social isolation often experienced by these types of families is also significant.²¹

Community and societal influences on the dynamic of juvenile violence are many and varied and play a pivotal role in both the stimulation and continuation of violent acts by and against juveniles. Salient factors include low social capital and poor social integration, inequality of income and a pervasive culture of violence. These are buttressed by the presence of gangs and easy access to weapons, alcohol and drugs, culminating in an environment where learning and participating in violence is not only tolerated but encouraged, and often combined with omnipresent violent peer

¹⁸ World Health Organization, *World Report on Violence and Health*, above n 1.

¹⁹ World Health Organization, *Youth Violence and Alcohol Fact Sheet*, above n 15, 3.

²⁰ D S Elliot, 'Youth Violence: An Overview' (Paper presented at The Aspen Institute's Children's Policy Forum Children and Violence Conference, Queenstown MD, United States, 8–21 February 1994) 3–4.

²¹ *Ibid.*

behaviour.²² The development of juvenile violence is also an important issue to consider when tracking the escalation of juvenile violence into violent adult behaviour.

Aggressive childhood behaviour often leads to aggressive and violent adolescent behaviour culminating in continued aggressive tendencies along with alcohol and substance abuse.²³ Although in many circumstances children who show early signs of violent tendencies or perhaps suffer from violent acts as victims can present an inclination toward violent acts through adolescence, this tends to decline after 20 years of age.²⁴ The development, however, of nurturing and safe environments between children and parents or caregivers in the formative years has been favourably associated with the prevention of child maltreatment and reduction in childhood aggression.²⁵

Yet the question arises: are sobering examples such as these more a product of media and politically driven insecurities than a real change in youth behaviour?²⁶ The misstatement of violent youth crime waves from the 1980s to date that leads commentators to such hyperbole as ‘epidemic’ and ‘unprecedented’ along with colourful descriptors such as ‘youth super predators’²⁷ has clouded the sound judgement of the extent and nature of juvenile violence in contemporary society. As a source of both information and entertainment, the ubiquitous mass media in contemporary society contributes in no small way to such misunderstandings. Many public opinions and understandings of violence and crime are as a result grounded in mass media reporting that often overestimates the amount and frequency of violent crime and manipulates the causes of crime, criminals, victims and the worthiness of the criminal justice system, according to Lawrence and Mueller.²⁸ The newsworthiness of violent acts perpetrated by and against juveniles is even more elevated, with school violence being particularly

²² World Health Organization, *Youth Violence and Alcohol Fact Sheet*, above n 15, 3.

²³ D Malcolm, ‘Addressing Juvenile Crime by Fixing the Dysfunctional Family’ (2007) 9 *University of Notre Dame Australia Law Review* 19.

²⁴ World Health Organization, *World Report on Violence and Health*, above n 1, 30; Elliot, above n 20, 2.

²⁵ World Health Organization, *Violence Prevention: The Evidence* (2010), 5

<http://www.who.int/violence_injury_prevention/violence/4th_milestones_meeting/evidence_briefings_al1.pdf>.

²⁶ World Health Organization, *Youth Violence and Alcohol Fact Sheet*, above n 15.

²⁷ C L Anderson, ‘Double Jeopardy: The Modern Dilemma for Juvenile Justice’ (2003–4) 152 *University of Pennsylvania Law Review* 1181.

²⁸ R Lawrence and D Mueller, ‘School Shootings and the Man Bites Dog Criterion of Newsworthiness’ (2003) (1)4 *Youth Violence and Juvenile Justice* 331.

prominent. Fuelled by the mass media, a fear of violence in school settings that is disproportionate to the actual risks has become a recurring theme in contemporary society.²⁹

Such a focus on juvenile violence within school environments is unsurprising as schools provide an arena in which juvenile violence is both perpetrated and controlled.³⁰ Further, there is a significant relationship between antisocial behaviour and learning difficulties or lack of student motivation.³¹ Violent school behaviour can be seen to have a flow-on effect to local communities such that school-based management plans for addressing violence and aggression are now often considered to be in the public domain rather than internalised, as was once the case. This blurring of boundaries between schoolyard and community has arguably generated further complications in the management of juvenile violence by school administrators.³² Once considered the exclusive preserve of administrators and teaching staff, the management of school violence presents a more sophisticated challenge in contemporary society, especially given the exponential growth in technology and social media that has spawned a new and extremely visible platform for juvenile violence.

Where previously school-based responses to juvenile violence were confined to the interpretation and enforcement of relevant legislation, policies and guidelines, the autonomy to assess, develop and implement school-based social and behavioural policies is now scrutinised as public policy.³³ A consequence of this more public and severe juvenile behavioural management regime is the more frequent removal of violent and misbehaving juveniles from schools by state agencies, leaving them disconnected from the very social institution they rely on for instruction in the social and conformist norms and behaviours necessary to become useful and valued individuals in society. The predictable passage by these now isolated juveniles into antisocial subcultures and other

²⁹ A Kupchik and N Bracy, 'The News Media on School Crime and Violence: Constructing Dangerousness and Fuelling Fear' (2009) 7(2) *Youth Violence and Juvenile Justice* 136.

³⁰ M H Moore and M Tonry, 'Youth Violence in America' (1998) 24(1) *Crime & Justice* 20.

³¹ Benson and Roehlkepartain, above n 17, 1–6.

³² Anderson, above n 27.

³³ S Jull, 'Youth Violence, Schools and the Management Question: A Discussion of Zero Tolerance and Equity in Public Schooling' (2000) 17 *Canadian Journal of Educational Administration and Policy* 1–2.

deviant behavioural environments is all but guaranteed as a result.³⁴ As an example, Sumner, Silverman and Frampton³⁵ argue that the increased severity of punitive school discipline management has resulting in increased rates of student suspension or exclusion and referral to juvenile criminal justice agencies in circumstances where less severe sanctions would previously have been applied by school administrators, further limiting opportunities for disaffected juveniles.

As an alternative, discipline management practice and procedure grounded in restorative justice methodology is well suited to schools as institutions that are predominantly engaged with facilitating the learning process in supportive environments, by providing the vehicle for offending students to confront the consequences of harm caused therefore engendering accountability and empathy.³⁶ The importance of early intervention in schools cannot be underestimated because through the vehicle of school-based restorative justice initiatives, dilution of the ascendancy toward adult criminality is a more than useful benefit.³⁷ As a corollary, the use of restorative practice and methodology therefore also has the potential to disrupt the schoolyard to jail yard journey so often seen with disaffected juveniles, as the restorative process is focussed on the core reasons for delinquent and violent behaviour through harm repair, victim engagement, offender accountability and relationship enhancement rather than detachment synonymous with punitive, retributive school disciplinary management regimes that rely heavily on suspension and exclusionary policies.³⁸

In light of this continued emphasis on juvenile violence and more particularly the increase in focus on its association with schools and school settings, this study will examine the merit or otherwise of rights-based restorative justice methodology and practice to address school violence in Australian schools and limitations in the

³⁴ Anderson, above n, 27, 1182.

³⁵ M D Sumner, C J Silverman and M L Frampton, *School-Based Restorative Justice as an Alternative to Zero-Tolerance Policies: Lessons From West Oakland* (Thelton E. Henderson Centre for Social Justice, University of California School of Law, 2010) 7.

³⁶ Ibid 6.

³⁷ Malcolm, above n 23, 25.

³⁸ S Varnham, 'Seeing Things Differently: Restorative Justice and School Discipline' (2005) 17(3) *Education and the Law* 88; Sumner, Silverman and Frampton, above n 35, 8.

traditional, retributive approach that eschews or inadequately safeguards human rights. In particular, it will explore how a rights-based approach incorporating restorative justice methodology is accommodated within the prism of education law, policy and practice. Restriction of the impact of essential human rights safeguards on domestic Australian education policy will also be examined given the lack of direct incorporation of significant international legal instruments that has undermined the promotion of juvenile rights, as will the need to promote and formalise the use of restorative justice methodology and practices that are currently sporadic in coverage throughout the domestic education law and policy regime. The conceptual framework of the thesis will now be discussed.

1.5 Conceptual Framework

The contextual framework for the study is a rights-based approach that upholds and protects human rights located in essential international frameworks. At its core, this methodology is underpinned by the relationship status between nation states or governments as duty bearers, who are obligated to citizens who are considered rights holders, to respect, protect and fulfil human rights contained in international human rights frameworks. This essentially requires that laws, practices, and administrative procedures be developed to safeguard rights and entitlements, including the potential to address rights violations.³⁹

Further, accountability and transparency between these two participants is essential to respect and fulfil rights. This extends to legislative, judicial and administrative action to fulfil the demands of the juvenile, and includes the universality of rights and individual dignity that suggests that all persons are entitled to rights, capacity development and empowerment including the ability of rights holders to demand and have their rights upheld, interdependence of rights and participation of rights holders to claim entitled

³⁹ A rights-based approach provides that all human beings are rights holders with each human right being bestowed a duty bearer, including governments and nation states, who is to ensure that entitlements are provided and protected whilst developing the capacity of rights holders to in fact claim rights and the meeting of obligations by duty holders. The notion of a rights-based approach including its adaptation for use with children and juveniles will be further defined and discussed in Chapter 5 of the thesis, culminating in the development of a rights-based restorative justice disciplinary management approach for use in Australian schools.

rights from duty bearers. This thesis will recommend the development of a rights-oriented approach grounded in restorative justice methodology to address the problem of school based juvenile violence and related school law and policy issues.

Adaptation of a rights-based approach to suit juveniles also presents some challenges, as traditional, more general human rights that simply include juveniles need to be distinguished from those that identify juveniles as eligible rights holders in their own capacity. This is appropriate given Australia's obligations as a signatory to the *United Nations Convention on the Rights of the Child* ('*UNCRC*').⁴⁰ A juvenile-oriented, human rights-based approach to upholding, promoting and safeguarding the rights of juveniles such as those contained in the *UNCRC* and associated international instruments, is preferred to generalist human rights mechanisms that simply include juveniles and young people who exhibit both evolving capacities and vulnerabilities.⁴¹

The central themes in this important instrument are the overarching requirement that the best interests of the child are to remain of paramount concern and that all children should enjoy participatory rights to express views freely in matters that affect them,⁴² both of which will emerge as important elements in this thesis. Also fundamental to the *UNCRC* is the requirement that the criminalisation of children is to be avoided, although responsibility for actions must be upheld. It is considered imperative under the *UNCRC* that juvenile offenders are held accountable for their actions and contribute to the repair of damage they may have caused, while the reintegration of juvenile offenders is also actively encouraged under the *UNCRC*.⁴³ Although Australia has ratified⁴⁴ this

⁴⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). The *UNCRC* was ratified by Australia on 17 December 1990. Structurally, a juvenile-oriented rights-based approach draws upon the *UNCRC* with particular emphasis on advancing the human rights of juveniles, including the best interests element and participation, which are concepts that will be expanded upon in Chapters 3, 4 and 5 of the thesis.

⁴¹ An overview of Australia's international legal undertakings, particularly those associated with juveniles, will be provided in Chapter 3 of the thesis.

⁴² Human Rights and Equal Opportunity Commission, *Australia's Commitment to Children's Rights and Reporting to the UN* (2007), 1–5

<http://www.hrec.gov.au/human_rights/children/aus_commitment_to_children_rights.html>.

⁴³ T Hammarberg, 'A Juvenile Justice Approach Built on Human Rights Principles' (2008) (8)3 *Youth Justice* 194.

important convention, it is yet to be incorporated into domestic law. Nevertheless, the High Court of Australia has promoted the expectation that the *UNCRC*'s provisions will be taken into account insofar as discretionary administrative decision-making is undertaken in cases concerning juveniles.⁴⁵

The *UNCRC* and other international human rights instruments provide a basis from which Australia's response to juvenile violence can be further examined. Important protocols include the United Nations *Guidelines for the Prevention of Juvenile Delinquency* 1990 ('*Riyadh Guidelines*')⁴⁶, United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* 1985 ('*Beijing Rules*')⁴⁷, United Nations *Standard Minimum Rules for Non-custodial Measures* 1990 ('*Tokyo Rules*')⁴⁸ and the United Nations *Rules for the Protection of Juveniles Deprived of Their Liberty* 1990 ('*Havana Rules*'),⁴⁹ and act to buttress the *UNCRC* and place importance on the need to reconcile and balance the social context within which the juvenile justice process is positioned with the need to maintain compliance with human rights principles.⁵⁰ In dealing with juvenile offenders, for example, Australia is also required to pay due regard to general human rights obligations⁵¹ under the United Nations *International Convention on the*

⁴⁴ Ratification refers to a process whereby a signatory state provides confirmation that it intends to be bound by a treaty.

⁴⁵ Human Rights and Equal Opportunity Commission, *Human Rights Brief No. 1* (March 1999), 1–6 <http://www.hreoc.gov.au/human_rights/briefs/brief_1.html>.

⁴⁶ *Guidelines for the Prevention of Juvenile Delinquency*, 68th plen mtg, UN Doc A/RES/45/112 (14 December 1990).

⁴⁷ *Standard Minimum Rules for the Administration of Juvenile Justice*, 96th plen mtg, UN Doc A/RES/40/33 (29 November 1985).

⁴⁸ *Standard Minimum Rules for Non-custodial Measures*, 68th plen mtg, UN Doc 1990 A/RES/45/110 (14 December 1990).

⁴⁹ *Rules for the Protection of Juveniles Deprived of Their Liberty*, 68th plen mtg, UN Doc 1990 A/RES/45/113 (14 December 1990).

⁵⁰ U Kilkelly, 'Youth Justice and Children's Rights: Measuring Compliance with International Standards' (2008) 8(3) *Youth Justice* 188.

⁵¹ Human Rights and Equal Opportunity Commission, *Human Rights Brief No. 5* (2001), 1–9 <http://www.hreoc.gov.au/human_rights/briefs/brief_5.html>.

Elimination of All Forms of Racial Discrimination ('*ICERD*')⁵² and the *International Covenant on Civil and Political Rights* ('*ICCPR*').⁵³

1.6 Research Questions

Against this background the research will address the following questions:

- (a) What is the nature and influence of juvenile violence on schools and communities in Australia?
- (b) What is the nature and scope of international and domestic law in addressing juvenile violence in Australia?
- (c) How is juvenile violence currently dealt with in Australian education law and policy?
- (d) What is a 'rights-based approach' to dealing with juvenile violence in schools in Australia?
- (e) How can a rights-based approach inform policy development and school discipline procedure in order for juvenile violence in Australian schools to be better managed?

1.7 Research Aims

The aims of this research are to:

- (a) examine the nature of juvenile violence in Australia;
- (b) examine international legislative instruments relevant to juvenile violence and Australia's obligations with respect to these and related domestic laws;
- (c) examine current Australian education law and policy dealing with juvenile violence;
- (d) discuss and analyse a rights-based approach to juvenile school violence in Australia; and
- (e) recommend a model for a rights-based, restorative justice discipline management regime for use in Australian schools.

⁵² *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). The *ICERD* was ratified by Australia on 30 September 1975.

⁵³ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The *ICCPR* was ratified by Australia on 13 August 1980.

1.8 Methodology

Legal research can be described as historic, systematic inquiry grounded in both the interpretation and explanation of the law.⁵⁴ As law is a social construct, it is eminently suitable for examining both why and how laws are created through courts and legislative agencies. By questioning the very nature of the law and examining articles of review and decided cases, both judicial reasoning and the disparate effects and consequences of laws can be explored. Within the confines of educational law, legal research may examine formal government policies that influence education and contribute toward further development of legal precedent through the analysis of legal cases germane to educational agencies.⁵⁵

Research in the discipline of law naturally falls into two categories. An approach traditional to legal research, ‘doctrinal research’ enables an exposition of the rules that regulate a particular legal category and their relationship, difficulties and future developments. This approach is typically grounded in the identification, analysis, organisation, and synthesis of legal commentary, judicial decision-making and legislation through the medium of reading and conducting of intensive, scholarly analysis.⁵⁶ Alternately, non-doctrinal research can be described as ‘about’ rather than ‘in’ law and reflects philosophies found in other disciplines, with data and information utilised in this type of research not confined necessarily to traditional legal resources.⁵⁷

Non-doctrinal research can be further unpacked into theoretical or reform-oriented investigation, with the former embracing a more complete understanding of legal concepts while the latter seeks to achieve legal change and exploits the use of inductive

⁵⁴ C Russo, ‘Legal Research: The Traditional Method’ in S Permuth and R D Mawdsley (eds), *Research Methods for Studying Legal Issues in Education* (Education Law Association, 2006) 5.

⁵⁵ J Lee and L Adler, ‘Qualitative Research Redux: Researching Contemporary Legal Issues Concerning Education’ in S Permuth and R D Mawdsley (eds), *Research Methods for Studying Legal Issues in Education* (Education Law Association, 2006) 31.

⁵⁶ D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Commission* (AGPS, 1987) 309.

⁵⁷ M McKerchar, *Design and Conduct of Research in Tax, Law and Accounting* (Lawbook, 2010) 9.

reasoning⁵⁸ to propose evidence in support of a conclusion which can then be utilised to achieve worthwhile reform.

Due to its narrow application and restrictions associated with societal or policy implications, doctrinal research is unsuitable for this thesis as stand-alone methodology. Instead, the methodology employed in this research is a combination of doctrinal methodology, in order to identify the deficiencies in existing law and policy, and non-doctrinal, reform-oriented methodology to identify lacunas in current approaches used to address school violence, culminating in the proposal of a rights-based strategy incorporating restorative justice practice and procedure that is cognisant of Australia's international legal obligations.

It is also anticipated that several databases will be employed in this thesis, such as Lexis, Austlii, ProQuest, Quicklaw, and Heinonline, amongst others.

1.9 Document Analysis

As this research is literature-based and involves an in-depth regime of reading, analysis and interpretation of primary legal documents, a document analysis procedure will be adopted. Document analysis requires the interpretation and examination of both printed and electronic data in order to elicit meaning develop empirical knowledge and gain understanding from the review or evaluation of the documents.⁵⁹ In analysing both the nature and impact of juvenile violence and the varied responses from state agencies, this thesis will analyse primary legal resources such as case law and legislation, in addition to making significant use of secondary materials such as the commentary found in legal and educational law journals and textbooks. This systematic analysis of law and policy across Australian jurisdictions is required in order to identify and assess important issues germane to the thesis. Literature will also be drawn from other fields such as social work, social justice, criminology and psychology where it addresses juvenile violence.

⁵⁸ Ibid 9, 116.

⁵⁹ G A Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) *Qualitative Research Journal* 27.

1.10 Relevance and Significance of the Study

The purpose of this research is to contribute to a further understanding of violent juvenile behaviour and its effect on society, particularly in school settings, in addition to policy development and an understanding of the constraints in the administration of violent youth behaviour. This is particularly relevant to the criminal justice and educational agencies as they have the most fundamental relationships with violent youth. Moreover, the relevance of international human rights obligations and their impact on legal obligations within these two agencies will be examined. This research will make a valuable contribution from a rights-based perspective to the field of education law and to the development of policy and practice in the management of violent and antisocial juvenile behaviour in schools within communities.

By examining the issue from an Australian perspective, it is anticipated that a significant contribution will be made to the existing body of knowledge concerning juvenile violence in school settings within Australia for both best practice principles and various limitations, which will help redress the lacuna in Australian research in this most important field. Moreover, more sophisticated and contemporary solutions and strategies underpinned by applicable human rights principles can be developed to help alleviate the juvenile violence problems evident in schools within communities.

1.11 Outline and Structure

The outline and structure of this thesis are as follows:

Chapter 1: The first chapter of the thesis introduces the topic and provides a statement of the problem, background and context to the study, research questions and aims, methodology, document analysis, relevance, significance and the outline and structure.

Chapter 2: The focus of this chapter will be on the nature of juvenile violence in Australia including its association with schools and communities. It will commence with important definitions of key terms including juvenile and violence and will examine the nature of school violence including attendant risk factors. The chapter will then focus on

patterns and trends in juvenile violence prior to a discussion of school violence including fatal episodic incidents in the Australian jurisdiction.

Chapter 3: This chapter will provide the platform for Chapter 4 of the thesis by examining relevant domestic and international law including historical trends in the management of violent juveniles and the emergence of autonomous human rights. This includes an analysis of international human rights instruments and their impact on law, policy and practice with a focus on the pivotal *UNCRC*. Domestic and international jurisprudence associated with the rights of juveniles will also be examined in the chapter.

Chapter 4: The domestic legal framework of juvenile justice and education policy and the inclusion or otherwise of essential human rights are examined in this chapter, including key definitional aspects. Initially the chapter will provide an overview of domestic juvenile justice legislation prior to a discussion on education legislation and policy germane to disciplinary management and school safety in Australian schools. The chapter will then identify and discuss the incorporation or otherwise of essential human rights canons within the domestic juvenile justice and education legislative and policy regime. This chapter will also provide the necessary platform for the development of a model rights-based, restorative justice methodology and practice for use in Australian schools.

Chapter 5: The focus of this chapter will be on a rights-based approach to the administration of school violence utilising restorative justice methodology and practices, and will include recommendations for the adoption of uniform domestic discipline management policy and practice in Australian schools. This will include an overview of the use of restorative justice practice and methodology in Australian schools and more broadly in the wider community, including important linkages with the criminal justice system and challenges to implementation, culminating in recommendations for the adoption of model rights-based disciplinary management policy grounded in restorative justice methodology for use in Australian schools.

Chapter 6: The final chapter of the thesis will focus on an overview of the research undertaken, the human rights implications of a restorative justice approach to address juvenile violence in Australian schools, the key findings resulting from the research, recommendations and future perspectives, and a final concluding statement.

Chapter 2: Definitions and the Nature of Juvenile School Violence in Australia

2.1 Introduction

This thesis is focussed on juvenile violence in schools from a rights-based perspective so it is therefore important that concepts germane to the thesis and various typologies of key terms be examined, including as ‘juvenile,’ violence’ and more particularly, ‘school violence.’ Further, reference will be made to the fundamental interconnectedness of schools with the wider community, with respect to the impact of violence within schools in addition to violence that occurs beyond geographical school boundaries but is nonetheless derived from school settings. The chapter will conclude with an important discussion examining the impact of school violence on Australian schools and communities before introducing the significance of school violence and Australia’s obligations under international legal instruments, which will be examined in Chapter 3.

This chapter will therefore explore the definitional and conceptual aspects of juvenile violence within contemporary society in addition to legal connotations, so as to link the discussion with the research questions outlined in Chapter 1. Further, the nature of juvenile violence in Australia, including its effect and consequences in the key areas of society, economy, education, health, family and community, will be scrutinised as will salient risk factors that influence juvenile violence along with associated protective factors.

2.2 Defining Juvenile

Historically, ‘juvenile’ has been defined as ‘of or belonging to youth’ and ‘young person’ from the Latin derivative ‘juvenilis’. As a corollary, ‘juvenilia’ was a term coined in the 17th century to describe the ‘work of a person’s youth’, while at the same time, the term juvenile gained popularity in the disparaging sense to describe unwanted childish behaviour. The first recorded use of the phrase ‘juvenile delinquency’ occurred

in the early 19th century.⁶⁰ Contemporary definitions of juvenile are typically grounded in terminology such as ‘of or pertaining to the young’, ‘youthful’, ‘immature’, ‘infantile’, ‘not fully grown or developed’, ‘childish’ and the like, whilst medical definitions of juvenile typically describe those who are ‘physiologically immature or underdeveloped’, ‘psychological⁶¹ or intellectual immaturity’ or a ‘young individual resembling an adult of its kind except in size or reproductive activity’.⁶² Defining what is or is not a juvenile is not without difficulty, however, as it would be ambitious to assume that there is a fixed or natural definition to attach to the term.

Instead, the term juvenile or youth is more appropriately seen as a term that distinguishes certain events from others.⁶³ Biologically, it may be described as a time period where humans progress through physical and emotional maturation, whilst a social definition may describe the period between being cared for to being a provider, or perhaps from the dependency of a child to the independence of a responsible adult.⁶⁴ Further, the description of juveniles as a subculture of society displaying its own values, ideals, sentiments and activities evolved from the 18th century onward, with particular emphasis from the mid-20th century where youth culture and a so-called ‘counterculture’ emerged, at least in Western countries.⁶⁵ In 2010, the Standing Committee on Family, Community, Housing and Youth in the Commonwealth Parliament released a significant report focussing on the impact of violence on young Australians⁶⁶ and defined ‘youth’ or ‘young Australians’ as those people generally between the ages of 12 and 25, although special consideration was recommended to extend the definitional boundaries to those aged from 10 onwards in order to encompass the ‘special developmental requirements of young adolescents’.⁶⁷

⁶⁰ Online Etymology Dictionary

<<http://www.etymonline.com/index.php?search=juvenile&searchmode=none>>.

⁶¹ See, eg, A Binder, ‘Juvenile Delinquency’ (1988) 39 *Annual Reviews of Psychology* 253–282 for psychological definitions and further explanation of juvenile delinquency.

⁶² Dictionary.com <<http://dictionary.reference.com/browse/juvenile>>.

⁶³ D Weinstein, ‘Alternative Youth: The Ironies of Recapturing Youth Culture’ (1995) (3)1 *Young* 61.

⁶⁴ *Ibid.*

⁶⁵ *Ibid* 34, 62.

⁶⁶ Standing Committee on Family, Community, Housing and Youth, Parliament of Australia, *Avoid the Harm – Stay Calm: Report on the Enquiry Into the Impact of Violence on Young Australians* (2010).

⁶⁷ *Ibid* 11.

2.3 Doli Incapax and the Legal Definition of Juvenile

The legal definition of juvenile is centred in mechanisms that attempt to track the important transition from the ‘age of innocence’ to what is recognised as legal maturity.⁶⁸ In any discussion of violent acts perpetrated by juveniles, therefore, it would be practical to examine the assessment of juvenile criminal responsibility as defined and categorised by law. Variations in the scope of juvenile age restrictions exist in both domestic and international legal systems with the common law presumptive principle of *doli incapax* and statutory equivalents a feature of most legal systems.⁶⁹ This principle upholds the assumption that a child is legally incapable of committing criminal acts and has long been incorporated into Australian law, either in statutory form or under the common law.⁷⁰

2.3.1 *Doli Incapax in Australian Law*

As a consequence, *doli incapax* remains an important feature in the administration of juvenile justice and determines that a graduated onset of criminal responsibility linked to the maturity levels of the accused juvenile is applied, which is in turn dependent on the juvenile’s comprehension of the wrongfulness of the act.⁷¹ Over the last two decades there has been a concerted attempt to standardise the age limit for criminal responsibility across Australian jurisdictions with all states and territories in agreement that no criminal liability can be attributed to a child under the age of 10, in addition to a rebuttable presumption available between the ages of 10 and 14.⁷²

In order to trigger this rebuttal or reversal of presumption, prosecutors are required to demonstrate that the accused child or juvenile was capable at the time the offence was

⁶⁸ Australian Institute of Criminology, *Legal Definition of a Juvenile* (2009) <http://www.aic.gov.au/crime_community/demographicgroup/youngpeople/definition.html>.

⁶⁹ G Maher, ‘Age and Criminal Responsibility’ (2005) 2 *Ohio State Journal of Criminal Law* 493.

⁷⁰ G Urbas, ‘The Age of Criminal Responsibility’ (Trends & Issues in Crime and Criminal Justice Paper No 181, Australian Institute of Criminology, November 2000) 3 <<http://www.aic.gov.au/documents/0/0/A/%7B00A92691-0908-47BF-9311-01AD743F01E1%7Dti181.pdf>>.

⁷¹ *Ibid* 1.

⁷² Australian Institute of Criminology, ‘The Age of Criminal Responsibility’ (Crime Facts Info No 106, Australian Institute of Criminology, 13 September 2005) <http://www.aic.gov.au/media_library/publications/cfi-pdf/cfi106.pdf>.

committed of adequately discerning right from wrong such that they were fully cognisant of the implications of the offence.⁷³ Essentially, the *doli incapax* doctrine protects juveniles who have not yet reached the age of ‘discretion’,⁷⁴ in an attempt to safeguard those who are ill-behaved rather than overtly criminal. To reverse the *doli incapax* refuge for juveniles aged between 10 and 14, the prosecution must establish that not only did the accused juvenile display the appropriate mens rea,⁷⁵ but additionally was aware that the act was seriously wrong.

Beyond the age of 14, the onus shifts to the defence who are encumbered with the obligation to establish that the accused juvenile was incompetent and lacked the required knowledge that the act was wrong.⁷⁶ Further, the maximum age that a child or juvenile can appear in a Children’s Court is consistent at under the age of 18 across all Australian jurisdictions, with the exception of Queensland which has a statutory ceiling of 17 years of age.⁷⁷ By way of comparison, the minimum age for criminal responsibility in many overseas jurisdictions is typically higher than in Australia. Western European minimum age restrictions range from 12 years in the Netherlands, 14 years in Italy and Germany and 16 years in Spain, to 18 years in Belgium. Japan also sets a relatively mature minimum age limit of 16 years.⁷⁸

The doctrine of *doli incapax* has however been subject to significant criticism, principally because of the supposition that contemporary society’s sophisticated and educated juveniles bear little resemblance to their counterparts of two centuries ago when the doctrine was introduced into the English common law. As a result, the *doli incapax* doctrine is both outmoded and unfair in practice.⁷⁹ According to Bradley, this argument is mostly based on the premise that modern day juveniles generally have, by the age of 10, experienced a minimum of four years schooling in addition to high levels

⁷³ Urbas, above n 70, 1.

⁷⁴ Ibid 3.

⁷⁵ The guilty mind or the state of mind of the accused is known as the mens rea. This must be proven to exist at the time of an offence by the prosecution in order to obtain a conviction.

⁷⁶ L Bradley, ‘The Age of Criminal Responsibility Revisited’ (2003) (8)1 *Deakin Law Review* 84.

⁷⁷ Australian Institute of Criminology, *Definition of Juvenile*, above n 68.

⁷⁸ Urbas, above n 70, 2.

⁷⁹ Ibid 5.

of exposure to radio, television, the internet and other forms of media and technology.⁸⁰ As a consequence of this development and understanding, they are better equipped to distinguish both right from wrong and what constitutes socially acceptable behaviour.⁸¹

2.3.2 *Criticisms of Doli Incapax*

Yet this notion is not without difficulty, as daily contact with electronic media and other information does not necessarily mean that juveniles are more intellectually developed, and more to the point, one should be wary of the assumption that such sophistication automatically equips juveniles with the competence to discriminate actions that are gravely wrong and very serious as compared to simply right and wrong.⁸² For example, less interaction with peers and life experience combined with more exposure to electronic media may in fact diminish juveniles' understanding of the effect of their actions on others.⁸³ In fact, the reliance upon and exposure of contemporary juveniles to electronic media and technology at the expense of social contact and experience can potentially lead to a diminished understanding of reality and underdeveloped social skills.⁸⁴

As such, modern day juveniles may not fully appreciate the effect and consequence of their actions. Similarly, it is apparent that juveniles in past time periods were more independent and aware of their responsibilities as a consequence of commencing work at an earlier age than their modern counterparts.⁸⁵ Moreover, argues Urbas,⁸⁶ the capacity of a juvenile to distinguish right from wrong more broadly should not be equated with their understanding of what is gravely wrong or very serious such that the more arduous legal test to rebut the *doli incapax* presumption is satisfied. Further criticism of the doctrine is grounded in the notion that, when it was introduced, children

⁸⁰ Bradley, above n 76, 84.

⁸¹ T Crofts, 'Doli Incapax: Why Children Deserve Its Protection' (2003) (10)3 *eLaw Journal: Murdoch University Electronic Journal of Law*, [22]
<<http://www.murdoch.edu.au/elaw/issues/v10n3/crofts103nf.html>>.

⁸² Urbas, above n 70, 5.

⁸³ Crofts, above n 81, [24].

⁸⁴ Ibid.

⁸⁵ Ibid [30].

⁸⁶ Urbas, above n 70, 5.

were subject to capital punishment for crimes less serious than unlawful killing, and such an obstacle was needed. This is not the case in most jurisdictions where less retributive and unsympathetic criminal justice regimes are in place.⁸⁷ Whilst contemporary criminal law is less punitive in nature, there still exists the need to reduce the stigmatisation of juveniles which compromises their understanding and appreciation of the wrongfulness of their actions and instead tends to label and breed resentment.⁸⁸

Although prosecutors are required to present evidence to rebut the *doli incapax* presumption, considerable concessions are provided for this very purpose including the submission of highly prejudicial material, such as past offences and cautions, which are normally inadmissible in adult prosecutions. This has resulted in minimal pleading of the *doli incapax* presumption due to its disadvantageous effect.⁸⁹ Various proposals for revamping the doctrine have been put forward including reducing the age range to 12 rather than 14 years, although it is questionable whether this is any more appropriate as an upper limit. Moreover, such a reduction effectively reduces the transitional window within which variability in juvenile moral development can be dealt with.⁹⁰

Other possible modifications to the doctrine include shifting the burden of proof (both standard and evidentiary) from prosecutors to defence counsel, which would require proof that the juvenile did not appreciate the gravity of his or her actions. This is in itself an affront to the presumption of innocence and lowering the standard of proof for the prosecution to rebut the presumption to the civil balance of probability standard rather than the more onerous beyond reasonable doubt criminal standard.⁹¹ Other suggestions include restricting the type of offences to which the doctrine of *doli incapax* will apply to those of a more serious nature such as armed robbery, murder and manslaughter.⁹²

⁸⁷ Crofts, above n 81, [31].

⁸⁸ Ibid [32].

⁸⁹ Bradley, above n 76, 85.

⁹⁰ R Van Krieken, 'When Should Children Be Held Criminally Responsible? Doli Incapax in New South Wales Law' <<http://www.personal.usyd.edu.au/~robertvk/papers/doli1.htm>>.

⁹¹ Urbas, above n 70, 5.

⁹² Ibid.

Nonetheless, despite this type of conjecture and the numerous advantages and disadvantages of the *doli incapax* protection, the presumption is still in operation in all Australian jurisdictions⁹³ and as such remains an issue in both juvenile violence and state responses to such violence. The impact of human rights obligations on the treatment of juvenile offenders also intersects with the doctrine. This effect of this impact will be discussed in Chapter 3, amongst other human rights issues as they relate to juvenile violence.

2.3.3 Age Range Relevant to Thesis

It is evident from this discussion that there is no single definition or meaning of juvenile and it remains a term that has evolved with time and circumstance. However, the *doli incapax* provision is a generic statutory definition linked to the maturity, legal capacity and comprehension levels of juveniles. Against this background, for the purposes of this thesis the term juvenile will be used to describe those persons aged 18 years or less in order to encompass changes in the school commencement age in the Western Australian jurisdiction (ostensibly bringing the state into alignment with other Australian states and territories) which will lead to many final year high school students being aged 18 rather than 17 as has been the case for many years.⁹⁴ This is a consequence of beginning year one aged over six due to a midyear rather than year-end age cut-off.⁹⁵ The age range in this thesis will therefore include those aged from what is typically year one, from five to six years of age, through to 17 and 18-year-olds who will make up year 12 in the near future, and will also encompass those students who have repeated school years or commenced at a more mature age or similar. Adult violence perpetrated by those aged over 20 will not be included.

2.4 The Concept of Violence Including Juvenile Violence

The quest for a clear and concise definition of violence, whether in popular or research literature, is not without difficulty. This is particularly apparent when referring to

⁹³ Australian Institute of Criminology, 'Age of Criminal Responsibility', above n 72.

⁹⁴ *School Education Act 1999* (WA) ss 5-6.

⁹⁵ *Ibid.*

juveniles⁹⁶ as discussed above. This search is further impeded by the frequent conflation of the terms ‘violence’ and ‘aggression’. Conceptually, violence is most often coupled with physicality whilst aggression is more often than not associated with malevolent acts intended to cause harm of some nature, be it physical, emotional or perhaps material deprivation. Moreover, illegitimate violence can quite logically be distinguished from more legitimate acts of force such as the distinction between parents using mild force to discipline a child as compared to the use of violence on the same child by the parents.⁹⁷

Typically couched in the language of criminal law, violence is often classified as an offence against the body of a person, such as grievous bodily harm, assault and other non-fatal offences, sexual offences and ultimately unlawful killing. Violent acts cover a broad spectrum of human behaviour that extends beyond that of inflicting physical injury and clearly encompasses the verbal, psychological, emotional and economic abuse⁹⁸ that prevails in society at many and varied levels and can be inflicted by individuals, groups, institutions or nations.⁹⁹ Gelles¹⁰⁰ suggests that violence can also be conceptually considered a political matter. For example, abortion could potentially be considered an act of violence by sympathisers of the political right.

2.4.1 Base Definition of Violence

As a base definition, violence describes action that ‘injures or destroys that to which it is applied’, ‘behaviour causing harm by use of force, violent conduct’,¹⁰¹ ‘rough or immoderate vehemence’, ‘rough or injurious acts or treatment’ and ‘any unjust or unwarranted exertion of force or power as against laws or rights’,¹⁰² ‘behaviour by or against people that is likely to cause physical or psychological harm of some type’,¹⁰³

⁹⁶ M O’Moore, *Defining Violence: Towards a Pupil Based Definition*, NoV.AS. R.E.S (No Violenza A Scuola Rete Europea di Scambi) European Commission, Education and Culture, Connect Program <<http://www.schoolbullying.eu/doc/Violencedefinition.pdf>>.

⁹⁷ R C Gelles, ‘Family Violence’ (1985) 11 *Annual Review of Sociology* 352.

⁹⁸ E Weir, ‘Preventing Violence in Youth’ (2005) (172)10 *Canadian Medical Association Journal* 1.

⁹⁹ See, eg, A Jones (ed) *Genocide, War Crimes & The West* (Zed Books, 2004).

¹⁰⁰ Gelles, above n, 97.

¹⁰¹ *Australian Pocket Oxford Dictionary* (Oxford University Press, 5th ed, 2006) 1234.

¹⁰² *Macquarie Dictionary* (Macquarie Library, 2nd ed, 1991) 1947.

¹⁰³ O’Moore, above n 96.

‘acts that frighten victims’¹⁰⁴ or ‘aggressive behaviour that is undertaken in socially unacceptable behaviour resulting in physical or psychological injury to people or property.’¹⁰⁵ Psychological injury or violence can include verbal assaults such as sarcasm, ridicule, name-calling and other vilifying statements that can potentially anger and alienate students. It can include mental cruelty, the provision of negative or destructive role models, and the exposure of children and juveniles to dangerous at-risk environments or systemic prejudice and bias, emotional neglect, sexual exploitation or dangerous and unstable environments.¹⁰⁶

As defined by the Australian Bureau of Statistics,¹⁰⁷ violence involves occurrences that result in actual, attempted or threatened physical or sexual assault. This definition delineates the use of physical violence that attempts to harm or frighten in circumstances where the victim expects the physical violence to be carried out, whilst sexual violence refers to situations where sexual acts are carried out against a person’s will using physical force, coercion or intimidation, or an attempt to do the same.¹⁰⁸

2.4.2 Definition of Violence Expanded

A more sophisticated analysis of violent acts will logically include physical acts that are designed to intimidate or cause emotional and psychological harm, such as embarrassment and humiliation, as well as verbal assaults that can intimidate others, as both of these actions are aggressive in character and can often be associated with antisocial impacts on others.¹⁰⁹ This broad definition is reflected in education legislation

¹⁰⁴ D Indermaur, ‘Young Australians and Domestic Violence’ (Trends & Issues in Crime and Criminal Justice No 195, Australian Institute of Criminology, February 2001) 4
<<http://www.aic.gov.au/documents/C/8/B/%7BC8BCD19C-D6D0-4268-984F-B6AF9505E5EA%7Dti195.pdf>>.

¹⁰⁵ J D Gorski and L Pilotto, ‘Interpersonal Violence Among Youth: A Challenge For School Personnel’ (1993) 5(1) *Educational Psychology Review* 36.

¹⁰⁶ I A Hyman and D Perone, ‘The Other Side of School Violence: Educator Policies and Practices That May Contribute to Student Misbehaviour’ (1998) (36)1 *Journal of School Psychology* 19.

¹⁰⁷ S Linacre, ‘Article: Interpersonal Violence’ (Australian Social Trends No 4102.0, Australian Bureau of Statistics, 7 August 2007) 2
<[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/347E5D23ED6DB058CA25732F001CA444/\\$File/41020_Interpersonal%20violence_2007.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/347E5D23ED6DB058CA25732F001CA444/$File/41020_Interpersonal%20violence_2007.pdf)>.

¹⁰⁸ *Avoid the Harm Report*, above n 66, 8.

¹⁰⁹ D Kunkel et al, ‘Measuring Television Violence: The Importance of Context’ (1995) 39 *Journal of Broadcasting & Electronic Media* 286.

which will be discussed more fully in Chapter 4. For example, the behaviour management policy used in Western Australian government schools defines violence as ‘incidents where people are threatened, physically assaulted or intimidated’, where ‘property is deliberately damaged’, and makes mention of the use of ‘extreme force’ that does not necessarily refer to a power imbalance and can be a ‘single or one-off incident’.¹¹⁰ Similar policy definitions are found in other Australian jurisdictions.¹¹¹

A number of serious violent offences, however, are noteworthy for their absence of physical violence. Farrington suggests that offences like aggravated assaults may involve only threats of violence with weapons, while sexual offences and robberies can on occasion be grounded in threatening behaviour only.¹¹² As a consequence, the definition of violence can legitimately be attached to the psychological trauma that is so often associated with the experience of threatening behaviour or fear, such that the term violence can also refer to a more general environment of anxiety and trepidation caused by the likelihood and volume of violent acts.¹¹³ Although it is often violent physical attacks that garner our focus and condemnation, psychological violence is potentially a more pressing issue in contemporary society as the pervasiveness of non-physical or verbal acts of violence is a major concern.¹¹⁴ Bodine and Crawford argue that victims of psychological trauma are often not even recognised as such, which represents a

¹¹⁰ Department of Education and Training WA, *Behaviour Management in Schools* (9 April 2013), 18 <file:///C:/Users/180690D/Downloads/Policy_Behaviour%20Management%20in%20Schools%20v1.2%20(1).pdf>.

¹¹¹ See, eg, Department of Education and Early Childhood Development, *Building Respectful and Safe Schools. A Resource for School Communities* (August 2010) State Government of Victoria, 8 <<https://www.eduweb.vic.gov.au/edulibrary/public/stuman/wellbeing/respectfulsafe.pdf>>. In the Victorian jurisdiction, violence is considered for education policy purposes as ‘damaging and destructive use of force against another person, group or property which can manifest in physical, verbal, sexual or another action or behaviour that may be connected to an ongoing relationship between the parties’. Violence can occur over time or be a stand-alone event involving provoked or unprovoked actions. Violence can also be undertaken in an effort to redress the imbalance of power by bullying targets. Other state and territory discipline management and related policy will be discussed in Chapter 4.

¹¹² D Farrington, ‘Predictors, Causes and Correlates of Male Youth Violence’ (1998) 24 *Crime and Justice* 422.

¹¹³ Moore and Tonry, above n 30, 4.

¹¹⁴ *Ibid.*

significant risk in societies should one subscribe to the theory that violence begets violence.¹¹⁵

The effect of psychological violence should not be underplayed as the psychological trauma that may be inflicted on communities is among the most concerning consequences of the violent act. The fear and apprehension that results can cause a breakdown in both formal and informal social control such that a neighbourhood is essentially abandoned to its most violent members.¹¹⁶ Often this results in neighbourhoods that exhibit an uneasy ambience and a pervading sense of violence rather than safety and security.¹¹⁷ By initiating a more comprehensive definition of violence that encompasses psychological or emotional injury,¹¹⁸ the opportunity to examine aggression in its manifold guises surfaces. Caution however is encouraged so as to be mindful of less severe forms of aggression, because violence is often perceived as being of a more serious or substantial typology, according to O'Moore.¹¹⁹

2.4.3 World Health Organization Definition of Violence

A social and cultural phenomenon, violence is more than just the result of deviant or aberrant conduct committed by socially isolated individuals, but is rather a continuum of behaviours that span diverse conduct, acts and practices.¹²⁰ Moreover, violence can and does take the form of abuses of physical, sexual, emotional, social and economic power.¹²¹ As defined by the World Health Organization ('WHO'),¹²² the notion of violence is classified as the intentional use of either actual or threatened physical force or power against persons, communities, groups or oneself that causes or will likely cause death, injury, psychological harm, maldevelopment or deprivation. It is instructive that the WHO expands the conventional understanding of violence by including the term

¹¹⁵ R J Bodine and D K Crawford, *The Handbook of Conflict Resolution Education. A Guide to Building Quality Programs in Schools* (Jossey-Bass, 1998) 7.

¹¹⁶ Moore and Tonry, above n 30, 4.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ O'Moore, above n 96.

¹²⁰ Sidey M, 'Creating New Choices: A Violence Prevention Plan For Schools in Australia' (Innodata Monographs No 9, International Bureau of Education, Switzerland, 2001).

¹²¹ World Health Organization, *World Report on Violence and Health*, above n 1, 5.

¹²² Ibid.

‘power’ in its definition as it encompasses threats and intimidation that may be generated from a power relationship, whilst the phrase ‘use of power’ also encapsulates negligent acts or omissions in addition to physical, sexual and psychological abuse and self-abusive acts including suicide.¹²³ As a consequence, the WHO’s comprehensive definition neatly incorporates violence that does not necessarily result in death or injury yet can substantially burden individuals, families and communities, such as violence against women or children that can generate immediate and latent physical, social or psychological problems.¹²⁴

Further, intentionality is associated by the WHO with the commission of an act irrespective of the resulting outcome, but excludes the unintentional consequences of violent acts such as in traffic accidents, for example. The intent to use force cannot automatically be aligned with the intent to cause damage as there can be significant discrepancies between behaviour and the resulting consequence.¹²⁵ Kunkel et al¹²⁶ emphasise that although intentionality remains an internalised, private psychological state that is for all intents and purposes closed to direct observation, it is nonetheless a focus used by humans to make some sense of the world, chiefly by attributing intentionality to the actions of others.

Usefully, the many types of violent acts described above can be assembled into practical typologies that distinguish violence perpetrated against oneself, by others and finally by large organised groups, states or governments.¹²⁷ Self-inflicted violent acts include actions such as self-harm, mutilation or abuse with suicide being the ultimate form of self-inflicted violence.¹²⁸ Interpersonal violence can be separated into a binary classification based on familial violence such as between intimate partners and family

¹²³ Ibid.

¹²⁴ Ibid 25.

¹²⁵ Ibid.

¹²⁶ Kunkel et al, above n 109, 286.

¹²⁷ World Health Organization, *World Report on Violence and Health*, above n 1, 6.

¹²⁸ Ibid.

members, including children and juveniles, and that of communal violence between acquaintances or strangers, generally occurring outside the family home.¹²⁹

2.4.4 Collective and Relational Violence

The final category is that of collective violence which can be further reduced to violence of a social nature including terrorism, hate crimes or mob violence, and economic violence including tactics employed to disrupt services or elicit economic division or chaos. Political violence includes such obvious actions as war or state conflict.¹³⁰ Equally, juvenile violence can be assembled into discrete types. Situational juvenile violence reflects patterns of violence amongst juveniles that are related more to the prevailing circumstances in which they may find themselves rather than any prior behavioural issue.¹³¹ That is, violence that would not otherwise have occurred is triggered by situational factors.¹³²

Examples include conflict between groups of juvenile friends and acquaintances or perhaps at public gatherings such as sporting events.¹³³ Further, low socio-economic status, discrimination and social disparity, prevailing drug and alcohol abuse, antisocial behaviour and the like can exacerbate juvenile violence.¹³⁴ As a corollary, developmental settings such as home and community, when combined with other pertinent issues including labelling and other social difficulties can have an influence upon episodic juvenile violence.¹³⁵ Tolan¹³⁶ states that access to firearms and other weapons alongside drug abuse has an undeniable effect on violent juvenile behaviour. The impact of these issues on juvenile violence can therefore be uncoupled from risk factors generated by separate individual character traits or prior conduct.¹³⁷

¹²⁹ Ibid.

¹³⁰ E G Krug et al, 'The World Report on Violence and Health' (2002) 360 *The Lancet* 1084.

¹³¹ P Tolan, 'Youth Violence Prevention' (Paper presented at the Meeting of the Collaborative Violence Prevention Initiative, San Francisco, United States, 17 February, 2000).

¹³² Ibid.

¹³³ P Tolan, 'Youth Violence and its Prevention in the United States: An Overview of Current Knowledge' (2001) (8)1 *Injury Control and Safety Promotion* 3.

¹³⁴ Tolan, 'Youth Violence Prevention', above n 131.

¹³⁵ Ibid.

¹³⁶ Tolan, 'Youth Violence and its Prevention in the US', above n 133.

¹³⁷ Tolan, 'Youth Violence Prevention', above n 131.

In a similar vein to other age groupings, relationship violence amongst family and friends is a prominent form of juvenile violence.¹³⁸ Typically, this form of violence concerns hostility between parents that in turn engenders violent acts toward and amongst children. A particularly notorious category is predatory violence,¹³⁹ which concerns violent acts that are concomitant with other criminal activities such as robbery and assault and as a result form a pattern of serious antisocial behaviour. Common examples include violence which is committed with intent during robberies and gang type assaults.¹⁴⁰ Predatory violence is fostered habitually over extended time periods by juveniles and can last until long after adolescence where career offending can develop. Much less common but of particular concern is psychopathological violence amongst juveniles where juveniles that display psychotic tendencies commit violent acts.¹⁴¹

2.4.5 Violence Typology Conclusion

The typology of violence remains fluid given the myriad definitional and conceptual variations. Violence may be of a purely physical genre or be coupled with moral or emotional harm as discussed above, whilst some categories of violence are conspicuous in their absence of physical violence yet are significant in the infliction of damage. According to Indermaur,¹⁴² violence is perhaps best seen as a descriptor rather than a singular phenomenon, and meaningful distinctions of violence are useful in garnering understanding of the concept. Further, violent acts perpetrated as a result of exposure to surroundings are prolific whilst individual risk factors can also contribute to violent juvenile behaviour. For the purposes of this thesis, however, violence will necessarily be broad in scope in order to encompass physical and psychological acts of violence which are of relevance in school based episodic violence. The next section will consider the nature of juvenile violence within the Australian jurisdiction.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Indermaur, above n 104, 6.

2.5 The Nature of Juvenile Violence in Australia

2.5.1 Introduction

Juvenile violence and other antisocial behaviour within Australia imposes considerable cost and burden upon communities and societies and remains a fundamental concern for police, parents, schools and governments.¹⁴³ Whilst not diminishing the impact or cost of other criminal offences such as property or motor vehicle theft, which often incorporate some measure of violence at any rate, the offences of assault, manslaughter and homicide remain the most serious types of violent criminal offence. Insofar as juvenile participation in violent criminal activity is concerned, the typology and frequency of juvenile violence in contemporary Australian society is reflected in some sobering statistics.

2.5.2 Statistical Status of Juvenile Violence in Contemporary Australian Society

Essentially, juveniles are at greater risk of both being the victim of violent acts committed by contemporaries and of committing violent acts themselves.¹⁴⁴ Despite a general reduction in crime within the Australian jurisdiction over the last two decades, violence as a component of Australian criminal activity appears to be on the increase. Violence involving juveniles is prominent in this increase both in gravity and regularity,¹⁴⁵ in concert with increased levels of juvenile victimisation due to violent episodes.¹⁴⁶ A statistic supporting the notion that juvenile violence is on the ascent concerns the rate with which juveniles are charged with assault, which increased by almost 50% in the decade between 1997 and 2007.¹⁴⁷ Late teen males were particularly prominent in the offender grouping with research showing that this cluster is almost

¹⁴³ D Smart et al, 'Patterns of Antisocial Behaviour From Early to Late Adolescence' (Trends & Issues in Crime and Criminal Justice No 290, Australian Institute of Criminology, December 2004) 1 <http://www.aic.gov.au/media_library/publications/tandi2/tandi290.pdf>.

¹⁴⁴ World Health Organization, *World Report on Violence and Health*, above n 1.

¹⁴⁵ *Avoid the Harm Report*, above n 66, 18.

¹⁴⁶ *Ibid* 19.

¹⁴⁷ Australian Institute of Criminology, *Australian Crime: Facts and Figures 2008* (2009) 59 <http://www.aic.gov.au/documents/E/4/0/%7BE4031E6F-031D-415C-B544-8CE865A3CA0C%7Dfacts_and_figures_2008.pdf>.

twice as likely to be physically assaulted by a contemporary than males aged from 20–24 and six times more likely than males aged over 25.¹⁴⁸

In conjunction with these trends, research also indicates that juvenile offending in general in Australia is at the highest recorded level since the mid-1990s for both male and female offenders. Offences by females are increasing at a higher rate although they remain less likely to offend than male counterparts.¹⁴⁹ Assault by juveniles also displayed a sizeable increase between the mid-1990s and 2009–10, including sexual assault and robbery for male juvenile offenders, whilst male and female assault victimisation encouragingly fell slightly in 2010 in the 10–14 age bracket. In the category of sexual assault, female victims outnumbered male counterparts,¹⁵⁰ which remains a constant across all age levels.

Within the Australian jurisdiction, rates of homicide have remained relatively stable at one to two incidents per 100 000 population with most perpetrators and victims aged over 25 years and males more prominent in both categories.¹⁵¹ The age category of 18 to 24 years does, however, include a small number of juveniles and it is this category that represents a sizeable proportion of perpetrators. In the 2007–8 period for example, there were 29 homicides committed by juveniles who were all male, with a sizeable proportion of the unlawful killings caused by beating victims to death.¹⁵² Juvenile homicide victims in the same reporting period totalled 12, divided evenly between males and females.¹⁵³ This differs markedly from the 1990s period, for example, where male victims outnumbered females by two to one.¹⁵⁴ In the 2010 recording period, however,

¹⁴⁸ Australian Bureau of Statistics, 'Risk Taking by Young People' (Australian Social Trends No 4102.0, 23 July 2008) 5 <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Chapter5002008>.

¹⁴⁹ Australian Institute of Criminology, *Australian Crime: Facts and Figures 2011* (2012), 74–75 <http://aic.gov.au/media_library/publications/facts/2011/facts11.pdf>.

¹⁵⁰ *Ibid* 71, 76.

¹⁵¹ Australian Institute of Criminology, *Homicide in Australia: 2007-2008 National Homicide Monitoring Program Annual Report* (2010) 5 <http://aic.gov.au/documents/8/9/D/%7b89DEDC2D-3349-457C-9B3A-9AD9DAFA7256%7dmr13_004.pdf>.

¹⁵² *Ibid* 27.

¹⁵³ *Ibid* 21.

¹⁵⁴ C Carcach, 'Youth as Victims and Offenders of Homicide' (Trends & Issues in Crime and Criminal Justice No 73, Australian Institute of Criminology, September 1997) 3 <<http://aic.gov.au/documents/9/7/6/%7b9765C7D1-F4F6-4AEF-AFAA-71025C47A060%7dti73.pdf>>.

victimisation for murder was consistently higher among males from the age of 10 onwards with particularly significant differences in the 15 to 24 age bracket that contains a number of juveniles. Although there were no female victims recorded in the 10 to 14 category, there were only three male victims.¹⁵⁵

Homicide was the only violent crime that decreased in the same recording period whilst trends in female offending revealed that the 10 to 14 age group in fact exceeded the 20 to 25 year bracket statistically, and more importantly, a near 50% increase was evident in female assault over the period from the mid-1990s to 2010.¹⁵⁶ Victimization for assault increased over the 2011–2012 period for both sexes in the 15 to 24-year-old age bracket,¹⁵⁷ which represented the highest category of assaults over a number of years. By the 2011 reporting period, juvenile homicide rates were 4 and 44 per 100 000 juveniles for female and male perpetrators respectively.¹⁵⁸

Juvenile participation in non-fatal violent acts in the Australian jurisdiction is not to be underestimated. In a major longitudinal study carried out in Victoria,¹⁵⁹ antisocial adolescent behaviour patterns among selected children were tracked from infancy to the age of 20 years. Male rates of juvenile violence were markedly higher than female rates, in stark contrast to substance abuse and shoplifting, for example, where there is no sizeable gender difference in participation rates.¹⁶⁰ Typically, as suggested by Blumstein,¹⁶¹ many juveniles ‘age out’ of violent acts. This is reflected in higher incidence rates of violent confrontations, weapon use and physical assaults in the early teen years in contrast to mid and late teen years in offences such as physical assault. Conversely, the use of weapons by juveniles was relatively evenly spread across early, mid and late teen years according to Smart et al.¹⁶² Particularly noteworthy in the study

¹⁵⁵ Australian Institute of Criminology, *Australian Crime: Facts and Figures 2011*, above n 149, 15.

¹⁵⁶ *Ibid* 71–73.

¹⁵⁷ Australian Institute of Criminology, *Australian Crime: Facts and Figures 2012* (2013) 19 http://aic.gov.au/media_library/publications/facts/2012/facts12.pdf.

¹⁵⁸ *Ibid* 74.

¹⁵⁹ Smart et al, above n 143, 1.

¹⁶⁰ *Ibid* 4.

¹⁶¹ A Blumstein, ‘Violence by Young People. Why The Deadly Nexus?’ (1995) 229 *National Institute of Justice Journal* 3.

¹⁶² Smart et al, above n 143, 3–4.

was the finding that juveniles exhibiting particularly extreme violent tendencies in adolescent years often escalated their activities and became entrenched in further violent acts and other categories of antisocial criminal behaviour in later years.¹⁶³

Although trends and statistics such as these provide a useful snapshot of juvenile violence issues, there must be a significant rider attached to the reliance on this data, particularly where juvenile crime reporting is concerned. The unreporting or underreporting of violent episodes is commonplace in contemporary society but particularly widespread amongst juveniles which effectively diminishes the veracity of this data.¹⁶⁴ The most obvious reason for the apathy towards reporting is the notion that many juveniles would consider an assault, for example, too trivial to report. There are also cultural restrictions such as the familiar practice of juveniles dealing with any assault personally, which effectively increases the likelihood of re-victimisation.¹⁶⁵

Moreover, a refusal to identify or give evidence against assailants along with an inherent distrust of and lack of confidence in the authorities, be it police, criminal justice agencies, schools, sporting clubs and the like, are also significant factors.¹⁶⁶ Trends and statistics are further hampered by issues including changes to policing methods¹⁶⁷ and overreliance on aggravated crime statistics where important developments may be submerged amongst general crime statistics.¹⁶⁸ A salient exemplar for the purposes of this thesis would be a schoolyard homicide that has simply been recorded as an unlawful killing perpetrated by a juvenile, with no reference to the important issue of location.

2.5.3 Impact of Juvenile Violence on Australian Society

Notwithstanding cautionary interpretations, the expansion of serious violent juvenile behaviour remains a reality in Australia and continues to have a significant impact on key societal indicators such as social, economic, community, familial, educational and

¹⁶³ Ibid 6.

¹⁶⁴ *Avoid the Harm Report*, above n 66, 14.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid 15.

¹⁶⁸ Ibid 16.

health measures.¹⁶⁹ In terms of basic assault for example, the actual cost to the Australian community was estimated by the Australian Institute of Criminology to be over AUD1.4 billion annually, allowing for medical costs and lost production but excluding insurance, compensation, security or policing imposts. It also did not take into account the important intangible costs such as pain, suffering and a pervading sense of trepidation and anxiety in communities that result from episodes of violence.¹⁷⁰ The manifold ramifications of juvenile violence in the Australian community include significant physical, emotional and social consequences.¹⁷¹ The physical and emotional trauma to a victim that follows an episode of juvenile violence are of major concern and extend to behavioural issues such as increased physical aggression, diminished self-esteem and heightened anxiety levels, depressive tendencies, increased reliance on drugs and alcohol as juveniles age, poor socialisation and deficient commitment to the education process.¹⁷²

The effect of violent events on juveniles is of great concern and includes not only the obvious cost to the victim in general health and welfare terms, but also the palpable extended effect on the victim's personal relationships and other familial associations.¹⁷³ The victim's financial burdens are as extensive as they are costly and include, but are not limited to, medical costs associated with hospital payments, mental health services, rehabilitation services, prescriptions, and health insurance processing costs. In the event of a homicide, the financial impost to the victim's family extends to funeral expenses and coroner costs.¹⁷⁴ As argued by Carcach,¹⁷⁵ not only is there a loss to the community and society as a whole, which is denied the benefit of the victim's potentially productive life, there is also the distressing and very obvious short, medium and long-term impact

¹⁶⁹ Australian Research Alliance for Children and Youth, *Preventing Youth Violence Project*, 1 <http://www.aracy.org.au/publications-resources/command/download_file/id/121/filename/Preventing_Youth_Violence_-_Project_rationale.pdf>. See also M A Cohen, 'The Monetary Value of Saving High-Risk Youth' (1998) 14(1) *Journal of Quantitative Criminology* 5.

¹⁷⁰ Australian Research Alliance for Children and Youth, *Preventing Youth Violence Project*, above n 169.

¹⁷¹ *Avoid the Harm Report*, above n 66, 23–24.

¹⁷² *Ibid* 24.

¹⁷³ World Health Organization, *Youth Violence and Alcohol Fact Sheet*, above n 15, 4.

¹⁷⁴ T R Miller, A Fisher and M A Cohen, 'Costs of Juvenile Violence: Policy Implications' (2001) 107(1) *Paediatrics* 2.

¹⁷⁵ Carcach, above n 154, 1.

on the victim's family. Other important community and societal costs include property damage, such as unrecovered property, administration costs generated by insurance claims and victim compensation expenses, and public expenses such as initial police intervention, resulting investigations and child protective and victim services, along with emergency medical responses.¹⁷⁶

At the extreme end of juvenile violence, the incarceration of a juvenile following a homicide results in severe societal financial costs, not limited only to the juvenile offender's confinement to a secure facility but also rehabilitation and ongoing costs. This includes detention costs, therapy, day treatment, electronic monitoring, reintegration and residential treatment programs including public and private institutional and community therapeutic initiatives, probation program costs, such as administrative and support expenses, amongst many other imposts.¹⁷⁷ Important causal factors associated with juvenile violence will now be discussed.

2.6 Causal and Risk Factors Associated with Juvenile Violence

2.6.1 Introduction

Given that most violent behaviour is effectively learned behaviour,¹⁷⁸ it would be instructive to examine the causes and risk factors that contribute to the development and continuance of violent acts by contemporary juveniles in order to better understand the dynamic of the juvenile violence problem and more importantly develop suitable interventions and policy recommendations to help combat the dilemma.¹⁷⁹ It should also be noted that juvenile violence exists not in a vacuum but often as part of an overall pattern of aggressive at-risk behaviour that suggests aggression amongst juveniles is emerging as increasingly normative and extends to drug and alcohol abuse, property damage such as vandalism, promiscuous sexual activity, school avoidance and motor

¹⁷⁶ Miller, Fisher and Cohen, above n 174, 2.

¹⁷⁷ Ibid 3.

¹⁷⁸ Elliot, above n 20, 3.

¹⁷⁹ World Health Organization, *World Report on Violence and Health*, above n 1, 30.

vehicle offences amongst other hazardous juvenile behaviours. However, some acts of violence may in fact be isolated.¹⁸⁰

Predictably, the salient factors associated with juvenile violence are many and varied, with individual, relational and societal risk factors featuring prominently amongst the causes of violent juvenile behaviour.¹⁸¹ These factors can be neatly classified as either risk factors that increase the likelihood of juveniles engaging in antisocial and violent activity, or conversely as protective factors that diminish the probability of juveniles indulging in such conduct.¹⁸² There is also a principal link between the developmental stage a juvenile is experiencing and both the amount of risk and protective factors to which they are exposed,¹⁸³ in addition to the interaction of the juvenile in his or her social environment. This will encompass positive or negative qualities in the juvenile's relationships with peers, school, family and community.¹⁸⁴

2.6.2 Biological Factors

With regard to possible biological contributors, research has suggested that juveniles subjected to complicated births with attendant neurological injury are potentially more predisposed to violent tendencies, particularly in situations where their mothers have exhibited some measure of mental illness, although it is likely that these factors have some bearing on predicted violence when acting in concert with other difficulties.¹⁸⁵ Risk-taking and attention-seeking, especially in boys, are also both potential contributors to violent tendencies that have been linked to low heart rates,¹⁸⁶ indicating that low autonomic arousal and an element of fearlessness can contribute to risk-taking

¹⁸⁰ Benson and Roehlkepartain, above n 17.

¹⁸¹ Australian Research Alliance For Children and Youth, *Violent and Anti-Social Behaviours Among Young Adolescents in Australian Communities: An Analysis of Risk and Protective Factors* (October 2009) 20 <http://www.aracy.org.au/publications-resources/command/download_file/id/161/filename/Violent_and_antisocial_behaviours_among_young_adolescents_in_Australian_communities_-_An_analysis_of_risk_and_protective_factors.pdf>.

¹⁸² *Avoid the Harm Report*, above n 66, 35.

¹⁸³ *Ibid.*

¹⁸⁴ Australian Research Alliance For Children and Youth, *Violent and Anti-Social Behaviours*, above n 181, 7.

¹⁸⁵ World Health Organization, *World Report on Violence and Health*, above n 1, 32.

¹⁸⁶ *Ibid.*

and attention-seeking in a similar fashion to boredom,¹⁸⁷ while conversely, elevated heart rates have been coupled with heightened anxiety, behavioural inhibition and fear, particularly amongst the very young.¹⁸⁸

Complications in pregnancy, however, have no notable association with predicted violent tendencies,¹⁸⁹ although there is some evidence that prenatal drug, tobacco and alcohol exposure,¹⁹⁰ including foetal alcohol syndrome,¹⁹¹ may contribute to violent predispositions amongst juveniles. They may have low levels of serotonin which has been linked to diminished inhibitions and cortical arousal, both of which are potentially conducive to violent tendencies.¹⁹² The developing adolescent brain is also an important factor in the gestation patterns of violent juvenile tendencies as risk-taking, reactions to alcohol and drugs,¹⁹³ regulation of emotions, response to both positive and negative environmental influences and stress management¹⁹⁴ are all prominent factors during this significant period of growth.

Gender also plays a pivotal part in predicting violent juvenile tendencies, with young males, whether perpetrator or victim, more likely to be entangled in antisocial and violent behaviour compared to young females¹⁹⁵ within the Australian jurisdiction.¹⁹⁶ This partiality in favour of males is repeated internationally, with the WHO observing that males have a strong demographic risk factor in instances of homicide, for example,¹⁹⁷ whilst in the United States juvenile males commit by far the majority of violent juvenile criminal acts. This supports the notion that juvenile ‘girls seldom kill or

¹⁸⁷ Farrington, above n 112, 441.

¹⁸⁸ World Health Organization, *World Report on Violence and Health*, above n 1, 32.

¹⁸⁹ *Ibid.*

¹⁹⁰ F J Earls, ‘Violence and Today’s Youth’ (1994) 4(3) *Critical Health Issues for Children and Youth* 12.

¹⁹¹ *Avoid the Harm Report*, above n 66, 36.

¹⁹² Farrington, above n 112, 442.

¹⁹³ *Avoid the Harm Report*, above n 66, 38.

¹⁹⁴ Australian Research Alliance for Children and Youth, *Preventing Youth Violence Project*, above n 169, 2.

¹⁹⁵ H Sercombe, ‘Reflections on Youth Violence’ (2003) 22(1) *Youth Studies Australia* 26.

¹⁹⁶ *Avoid the Harm Report*, above n 66, 37.

¹⁹⁷ World Health Organization, *World Report on Violence and Health*, above n 1.

mains others',¹⁹⁸ although it must be said that there is evidence of an upswing in violent acts by females,¹⁹⁹ which is also reflected in Australian statistics where female offending rates for assault rose at twice the rate of males.²⁰⁰ According to Smart et al,²⁰¹ for those juveniles who do not 'age out' of offending as they traverse the teen period, violent and aggression typically peaks in the mid to late teen years,²⁰² whilst some juveniles will sadly be at the commencement of violent adult careers soon thereafter.²⁰³ Unlike Indigenous property or public order offending where policing and other issues may influence elevated levels, Indigenous rates of violent offences including unlawful killing and assaults are in the main similar to non-Indigenous rates.²⁰⁴

2.6.3 Psychological and Behavioural Indicators

Perhaps the most instructive factors in any prediction of juvenile violence are psychological and behavioural characteristics. Prominent amongst these causes are a rebellious nature and poor impulse control or hyperactivity, deficiencies in behavioural control and a lack of persistence,²⁰⁵ and low general intellect and academic achievement,²⁰⁶ which are possibly linked with deficiencies in brain executive function associated with the frontal lobes.²⁰⁷ This factor is particularly noteworthy, as executive functions regulate abstract reasoning and concept formation, anticipation and planning, sustaining concentration, self-awareness and control of inhibitions.²⁰⁸ Farrington,²⁰⁹ also suggests that testosterone levels in young males also can have a bearing on predicting juvenile violence as there is evidence that heightened post-puberty testosterone levels can anticipate violent tendencies amongst juvenile males when they

¹⁹⁸ W H Courtenay, 'Youth Violence? Let's Call it What It is' (1999) 48 *Journal of American College Health* 141.

¹⁹⁹ Benson and Roehlkepartain, above n 17.

²⁰⁰ Australian Institute of Criminology, *Australian Crime: Facts and Figures 2007* (2008) 58 <http://www.aic.gov.au/documents/5/6/8/%7b568C3490-EEDD-4C98-BDA8-861F0E624BFC%7dfacts_and_figures_2007.pdf>.

²⁰¹ Smart et al, above n 143, 4.

²⁰² *Avoid the Harm Report*, above n 66, 37.

²⁰³ World Health Organization, *World Report on Violence and Health*, above n 1.

²⁰⁴ C Cunneen and R White, *Juvenile Justice Youth and Crime in Australia* (Oxford University Press, 4th ed, 2011) 159.

²⁰⁵ World Health Organization, *World Report on Violence and Health*, above n 1, 32.

²⁰⁶ Farrington, above n 112, 444.

²⁰⁷ World Health Organization, *World Report on Violence and Health*, above n 1, 32.

²⁰⁸ *Ibid.*

²⁰⁹ Farrington, above n 112.

are reproductively active. From a standpoint of protective factors, it is unsurprising that cautiousness, anxiety, alienation and characteristics of nervousness have been shown to have a negative correlation with juvenile violence tendencies,²¹⁰ and that socially competent juveniles who are cognisant of what is right and wrong are less inclined to abuse alcohol and drugs and engage in violent, delinquent behaviour.²¹¹

2.6.4 Familial Influences

There is a compelling argument that familial factors and issues have a sizeable impact on predicting habitual juvenile violence.²¹² Prevailing familial environments and parental behaviour including harsh, physical and erratic discipline regimes,²¹³ exposure to violent episodes such as physical abuse and witnessing violence within the family environment can all increase the risk of juveniles developing violent adolescent tendencies, although it must be said that a sizeable number of juveniles who are victims of familial abuse do not descend into performing serious violent acts.²¹⁴ Moreover, parental attitudes play an important part in the gestation or otherwise of violent tendencies amongst juveniles.²¹⁵

Essentially, circumstances where there is ostensibly poor attachment between parents and children,²¹⁶ lack of parental affection and poor supervision of children,²¹⁷ the complete absence of or ineffective social bonds and control mechanisms leading to ineffective or absent internalisation of conventional norms and values by children,²¹⁸ marital discord, long-term parental unemployment and parental rejection,²¹⁹ all play a central role in elevating the risk of juvenile violent attitudes and behaviour. Parental

²¹⁰ Ibid 444.

²¹¹ Australian Research Alliance For Children and Youth, *Violent and Anti-Social Behaviours Among Young Adolescents in Australian Communities*, above n 181, 41.

²¹² J D Hawkins, 'Controlling Crime Before it Happens: Risk Focussed Prevention' (1995) August *National Institute of Justice Journal* 13.

²¹³ Australian Research Alliance For Children and Youth, *Violent and Anti-Social Behaviours Among Young Adolescents in Australian Communities*, above n 181, 41.

²¹⁴ Elliot above n 20, 3.

²¹⁵ Ibid.

²¹⁶ World Health Organization, *World Report on Violence and Health*, above n 1, 33.

²¹⁷ Farrington, above n 112, 445.

²¹⁸ Elliot, above n 20, 3.

²¹⁹ G Christie, S Petrie and C Christie (1999) 'Reducing And Preventing Violence in Schools' (Paper presented at the Children and Crime, Victims and Offenders Conference, Brisbane June 17–18, 1999) 7–8.

neglect during the course of adolescent development may in fact have a more profound effect on children than physical abuse,²²⁰ whilst lax parental attitudes to alcohol and drug use, antisocial behaviour by children²²¹ or the involvement of children in this type of behaviour by parents themselves²²² also contribute to the development of violent juvenile attitudes. It is also evident that the cyclic nature of violence whereby victimisation precedes aggressive and violent behaviour in juveniles is a corollary of exposure to violence within families.²²³

By and large, children learn to adopt and model the violent behaviour first seen in the significant people in their lives, such as parents, caregivers²²⁴ or siblings, leading to an escalation of violent and aggressive conduct as they age. The impact of low income households on the development of violent and aggressive behaviour by juveniles is also not to be underestimated, according to Elliot,²²⁵ as economic stress as a by-product of deficient disposable familial income can disrupt parenting and fuel parental neglect, which can in turn exacerbate violent tendencies in children. Further, there are linkages between low familial income and behavioural problems in the very young as difficulty in gaining employment has an obvious flow-on effect on the self-esteem of children, along with a sense of hopelessness and resentment which contribute to social marginalisation, and by extension, criminal activity in juveniles.²²⁶

Other familial factors that may contribute to the development of aggressive and violent juvenile behaviour include single parent households, large family size, and the young age of mothers,²²⁷ but the results of research into these and other similar factors is by no means conclusive. That is, factors that can contribute to juvenile delinquency are manifold with detailed interconnectedness, yet there is no clear connection between

²²⁰ Elliot, above n 20, 3.

²²¹ *Avoid the Harm Report*, above n 66, 39.

²²² Australian Research Alliance For Children and Youth, *Violent and Anti-Social Behaviours Among Young Adolescents in Australian Communities*, above n 181, 41.

²²³ *Avoid the Harm Report*, above n 66, 39.

²²⁴ *Ibid.*

²²⁵ Elliot, above n 20, 4.

²²⁶ Malcolm, above n 23, 26.

²²⁷ Farrington, above n 112, 447.

single factors and a child or juvenile's proclivity to commit acts of violence or other offences, and nor does the presence of a multiple at-risk factors in a child or juvenile necessarily lead to offending.²²⁸ In regard to protective familial factors, family bonding as a function of the contribution of pro-social capital²²⁹ to familial responsibilities and activities, along with nurturing environments where children feel attached and valued in the family unit,²³⁰ appear to have a beneficial effect in reducing the likelihood that juvenile violence will arise.

2.6.5 Community and Societal Factors

Community and societal elements can also contribute significantly to the development of violent and aggressive juvenile conduct because the communities in which juveniles live have a profound effect on their behaviour,²³¹ the disposition of their peer groups and their exposure to situational violence.²³² The composition of communities has a significant role in both the presence of violence and its escalation through exposure to violent events, the presence of violent role models and the encouragement of violent activity.²³³

Chief amongst the major structural factors are low socio-economic status and poverty with attendant high unemployment levels.²³⁴ These contribute to situations of social and cultural disorganisation like social isolation from legitimate labour sources and markets, which can in turn have a deleterious effect on attitudes toward furtherance of education by diminishing the relevance and perceived importance of completing secondary school, for example.²³⁵ Caution should be exercised, however, in forwarding the notion that socio-economic status in isolation necessarily predicts violent outcomes, because although violence within communities statistically escalates as socio-economic rank

²²⁸ Malcolm, above n 23, 27.

²²⁹ *Avoid the Harm Report*, above n 66, 39.

²³⁰ Australian Research Alliance For Children and Youth, *Violent and Anti-Social Behaviours Among Young Adolescents in Australian Communities*, above n 181, 41.

²³¹ *Avoid the Harm Report*, above n 66, 41.

²³² World Health Organization, *World Report on Violence and Health*, above n 1, 34.

²³³ Elliot, above n 20, 4.

²³⁴ *Avoid the Harm Report*, above n 66, 41.

²³⁵ Elliot, above n 20, 4.

diminishes, a more sophisticated analysis reveals that low socio-economic status communities traditionally experience higher numbers of risk factors than more affluent areas.²³⁶

Further, within such disorganised low socio-economic areas, gangs and other illegitimate activities typically proliferate,²³⁷ which in turn amplifies the communal feeling of exclusion and futility amongst members within.²³⁸ In spite of these observations, well-organised low socio-economic areas are capable of maintaining low rates of juvenile violence with the observation that violence being linked to low socio-economic status is more a product of community disorganisation than insufficient household income.²³⁹ The erosion of social capital and values through high population density and transience combined with poor social bonding to neighbourhood and community is further exacerbated by a culture of violence and the availability of drugs of addiction, weapons and the like in such communities, which impacts on the likelihood that juvenile violence will result.²⁴⁰

Societal issues such as rapid demographic change in juvenile numbers,²⁴¹ general population growth, the aging of populations, urban density and prolific migration, along with cultural changes such as increased acceptance of violence in sports and against minority ethnic groups and excessive exposure to ubiquitous media violence, can also encourage an acceptance of violence within society.²⁴² Chief amongst the protective community and societal factors that diminish the likelihood of juvenile violence occurring is the beneficial effect juveniles experience when they feel bonded²⁴³ to

²³⁶ *Avoid the Harm Report*, above n 66, 41.

²³⁷ Elliot, above n 20, 4.

²³⁸ *Avoid the Harm Report*, above n 66, 41.

²³⁹ Elliot, above n 20, 4.

²⁴⁰ *Avoid the Harm Report*, above n 66, 41–42.

²⁴¹ World Health Organization, *Youth Violence and Alcohol Fact Sheet*, above n 15, 3.

²⁴² *Avoid the Harm Report*, above n 66, 45.

²⁴³ Blumstein, above n 161, 15.

positive communities where participation is encouraged,²⁴⁴ in addition to the availability of appropriate areas and facilities where socialisation can occur.²⁴⁵

The influence of peers on the development and maintenance of violent juvenile behaviour cannot be underestimated, as the influence of contemporaries on juveniles during adolescence assumes greater prominence whilst parental influence declines during this developmental phase.²⁴⁶ Association with delinquent and problem contemporaries has been positively linked to episodes of violence by juveniles²⁴⁷ as juveniles who feel alienated by society and are non-receptive to rules and social norms often display kinship with likeminded juveniles.²⁴⁸ Juveniles who normally exhibit an overt rebellious stance toward society²⁴⁹ exhibit low impulse control,²⁵⁰ generally condone acts of violence, alcohol and drug use²⁵¹ and tend to be habitually uninterested in striving and maintaining success or responsibility.²⁵² Alcohol use in particular is closely correlated with peer influence.

Significantly, the effect of alcohol consumption on juveniles is more profound compared with adults in the area of behaviour and brain function, which is of particular concern given the biological changes that occur during the adolescent period.²⁵³ Further, instances of violent and antisocial behaviour rapidly accelerate with alcohol consumption with the suggestion that juveniles who consume alcohol are five times more likely to participate in violent activity than those who refrain.²⁵⁴ Research by the

²⁴⁴ Australian Research Alliance For Children and Youth, *Violent and Anti-Social Behaviours Among Young Adolescents in Australian Communities*, above n 181, 43.

²⁴⁵ *Avoid the Harm Report*, above n 66, 45.

²⁴⁶ *Ibid* 41.

²⁴⁷ World Health Organization, *World Report on Violence and Health*, above n 1, 34.

²⁴⁸ Hawkins, above n 212.

²⁴⁹ Australian Research Alliance For Children and Youth, *Violent and Anti-Social Behaviours Among Young Adolescents in Australian Communities*, above n 181, 42.

²⁵⁰ Hawkins, above n 212.

²⁵¹ Australian Research Alliance For Children and Youth, *Violent and Anti-Social Behaviours Among Young Adolescents in Australian Communities*, above n 181, 42.

²⁵² *Ibid*.

²⁵³ Australian Research Alliance For Children and Youth, *Preventing Youth Violence Project*, above n 169, 2.

²⁵⁴ Australian Research Alliance For Children and Youth, *Violent and Anti-Social Behaviours Among Young Adolescents in Australian Communities*, above n 181.

World Health Organization also indicates that juvenile females are increasingly vulnerable to alcohol-fuelled violence.²⁵⁵

2.6.6 The Impact of Binge Drinking

Binge drinking is a particularly alarming development in the contemporary juvenile drinking culture.²⁵⁶ The availability of premixed drinks and preloading—drinking heavily prior to attending licensed premises where further alcohol is consumed—is a major factor in escalating juvenile violence.²⁵⁷ The transition from adolescence to young adulthood represents a critical period for juveniles as binge drinking and other alcohol related issues typically are more prominent during this period of the lifetime than any other.²⁵⁸ The very topic of alcohol is inextricably linked with Australian tradition and immersed within popular culture and the national identity, hence the dilemma in reducing alcohol consumption, not only by juveniles but also the public at large.²⁵⁹ The rapid escalation in consumption of illicit drugs such as amphetamines has also contributed to increased alcohol-fuelled violent behaviour by juveniles as a result of the increased energy and frenetic restlessness that is a by-product of the drug, combined with the decreased cognitive ability and reduced inhibition provided by alcohol.²⁶⁰

Hawkins suggests that peer influence clearly has a significant effect on the amplification of these opportunities for violent confrontation,²⁶¹ and also contributes to the elevation of levels of machismo-bravado.²⁶² The increased levels of peer engagement during this period of heightened personal freedom can also contribute to greater opportunity for excessive alcohol use.²⁶³ The sizable influence of peers comes as no surprise since pressure from contemporaries can be difficult to endure, particularly in circumstances

²⁵⁵ World Health Organization, *Youth Violence and Alcohol Fact Sheet*, above n 15, 3.

²⁵⁶ Australian Research Alliance For Children and Youth 2010, *Preventing Youth Violence Project*, above n 169, 2.

²⁵⁷ *Avoid the Harm Report*, above n 66, 48.

²⁵⁸ J Schulenberg et al, 'Getting Drunk and Growing Up: Trajectories of Frequent Binge Drinking During the Transition to Young Adulthood' (1996) 57(3) *Journal of Studies on Alcohol* 289, 290.

²⁵⁹ *Avoid the Harm Report*, above n 66, 48–49.

²⁶⁰ *Ibid*, 51.

²⁶¹ Hawkins, above n 212.

²⁶² *Avoid the Harm Report*, above n 66, 40.

²⁶³ Schulenberg et al, above n 258.

where the juvenile is actively seeking friendship and acceptance. More to the point, this kind of influence can result in the impressionable juvenile becoming both a perpetrator and victim simultaneously.²⁶⁴

The preceding background discussion has sought to encapsulate both the nature of juvenile violence and the manifold factors that can contribute to its manifestation. School-related factors also have a part to play in the development and growth of juvenile violence. In the next section, the notion of school-based juvenile violence will be discussed including the problematic definitional elements of school violence.

2.7 Defining School Violence

2.7.1 Introduction

From nascent classrooms of the Ancient World to modern day equivalents, schools have, as observed by Bailey, remained a societal crucible where elements of human interaction and new communal trends frequently evolve.²⁶⁵ It is therefore no coincidence that violence which is seemingly so visible in modern society is frequently perpetrated in schools and educational institutions,²⁶⁶ with much of what occurs within schools repeated within societies. As a corollary, some argue that the school institution is in fact the nucleus of this communal violence, contending, for example, that geographical areas adjacent to inner city schools are more violent than comparable areas not in the near vicinity of schools.²⁶⁷ A supposition that school violence and community juvenile violence are indelibly linked often follows such an assessment.²⁶⁸

Given the close relationship between school and community juvenile violence it would however be disingenuous to discount school violence and the attendant implications for the wider community. As Futrell notes, the school student of today becomes a member of the adult population of tomorrow, and in turn helps to shape future civil, economic

²⁶⁴ *Avoid the Harm Report*, above n 66, 40–41.

²⁶⁵ K A Bailey, 'Legal Knowledge Related to School Violence and School Safety' in S R Jimerson and M J Furlong (eds) *Handbook of School Violence and School Safety, From Research to Practice* (Lawrence Erlbaum Associates, 2006) 31.

²⁶⁶ *Ibid.*

²⁶⁷ J P Jones, *School Violence* (Lucent Books, 2001) 15.

²⁶⁸ *Ibid.*

and political rights.²⁶⁹ As a consequence, schools can usefully be considered a reflection of the society in which children and young people are placed such that school violence often reflects violence within the wider community in which the school is located.²⁷⁰

2.7.2 School Violence as a Contemporary Societal Concern

With this in mind, the fact that school-aged juveniles on average spend almost half their waking hours within school cultures that are pivotal to their development further reinforces the critical role played by schools in society. This is particularly apparent in relation to student aggression and antisocial behaviour.²⁷¹ In response, schools must address both violence and school safety within the environs of the legal procedures and institutions that provide the bedrock to society, compelling teachers, administrators and other stakeholders to make important legal decisions that impact upon many.²⁷²

Predictably, school violence is a multifaceted issue that spans the extensive divide between minor verbal altercations and unlawful killing. A global phenomenon affecting one of the most important societal core institutions in practically all nation states to some degree, school violence is clearly an area which warrants serious attention from policymakers.²⁷³ At least in Western societies, argue Hyman and Perone, school violence is hardly a new development. Historians and interested observers have tracked the nature of student disruption and hurtful behaviour over several centuries in analyses of European and American education, with a major focus evident from the 1970s onward²⁷⁴ when rates of school violence began to accelerate. Yet only three decades earlier in the late 1940s in the United States, for example, episodes of interpersonal violence or property destruction in schools were near invisible, with, quaintly, student

²⁶⁹ M H Futrell, 'Violence in the Classroom: A Teacher's Perspective' in A M Hoffman (ed) *Schools, Violence and Society* (Praeger, 1996) 17.

²⁷⁰ Gorski and Pilotto, above n 105, 38.

²⁷¹ K A Brookmeyer, K A Fanti and C C Henrich, 'Schools, Parents and Youth Violence: A Multilevel, Ecological Analysis' (2006) 35(4) *Journal of Clinical Child and Adolescent Psychology* 505.

²⁷² Bailey, above n 265.

²⁷³ M Akiba et al, 'Student Victimization: National and School Systems Effects on School Violence in 37 Nations' (2002) 39 *American Educational Research Journal* 830.

²⁷⁴ Hyman and Perone, above n 106, 7.

lying and disrespect of most concern to high school principals along with impertinence and running in school halls.²⁷⁵

Contemporary school violence including the use of automatic weapons in multiple fatality shootings²⁷⁶ in the United States for example highlights the triviality of the school violence concerns in the middle of last century.²⁷⁷ In light of these and other incidents, school violence continues to be of concern to students, school staff, media and clearly the public in general in contemporary society. In some locations, school violence is of more paramount concern than academic achievement, which is traditionally the most pressing concern in education agendas. This is leading to diminished popular support of public education, particularly in circumstances where schools and school authorities are inadequate in their response to the problem.²⁷⁸

2.7.3 Conceptual Analysis of School Violence

Conceptually, school violence would logically include disrespect toward fellow students and academic and administration staff, theft, verbal and physical assault, sexual offences, bullying,²⁷⁹ robbery²⁸⁰ and an ensemble of antisocial behaviour in school settings that extend from oppositionality to assaults.²⁸¹ Given its elevation to popular use, the phrase 'school violence' has predictably become an umbrella expression lacking clear definition.²⁸² Its meaning has changed throughout history and from study to study, further exacerbated by the examination and measurement of different forms of violence

²⁷⁵ B Warner, M D Weist and A Krulak, 'Risk Factors For School Violence' (1999) 34(1) *Urban Education* 54.

²⁷⁶ See, eg, below n 339 for a discussion on fatal school shootings in the United States, Europe etc.

²⁷⁷ Warner, Weist and Krulak, above n 275, 56.

²⁷⁸ P Noguera, 'Preventing and Producing Violence: A Critical Analysis of Responses to School Violence' (1995) 65(2) *Harvard Educational Review* 189.

²⁷⁹ It is not within the scope of this study to examine the bullying issue. For comprehensive studies in this area see, eg, K Rigby, *New Perspectives on Bullying* (Jessica Kingsley Publishers, 2002); K Rigby, 'Addressing Bullying in Schools: Theoretical Perspectives and Their Implications' (2004) (25)3 *School Psychology International* 287–300.

²⁸⁰ Akiba et al, above n 273, 836.

²⁸¹ J A Baker, 'Are We Missing the Forest For The Tress? Considering The Social Context of School Violence' (1998) 36(1) *Journal of School Psychology* 29.

²⁸² M Furlong and G Morrison, 'The School in School Violence' (2000) (8)2 *Journal of Emotional and Behavioural Disorders* 73.

including the conflation of school and community violence, making the isolation of school-based hostility problematic.²⁸³

As a corollary, the use of the phrase ‘school violence’ is at best fluid, yet is unlikely to be usurped by another descriptor, at least in the short term.²⁸⁴ This in some way justifies the lack of precision in the definition because discrepancies in the expression of deviance or violence in individual cultures make it difficult to isolate a single group of behaviours for assessing school violence.²⁸⁵ Moreover, the political rhetoric that schools are essentially dangerous places that are less than successful in educating today’s youth adds little to the contemporary debate, while further compromising the astute exposition of the phrase school violence, and more to the point, its connotation.²⁸⁶

Nonetheless, the strategic importance of the phrase should not be underestimated as the expression reflects the important and visible societal concerns regarding both juvenile violence and its influence on the education process.²⁸⁷ The expression can also be considered to have some usefulness as a policy term because it also mirrors societal values that schools should be fundamental places of refuge and nurturance for juveniles, and any attack on that institution undermines core social systems.²⁸⁸ As a result, argue Furlong and Morrison,²⁸⁹ school violence is unlikely to be replaced with another inclusive term, at least in the short term. Insofar as teachers are concerned, research into perceptions of school violence has suggested that it occurs whenever a person such as a student, staff member or parent feels unsafe in either a physical or emotional manner, or whenever there is a lack of respect for other persons, property or feelings.²⁹⁰

²⁸³ Warner, Weist and Krulak, above n 275, 55.

²⁸⁴ Furlong and Morrison, above n 282.

²⁸⁵ Akiba et al, above n 273, 836.

²⁸⁶ Furlong and Morrison, above n 282.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ S C Bon, S C Faircloth and G K Le Tendre, ‘The School Violence Dilemma. Protecting the Rights of Students With Disabilities While Maintaining Teachers Sense of Safety’ (2006) (17)3 *Schools Journal of Disability Policy Studies* 152.

Simplistic views of school violence are not without value, such as those defining violence in school settings as involving the use of some kind of force against another, resulting in harm of some kind. However, they are of limited use in examinations of school violence. The domination of individuals by institutions or agencies in a structural sense, such as those which impinge on human rights, is not necessarily covered effectively by this definition.²⁹¹ An example of this category of school violence would include instances where student creativity and educational processes are restricted as a result of school organisation processes.²⁹² Also overlooked in unsophisticated labels of school violence is the concept of violence as a social process, such as circumstances of institutionalised sexism, discrimination or racism²⁹³ in schools, including discriminatory labelling.

Obvious examples of this form of school violence would include the harm experienced by female students where male students are unnecessarily advantaged in classrooms at their expense. Race or ethnic school violence can occur in circumstances where students are unduly grouped or otherwise dealt with according to preconceived stereotypes.²⁹⁴ Another infrequently acknowledged category of school violence is the victimisation of students at the hands of school staff, typically administered under the guise of school discipline. This includes the intrusive and frequently abusive law enforcement type procedures including strip searches employed in many schools in the United States, which are often a contributing factor to student aggression and alienation.²⁹⁵

Symbolic violence that results from domination, including coercion exercised through hierarchical relationships, is not adequately covered by this designation.²⁹⁶ This type of school violence would include what could be labelled hidden crimes that impinge upon human rights, such as acts carried out by teachers upon students or perhaps educational administrators on teachers and students. For example, this situation could arise when a

²⁹¹ S Henry, 'What is School Violence? An Integrated Definition' (2000) 567(16) *The Annals of the American Academy of Political and Social Science* 18.

²⁹² Ibid.

²⁹³ Furlong and Morrison, above n 282, 75.

²⁹⁴ Henry, above n 291, 18–19.

²⁹⁵ Hyman and Perone, above n 106, 7.

²⁹⁶ Henry, above n 291, 17–18.

school organisation stifles or ignores teacher and student creativity.²⁹⁷ The harmful effects of this type of school violence cannot be underestimated, despite the lack of physical damage suffered, as a person with more limited power and means has been harmed in some way.²⁹⁸ Not unexpectedly, contemporary acts of severe school violence including multiple fatality shooting attacks²⁹⁹ have resulted in the phrase ‘targeted school violence’ gaining currency.

In this category of school violence, a known or at least knowable attacker or attackers select a target or targets prior to the carrying out of the attack. This might include instances of extreme violence against individual school students or groups, specific school staff members or perhaps school buildings and infrastructure through arson, for example.³⁰⁰ Deliberate selection of the school as the site of the offence is a characteristic of this form of school violence, which typically involves former or current students as perpetrators who often favour potentially lethal weaponry to carry out offences. Weapons are not restricted to firearms but can include blade weapons, while the use of explosives is also not unknown in these incidents.³⁰¹

2.7.4 Effectual School Violence Typology

A more scholarly approach to school violence typology would incorporate violent acts perpetrated on and between stakeholders such as students, teachers, parents, administrators, communities, school boards and districts, and state and governmental agencies. The acts would include educational and juvenile justice policies and political decisions, the wider media and popular culture, harmful social processes and practices and corporate exploitation.³⁰² In any discussion on school violence it is important to recognise that schools are physical domains where violence originating in communities can be perpetrated (including circumstances where students or perhaps intruders bring violence onto school campuses), in addition to being systems that create or exacerbate

²⁹⁷ Ibid 18.

²⁹⁸ Sercombe, above n 195, 28.

²⁹⁹ See, eg, below n 339 for a discussion on fatal school shootings in the United States, Europe etc.

³⁰⁰ R Bondu and H Scheithauer, ‘Explaining the Preventing School Shootings: Chances and Difficulties of Control’ in W Heitmeyer et al (eds) *Control of Violence* (Springer, 2011) 296.

³⁰¹ Ibid.

³⁰² Henry, above n 291, 25–26.

the difficulties experienced by those within, including situations where relationships developed within schools break down, leading to school campus violence.³⁰³ Unsavoury examples of this category would include situations where school students who have been rejected by fellow students commit retaliatory acts of violence on school campuses.³⁰⁴ Social constructs and arrangements like relationships between school students can also be recognised and influenced by educators.³⁰⁵

Clearly, to confine an understanding of school violence to the spatial geographical areas of a school campus or school bus, for example, ignores the important interconnectedness between schools and the wider society in which they exist and function, as a school is one of a number of forums where systemic societal conflict can occur.³⁰⁶ This more sophisticated understanding of the concept of school setting, suggests Henry,³⁰⁷ also reinforces the notion that violence habitually pervades social and geographic space. Moreover, by adopting a definition grounded in ‘school related violence’ rather than ‘violence that occurs in schools’, a more appropriate understanding of violence and schools as physical, social and educational constructs for those within can be made and understood.³⁰⁸

A more learned definition of school violence would therefore encompass an ‘excessive exercise of power by an individual, agency or social process in a school related setting’.³⁰⁹ This excess of power effectively denies those affected by it opportunities or limits them from achieving their potential.³¹⁰ This will be the approach taken in this thesis toward the concept of school violence rather than a more limited view constrained by a single definition. It is also worth noting that despite a plethora of violence

³⁰³ Furlong and Morrison, above n 282, 73–74.

³⁰⁴ An example of this type of school violence occurred in Australia during November 1991 at Churchlands Senior High School in Perth, Western Australia, where a 15-year-old student stabbed his former girlfriend and classmate Vicki Groves 18 times in front of horrified classmates, resulting in her death. See *Violence in Our Schools: August 1, 1991 Through July 31, 1992* (2008) Angels of Columbine <www.columbine-angels.com/School_Violence_1991-1992.htm>.

³⁰⁵ Furlong and Morrison, above n 282, 74.

³⁰⁶ Ibid 73.

³⁰⁷ Henry, above n 291, 21.

³⁰⁸ Furlong and Morrison, above n 282, 74.

³⁰⁹ Henry, above n 291, 21.

³¹⁰ Ibid.

typologies such as those discussed above, more simple assaults committed without the aid of weaponry that result in minor injuries only are by far the main source of school violence incidents.³¹¹ It should also be accepted that it is folly to expect that schools would ever have immunity from societal violence.³¹²

2.8 Causal Factors Associated With School Violence

2.8.1 Introduction

Whilst aggressive and violent juvenile behaviour at home or within communities³¹³ logically can carry over into the school environment, the education process itself generates much potential for conflict and violence.³¹⁴ In turn, this can be exacerbated on occasion by ineffectiveness on the part of administrators, excessively punitive school rules and disciplinary procedures, unproductive or scant counselling and pastoral services, irrelevance in school curricula and intolerant or prejudiced staff, particularly for minority students who often experience a disproportionate frequency of negative labelling, suspension and exclusion.³¹⁵ Academic underachievement or failure and diminished engagement³¹⁶ are often catalysts for violence and aggression by school students, with the experience of failure crucial in generating incidents of school violence rather than a lack of ability or understanding.³¹⁷ Student underachievement or failure should not be underestimated as an influential factor because academically and socially unsuccessful students are more predisposed to low levels of self-esteem, limited coping skills and limited frustration tolerance, which are characteristics that, combined with inattentiveness, impulsivity and aggressive inclinations can often manifest in the commission of violent acts in the school environment.³¹⁸

³¹¹ R Alexander and C M Curtis, 'A Critical Review of Strategies to Reduce School Violence' (1995) 17(2) *Social Work in Education* 74.

³¹² Noguera, above n 278.

³¹³ See 2.6 above for a discussion on causal/risk factors more generally associated with juvenile violence.

³¹⁴ Elliot, above n 20, 5.

³¹⁵ Gorski and Pilotto, above n 105, 44.

³¹⁶ *Avoid the Harm Report*, above n 66, 44.

³¹⁷ Blumstein, above n 161, 13.

³¹⁸ Warner, Weist and Krulak, above n 275, 60.

2.8.2 Impact of Teaching Staff

The impact of school teachers in this sense should be acknowledged, as blame can often be directed toward teaching staff who envelop themselves in teacher-centric classroom environments, thus restricting responsible growth in students and generating environments designed more for teacher convenience than the fostering and nurturing of individual student expression and learning maximisation.³¹⁹ The alternative is a school environment that actually promotes teaching and learning without over-encouraging individual competition amongst the student cohort, which is a factor known to heighten student aggression.³²⁰

Additionally, the capacity of teachers to manage risk and classroom disruption is a factor to consider in the school violence dilemma. This includes consideration of deficient crisis intervention skills and training, particularly when comparing classroom disruption rates among teaching staff members. That is, compromised delivery by teaching staff, often combined with unnecessary labelling and tracking of students, tends to lead to self-fulfilling prophecies in addition to deficient classroom management techniques.³²¹

An example of this deficient behaviour with respect to the delivery of classroom disciplinary regimes concerns the punitive nature of some measures employed by teachers, who are often repeating their own retributive school and familial disciplinary experiences. This is in addition to stereotypical attitudes and predispositions toward gender behaviour in the classroom environment such that teacher attitudes toward female students, for example, can have a deleterious impact on their motivation, self-esteem and career aspirations.³²² A philosophy of discipline in school management that habitually upholds clarity and consistency in practice and procedure is preferable, with consistent rules enforced in a firm yet not punitive manner. This will go some way towards lessening school violence rather than arbitrariness or excessively harsh,

³¹⁹ Gorski and Pilotto, above n 105, 43.

³²⁰ Warner, Weist and Krulak, above n 275, 61.

³²¹ Gorski and Pilotto, above n 105, 43.

³²² Alexander and Curtis, above n 311, 79.

restrictive rule application often seen in concert with a lack of classroom structure.³²³ Further, Warner, Weist and Krulak state that poorly supervised or unsupervised students in unstructured environments with minimal engagement are more inclined to display aggressive tendencies.³²⁴

2.8.3 Familial Disengagement, Connectedness and Peer Influences

Student behavioural and disciplinary issues that are a consequence of difficult familial environments, including the breakdown of family structure and dynamics due to marriage dissolution and combative family environments, along with excessively permissive or deficient parenting skills, have also been associated with academic underachievement.³²⁵ In such circumstances, juveniles who often dislike attending school and consequently spend inadequate time focussed on their schoolwork are at greater risk of developing an inclination toward violent and aggressive behaviour.³²⁶ This type of disengagement and aggressive behaviour habitually leads to suspension and expulsion, which can on occasion be interpreted as rewarding by the violent juvenile, encouraging a cycle of substandard behaviour and school exclusion.³²⁷ Ability tracking also can contribute to this cycle as schools routinely group the academically challenged with the aggressive and poorly behaved. This can exacerbate the problem by encouraging the influence of the aggressors within the school environment.³²⁸

Conversely, a form of protection that discourages violent and aggressive juvenile behaviour occurs where students are provided with the opportunity and encouragement to actively contribute to the education process. This engenders commitment and bonding to the school process,³²⁹ whilst instructional content that focusses on school violence reduction, skill building and coping skills can also be beneficial.³³⁰

³²³ Warner, Weist and Krulak, above n 275, 62.

³²⁴ Ibid 58.

³²⁵ Gorski and Pilotto, above n 105, 42.

³²⁶ Australian Research Alliance For Children and Youth, *Violent and Anti-Social Behaviours Among Young Adolescents in Australian Communities*, above n 181, 42.

³²⁷ *Avoid the Harm Report*, above n 66, 44.

³²⁸ Elliot, above n 20, 5.

³²⁹ Australian Research Alliance For Children and Youth, *Violent and Anti-Social Behaviours Among Young Adolescents in Australian Communities*, above n 181, 43.

³³⁰ Warner, Weist and Krulak, above n 275, 62.

Connectedness, empathy and a climate of respect between students, teachers and schools themselves can also contribute to the lessening of school violence and can be augmented by equality in resource allocation and treatment irrespective of socio-economic status, race, gender and other variables.³³¹ A lack of connectedness can manifest in student alienation which can also contribute to school violence tendencies by disaffected students, as can lack of knowledge of school structures and wider environments.³³² This includes school organisational features that create challenges for at-risk students such as an excessively task-driven curriculum which by necessity requires students to display adequate self-management skills, such as impulse control, gratification delay and the ability to moderate activity levels.³³³ Preferable curricula are those that interest students and are culturally relevant, presented by teaching staff who are enthused and engaged and are conversant with disruptive discipline management techniques.³³⁴

School peer group association remains a factor of significance in the establishment and maintenance of school violence. Antisocial conduct is often learnt and nurtured through peer groups and is often a particularly robust influence when school and familial bonding is weak or compromised because delinquent and antisocial behaviour is typically modelled on peers who can provide reinforcement through approval and the anticipation of financial and non-financial rewards.³³⁵ Impacted by socio-economic and social contexts, peer group association endures as a significant factor in school violence, particularly as violent male students, for example, are routinely able to elicit respect from a number of peers whilst concurrently being disliked by others. This reflects a theoretical social science understanding of subculture delinquency and oppositional behaviour, because violence rather than academic success can actually be a status resource as a mechanism to earn respect and establish masculinity, in addition to meeting peer expectations among some juvenile males.³³⁶

³³¹ Ibid 63.

³³² Ibid.

³³³ Baker, above n 281, 34.

³³⁴ Warner, Weist and Krulak, above n 275, 65.

³³⁵ Gorski and Pilotto, above n 105, 43.

³³⁶ J Staff and D A Kreager, 'Too Cool for School? Violence, Peer Status and High School Dropout' (2008) 87(1) *Social Forces* 445.

2.8.4 Wider Community and Societal Influences

It could also be argued, however, that school violence tends to mirror wider community and society influences, including those of community members, churches and religious institutions, law enforcement and schools themselves. That is, low level school violence and behavioural issues are often experienced in communities in which robust morals and values are shared between these individuals and institutions, yet conversely elevated levels of school violence are often experienced in locations with a prevalent environment of antagonistic and distrustful relations combined with conflict and confusion.³³⁷ The nature of school violence in the Australian jurisdiction will now be discussed.

2.9 School Violence in the Australian Jurisdiction

2.9.1 Introduction

Spared the atrocities of multiple fatality school campus shooting episodes³³⁸ experienced overseas,³³⁹ school violence within Australia³⁴⁰ nonetheless remains of genuine and escalating concern. Unfortunately, fatalities have occurred at Australian

³³⁷ Gorski and Pilotto, above n 105, 48.

³³⁸ M Cameron, 'Young Men and Violence Prevention' (Trends & Issues in Crime and Criminal Justice No 154, Australian Institute of Criminology, June 2000) 2

<<http://aic.gov.au/documents/5/7/0/%7B570424D2-8FCC-4E50-8D89-9A32209F7ED5%7Dti154.pdf>>.

³³⁹ Notably Columbine High School, Littleton, Colorado, USA in April 1999, where two students fired upon fellow students and staff resulting in the deaths of 13 students and staff members, and Red Lake Senior High School, Minnesota, USA in March 2005, where a student opened fire on the school campus resulting in the deaths of five students, a teacher and a security guard. In Europe, prominent school shootings include Erfurt, Germany in April 2002, where an expelled former student shot and killed 13 faculty members, two students and a police officer. A similar incident occurred at the Albertville-Realschule situated in Winnenden, Germany in March 2009, where a former student shot and killed nine students, whilst in Jokela High School in Finland in November 2007, eight students were shot and killed by a student. More recently, a particularly unsavoury incident occurred at the Sandy Hook Elementary School in Newtown, Connecticut, USA in December 2012, where lone gunman Adam Lanza shot and killed 20 school children and six staff members with high velocity automatic weapons before turning the gun on himself. Prior to the school shooting, Lanza had shot and killed his mother at the family home in Newtown. This event sparked almost unprecedented debate over both gun control and the right to bear and keep arms or otherwise as guaranteed by the *United States Constitution*.

³⁴⁰ There have, however, been university shooting deaths within the Australian jurisdiction, most notably at the Monash University Campus in Clayton, Melbourne in October 2002, where Huan Yun Xiang opened fire in a classroom, killing two classmates and injuring five others. During 1999, a shooting occurred at the La Trobe University Bundoora campus in Melbourne leaving one dead and another person seriously injured.

schools over the last decade,³⁴¹ which has led to an increased focus on the question of school violence within Australia. Whilst the topic of school violence continues to raise concern amongst commentators and the public alike, Squelch and Wimbridge note that Australian schools are still comparatively safe places for students and staff compared to other jurisdictions, notably the United States and South Africa, and are generally free of fatal violent acts,³⁴² notwithstanding the limited number of school campus deaths experienced in Australia to date.

Equally, Australian schools are not immune from crimes that include acts of violence, such as assault, harassment and bullying, graffiti, theft, vandalism and criminal damage, including arson. Amongst other safety and disciplinary issues, these remain a high priority for administrators and teaching staff alike.³⁴³ It would be naive to expect schools, which function as complex social institutions, to be immune from acts of violence given the prevailing school landscape, which celebrates competition and achievement by the individual often at the expense of cooperation.³⁴⁴ Schools that are predominantly safe, effective and controlled are far from accidental and are typically the result of considerable effort expended in the establishment and maintenance of safe school cultures.³⁴⁵

³⁴¹ In February 2010, a 12-year-old school boy was fatally stabbed at a Queensland Catholic school by a 13-year-old fellow student, whilst Jai Morcom was fatally injured during a fracas at morning recess at the Mullumbimby High School in Northern New South Wales in August 2009. Police are unlikely to lay charges for the latter following an open ruling by the Coroner. See 'Jai Morcom Inquest Inconclusive', *The Northern Star* (online), 11 February 2011 <<http://www.northernstar.com.au/news/inquest-inconclusive-death-jai-morcom/767235/>>.

³⁴² J Squelch and G Wimbridge, 'Legal Challenges for School Administrators and Governors When School Playgrounds Become Battlegrounds' (2010) u/p 2.

³⁴³ J Squelch and A Squelch, 'Webcams in Schools: A Privacy Menace or a Useful Monitoring Tool' (Paper presented at the Australia and New Zealand Education Law Association Annual Conference, Fremantle, Western Australia September 28–30 2005) 236.

³⁴⁴ Gorski and Pilotto, above n 105, 44.

³⁴⁵ G Sugai, J R Sprague, R H Horner and H M Walker, 'Preventing School Violence: The Use of Office Discipline Referrals to Assess and Monitor School-Wide Discipline Interventions' (2000) 8(2) *Journal of Emotional and Behavioural Disorders* 94.

2.9.2 Insufficiency of School Violence Data in Australia

The prevalence of school violence within Australia and any associated trends or developments is difficult to isolate and gauge³⁴⁶ as there is no reliable and readily available national data that focusses entirely on this issue.³⁴⁷ Many recorded juvenile school assaults, for example, are embedded in general juvenile crime and violence data which requires detailed unpacking. This is a recurring difficulty as evidenced by an early but important Commonwealth Parliament report on school violence in Australia,³⁴⁸ which aimed to inquire and report on the extent, nature and typology of school violence within Australia amongst other objectives, and made mention of the lack of useful data.³⁴⁹ The report also cautioned against the general supposition that Australian schools are dangerous places, which is more a corollary of enthusiastic local media reporting that has been overly influenced by graphic, multiple fatality overseas school violence episodes, particularly those experienced in the United States. This being the case and in the absence of reliable and quantifiable school violence data, it is in fact the media perception of increasing school violence that often influences public perception.³⁵⁰

On the contrary, the report suggested that, by and large, Australian schools are safe havens from the violence prevalent in the wider community and are coping reasonably well.³⁵¹ Anecdotal and media reports of school violence do, however, suggest an escalation in frequency in contemporary Australia.³⁵² Selected examples of media reports of school violence and data in Australian state and territory jurisdictions will now be provided.

³⁴⁶ Note that although there is limited reliable statistical information on the prevalence and severity of school violence in Australia, it is not the purpose or within the scope of this thesis to undertake such a study, although it may form the basis of future post-doctoral study.

³⁴⁷ Grunseit, Weatherburn and Donnelly, above n 6, 1.

³⁴⁸ House of Representatives Standing Committee on Employment Education and Training, Parliament of Australia, *Sticks and Stones: Report on Violence in Australian Schools* (1994).

³⁴⁹ *Ibid* 4.

³⁵⁰ *Ibid*.

³⁵¹ *Ibid* 4.

³⁵² Squelch and Winbridge, above n 342.

2.9.3 Australian Capital Territory

The ability or otherwise of court-based protection orders to safeguard students who have been victims of school violence has garnered controversy in the Australian Capital Territory, according to a 2012 media report.³⁵³ Over a four year period, a large number of protection orders were issued through the courts but were largely ineffectual as schools found the undertakings increasingly difficult to police. In particular, restricting contact between victims and respondents is almost impossible given the close proximity of the student cohort during the school day and the constant transit between classes and during lunch and recess, for example.³⁵⁴ The Education Minister made mention of the measures employed to combat school violence and bullying, including restorative practices³⁵⁵ and instruction of students on respectful conduct and capacity to interact. He conceded that protection orders were particularly difficult as only police could respond to violations.³⁵⁶

Similarly, there were large numbers of violent incidents between school-aged children in the Australian Capital Territory reported to police during 2007, and these were the topic of another media report which suggested that more than one third of incidents progressed to the bringing of charges, including a significant number for sexual assaults.³⁵⁷ This prompted a ministerial review and improvements to reporting regimes in schools.³⁵⁸ In 2012, a long standing bullying issue escalated into mob violence involving students and parents at a primary school in the Australian Capital Territory, prompting criticism of the education agency by parent groups along with the teachers union who argued that the matter was longstanding in nature and inadequately dealt with by the agency.³⁵⁹ As in other states and territories, the use of information technology including mobile phone technology to film and, perhaps most importantly, distribute

³⁵³ V Knaus, 'School Violence Orders Failing', *The Canberra Times* (online), 16 July 2012, <<http://www.canberratimes.com.au/act-news/school-violence-orders-failing-20120715-224m4.html>>.

³⁵⁴ Ibid.

³⁵⁵ The principles of restorative justice will be expanded upon in subsequent chapters of the thesis.

³⁵⁶ Knaus, above n 353.

³⁵⁷ 'Police Move on Schools Violence', *The Canberra Times* (Canberra), 24 May 2007.

³⁵⁸ 'Schools Forced to Report Violence', *The Canberra Times* (Canberra), 1 June 2007.

³⁵⁹ E Macdonald, 'Police Investigate School Incident in Bullying Row', *The Canberra Times* (online), 4 July 2012 <www.canberratimes.com.au/act-news/police-investigate-school-incident-in-bullying-row-20120703-21ft0.html>.

violent school incidents has become a concern in the Australian Capital Territory,³⁶⁰ as has the increasing use of weaponry by students in school-based episodes of violence.³⁶¹

2.9.4 New South Wales

According to a newspaper article in early 2011, school violence in New South Wales has spiked in the last five years.³⁶² The article reported on the types of assault and the various weapons used by school students, including firearms, knives, clubs and syringes, amongst other dangerous implements. The article also described an infamous YouTube video obtained from a student's mobile phone that had achieved cult status on the internet by portraying a sizeable but clearly passive school student continually being taunted and bullied, and eventually retaliating against the much smaller protagonist by violently throwing him to the ground.³⁶³ Graphic imagery along with broad, almost instantaneous dissemination of footage such as this further complicates the school violence issue as it often results in the encouragement and staging of conflicts in an effort to elevate the status of student offenders amongst peers, effectively mirroring similar technological abuse by adults.³⁶⁴

However, no such footage was recorded during the fatal schoolyard attack on Jai Morcom at Mullumbimby High School in northern New South Wales during 2009, following a school gang-related altercation during recess. This case garnered extensive media attention as the victim seemingly was not involved in the dispute but was set upon by the combatants and hit his head after falling to the ground, sustaining fatal injuries.³⁶⁵ Student suspensions in New South Wales following violent and disruptive

³⁶⁰ 'Defying The Schoolyard Bullies', *The Canberra Times* (Canberra), 2 June 2007.

³⁶¹ 'Court Told of Sword Kill Threat', *The Canberra Times* (Canberra), 22 July 2007.

³⁶² B Stack, 'Schools Powerless to Stop Violence', *The Daily Telegraph* (online), 20 March 2011 <<http://www.dailytelegraph.com.au/schools-powerless-to-stop-the-violence/story-fn6bm90q-1226024611274>>.

³⁶³ Ibid.

³⁶⁴ P Doneman, 'School Violence at Highest Ever Levels', *The Sunday Mail* (online), 13 September 2009 <<http://www.news.com.au/story/0,27574,26065932-421,00.html>>.

³⁶⁵ Labi S and L Ackroyd, 'Schoolboy Jai Morcom Beaten to Death During Recess', *Adelaidenow* (online), 29 August 2009 <<http://www.news.com.au/adelaidenow/story/0,,26001995-911,00.html>>. See also note 340 above.

behaviour also increased considerably during 2008, as did student exclusions for the bringing of weapons to schools.³⁶⁶

The use of weapons in New South Wales school assaults can be illustrated by two examples from 2010 concerning knife assaults. Firstly, an 11-year-old boy confronted a fellow pupil armed with a knife at a school in Sydney's west following an earlier altercation,³⁶⁷ while at a northwest high school in Sydney a 14-year-old student was arrested and charged after he had confronted a classmate with a kitchen knife following an earlier altercation, before assaulting two more students a short time later.³⁶⁸ The incident was defused when a teacher disarmed the culprit.³⁶⁹ Elsewhere in New South Wales, at a local high school in Batemans Bay on the south coast, a particularly unsavoury schoolyard attack occurred in which a 13-year-old boy was left with swelling on the brain as a result of an altercation. This resulted in each of the offenders being charged with non-fatal offences including assault occasioning grievous bodily harm of the student.³⁷⁰

At a Sydney school, a schoolteacher was also knocked to the ground and suffered serious head and facial injuries after being kicked repeatedly in the head by a 15-year-old student.³⁷¹ Although outside school premises, a schoolboy altercation involving two Sarah Redfern High School students ended in tragedy when the older student died as result of injuries sustained in the incident³⁷² whilst another assault outside a Wollongong

³⁶⁶ Squelch and Wimbridge, above n 342.

³⁶⁷ 'Schoolboy With Knife Confronts Pupil', *Sydney Morning Herald* (online), 16 February 2010 <<http://news.smh.com.au/breaking-news-national/schoolboy-with-knife-confronts-pupil-20100216-o8r1.html>>.

³⁶⁸ 'Teased Boy Held Knife to Classmate's Neck', *The Daily Telegraph* (online), 10 March 2010 <<http://www.dailytelegraph.com.au/news/national/teased-boy-held-knife-to-classmates-neck/story-e6freuzr-1225838921718?nk=ffcfeda0562f5d13c200e79cd976f30e>>.

³⁶⁹ 'Schoolboy with Knife Confronts Pupil', above n 367.

³⁷⁰ 'Two Boys Charged Over Schoolyard Bashing', *News.com.au* (online), 9 September 2010 <<http://www.news.com.au/breaking-news/two-boys-charged-over-schoolyard-bashing/story-e6frku0-1225916440500>>.

³⁷¹ C Cuneo and M Morri, 'Teacher Kicked in The Head by Student', *The Daily Telegraph* (online), 22 May 2012 <<http://www.dailytelegraph.com.au/news/national/teacher-kicked-in-the-head-by-student-in-mortdale/story-e6freuzr-1226363537545>>.

³⁷² 'Bashing Death of Sarah Redfern High School Student Shocks Community', *News.com.au* (online), 24 November 2011 <<http://www.news.com.au/national/bashing-death-of-sarah-redfern-high-school-student-shocks-minto-community/story-e6frkvr-1226204886060>>.

school in New South Wales perpetrated by two adults and a 13-year-old school girl left a 13-year-old girl unconscious and injured.³⁷³ All of the perpetrators were charged with the offence.

2.9.5 *Queensland*

School violence in both government and private schools in Queensland was claimed to be at record levels according to a news report in late 2009.³⁷⁴ The article made particular mention of hefty increases in schoolyard assaults at high schools, in addition to a worrying escalation in assaults committed by primary school students. Further, the Deputy Commissioner of Police highlighted the worrying use of technology, such as mobile phone text and video capabilities, to incite, record and upload images and footage to internet sites like YouTube and Facebook. Moreover, the Queensland Teacher's Union president commented that the increase in school violence simply reflected the escalating violence in contemporary society.³⁷⁵

Troubling examples of the emerging impact of social and other media on school violence can be seen in a series of school violence incidents in Queensland. In 2009, a 16-year-old schoolgirl assaulted a 15-year-old classmate on Queensland's Gold Coast, leaving the victim hospitalised which resulted in the offender, who had raised the mitigating factor of retaliation following a long campaign of cyberbullying by the victim, being incarcerated for a short time.³⁷⁶ The magistrate ordered the perpetrator to attend counselling sessions and made mention of several similar attacks that had been recorded on mobile phones by fellow students and disseminated through internet sites in the same fashion.³⁷⁷ Online footage of the incident was especially distasteful according to the magistrate, particularly in its graphic nature.³⁷⁸

³⁷³ 'Three Arrested After NSW School Bashing', *News.com.au* (online), 22 February 2012 <<http://www.news.com.au/national/three-arrested-after-nsw-school-bashing/story-e6frkvr-1226278197319>>.

³⁷⁴ Doneman, above n 364.

³⁷⁵ *Ibid.*

³⁷⁶ J Pierce, 'Schoolyard MySpace Bashing Girl Jailed', *News.com.au* (online) 9 September 2009, <<http://www.news.com.au/story/0,,26047889-421,00.html>>.

³⁷⁷ *Ibid.*

³⁷⁸ 'Schoolgirls Caught Fighting on Film', *The Daily Telegraph* (online), 7 May 2009 <<http://www.dailytelegraph.com.au/schoolgirls-caught-fighting-on-film/story-e6freuy9-1225710344909>>.

Earlier in the year at the same school, a year 12 schoolboy was knocked unconscious by a younger student during a fight on school grounds. This prompted the victim to complete his final school year elsewhere as he felt unsafe in the school environment.³⁷⁹ Another particularly unfortunate incident occurred in Townsville during 2010 where an eight-year-old schoolboy suffered life threatening injuries as a result of trying to evade a school bully by running from a school bus, only to collide with another vehicle.³⁸⁰ It transpired that the schoolboy had been subjected to prolonged bullying by other schoolboys who also travelled by school bus to and from the Bohlevale State School.³⁸¹

Elsewhere in Queensland, an article outlined a growing knife culture amongst school students,³⁸² highlighting a particularly unsavoury aspect of school violence in which school children as young as five were arriving at school brandishing knives in order to big note themselves, threaten classmates or as a form of protection. There was even a report of a young male kindergarten student threatening a female classmate with a knife in order to secure a food bar.³⁸³ Again in Queensland, an incident occurred at the Ipswich State High School whereby female gang members invaded the school and terrorised students with knives and chains, culminating in school personnel initiating a lock down as a precaution.³⁸⁴ More worrying, however, was the fatal stabbing of a 12-year-old boy by a 13-year-old fellow student at Queensland's St Patrick College, Shorncliffe,³⁸⁵ prompting the school to initiate an emergency lockdown.³⁸⁶

³⁷⁹ 'Fight Victim in Fear of School', *goldcoast.com.au* (online), 14 May 2009 <http://www.goldcoast.com.au/article/2009/05/14/78685_print_friendly.html>.

³⁸⁰ 'Blair Retallick, 8, Hit by Car in Townsville While Fleeing Bully', *News.com.au* (online), 3 March 2010 <<http://www.news.com.au/national/blair-retallick-8-hit-by-car-in-townsville-while-fleeing-bully/story-e6frfkvr-1225836331421>>.

³⁸¹ *Ibid.*

³⁸² See also McDougall B, 'Knives Rule in School Fights', *The Daily Telegraph* (online), 26 November 2010 <<http://www.dailytelegraph.com.au/news/nsw/knives-rule-in-school-kids-fights/story-e6freuzi-1225961149553>>.

³⁸³ *Ibid.*

³⁸⁴ 'Knife Gang Rampage at City School', *Ipswich Queensland Times* (online), 3 September 2009 <<http://www.qt.com.au/news/knife-gang-rampage-ipswich-high/311126/>>.

³⁸⁵ 'Boy, 12, Dies After Being Stabbed at St Patrick's College, Shorncliffe', *Courier Mail* (online), 15 February 2010 <<http://www.couriermail.com.au/news/queensland/boy-12-dies-after-being-stabbed-at-st-patricks-college-shorncliffe/story-e6freoof-1225830389366>>.

³⁸⁶ 'Schoolboy's Death a Tragic Loss of Life Says St Patricks Headmaster Michael Carrol', *News.com.au* (online), 15 February 2010 <<http://www.news.com.au/breaking-news/schoolboys-death-a-tragic-loss-of-life-says-st-patricks-headmaster-michael-carroll/story-e6frfku0-1225830569361>>.

The fatality at St Patrick College prompted then Prime Minister Gillard to discuss the possibility of a national campaign to combat knife crime in schools by seeking advice from law enforcement and education agencies.³⁸⁷ In a similar although non-fatal incident in 2012, a 14-year-old girl was stabbed repeatedly by a 16-year-old fellow student who later handed himself into police following a schoolyard dispute at St Columban's College located in Caboolture, Queensland.³⁸⁸ In 2014 the Queensland Education Minister condemned the prolific way in which school violence was being broadcast online following several incidents. These incidents resulted in charges being laid by police in Rockhampton and prompted the Police Commissioner to comment that the use of social media to harass or intimidate is potentially a criminal offence.³⁸⁹

2.9.6 South Australia

Similarly, a series of school violence incidents at South Australian schools have prompted the Secondary Principals Association President to suggest that school security policies could be reviewed, with the possibility of upgrading closed circuit television coverage to better monitor school facilities, particularly in light of school violence perpetrated by students and by outsiders invading school grounds.³⁹⁰ In 2013, parents and principals alike also voiced concern that five violent incidents per day were occurring in South Australian schools, with almost 3500 violent incidents recorded over a three year period dating from 2010–2013. These included student on student, student on teacher and parent on teacher critical incidents that were seen as significant or threatening events that could be assessed as dangerous or contentious.³⁹¹ Concern was

³⁸⁷ 'School by School Approach For Knife Violence', *CCH Australia* (online), 19 February 2010 <<http://www.cch.co.nz/au/News/ShowNews.aspx?PageTitle=Fed--School-by-school-approach-for-knife-violence--Gillard&ID=34745&Type=F>>.

³⁸⁸ 'Girl, 14, Stabbed in Queensland Schoolyard Attack', *News.com.au* (online), 9 May 2012 <<http://www.news.com.au/national/girl-stabbed-in-caboolture-schoolyard-attack/story-e6frfkvr-1226350604915>>.

³⁸⁹ 'More Girls Charged Over Queensland School Fight', *News.com.au* (online), 13 February 2014 <<http://www.news.com.au/national/breaking-news/qld-school-fight-victim-touched-by-support/story-e6frku9-1226825756585>>.

³⁹⁰ M Williams, 'Can Big Brother Save Our Violent Schools', *The Advertiser* (online), 27 August 2009 <<http://www.adelaidenow.com.au/news/can-big-brother-save-our-violent-schools/story-e6freo8c-1225766587144?nk=ffcfeda0562f5d13c200e79cd976f30e>>.

³⁹¹ J Schriever, 'Parents, Principals Concerned as Violence at South Australian Schools Erupts Five Times a Day', *The Advertiser* (online), 16 August 2013 <<http://www.adelaidenow.com.au/news/south->

also raised by the Primary Principals Association, which reported a growing trend in school violence involving parents who tended to deviate from accepted protocol when questioning incidents at school involving their children, instead confronting principals and other teaching staff in an often aggressive fashion. This reflected a dilution in the authority status of school staff and principals common to other states and territories, although the Education Minister argued that increased levels of aggression in schools had much to do with stringent new critical incident reporting regimes.³⁹²

2.9.7 Tasmania

A series of sexual assaults perpetrated by a school bully against a fellow student in 2007 at a southern Tasmanian primary school left the victim severely traumatised, and was exacerbated a number of years later when the attacker, who had previously left the school, enrolled at the school once more.³⁹³ This prompted impassioned pleas from the victim's father to the education department to prevent the re-enrolment, but this was denied for procedural reasons to do with the inability to deny schooling to a government student within the applicable catchment area. The attacker's father did in fact eventually remove him from the school.³⁹⁴ Meanwhile, a Tasmanian high school student who had been subjected to long-term physical, verbal, mental and cyberbullying at school took her own life. The prolonged attacks had, in what is becoming a ubiquitous manner, been filmed and disseminated through social media.³⁹⁵ This prompted calls for the wide ranging adoption of anti-bullying legislation, which was supported by a local Tasmanian transport concern that mounted an awareness-raising campaign for the cause.³⁹⁶

australia/parents-principals-concerned-as-violence-at-south-australian-schools-erupts-five-times-a-day/story-fni6uo1m-1226698760849>.

³⁹² Ibid.

³⁹³ 'Boy, 7, Raped by School Bully', *The Mercury* (online), 19 March 2010

<<http://www.themercury.com.au/boy-7-raped-by-school-bully/story-fnj3twbb-1225842734882>>.

³⁹⁴ Ibid.

³⁹⁵ E Hope, 'Tragic Family's Crusade Against Bullying', *The Mercury* (online), 19 September 2013

<<http://www.themercury.com.au/news/tasmania/tragic-familys-crusade-against-bullying/story-fnj4f7k1-1226722411138>>.

³⁹⁶ 'Metro Joins Fight Against Bullying in Wake of Hobart Schoolgirl Tragedy', *The Mercury* (online), 23 September 2013 <<http://www.themercury.com.au/news/tasmania/metro-joins-fight-against-bullying-in-wake-of-hobart-schoolgirl-tragedy/story-fnj4f7k1-1226724769088>>.

2.9.8 Victoria

The use of technology was underscored by another schoolyard fight involving two students at Hampton Park Secondary College in Melbourne, which prompted the Victorian Minister for Education to comment that social media such as YouTube have made it all the more difficult to combat school violence.³⁹⁷ Elsewhere in Victoria, a year nine schoolboy at Brauer College in Warrnambool was bashed savagely by fellow students, and was placed in an induced coma following the attack. This incident was also captured on mobile phone cameras and widely distributed,³⁹⁸ whilst a lunchtime attack by balaclava-clad juveniles at Macleod College in Melbourne that resulted in the severe assault of a 15-year-old boy was widely considered to be a revenge attack.³⁹⁹ Knife and weapon attacks in Victorian schools had also apparently doubled and were as ubiquitous as bar room stabbing and glassings, according to another news report on knife attacks by students at Bellarine and Gisborne Secondary Colleges.⁴⁰⁰

In another incident, a victim of school bullying at a Victorian state primary school was provided with compensation by the Supreme Court of Victoria after a decision of the Victims of Crime Assistance Tribunal was overturned.⁴⁰¹ The bullying had begun when the schoolgirl was only eight years of age and continued for many years, but compensation for the victim had initially been refused by the tribunal as the three schoolgirl offenders lacked criminal intent.⁴⁰² Increased lockdown frequency at

³⁹⁷ 'Probe Into Appalling YouTube Fight Video', *News.com.au* (online), 7 May 2011 <<http://www.news.com.au/national/probe-into-youtube-school-fight/story-e6frfkvr-1226051487353>>. See also Squelch and Wimbridge, above n 341, 3.

³⁹⁸ W Flower, 'Boy in Coma After Being Bashed at Brauer College, Warrnambool', *The Herald Sun* (online), 26 October 2010 <<http://www.heraldsun.com.au/news/victoria/boy-in-coma-after-being-bashed-at-brauer-college-warrnambool/story-e6frf7kx-1225943581245>>.

³⁹⁹ S Wotherspoon, 'Schoolboy Bashed by Gang of Balaclava-Clad Youths During Lunchbreak at Macleod College', *The Herald Sun* (online), 30 October 2009 <<http://www.heraldsun.com.au/news/schoolboy-bashed-by-gang-of-balaclava-clad-youths-during-lunchbreak-at-macleod-college/story-e6frf7jo-1225792693794>>.

⁴⁰⁰ Mickelborough P and S McMahan, 'Schoolground Knife and Weapon Attacks Have Doubled in 10 Years', *The Herald Sun* (online), 5 March 2010 <<http://www.heraldsun.com.au/news/schoolground-knife-and-weapon-attacks-have-doubled-in-10-years/story-e6frf7jo-1225837145229>>.

⁴⁰¹ E Hunt, 'Girl Tormented and Abused by Child Bullies Wins Landmark Compensation', *News.com.au* (online), 10 March 2010 <<http://www.news.com.au/national/asgsdfgs/story-e6frfkvr-1225838913845>>.

⁴⁰² See 2.3 above for a discussion on the concept of *doli incapax*.

Victorian schools was the subject of a 2013 article⁴⁰³ that reported on material obtained under Freedom of Information procedures. The article described an increase in lockdowns over the 2011–2012 period in response to aggressive behaviour, most often followed by police operations. Lockdowns require that schools are secured and all students contained indoors with staff posted in key positions, in response to potential or perceived risks, or under instructions from police.⁴⁰⁴ These security responses were instigated by serious incidents including the physical assault of students and staff, threats by a student brandishing a knife, threats against a principal by a parent, an attack on a principal by a student wielding a shovel, and an incident where a staff member was stabbed with a fork by a student.⁴⁰⁵

Parental harassment was the subject of a Victorian Principals Association claim that closed circuit television is a necessity in school foyers, given widespread threatening behaviour, abuse and disruption directed at school principals by parents.⁴⁰⁶ With rates of physical violence higher than six times that of the general population, a survey conducted by Monash University into violence in school environments across Australia revealed alarming trends including evidence that parents were more likely to threaten violence against school principals, unlike students who were more inclined to be perpetrators of actual violence against school principals.⁴⁰⁷ Teaching staff have also been implicated in threats or actual violence against school principals who now have a seemingly reduced level of status and respect in communities than once was the case (similarly to nurses). This is particularly worrisome for principals stationed in remote

⁴⁰³ S Hadfield, 'Violence Forces Victorian Schools Into Lockdown', *News.com.au* (online), 21 April 2013 <<http://www.news.com.au/national/violence-forces-victorian-schools-into-lockdown/story-e6frfkp9-1226625427358>>.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

⁴⁰⁶ B Preiss, 'Principals Want CCTV Cameras for All Schools to Deter Abusive Parents', *Canberra Times* (online), 10 September 2012 <<http://www.canberratimes.com.au/victoria/principals-want-cctv-cameras-for-all-schools-to-deter-abusive-parents-20130910-2ti1c.html>>. Note also J Tovey, 'Principals Often Victims of Violence in Schools', *Canberra Times* (online), 23 July 2013 <<http://www.canberratimes.com.au/national/principals-often-victims-of-violence-in-schools-20130722-2qevg.html>>.

⁴⁰⁷ Preiss, above n 406.

areas who are at higher risk.⁴⁰⁸ While government school principals were the most endangered, Catholic and independent school principals were not immune from risk.⁴⁰⁹

2.9.9 Western Australia

Similarly, a 'fight club' type scenario was the focus of a media report published during 2010 in which it was reported that 'male bonding' was the incentive for boxing in a classroom at Kelmscott High School in Perth while a teacher looked on. A video of the incident was recorded on a student's mobile phone and sent to a local television station which broadcast the footage.⁴¹⁰ In Western Australia's south east, a dramatic high school shotgun siege at Esperance Senior High School involving a student who had been bullied⁴¹¹ fortunately ended peacefully when the student surrendered to police after being counselled by the school principal.⁴¹² According to a news report, student assaults on teaching and school administration staff increased by 23% during 2007 in Western Australia.⁴¹³ Although the level and intensity of assaults on school students or school staff is not recorded in stand-alone data by the Ministry of Education in Western Australia, the suspension of students from school for either physical assault or intimidation has increased by 10% per annum according to an investigation launched by a Perth newspaper, which suggested that school violence in Western Australia is increasing in frequency and intensity.⁴¹⁴ Further, the report suggested that a third of all suspensions recorded since 1999 were a result of pupil on pupil assault, while 7% were from pupil on school staff assault. However, the Ministry of Education's School Support Programs Executive Director cautioned against simplistic assumptions based upon data drawn from rates of student suspension as increases may in fact reflect stronger action

⁴⁰⁸ Ibid.

⁴⁰⁹ 'Violence on Job More Common For Principals', *The Sydney Morning Herald* (online), 5 March 2012 <<http://news.smh.com.au/breaking-news-national/violence-on-job-more-common-for-principals-20120305-1ubko.html>>.

⁴¹⁰ P Lampathakis, 'Fight Club Footage Was Male Bonding', *Perthnow* (online), 27 February 2009 <<http://www.perthnow.com.au/news/school-fight-was-male-bonding/story-e6frg12c-111118992697>>.

⁴¹¹ G Adshead, 'Gun Toting Teen Just Snapped', *The West Australian* (Perth), 7 August 2010, 11.

⁴¹² Y Phillips, 'Hero Esperance High School Principal Averted Gun Drama', *Perthnow* (online), 14 August 2010 <<http://www.perthnow.com.au/news/high-school-hero/story-e6frg12c-1225905241001>>.

⁴¹³ P Lampathakis, 'Teachers on Hit List', *Sunday Times* (Perth), 13 April 2008, 3; See also P Lampathakis, '200 Suspended at One School', *Sunday Times* (Perth), 8 June 2008, 7.

⁴¹⁴ B Hiatt, N Prior and G Knowles, 'Class Warfare', *The West Australian* (Perth), 17 July 2010, 23, 34.

being taken and not necessarily increases in school violence.⁴¹⁵ According to the report, many teachers were of the opinion that increased school violence reflected the escalation in societal violence and decrease in respect for authority figures.⁴¹⁶

The report also bemoaned the fact that while government school figures were hard to come by, data on instances of violence at Western Australian private schools was nearly impossible to obtain.⁴¹⁷ More to the point, in response to a call from the State School Teachers Union for more transparency in school violence data in Western Australian government schools, the Education Minister warned of the danger of misinterpreting the data due to the aggregated nature of the statistics and the lack of separation of the incidents according to typology and severity of assault.⁴¹⁸ Mention was also made of the perception amongst teachers that school violence was increasing,⁴¹⁹ and that it is now commonplace to separate disruptive students and confiscate weapons. In addition, family dysfunction and increasing mental health issues amid student cohorts are potentially contributing factors to the increase in school violence.⁴²⁰

This can be illustrated by a series of incidents of school violence in Western Australia. For example, a year 12 student inflicted grievous bodily harm on a year 10 student at a Perth high school which led to the younger student being hospitalised for life threatening brain swelling after his head was stomped on, and prompted calls for a custodial sentence by prosecutors.⁴²¹ Parental assaults on teachers have convinced some in the profession to change careers after suffering increasing abuse from parents and students, often to the point that teaching staff seek violence restraining orders.⁴²² An example is an attack on a school teacher by a 13-year-old girl in the Kalgoorlie region,

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ B Hiatt, 'Transparency Call on School Violence Data', *The West Australian* (Perth), 19 July 2010, 13.

⁴¹⁹ B Hiatt, 'Teachers Left to Face the Attacks Alone', *The West Australian* (Perth), 21 July 2010, 16.

⁴²⁰ Hiatt, 'Transparency Call', above n 418.

⁴²¹ N Prior, 'Jail Plea for School Stomping', *The West Australian* (online), 20 July 2010

<<http://www.au.news.yahoo.com/thewest/a/-news/7608135/jail-plea-for-school-stomping/>>.

⁴²² C Jones, 'Teacher Quits After Parents Verbal Attack', *The West Australian* (online), 9 July 2011

<<https://au.news.yahoo.com/thewest/a/9811610/teacher-quits-after-parents-verbal-attack/>>.

which was recorded on a mobile phone and uploaded to the internet in what is fast becoming a habitual practice among violent school students.⁴²³

During the period 2005–2008, episodic school violence in Western Australian schools also increased by 30% across an array of categories including student-teacher or student on student assaults, while instances of weapon use and sexual assault in addition to parental abuse of school staff were recorded. It should be noted that some of the student-teacher assaults were carried out by disabled students who lacked any intent to harm.⁴²⁴ In response to the escalation in reported school violence and a yearly increase in student suspension and exclusion, the State School Teachers Union of Western Australia called for the return to schools of resident police officers removed under previous government policy, particularly to those considered to be problematic high schools.⁴²⁵ The Union argued that underreporting of school violence incidents remained a problem and urged school staff to report any and all violence to police and school authorities in order to more clearly outline the true nature of violence in Western Australian schools.⁴²⁶

A 2012 media report also highlighted a series of particularly disturbing episodes of violence in Western Australian schools, designated as so-called ‘critical incidents’, information on which had been obtained under Freedom of Information legislation. These included knife attacks and school lockdowns amongst other issues, including instances of prescription drug trafficking that were referred to the Education Minister.⁴²⁷ The report made mention of the subjectivity involved in assessing critical incidents, which might compromise the ability to make meaningful comparisons between schools given that one school’s serious event could be considered merely operational in another ostensibly more difficult school environment. This distorts the statistical analysis of the

⁴²³ Prior, above n 421.

⁴²⁴ ‘Bashings on the Rise in Our Schools’, *The West Australian* (online), 16 July 2009 <<https://au.news.yahoo.com/thewest/a/5730493/bashings-on-the-rise-in-our-schools/>>.

⁴²⁵ B Hiatt, ‘Teachers Want Police in Schools’, *The West Australian* (online), 18 July 2009 <<http://au.news.yahoo.com/thewest/a/-/news/5809400/teachers-want-police-in-schools/>>. Note also that the Northern Territory has recently recorded an escalation in the suspension of school students. See Squelch and Wimbridge, above n 342, 3.

⁴²⁶ Hiatt, ‘Teachers Want Police’, above n 425.

⁴²⁷ B Hiatt, ‘School Alert: Drugs and Knives Taken to Classroom’, *The West Australian* (Perth), 13 February 2012, 1.

extent of school violence.⁴²⁸ As is the case in a number of media reports, staff often argued that schools simply reflect general societal trends and that school violence is to a large extent expected, and called for a more comprehensive range of school psychologists, social workers and behaviour centres.⁴²⁹

Also of concern was a 2013 media report highlighting an incident involving a very young student offender who assaulted a teacher before making a more vicious assault on the deputy principal at a Perth primary school. Both victims sustained injuries, prompting the Western Australian State School Teachers Union spokesperson to highlight the increasingly young age of perpetrators in school violence incidents and call for more support and funding to be directed toward mental health and social behaviour skill development.⁴³⁰ The report also drew attention to newly released statistics that showed a sizeable increase in assaults against government school teaching staff and emphasised the downward spiral toward academic failure and social disposition that was likely to befall violent students, should support and intervention not be provided.⁴³¹

There have been other examples of Western Australian school violence augmented by publicity through social media, prompting both police and Department of Education investigation into the incidents.⁴³² The incidents were broadcast via stand-alone web pages devoted to school fights in a southern Perth region, prompting a Western Australian Police review into the potential criminality of any of the participants.⁴³³ Meanwhile, Western Australian school principals have appealed for the initiation of a school violence task force in view of the habitual school violence specifically directed at principals. Their rationale for this is that it is more cost effective to provide support in conflict resolution and dealing with stress, as well as intimidation training for principals

⁴²⁸ Ibid.

⁴²⁹ Ibid.

⁴³⁰ Y Phillips, 'Student, 7, Hits Relief Teacher in Assault at Perth School', *Perthnow.com.au* (online), 9 November 2013 <<http://www.perthnow.com.au/news/western-australia/student-7-hits-relief-teacher-in-assault-at-perth-school/story-fnhocxo3-1226756493146>>.

⁴³¹ Ibid.

⁴³² T Barone, 'Another Facebook Page Promotes School Fights', *The West Australian* (Perth), 14 November 2013, 5.

⁴³³ Ibid.

under siege, than continual workers compensation payments as a result of workplace injury.⁴³⁴ The principals also claimed that they were increasingly subject to intimidation and stress as a result of violent episodes in school settings, leaving them seven times more likely to be assaulted and five times more likely to be threatened with violence than members of the general public.⁴³⁵ The Ministry of Education suggested, however, that while any assault of school staff was a concern, actual incidents were rare and that training in defusing of volatile situations and restraint was already available to principals. The Education Minister did however agree to submit a proposal for a task force in response to the request by school principals.⁴³⁶

A contentious public school policy in Western Australia involving the use of so-called time out rooms for particularly aggressive and violent students was the topic of a 2013 media article.⁴³⁷ It described specially modified school rooms lacking any furniture and painted in calming colours that enabled the protective isolation of students in safe areas free of harmful objects or stimulus, in order to stabilise emotions.⁴³⁸ The practice prompted criticism from academia principally because such isolation of problem students can both increase self-loathing and decrease self-esteem, with positive reinforcement and restorative behaviour management practice and procedure being recommended instead. The Catholic Education Office of Western Australia has opposed the use of such isolation methods in their schools.⁴³⁹

In view of the difficulties of unpacking aggregated crime statistics, under- and over-reporting of school assaults and differences in compiling statistics⁴⁴⁰ gleaned from disparate Australian jurisdictions, it is useful to refer to a major Australian study aimed at improving the school violence knowledge base and contributing to programs designed

⁴³⁴ B Hiatt, 'Principals Want Panel to Tackle Violence', *The Weekend West* (Perth), 24 November 2013, 1.

⁴³⁵ Ibid.

⁴³⁶ Ibid.

⁴³⁷ Phillips Y, 'Violent West Australian Primary School Children Sent to Cells', *The Australian* (Sydney), 12 January 2013 <<http://www.theaustralian.com.au/news/violent-kids-in-cells/story-e6frg6n6-1226552745216?nk=2c42354a762a8d9b2a3c925216dbb2df>>.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ The collection of statistical data is not the purpose of this research but the author may further investigate school violence using quantitative analysis in future research studies.

to reduce the incidence of school violence.⁴⁴¹ Although centred on an examination of high school students in New South Wales, the report is the most extensive and comprehensive on school violence yet undertaken in Australia, so can be considered useful in an examination of the prevailing status of school violence within Australia.

Utilising both a qualitative approach based upon detailed interviews with perpetrators and victims of school violence and an extensive quantitative investigation by way of sophisticated questionnaires, the study aimed to reliably document trends in school violence.⁴⁴² In particular, the study questioned whether predictions of school violence could be made based upon salient factors such as school structures, climates and cultures, after the introduction of appropriate controls for individual features known to increase aggressive behaviour, along with an examination of the social contexts within which assaults on school campuses frequently occur.⁴⁴³ In the 12 month sample period, results gathered from more than 2500 students indicated that more than 40% of students had physically attacked other students either in or near school premises at least once, with multiple attacks ranging from twice to as many as five times occurring from 5% to 10% of occasions. Playgrounds were by far the most common venue for attacks and lunchtime the most common time period in which attacks occurred.⁴⁴⁴

In terms of the motivation for the school violence, provocation was isolated as the main reason for the harm followed by retaliation against the instigator, whilst a significant proportion cited racist remarks, dislike of the victim and general aggressive behaviour as causative factors.⁴⁴⁵ Fortunately, most violent acts were of a low level typology with pushing and holding between protagonist and victim the norm, although attacks using fists were also relatively common. Weapon use was recorded in only a small number of cases.⁴⁴⁶ Significant risk factors associated with school-related violence were identified in the study. These included lack of awareness by students of school discipline policies,

⁴⁴¹ Grunseit, Weatherburn and Donnelly, above n 6.

⁴⁴² Ibid 2.

⁴⁴³ Ibid 60.

⁴⁴⁴ Ibid 15–18.

⁴⁴⁵ Ibid 16–17.

⁴⁴⁶ Ibid 18.

school rules and consequences attached to any breach of the same, a racist cohort, lack of belief on the part of students that good behaviour would be rewarded, unprepared, inexperienced, unhelpful and disorganised teaching staff, overemphasis on repetitive tasks in classrooms, and where excessive time was spent on controlling of unruly student behaviour at the expense of instruction.⁴⁴⁷ Moreover, violent attacks were more ubiquitous in smaller schools, stand-alone boy's schools, schools lacking any mediation systems and where student cohorts displayed high levels of reading and language difficulties.⁴⁴⁸

Inevitably, schools where bullying was common and where teaching staff were passive to its dangers were also at heightened risk of school violence.⁴⁴⁹ Whilst school-based factors such as these were identified as fundamental in the study, individual and family-based factors, such as circumstances where students experienced punitive parenting styles, lived in sole or neither parent families, were impulsive, displayed reading and writing difficulties and were of the male gender, also contributed to the likelihood that school violence would occur.⁴⁵⁰ Conversely, students were less likely to commit acts of violence when their mothers were aged over 40 and their behaviour and whereabouts were closely monitored by parents,⁴⁵¹ prompting a newspaper to conclude that the study suggested that to some degree 'school violence is learnt in the home.'⁴⁵² Nonetheless, school climates, cultures, and to a lesser extent structures, have an impact on the likelihood that violence will eventuate.⁴⁵³

Throughout the Australian jurisdiction, various items of legislation and related policies have been implemented in order to lessen the prevalence and magnitude of school

⁴⁴⁷ Ibid 60.

⁴⁴⁸ Ibid.

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid 7.

⁴⁵¹ Ibid 31.

⁴⁵² K Burke, 'School Violence is Learnt in the Home', *The Sydney Morning Herald* (online), 15 March 2005

<<http://newsstore.smh.com.au/apps/viewDocument.ac?page=1&sy=smh&kw=school+violence+is+learnt+in+the+home&pb=smh&dt=selectRange&dr=10years&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=nrm&clsPage=1&docID=SMH050315EP7DA7RGNE8>>.

⁴⁵³ Grunseit, Weatherburn and Donnelly, above n 6, 61.

violence, with all schools encumbered with the need to have discipline management plans or codes of conduct⁴⁵⁴ in operation. These will be the focus of discussion and analysis in Chapter 4.

2.10 Conclusion

This chapter commenced with an explanation of key terms germane to the thesis such as juvenile, violence and most importantly school-based violence. Several typologies of these key expressions were examined in order to link the discussion to the key area of the research questions such as the provision of a legal definition of juvenile grounded in the important and aged *doli incapax* standard, which attempts to decipher what is legal maturity. The quest for a workable definition of violence was then explored which included a discussion of numerous types of violent acts including physical, psychological, emotional and economic abuse and the various members in society who can perform such acts of violence. An examination of the nature of school violence followed including the itemisation of several risk factors that can contribute to acts of violence that occur within school environments.

Juvenile violence within the Australian jurisdiction was then examined, including the various patterns and trends in juvenile violence and the difficulties in interpreting such data, for example, underreporting and changes in policing methods. The cost of juvenile violence to victims, communities and society was also discussed along with the imperative causes, risks and protective factors that are associated with juvenile violence. The all-important and multifaceted topic of school violence was in turn investigated, including the crucial issue of schools being both a physical domain where violent acts can occur and systems that create or exacerbate difficulties for those within. Also discussed were causal factors linked with school violence. The chapter concluded with an investigation of school violence within the Australian jurisdiction, including a discussion of instances involving fatal episodic school violence in several states and territories along with the seemingly unstoppable use of technology and media to

⁴⁵⁴ Squelch and Wimbridge, above n 342, 8.

exacerbate and broadcast school violence. An overview of a sophisticated school violence study conducted in New South Wales high schools was also provided.

A social reality, juvenile violence, including school-based violence, remains of serious concern. In order to transform juvenile behaviour, effective management and control is required through using appropriate legal instruments and institutions that have been developed over time and which vary significantly in their approach to the problem. This will now be the focus of the research, specifically scrutinising the interplay between school violence within Australia and domestic and international laws, including Australia's obligations under various human rights instruments. This will be the focus of Chapter 3 of the thesis.

***Chapter 3: The Human Rights of Juveniles in Australia and the
United Nations Convention on the Rights of the Child
Including Domestic and International Case Studies***

3.1 Introduction

Chapter 2 of this thesis addressed several definitional aspects that are fundamental to the study of juvenile violence in schools and communities. This chapter examines the research question related to domestic and international law and its impact on and relevance to juvenile violence, with a view to developing a shift in law and policy towards a human rights-based approach to discipline management in Australian schools. In particular, human rights law and international legal developments and obligations that may or may not compel Australia will be discussed in relation to the development of useful discipline management policy for juvenile school violence. The latter will be further expanded upon in Chapter 4 of the thesis.

This chapter commences with a historical overview of the development of stand-alone systems for dealing with juvenile offenders. Initially, juvenile offenders received near identical treatment to adult counterparts in criminal justice systems. However, by the 19th century, important changes to state control emerged, as well as institutions including workhouses and industrial and reformatory schools, along with nascent children's and juvenile courts and other advances in the administration of juvenile justice such as increased powers of the judiciary to differentiate juvenile from adult offender in regard to penalties and procedures. This chapter also introduces the notions of diversion from traditional criminal justice processes and restorative justice principles, which will be further explored in later chapters.

Human rights as a concept will also be introduced prior to a discussion on the development of a discrete children's rights movement. There will be a historical overview followed by an examination of children's rights under international legal instruments including the pivotal United Nations Convention on the Rights of the Child

(‘*UNCRC*’), which represents a central plank in children’s human rights jurisprudence, along with other important treaties and protocols. The chapter will conclude with an overview of several important cases that are germane to the human rights of children and juveniles within the Australian jurisdiction. Whilst it can be safely assumed that juveniles have been involved in one form of violence or another for many centuries,⁴⁵⁵ developments in international law and a greater awareness of and focus on human rights as they relate to juvenile violence have added further complexity to the issue. These developments have associated implications for states and authorities in addressing juvenile violence. The discussion will now turn to the evolution of state and authority responses to violent juvenile behaviour.

3.2 The Development of Stand-alone Legal Systems for Dealing With Juvenile Offenders

3.2.1 *Historical Context*

Prior to the 19th century, there was scant differentiation between juvenile and adult offenders insofar as the criminal justice systems were concerned.⁴⁵⁶ During this draconian period, however, deterrence was the primary aim espoused by the authorities which often resulted in executions, floggings and incarceration of juvenile offenders in Australia.⁴⁵⁷ Similarly, in the United Kingdom during the Dickensian era it was not uncommon for children as young as five years of age to be hanged for minor offences such as larceny, with one English judge remarking harshly that it was more than acceptable for a child to be executed and that they should suffer for their offences.⁴⁵⁸

In the United Kingdom during this time, the notion of a criminal ‘underworld’ gained traction with fictional literary works by luminaries such as Charles Dickens, whose explorations into London low-life heavily influenced both contemporary and historical views of the time, so much so that a juvenile offender being interviewed at the time was

⁴⁵⁵ S Bennett, S N Hart and K A Svevo-Cianci, ‘The Need For a General Comment For Article 19 of the UN Convention on the Rights of the Child: Toward Enlightenment and Progress for Child Protection’ (2009) 33(1) *Child Abuse & Neglect* 3.

⁴⁵⁶ Gelsthorpe L and V Kemp, ‘Comparative Juvenile Justice: England and Wales’ in J A Winterdyk (ed), *Juvenile Justice Systems: International Perspectives* (Canadian Scholars’ Press, 2nd ed, 2002) 130.

⁴⁵⁷ Cunneen and White, above n 204, 5.

⁴⁵⁸ *Ibid.*

heard to remark that he had seen ‘Oliver Twist’ and that ‘Artful Dodger’ was very much like some of the boys he knew.⁴⁵⁹ In regard to instances of school violence during the era, Thomas Hughes’s celebrated 1857 novel, ‘Tom Brown’s School-Days’, provided a backdrop of the prevailing environment by depicting the anguished milieu faced by Tom Brown and his classmates at the fabled Rugby School. This served to instil a spirit of valour and stoicism in the schoolyard amongst often unruly classmates and authoritarian school masters.

Within Australia, children as young as six years of age could routinely be found in the iniquitous Pentridge prison in Melbourne during the mid-1860s note Cunneen and White.⁴⁶⁰ However, there is some evidence to suggest that attempts were made on occasion by Australian magistrates to make concessions for an offender’s immature age, such as frequent pardoning, the discharge of first offenders, and separation of juveniles from adult inmates in prisons when held in the same prison, as well as placing children with parents or institutions.⁴⁶¹

The development of a separate and stand-alone system for dealing with juvenile offenders was gaining some traction in the second half of the 19th century, however, which neatly coincided with other landmark political and legal developments such as the expansion of state control and regulatory reform leading to developments such as compulsory schooling and restrictions on child labour.⁴⁶² Moreover, within the realm of juvenile offending, specific institutions were created to deal with destitute and neglected juveniles such as the so-called reformatory and industrial schools targeted at those juveniles convicted of criminal offences. There were also several types of institutions fashioned to house dangerous and impoverished juveniles in the United Kingdom which, as a corollary, signalled the early development of juvenile offender identification and recognition.⁴⁶³ In effect, these types of institutions, whilst not specifically addressing

⁴⁵⁹ H Shore, ‘Cross Coves, Buzzers and General Sorts of Prigs. Juvenile Crime and the Criminal Underworld in the Early Nineteenth Century’ (1999) 39(1) *British Journal of Criminology* 11.

⁴⁶⁰ Cunneen and White, above n 204, 5.

⁴⁶¹ *Ibid*, 5–6.

⁴⁶² *Ibid*, 4.

⁴⁶³ *Ibid* 8.

juvenile violence and maltreatment, nonetheless provided food, accommodation and some measure of education for juveniles in need.⁴⁶⁴

As a result of these developments, juvenile delinquency began to emerge as a burgeoning social problem⁴⁶⁵ warranting specialised attention by legislators and authorities alike. Similar institutions emerged in Australia, for example, including several asylums and orphan schools which routinely arranged the apprenticeship of orphaned juveniles into the workplace. This could also be ordered by magistrates under New South Wales legislation from the late 1820s.⁴⁶⁶ This concern for the plight of destitute and vagrant juveniles led to the establishment of industrial and reformatory school legislation throughout most Australian states from the 1860s onward.⁴⁶⁷

Ostensibly, reformatory or industrial schooling aimed to provide discipline and self-awareness in order to transform delinquents, referred to generally as those from the 'dangerous classes' who had already commenced a criminal career, and impoverished juveniles identified as members of the 'perishing classes' who were yet to descend into criminality but due to desperate circumstances would likely do so in short order.⁴⁶⁸ A blurring of boundaries between those juveniles considered destitute or vagrant according to middle and upper class notions of the deserving or undeserving poor was reflected in the treatment of juveniles during this period.⁴⁶⁹ That is, juveniles were often segregated according to their attitude, with deserving poor juveniles dealt with in a welfare institution because they were seen to be destitute whilst others were treated as criminals and unjustly incarcerated under vagrancy laws.⁴⁷⁰ Whilst ostensibly educational or training-oriented in philosophy, reformatories and industrial schools more often resulted

⁴⁶⁴ Bennett, Hart and Svevo-Cianci, above n 455.

⁴⁶⁵ Gelsthorpe and Kemp, above n 456.

⁴⁶⁶ Cunneen and White, above n 204, 7.

⁴⁶⁷ Ibid 8.

⁴⁶⁸ Ibid 11.

⁴⁶⁹ Ibid 7.

⁴⁷⁰ Ibid.

in juveniles who were destined to join the ranks of prosaic and malleable workforces⁴⁷¹ well suited to the most menial of employment tasks.⁴⁷²

Other important developments in the area of juvenile justice during this period were the extension of lower or inferior court jurisdiction to preside over summary or minor offences involving juvenile offenders, and removal of the requirement that juveniles be remanded in adult prisons awaiting trial.⁴⁷³ This was echoed in the Australian jurisdiction where analogous legislation was enacted to extend the power of magistrates to hear minor juvenile offences and different penalties and procedures were introduced for dealing with juveniles compared with adult offenders.⁴⁷⁴

According to Fox, the turn of the 19th century saw the emergence of stand-alone juvenile courts and the adoption of the ‘*parens patriae*’ doctrine that encumbered states with a duty to intervene in the lives of juveniles at risk of becoming vagrant or criminal.⁴⁷⁵ This obligation to act in the best interests of the juvenile required juvenile justice personnel to adopt a more discretionary, informal and fostering approach to the administration of juvenile justice. Further, the doctrine championed the notion that juvenile offenders should not be treated like criminals in order to avoid branding the juvenile with a criminal persona that might be difficult to discard over time.⁴⁷⁶

3.2.2 Introduction of Restorative Justice and Diversionary Options

Whilst children’s courts continue to this day, diversionary options based in restorative justice principles are available in most jurisdictions. These deflect juvenile offenders away from the traditional criminal justice process in order to reduce coerciveness and formality in proceedings. Gaining popularity throughout the Australian jurisdiction since the 1970s, diversionary options have nonetheless garnered some dissatisfaction from the law and order or back to justice fraternity, who espouse a more punitive approach to

⁴⁷¹ Gelsthorpe and Kemp, above n 456.

⁴⁷² Cunneen and White, above n 204, 10.

⁴⁷³ Gelsthorpe and Kemp, above n 456.

⁴⁷⁴ Cunneen and White, above n 204, 8.

⁴⁷⁵ S J Fox, ‘Juvenile Justice Reform: An Historical Perspective’ (1970) 22 *Stanford Law Review* 1191–1193.

⁴⁷⁶ Cunneen and White, above n 204, 12–13.

juvenile justice and routinely discredit diversionary options, most particularly in the case of leniency for recidivist juvenile offenders.⁴⁷⁷

Prominent amongst these options is restorative justice. The overarching aim of this approach is a concerted focus on the aftermath of the offence, engagement in a harm reparation process for victims, and acknowledgement of the various competencies and needs of offenders leading ultimately to a message of disapproval of the impact of the offence suggest White, Haines and Asquith.⁴⁷⁸ Essentially, the restorative process involves parties like victims, offenders, family members, statutory agencies, supporters, and other parties with an interest in the offence to formalise a negotiated, collective resolution to the offence with creativity and flexibility to promote both responsibility for the offence yet simultaneously repair the harm caused by the offence.⁴⁷⁹ One of the most common restorative justice vehicles is the victim-offender group conference used extensively throughout the Australian jurisdiction, comprising an informally structured meeting between relevant parties which may be utilised at various junctions in the juvenile justice process and can be facilitated by police, court or juvenile justice personnel in order to deliver an appropriate response to the juvenile's offence.⁴⁸⁰

Other diversionary options include victim-offender mediation and conciliation programs, so-called sentencing circles which involve parties in setting appropriate sentences for juvenile offenders and repatriation boards that engage community members in the formulation of appropriate penalties for juvenile crime. In Western Australia, for example, has long employed so-called juvenile justice teams, coordinators and police officers who are involved in the diversion of juvenile offenders away from traditional retributive criminal justice processes which in appropriate circumstances can

⁴⁷⁷ C Alder and J Wundersitz, 'Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?' in C Alder and J Wundersitz (eds), *New Directions in Juvenile Justice Reform in Australia* (Australian Institute of Criminology, 1994) 5–6.

⁴⁷⁸ R White, F Haines and N Asquith, *Crime and Criminology* (Oxford University Press, 5th ed, 2012) 228.

⁴⁷⁹ T Marshall, 'Criminal Mediation in Great Britain' (1996) 4(4) *European Journal on Criminal Policy and Research* 37.

⁴⁸⁰ Australian Institute of Health and Welfare, 'Juvenile Justice in Australia 2000–2001 to 2003–2004' (Juvenile Justice Series No 1, Australian Institute of Health and Welfare, 22 February 2006) 4 <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442458868>>.

involve the input of Indigenous officers in matters concerning Aboriginal offenders.⁴⁸¹ Restorative justice will be discussed in detail in Chapter 5 in relation to school behavioural management policy development.

Autonomous rights for children and juveniles were notable by their absence prior to the early decades of the 20th century, with many institutions dealing harshly and punitively with children and juveniles and being typically abusive in organisation and administration. A movement to promote the rights of children and juveniles was to some extent, however, gaining momentum, which can be viewed in light of the broader recognition of human rights that emerged following World War Two. Prior to tracking the development and status of human rights relevant to children and juveniles, however, it is useful to lend some definition to the holistic notion of ‘human rights’ including some historical background with respect to this study of juvenile violence and schools.

3.3 The Notion of Human Rights

3.3.1 Introduction

In essence, human rights are essential freedoms and protections that individuals are entitled to irrespective of race, gender, nationality, ethnicity or ability, and are both inherent through birth and universal to all.⁴⁸² Universality of rights is of significant importance in the rights debate as past practices have relied upon gender and race rather than simple membership of the human race to accord rights status. Previous rights crusades include those conducted on behalf of women and non-whites which focussed upon the non-person status of women and subservient so-called separate but equal racial policies that denied human rights.⁴⁸³

⁴⁸¹ M Hakaiha, ‘Youth Justice Teams and the Family Meeting in Western Australia: A Trans-Tasman Analysis’ in C Alder and J Wundersitz (eds), *New Directions in Juvenile Justice Reform in Australia* (Australian Institute of Criminology, 1994) 1. See also note 1435 below regarding Juvenile Justice Teams in Western Australia.

⁴⁸² Amnesty International Australia, *What Are Human Rights?* (3 February 2013) <<http://www.amnesty.org.au/about/comments/21681/>>.

⁴⁸³ M Freeman, ‘Review Essay: What’s Right with Rights for Children’ Review of Guggenheim M “What’s Wrong With Children’s Rights” (Harvard University Press, 2005)’ (2006) 2(1) *International Journal of Law in Context* 89.

Human rights are internationally secured and focus on the dignity and equal worth of human beings, protect individuals and on occasion groups,⁴⁸⁴ are necessary for both quality of life and liberty irrespective of place and context, and are linked intrinsically to the relationship between state and individual.⁴⁸⁵ Whilst human rights are most certainly inalienable and thus cannot be removed, they can, of course, be violated.⁴⁸⁶ Broadly grounded in freedom, dignity and equality, human rights are an age-old concept with historical links to both ancient civilisations and many religious teachings. They seek to protect and reinforce a right to and quality of life as well as the right to free speech, freedom from discrimination, violence, cruel, inhumane or degrading treatment, and unlawful deprivation of liberty, and entitlements to health, fair trial, education⁴⁸⁷ and important moral and legal guiding principles that enshrine the promotion and protection of values, identity and adequate standards of living, equality, fairness and dignity.⁴⁸⁸

Further, human rights guarantee just and favourable working conditions, freedom of association, assembly and movement, food, housing and social security, freedom from arbitrary interference with family, privacy, home or correspondence, freedom from slavery and a right to nationality, freedom of thought, religion or conscience, suffrage, participation in public affairs and the right to participate in cultural matters.⁴⁸⁹ The rise in prominence of human rights first gained momentum in response to the rights abuse routinely experienced by members of vulnerable or oppressed populations including the poor, diseased, those in conflict, women and, notably for the purposes of this study, children.⁴⁹⁰

⁴⁸⁴ Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (2006) United Nations, 1 <<http://www.ohchr.org/Documents/Publications/FAQen.pdf>>.

⁴⁸⁵ L Hallgath and D Tarantola, 'A Rights-based Approach to the Assessment of Health Initiatives' (2008) 13(2) *Australian Journal of Human Rights* 158.

⁴⁸⁶ Amnesty International Australia, *What Are Human Rights?*, above n 482.

⁴⁸⁷ Australian Human Rights Commission, *Human Rights – What Do I need To Know?* (August 2008) 3 <<http://www.humanrights.gov.au/publications/human-rights-what-do-i-need-know-2008>>.

⁴⁸⁸ Australian Human Rights Commission, *Defining Human Rights Fact Sheet No 1* (2009) <https://www.humanrights.gov.au/sites/default/files/content/education/hr_explained/download/FS1_Defining.pdf>.

⁴⁸⁹ Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, above n 484, 1–2.

⁴⁹⁰ Hallgath and Tarantola, above n 485, 159.

3.3.2 *International Human Rights Instruments*

Human rights delineate the rights, standards and mechanisms of protection to which nation states commit themselves with state legitimacy grounded in respect, protection and fulfilment of the rights of all individuals.⁴⁹¹ Human rights are enshrined in important and specific international instruments including the *International Covenant on Civil and Political Rights* ('ICCPR'),⁴⁹² the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR')⁴⁹³ and the *Convention on the Elimination of all Forms of Racial Discrimination* ('ICERD').⁴⁹⁴ These were established subsequent to the propitious *Universal Declaration of Human Rights* ('UDHR'),⁴⁹⁵ which elegantly enunciated the basic premise of human rights in Article 1 that 'all human beings are born free and equal in dignity and rights.'

This pivotal human rights declaration was developed by the international community and more specifically the United Nations in order to create a road map to guarantee the rights of people everywhere, and more specifically in response to the atrocities inflicted during the Second World War. The first session of the United Nations General Assembly in 1946 following the cessation of hostilities considered the draft declaration on fundamental human rights and freedoms for referral to the United Nations Commission, which in early 1947 authorised its members to formulate a 'preliminary draft Bill of Human Rights'. Over 50 member states participated in the final drafting process leading to the adoption of the document at the end of 1948.⁴⁹⁶

Legislative definition of human rights is also provided in Australia through the operation of the Australian Human Rights Commission which was established pursuant to the

⁴⁹¹ Danish Institute for Human Rights, *Applying a Rights-based Approach. An Inspirational Guide for Civil Society* (2007) 11 <<http://www.humanrights.dk/files/media/dokumenter/udgivelser/applying-a-rights-based-approach-2007-an-inspirational-guide-for-civil-society.pdf>>.

⁴⁹² See Chapter 1 for an explanation of United Nations Human Rights Treaties and other instruments referred to in this thesis.

⁴⁹³ Ibid.

⁴⁹⁴ Ibid.

⁴⁹⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183 plen mtg, UN Doc A/810 (10 December 1948).

⁴⁹⁶ Ibid.

Australian Human Rights Commission Act 1986 (Cth) ('*AHRC Act*')⁴⁹⁷ in addition to other Commonwealth legislation⁴⁹⁸ and includes rights and freedoms contained in specific international instruments included or scheduled to the *AHRC Act*. The Commission is required amongst other functions to investigate complaints of unlawful discrimination and human rights complaints, research and promote human rights awareness and debate in Australia and to ensure compliance with human rights instruments.⁴⁹⁹ Although Australia is a signatory to many international instruments and by extension has agreed to be bound by the terms found within, obligations do not form part of domestic Australian law unless and until incorporated through enactment of appropriate legislation.⁵⁰⁰ However, a number of provisions found in treaties, covenants and the like are reflected in Australian legislation such as the *Disability Discrimination Act 1992* (Cth), for example, which displays many of the requirements of the *Convention on the Rights of Persons With Disabilities* ('*CRPD*').⁵⁰¹

The landmark *UDHR* also advanced the proposition that indivisibility or equality of all human rights is imperative irrespective of whether they are based in civil, political, economic, cultural or social categories. This is in addition to the so-called interdependence of human rights that relates to the futility of recognising one human right in isolation, which is difficult, if not impossible, such as the case where there is recognition of a right to work without a corresponding realisation of a right to education.⁵⁰² It is incumbent on participating states to respect human rights generally by not violating rights in a direct fashion, ensuring protection against violation of human rights by non-state actors, and promoting human rights as well as taking appropriate

⁴⁹⁷ *Australian Human Rights Commission Act 1986* (Cth) s 3.

⁴⁹⁸ Other legislation that the Australian Human Rights Commission draws upon include the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Fair Work Act 2009* (Cth), *Native Title Act 1993* (Cth), *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth).

⁴⁹⁹ *Australian Human Rights Commission Act 1986* (Cth) s 11.

⁵⁰⁰ See, eg, *Kioa v West* (1985) 159 CLR 550 per Gibbs J.

⁵⁰¹ Australian Human Rights Commission, *Australia and Human Rights Treaties. Fact Sheet 7* (2009) <https://www.humanrights.gov.au/sites/default/files/content/education/hr_explained/download/FS7_Australia.pdf>.

⁵⁰² Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, above n 484, 2.

measures toward the fulfilment of relevant human rights.⁵⁰³ The monitoring of human rights standards has become increasingly sophisticated of late with fulfilment of human rights commitments by nation states monitored by treaty bodies or independent expert committees who also review compliance and general performance through important commentary and recommendations.⁵⁰⁴ Typically, responsibility for meeting human rights obligations remains with state organs including parliaments, local government authorities, the judiciary, police and teachers.⁵⁰⁵

3.3.3 Legal Responsibility for Human Rights in Australia

Overall legal responsibility for the protection of human rights in Australia rests with the Commonwealth Government as the signatory to international instruments, but as Australia has a federal system of government, state and territory governments are often responsible for many issues that are intrinsically related to the exercise of human rights in significant areas such as health, land matters, law and order and notably for this study, education.⁵⁰⁶ Accordingly, state and territory governments can infringe upon the Commonwealth's human rights obligations, yet state and territory laws can in fact be overridden by the Commonwealth as protection against breaches of human rights obligations,⁵⁰⁷ such as through the use of 'external affairs' power found in the *Australian Constitution*.⁵⁰⁸

An example of this very exercise in Commonwealth power can be found in *Koowarta v Bjelke-Petersen*⁵⁰⁹ where the validity of the *Racial Discrimination Act 1975* (Cth) was called into question following a claim for leasehold crown land in remote locations. The High Court was of the opinion that the enactment of the *Racial Discrimination Act 1975* (Cth) was a valid exercise of the 'external affairs' power found in s 51(xxix) of the *Constitution* and as such allowed the Commonwealth to override Queensland law that

⁵⁰³ Hallgath and Tarantola, above n 485, 159.

⁵⁰⁴ Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, above n 484.

⁵⁰⁵ Danish Institute for Human Rights, above n 491.

⁵⁰⁶ Australian Human Rights Commission, *Human Rights – What Do I need To Know?*, above n 487, 5.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Australian Constitution* s 51(xxix).

⁵⁰⁹ *Koowarta v Bjelke-Petersen* (1982) HCA 27.

prohibited the granting of leasehold land to Aboriginal people in remote areas. The creation of the *Act* was a necessary obligation for the Commonwealth pursuant to entering the *ICERD*.⁵¹⁰ There is also an opportunity for claimants within Australia to seek suitable remedy for breach of human rights⁵¹¹ through the Australian Human Rights Commission, various state and territory human rights agencies⁵¹² and international bodies such as the United Nations Committee on the Rights of the Child, amongst others,⁵¹³ with some protection also available under the common law including rights against self-incrimination, presumption of innocence in criminal trials, rights to sue against false imprisonment and the presumption of beyond reasonable doubt in a criminal trial.⁵¹⁴

Children's rights have emerged within the broader context of general human rights providing recognition that children, along with other minority groups, require specific and specialised protection and promotion of their human rights. The discussion will now turn to the development of children's human rights.

⁵¹⁰ See also *Commonwealth v Tasmania* [1983] HCA 21 where the construction of a dam in a Tasmanian wilderness area was prevented by Commonwealth legislation enacted pursuant to Australia's international obligations as a signatory to the *Convention Concerning the Protection of World Cultural and Natural Heritage*, 17th sess (16 November 1972). Note also that in addition to the external affairs power under s 51(xxix) of the *Constitution*, the High Court of Australia has original jurisdiction with respect to 'all matters arising under any treaty' pursuant to s 75(i) of the *Constitution* although this power is seldom triggered.

⁵¹¹ Australian Human Rights Commission, *Human Rights – What Do I Need To Know?*, above n 487, 6–7.

⁵¹² See, eg, Australian Capital Territory Human Rights Commission, Anti-Discrimination Board of New South Wales, Northern Territory Anti-Discrimination Commission, Anti-Discrimination Commission Queensland, Equal Opportunity Commission of South Australia, Office of the Anti-Discrimination Commissioner, Tasmania, Victorian Equal Opportunity and Human Rights Commission and Equal Opportunity Commission Western Australia.

⁵¹³ There are several other United Nations Committees that aggrieved persons in Australia can access should all domestic avenues be exhausted, including the Human Rights Committee, Committee Against Torture, Committee on the Elimination of Discrimination Against Women and the Committee on the Elimination of Racial Discrimination. Whilst these committees can express an observation following investigation of a complaint regarding human rights violation, it will not be legally binding on the state. An example of this type of investigation can be seen in *Rogerson v Australia* (2002) Communication no 802/1998 where the Human Rights Committee established that a breach of art 14(3c) of the *ICCPR* had taken place. This case concerned an Australian lawyer who was found to have been denied the right to a fair hearing when contesting a protracted contempt of court charge in the Northern Territory after two years elapsed between the hearing and dismissal of proceedings.

⁵¹⁴ Australian Human Rights Commission, *Human Rights – What Do I Need To Know?*, above n 487, 14.

3.4 The Children's Human Rights Movement

3.4.1 Historical Context

The development of autonomous human rights for children and juveniles has been unhurried. Whilst gaining traction in the last decades of the 20th century, prior to 1900⁵¹⁵ the notion that children and juveniles possessed their own civil rights or liberties distinct from their parents or the state was in fact novel, as courts routinely preserved the social order that liberty is only to be extended to those of mature years, debarring those below an age of manhood or womanhood as prescribed by law.⁵¹⁶ Historically considered primarily as a form of parental possession rather than as persons in their own right,⁵¹⁷ children and juveniles were routinely denied any semblance of liberty or autonomy. In Roman times, for example, fathers were unrestricted in their regulation of any of their children's services and acquisitions and exercised unfettered control over them.⁵¹⁸ Children have in fact been afforded negligible importance historically with little in the way of dignity or respect, and have often been reduced to objects of intervention rather than legal subjects, have frequently been labelled as members of problem populations and often reduced to property status, resulting in habitual denial of moral consequence.⁵¹⁹

Further, rights of liberty and autonomy were reserved for individuals who had attained a measure of maturity to the exclusion of those who had yet to attain adulthood.⁵²⁰ Consequently, according to Wald, states and authorities adopted an overarching protective posture which required that parents protect and control children who were disadvantaged by their immaturity leaving them incomplete physically and intellectually

⁵¹⁵ But see M K Parker-Jenkins, 'Children's Rights and Wrongs' (2011) 16(1) *International Journal of Law & Education* 88 for evidence of pre-20th century pursuits of children's rights. Essentially, Parker-Jenkins suggests that although couched more particularly in the 'best interests' and 'welfare' of children, early developments usefully provided a platform for the development of autonomous children's rights.

⁵¹⁶ G Monohan and L Young, *Children and the Law in Australia* (LexisNexis Butterworths, 2008) 25.

⁵¹⁷ S N Hart, 'From Property to Person Status: Historical Perspective on Children's Rights' (1991) 46(1) *American Psychologist* 53.

⁵¹⁸ Monohan and Young, above n 516.

⁵¹⁹ M Freeman, 'Taking Children's Rights More Seriously' (1992) 6 *International Journal of Law and the Family* 54.

⁵²⁰ Monohan and Young, above n 516.

and lacking sufficient experience to conduct themselves capably in society.⁵²¹ A recurring theme is the protection of minors from the hazards of contemporary society so that they can develop into conscientious and accountable adults. This is because children and juveniles have long been considered to have special needs that are to be cultivated,⁵²² yet many rights, including participation in political, legal and many social processes, were withheld from them.⁵²³

Perhaps best described as the last majority in the human rights movement, children and juveniles have been largely invisible in traditional rights movement optics such as protestation and boycott, and instead could be said to belong to a movement grounded in constitutional argument.⁵²⁴ It is not unreasonable to suggest, therefore, that child rights are an inconvenience for adults who traditionally enjoy a more powerful status as decision-makers, and the ability to rule would be simplified if children were continually denied rights.⁵²⁵ Yet children and juveniles remain vulnerable and lack the necessary resources needed in times of adversity, including psychological, material and relational resources, and while often blameless, argues Freeman, they are equally voiceless when they are the subject of dispute.⁵²⁶

At the turn of the 20th century, the rapid expansion of industry and manufacturing along with concomitant urbanisation focussed attention on the plight of working children and juveniles and their status as individual citizens rather than the property of parents.⁵²⁷ Central to this attention was the exploitation of working children and juveniles and associated health and wellbeing issues faced by states, which prompted several key reforms such as the International Labour Organization's adoption of minimum age restrictions for employment in 1919. This in turn helped prompt an appreciation of the

⁵²¹ M S Wald, 'Children's Rights: A Framework For Analysis' (1979) 12(2) *University of California Law Review* 256.

⁵²² C R Margolin, 'Salvation Versus Liberation: The Movement For Children's Rights in a Historical Context' (1978) 25(4) *Social Problems* 441.

⁵²³ Wald, above n 521.

⁵²⁴ Margolin, above n 522.

⁵²⁵ Freeman, 'Review Essay: What's Right with Rights for Children', above n 483, 89–90.

⁵²⁶ *Ibid* 95.

⁵²⁷ Monohan and Young, above n 516.

needs and individual rights of children and juveniles.⁵²⁸ American initiatives were also evident, such as the first White House Conference on Children in 1909 which focussed on childhood issues including delinquency and education although their real utility in improving the wellbeing of children and juveniles remains contentious in addition to other initiatives such as the Children's Bureau which was established in 1912 to address maternal health and infant mortality.⁵²⁹

Further White House Conferences led to the recognition of a child's right to education through the establishment of compulsory education and the prohibition of child labour.⁵³⁰ According to Margolin, however, the movement to regulate child labour in America⁵³¹ was not without difficulty, as on many occasions federal laws were found to be unconstitutional due to being in violation of states' rights. More success was to be found in the enactment of uniform child labour laws in each American state. Nascent international instruments focussed on the rights of children and juveniles, such as the 1924 *Declaration on the Rights of the Child* implemented in response to the anguish experienced by children and juveniles during and after the First World War. These were pivotal in the development of liberty and autonomy of children and juveniles despite being principally welfarist in nature, as they provided a platform for subsequent treaties and protocols that furthered the pursuit of children's rights.⁵³²

Fortuitously, these initial steps toward embedding the human rights of children and juveniles through international instruments were accompanied by global consensus which challenged the accepted assumptions regarding both status and standing of children and juveniles, the so-called myth of natural parental affection, and the belated recognition that children and juveniles were capable, active thinkers. They further signalled a period of unmatched social change that also saw the emergence of similar

⁵²⁸ Ibid.

⁵²⁹ Margolin, above n 522, 443.

⁵³⁰ Ibid.

⁵³¹ Ibid.

⁵³² Monohan and Young, above n 516, 25–26; see n 537 below for a description of the 1924 *Declaration on the Rights of the Child*.

rights-based movements aligned with the plight of women and racial groupings.⁵³³ Moreover, there is now clear evidence that children and juveniles can exercise agency such that negotiation and the making and alteration of decisions or relationships is well within their capability, effectively shifting social assumptions and constraints.⁵³⁴ More to the point, courts began to acknowledge the call by legal counsel for acceptance of autonomous children's and juvenile rights, rather than denial⁵³⁵ which had traditionally been the case.⁵³⁶ The discussion will now turn to the development of important international legal instruments that advanced the cause of children's and juvenile rights.

3.5 Children's Rights Under International Legal Instruments

3.5.1 The United Nations Convention on the Rights of the Child

Whilst the United Nations' 1959 *Declaration on the Rights of the Child* and its identically titled predecessor of 1924⁵³⁷ extended protection and safety to children rather than rights of autonomy or political or civil participatory rights per se,⁵³⁸ the well intentioned and received *UNCRC* remains pivotal in any discussion on the human rights of children and juveniles. The *UNCRC* was introduced with some fanfare, expectation and considerable self-adulation after a decade-long negotiation and drafting process between governments and non-government agencies.⁵³⁹ The *UNCRC* has also been touted as the world's first true legal instrument to promote children's rights,⁵⁴⁰ having jettisoned the paternalistic tenor of its 1924 and 1959 predecessors and instead promoted the notion that children should be internationally recognised as rights bearers in their own accord.⁵⁴¹ The convention also promotes children as legal citizens rather than

⁵³³ Ibid 26.

⁵³⁴ M Freeman, 'Why it Remains Important To Take Children's Rights Seriously' in M Freeman (ed), *Children's Rights: Progress and Perspectives Essays From The International Journal of Children's Rights* (Martinus Nijhoff Publishers, 2011) 9.

⁵³⁵ Monohan and Young, above n 516, 26.

⁵³⁶ See 3.7 below for a discussion on children's rights jurisprudence including landmark case law.

⁵³⁷ *Declaration on the Rights of the Child*, adopted 26 September 1924, League of Nations. This declaration was also commonly referred to as the 'Declaration of Geneva' or 'Geneva Declaration on the Rights of the Child'. See <<http://www.un-documents.net/gdrc1924.htm>> for details of the child rights provisions of the declaration.

⁵³⁸ Monohan and Young, above n 516, 26.

⁵³⁹ M Freeman, 'The Future of Children's Rights' (2000) 14 *Children & Society* 277–278.

⁵⁴⁰ Ibid 277.

⁵⁴¹ Monohan and Young, above n 516, 26.

simple extensions of parental property⁵⁴² and significantly espouses the notion that their 'best interests' are upheld at all times. A shortcoming of both previous instruments was an overemphasis on the protection and safety of children largely at the expense of meaningful civil and political participatory rights and autonomy, which was fortunately addressed during the drafting stages in the *UNCRC*'s evolution.⁵⁴³

The *UNCRC* has also been labelled a significant, easily digested tool of advocacy⁵⁴⁴ and a milestone in the evolution of civilisation by conceding both the existence and substance of the rights of children,⁵⁴⁵ along with the promotion of health and prosperity of children and juveniles. This is in contrast to the charity found in the 1929 and 1959 predecessors that both lacked the pivotal recognition of autonomy for children and juveniles, participatory rights and empowerment, and were largely aspirational and protective in substance.⁵⁴⁶ According to Freeman, the *UNCRC* was the subject of much negotiation and considerable drafting and redrafting, with consensus being difficult to achieve amongst nation states in controversial areas during the gestation of the instrument.⁵⁴⁷ Controversial issues included freedom of religion in the Islamic world and protective mechanisms for intercountry adoption for those in Latin America, the rights of the unborn, which generated division amongst nation states along religious lines, and overpopulation amid developed and developing countries.⁵⁴⁸

The *UNCRC* is comprised of non-negotiable standards that aim to buttress the rights inherent to human dignity but with a particular focus on the rights of children who require specific and stand-alone rights protection despite benefiting from broader human rights protection.⁵⁴⁹ The *UNCRC* is a methodical document containing a full gamut of

⁵⁴² Australian Council For International Development, *Child Rights* <<http://www.acfid.asn.au/aid-issues/files/child-rights-info-sheet>>.

⁵⁴³ Monohan and Young, above n 516, 26.

⁵⁴⁴ Freeman, 'The Future of Children's Rights', above n 539, 277.

⁵⁴⁵ Jones M, 'Myths and Facts Concerning the Convention on the Rights of the Child in Australia' (1999) 5(2) *Australian Journal of Human Rights* 126 <<http://www.austlii.edu.au/au/journals/AJHR/1999/28.html>>.

⁵⁴⁶ Freeman, 'The Future of Children's Rights', above n 539, 277.

⁵⁴⁷ *Ibid* 278.

⁵⁴⁸ *Ibid*.

⁵⁴⁹ Australian Council For International Development, *Child Rights*, above n 542.

civil, political, economic, cultural and social rights, and upholds the obligation that governments bear definitive responsibility for the protection, fulfilment and promotion of the rights of children⁵⁵⁰ and the treatment standards for children applicable during peacetime and in armed conflict.⁵⁵¹ A salient point to consider is the notion that child rights protection must be considered essential, as a child may in fact need protection in many ways from the self-same rights that adults routinely pursue, such as the right to work, have sexual relationships or marry.⁵⁵²

Ensuring that all children have rights attached to human dignity, the *UNCRC* is a non-negotiable set of standards divided into three sections comprised of preamble, substantive provisions and implementation and monitoring. Of particular interest to this thesis, the second section contains articles outlining the protection and participation rights of children among other useful provisions.⁵⁵³ Insofar as debate and inquiry is concerned, the *UNCRC* has had no small part in the rapid growth of scholarly research on the human rights of children and could be said to be responsible for injecting timely impetus and credibility to academic discourse in the discipline.⁵⁵⁴ The *UNCRC* seeks to address the specific human rights interests and needs of children and juveniles as individuals rather than as a consequence of their relationship with adult family and the state.⁵⁵⁵

The *UNCRC* was adopted by the United Nations during November 1989 and entered into force generally in September 1990.⁵⁵⁶ Although ratified by Australia in December 1990, the *UNCRC* is only ostensibly part of the domestic law, as the direct legal implementation of the convention into domestic law expected of member states upon

⁵⁵⁰ Ibid.

⁵⁵¹ Jones, above n 545.

⁵⁵² Australian Council For International Development, *Child Rights*, above n 542.

⁵⁵³ Ibid.

⁵⁵⁴ D Reynaert, M Bouverne-De Bie and S Vandevelde, 'A Review of Children's Rights Literature Since the Adoption of the United Nations Convention on the Rights of the Child' (2009) 16(4) *Childhood* 518.

⁵⁵⁵ D McGoldrick, 'The United Nations Convention on the Rights of the Child' (1991) (5) *International Journal of Law and the Family* 133.

⁵⁵⁶ Australian Human Rights Commission, *Australia's Commitment to Children's Rights and Reporting to the UN* (October 2007) [1.1]

<http://www.hreoc.gov.au/human_rights/children/aus_commitment_to_children_rights.html>.

ratification has yet to occur in Australia. This is also the case for many other member states.⁵⁵⁷ Therefore, the provisions of the *UNCRC* lack any domestic force unless and until the convention is incorporated into Australian domestic legislation.⁵⁵⁸ In this respect, the nature of Australian and English legal systems remains fundamentally different from nation states such as those of continental Europe and the United States, for example, where the ratification of an international instrument such as the *UNCRC* generates self-executing laws which establish legal rights and obligations without a Congressional legislative act.⁵⁵⁹ Nonetheless, several *UNCRC* elements have in fact been subsumed into domestic law in Australia. For example, the ‘best interests’ element has been given widespread focus in juvenile justice legislation and policy across the various jurisdictions.⁵⁶⁰

Irrespective of a lack of direct incorporation into Australia’s domestic legal arena, the tenor of the *UNCRC* and other instruments can yet have an active role in influencing judicial interpretation by domestic courts wherever applicable statutes are to be interpreted with due deference to international obligations in circumstances where ambiguity exists, although not where there is clarity in legislation even if such a position is in opposition to the terms of an international instrument.⁵⁶¹ Further, in the exercise of administrative discretion, the executive⁵⁶² is to act consistently with the terms of an international instrument ratified by Australia in the absence of express provision to the contrary and must extend the right for the affected party to seek redress grounded in a legitimate expectation that the government intends to comply with a ratified

⁵⁵⁷ Monohan and Young , above n 516, 24.

⁵⁵⁸ Note also that Australia is a party to several United Nations human rights treaties but is yet to implement many provisions of these instruments, prompting some to suggest that whilst Australia is active as a member of the international community in accepting the obligations contained in international instruments such as the *ICCPR*, *ICESCR* and the *UNCRC*, the expected domestic implementation process remains more elusive. See, eg, H Charlesworth et al, ‘Deep Anxieties: Australia and the International Legal Order (2003) 25(4) *Sydney Law Review* 436.

⁵⁵⁹ J Cumming and R Mawdsley, ‘Student Rights and Parent Rights in Education in Australia’ (2005) 10(2) *Australia & New Zealand Journal of Law & Education* 49.

⁵⁶⁰ This element will be further discussed in Chapter 4 in the context of domestic juvenile justice legislative provisions.

⁵⁶¹ Jones, above n 545.

⁵⁶² The *Australian Constitution* allows the Commonwealth government to enter treaties and engage in diplomacy through the operations of the executive branch.

instrument.⁵⁶³ There is the additional potential for legislative human rights activism in some Australian jurisdictions⁵⁶⁴ that have enacted stand-alone human rights legislation, and this has also provided an additional developing source of human rights protection for children and juveniles. This includes deference to provisions found in the *UNCRC* and other international instruments and the encouragement of legal counsel and courts to engage with international human rights law with the long-term development of human rights compatible legislation being a desirable objective.⁵⁶⁵

3.5.2 Jurisprudence and Legislation Relevant to the Convention on the Rights of the Child in Australia

The issue of expectation following the ratification of an international instrument was raised in the controversial decision in *Minister of Immigration and Ethnic Affairs v Teoh*,⁵⁶⁶ which was centred on the incorporation or otherwise of the *UNCRC* into Australian law. Specifically, a Malaysian citizen who had married an Australian citizen and was lawfully in the country pursuant to a temporary visa was convicted and imprisoned for drug offences prior to his application for permanent resident status being finalised. This application was subsequently refused and the High Court dealt with the issue of whether the so-called best interests of the child⁵⁶⁷ were infringed by deporting the father and denying procedural fairness.⁵⁶⁸ Caution should be exercised, however, with respect to the utility of a legitimate expectation to comply with terms of the international instrument, as although the High Court in *Teoh* suggested that the message of ratification was such that an expectation of compliance could arise, it did not compel decision-makers to apply the treaty terms. Conversely, it confirmed that it remains within the remit of government officials to in fact act contrary to international law.⁵⁶⁹ At

⁵⁶³ Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [3.22].

⁵⁶⁴ See 4.11 below for a discussion of recent human rights legislative activism in both the Australian Capital Territory and Victoria.

⁵⁶⁵ Monohan and Young, above n 516, 31.

⁵⁶⁶ *Minister of Ethnic Affairs v Teoh* (1995) 128 ALR 353.

⁵⁶⁷ See 3.6.9 below for an explanation of the best interests principle.

⁵⁶⁸ Jones, above n 545.

⁵⁶⁹ *Ibid.*

the time, there was a hurried (and ultimately unsuccessful) introduction of legislation⁵⁷⁰ attempting to undo the *Teoh* principle.⁵⁷¹ In addition, High Court decisions dating from 2000⁵⁷² have further questioned the validity of the legitimate expectation standard by suggesting that the standard is neither a freestanding administrative doctrine nor a source of substantive rights.⁵⁷³

Promisingly, human rights legislation has been introduced in some states such as Victoria and the Australian Capital Territory that encourages engagement with human rights standards, which can also be considered a source of human rights for children.⁵⁷⁴ In addition, the development of the common law has allowed for the consideration of international obligations by domestic courts in Australia in some cases of late.⁵⁷⁵ The importance of the *UNCRC* is further endorsed through the auspices of the Australian Human Rights Commission, which maintains an active role in promoting and protecting the human rights of children and juveniles under the provisions of the *Human Rights and Equal Opportunity Act 1986* (Cth). These permit the Commission to actively consider claims of rights offences against children and juveniles with reference to the *UNCRC* in addition to conducting public enquiries, providing policy advice and examining relevant domestic laws that impinge upon *UNCRC* provisions.⁵⁷⁶

Whilst the Commission lacks power to enforce any of its recommendations or those of the United Nations, it can encourage the implementation of provisions found in the *UNCRC*. This was seen in the Commission's enquiry into the mandatory detention of refugee status children and juveniles, which resulted in the Commonwealth government

⁵⁷⁰ Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth), Administrative Decisions (Effect of International Instruments) Bill 1997 (Cth) and the Administrative Decisions (Effect of International Instruments) Bill 1999 (Cth). All of the bills lapsed in Parliament.

⁵⁷¹ Charlesworth et al, above n 558, 437.

⁵⁷² See, eg, *Re Minister of Immigration and Multicultural Affairs; Ex parte Lam* (2002) 195 ALR 502.

⁵⁷³ R Lindsay, 'Natural Justice: Procedural Fairness: "Now We See Through a Glass Darkly"' (2010) 63 *Australian Institute for Administrative Law Forum* 72.

⁵⁷⁴ Monohan and Young, above n 516, 30–31.

⁵⁷⁵ Jones, above n 545; see also 3.6 below for a discussion on juvenile human rights tenets found in international agreements including the *UNCRC*.

⁵⁷⁶ Australian Human Rights Commission, *Australia's Commitment to Children's Rights and Reporting to the UN*, above n 556, [1.3].

amending immigration laws.⁵⁷⁷ Yet, unlike some treaties and protocols relevant to children and juveniles,⁵⁷⁸ such as the *ICCPR* and the *ICERD*, no individual complaint under the *UNCRC* will be considered by the United Nations. However, the Commission can refer to the *UNCRC* when investigating complaints from children and juveniles who believe their rights have been breached, in addition to examining laws that appear to breach the *UNCRC*, publicly promoting children's rights, establishing public enquiries and providing policy advice regarding the *UNCRC*.⁵⁷⁹

The *UNCRC* has also been seen as a major step forward in the protection of the human rights of children and juveniles through the promotion of welfare through justice rather than charity principles.⁵⁸⁰ It is also operational in informing humanitarian principles such as in areas of political emergency.⁵⁸¹ The difficulty in achieving consensus among delegates during the creation of the *UNCRC* cannot be underestimated, as much opposition was evident in the areas of religious and cultural differences on sensitive issues including the plight of the unborn, along with other impediments such as achieving consensus on whether children should have any duties.⁵⁸²

Nonetheless, with near-universal acceptance by over 190 member states, the *UNCRC* is the most ratified global human rights treaty, with only the United States a conspicuous absentee.⁵⁸³ However, Pupavac argues that despite such widespread endorsement, it is useful to exercise some caution when interpreting the *UNCRC*'s actual influence on the promotion of children's rights.⁵⁸⁴ It is enticing to overestimate the real effect of the treaty in light of its celebrated introduction and popularity because the *UNCRC*'s benefits have been enthusiastically expected to some extent. It could well be argued that the *UNCRC* is largely inoffensive and reflects the lengthy consensus process from which

⁵⁷⁷ Ibid [5.1].

⁵⁷⁸ Ibid [6.1].

⁵⁷⁹ Ibid [1.3].

⁵⁸⁰ Freeman, 'The Future of Children's Rights', above n 539, 277.

⁵⁸¹ Pupavac V, 'Misanthropy Without Borders: The International Children's Rights Regime' (2001) (25)2 *Disasters* 95.

⁵⁸² Freeman, 'The Future of Children's Rights', above n 539, 278.

⁵⁸³ Australian Human Rights Commission, *About Children's Rights*

<<https://www.humanrights.gov.au/our-work/childrens-rights/about-childrens-rights>>.

⁵⁸⁴ Pupavac, above n 581, 96.

it arose by excluding controversial terms, combined with only voluntary implementation by member states.⁵⁸⁵

3.5.3 Scepticism About and Opposition to the Convention on the Rights of the Child

The *UNCRC* remains imperative in recognising that, while remaining protected by other human rights instruments, children and juveniles can implement their own independent human rights. These rights are influenced by their own maturation and in certain circumstances extends rights to parents to act on behalf of children and juveniles.⁵⁸⁶ Further, it could be argued that given their susceptibility to abuse and exploitation, children and juveniles are entitled to the special attention and protection the *UNCRC* promises.⁵⁸⁷ However, despite the enthusiasm for stand-alone human rights for children and juveniles, there is still some scepticism regarding the notion. This opposition is principally grounded in the idea that such rights are unnecessary because adults continually embrace the best interests of children⁵⁸⁸ and juveniles, and that family cohesion and structure can be compromised by state intervention pursuant to the individual rights of children and juveniles. However, this attitude may be excessively optimistic as children and juveniles are vulnerable and need rights for the safeguarding of their dignity and integrity.⁵⁸⁹

It could well be argued that the drafters of the *UNCRC* favoured the familial support element above that of autonomy for children despite some criticism that the *UNCRC* is anti-family and interferes with parental rights.⁵⁹⁰ For example, there is the ambiguity found in art 3 which advocates that the best interest principle be applied at all times by those exercising parental responsibility, but is silent on inclusion of parents in the article itself.⁵⁹¹ The tenor of the *UNCRC* does, however, point to a seemingly greater emphasis on nurturing and ideological commitment to the family unit for childhood

⁵⁸⁵ Jones, above n 545.

⁵⁸⁶ Australian Human Rights Commission, *Australia's Commitment to Children's Rights and Reporting to the UN*, above n 556.

⁵⁸⁷ Australian Human Rights Commission, *About Children's Rights*, above n 583.

⁵⁸⁸ See 3.6.9 below for a discussion on the best interests principle of the *UNCRC*.

⁵⁸⁹ Freeman, 'Taking Children's Rights More Seriously', above n 519, 55.

⁵⁹⁰ Jones, above n 545.

⁵⁹¹ Freeman, 'The Future of Children's Rights', above n 539, 288.

developmental purposes.⁵⁹² Equally, the promotion of the rights of children and juveniles does not necessarily result in the abandonment of adult rights, as the promotion of such an environment would be disingenuous and would clearly not be in the best interests of children or juveniles,⁵⁹³ which remains of fundamental importance in the context of the *UNCRC*. The autonomy of parental rights is, however, provided by the *UNCRC* in art 5, which denounces the separation of child from parent unless in circumstances where a competent authority determines that such severance is in the best interests of the child.⁵⁹⁴ Finally, the belief that youth remains a period of innocence, protected growth and helplessness that should not consequently be impacted by human rights responsibilities⁵⁹⁵ is also an established point of view that is opposed by human rights activists who argue for rights irrespective of age.⁵⁹⁶

According to Freeman, an argument that juveniles should not be burdened with human rights responsibilities may in fact be flawed given that many children and juveniles globally routinely experience poverty, abuse, disease and myriad forms of exploitation.⁵⁹⁷ One could argue, perhaps, that difficulties such as these are seldom seen among Australian youth, negating the need for *UNCRC* protection given the relatively privileged socio-economic environment. Such an attitude is unsophisticated however, as Australian youth experience significant difficulties that remain unresolved, according to Jones. These echo similar global issues including poverty, shortfalls in education systems, youth suicide and mental health issues, excessive contact with criminal justice agencies, housing and troubling juvenile health issues such as diabetes and disability, amongst other concerns.⁵⁹⁸

The vexed issue of citizenship rights for children and juveniles in the *UNCRC* has also generated some criticism, particularly in the area of participation as agents in the democratic process. Such rights are not addressed in the *UNCRC* except for some

⁵⁹² Jones, above n 545.

⁵⁹³ Freeman, 'Why it Remains Important To Take Children's Rights Seriously', above n 534, 19.

⁵⁹⁴ Freeman, 'Review Essay: What's Right with Rights for Children', above n 483, 91.

⁵⁹⁵ Monohan and Young, above n 516, 27.

⁵⁹⁶ Margolin, above n 522, 448.

⁵⁹⁷ Freeman, 'Taking Children's Rights More Seriously', above n 519, 56.

⁵⁹⁸ Jones, above n 545.

oblique references in the art 29 education aims that are directed at equipping children for responsible life in free society combined with understanding, peace, tolerance and equality.⁵⁹⁹ Citizenship rights should not be undersold, as participation by children and juveniles enables their agency and their ability to demand rights, which remains a significant asset.⁶⁰⁰

Despite such shortcomings and reservations, the *UNCRC* has been significant and has given impetus to the further advancement of the human rights of children and juveniles, particularly in encouraging children and juveniles themselves to have a greater voice in future conventions. Despite the tenor of the *UNCRC* upholding the participatory rights of children and juveniles, these rights were given scant regard during the creation of the instrument itself.⁶⁰¹ Furthermore, new rights for children and juveniles are to be investigated and debated, the substantive implementation mechanisms of the *UNCRC* are to be expanded and buttressed, existing rights should also be reappraised and examined, and new groups of vulnerable children and juveniles, including indigenous and refugee children, need to be recognised and included. It would also be optimistic to assume that a convention drafted and implemented in the last years of the 20th century will adequately service the needs of the current epoch, justifying ongoing revision, reform and innovation in future *UNCRC* versions.⁶⁰²

3.5.4 Other International Instruments Relevant to the Treatment of Children and Juveniles

Other international instruments germane to the treatment of children and juveniles should not be overlooked. These important instruments include the *ICCPR*, the *ICESCR*, the *ICERD* and the *CRPD*.⁶⁰³ Other relevant international instruments that provide more detailed and focussed protection include the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*⁶⁰⁴ ('*CAT*'), which obligates

⁵⁹⁹ Freeman, 'The Future of Children's Rights', above n 539, 287.

⁶⁰⁰ Freeman, 'Review Essay: What's Right with Rights for Children', above n 483, 90.

⁶⁰¹ Freeman, 'The Future of Children's Rights', above n 539, 282.

⁶⁰² *Ibid* 282, 285.

⁶⁰³ Ratified by Australia in 2008.

⁶⁰⁴ Ratified by Australia in 1989.

state parties to enact legislative, judicial, administrative or similar measures to prevent torture, and the *Convention on the Elimination of all Forms of Discrimination Against Women*⁶⁰⁵ ('CEDAW'), which is targeted at the reduction of discrimination and violence against women and the improvement of their status. Also pertinent to the treatment of children and juveniles is the *Convention Against Discrimination in Education*⁶⁰⁶ ('CADE'), which specifies that all persons are to have access to and an equal standard of education irrespective of sex, colour, religion, language, political view or social, economic or national origin, which are discriminatory elements that are also prohibited in the provisions regarding opportunity or treatment in employment or occupation set down in the *Discrimination (Employment and Occupation) Convention*⁶⁰⁷ ('DEO').

Several United Nations human rights protocols also impact upon juvenile violence in Australian schools inasmuch as they are independently relevant and persuasive whilst providing substance to the *UNCRC*,⁶⁰⁸ and usefully acknowledge both the social milieu in which the juvenile justice system operates and the difficulty in translating human rights obligations to feasible and compliant juvenile justice practices.⁶⁰⁹ As a state party to the *UNCRC*, Australia must refer to these rules and guidelines when interpreting the *UNCRC* in order to fully understand the requirements of the convention.⁶¹⁰

The United Nations *Guidelines for the Prevention of Juvenile Delinquency 1990* ('*Riyadh Guidelines*') seek to prevent juvenile delinquency through general prevention principles, socialisation processes, familial and education assistance programs, social policy, research and policy development, community and mass media initiatives, juvenile justice administration and the introduction of laws and procedures to protect the rights and wellbeing of young persons.⁶¹¹ Appropriate treatment of juvenile offenders is

⁶⁰⁵ Ratified by Australia in 1983.

⁶⁰⁶ Ratified by Australia in 1967.

⁶⁰⁷ Ratified by Australia in 1974.

⁶⁰⁸ Australian Human Rights Commission, *Human Rights Brief No 2, Sentencing Juvenile Offenders* (1999) <http://www.hreoc.gov.au/human_rights/briefs/brief_2.html>.

⁶⁰⁹ Kilkelly, above n 50.

⁶¹⁰ Australian Human Rights Commission, *Human Rights Brief No 2*, above n 608.

⁶¹¹ *United Nations Guidelines for the Prevention of Juvenile Delinquency* ('*The Riyadh Guidelines*'), GA Res 45/112, UN GAOR, 45th sess, Supp No 49A, UN Doc A/45/49 (14 December 1990) annex 201.

subject to the *Standard Minimum Rules for the Administration of Juvenile Justice 1985* ('*Beijing Rules*'), which outline the appropriate conduct and behaviour of juvenile offenders in meeting their varying needs while upholding rights, and the fair and thorough application of rules while meeting societal needs, particularly in the areas of proportionality of sentencing, promotion of the wellbeing of the juvenile, procedural safeguards, privacy and diversion from punitive criminal justice processing.⁶¹²

Alternatives to confinement and detention are outlined in the *Standard Minimum Rules for Non-custodial Measures 1990* ('*Tokyo Rules*'), which are directed at the promotion of non-custodial measures and minimum safeguards of alternatives to incarceration at all stages of criminal justice administration including during pre-trial, trial and post-sentence stages. They include measures such as probation, conditional discharge, status penalties, community service orders and suspended or deferred sentencing while acknowledging offender rehabilitation, society protection and victim interests.⁶¹³ It is the intent of the *Rules for the Protection of Juveniles Deprived of Their Liberty 1990* ('*Havana Rules*') that juveniles are imprisoned only as a measure of last resort and for minimum periods and in exceptional cases, only while demonstrating respect for human rights in order to address the deleterious effect of detention and encourage reintegration.⁶¹⁴

⁶¹² *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('*The Beijing Rules*'), GA Res 40/33, UN GAOR, 40th sess, Supp No 53, UN Doc A/40/53 (29 November 1985) annex, 207.

⁶¹³ *United Nations Standard Minimum Rules for Non-custodial Measures* ('*The Tokyo Rules*'), GA Res 45/110, UN GAOR, 45th sess, Supp No 49A, UN Doc A/45/49 (14 December 1990) annex, 197.

⁶¹⁴ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* ('*The Havana Rules*'), GA Res 45/113, UN GAOR, 45th sess, Supp No 49A, UN Doc A/45/49 (14 December 1990) annex, 205.

3.6 Specific Rights Provided by the Convention on the Rights of the Child with Particular Focus on Participation and Best Interests

3.6.1 Introduction

The *UNCRC* has both incorporated a comprehensive range of human rights, including civil, economic, political, cultural and social rights, and outlined the ways in which these rights can be upheld for children and juveniles.⁶¹⁵ Under the *UNCRC*, a child is a person below the age of 18 years, unless in circumstances where the age of majority is set lower by state parties, in which case an increase of adult age is recommended by the United Nations⁶¹⁶ as well as a general encouragement to the increase protection of children. The rights of children and juveniles under the *UNCRC* encompass various safeguards that have an impact upon discipline management policy in school settings. This will be expanded upon in Chapter 4 with an assessment of the status of these safeguards in Australian juvenile justice legislation as well as domestic education law and policy.

3.6.2 General Rights

The *UNCRC* espouses general rights including the right to life, freedom of expression, thought and religion, and is against all forms of torture, economic and sexual exploitation, abuse including drug abuse and other forms of neglect. It advocates the preservation of identity and nationality, development and welfare, including reasonable standards of living, education, leisure, health, social security, medical services, privacy, information, and reunion with family unless contrary to the best interests of the child or juvenile.⁶¹⁷ Other general rights upheld by the *UNCRC* incorporate those concerning welfare, including the right of children to reasonable standards of living and development, the cultural concerns of indigenous and minority children and the special needs of handicapped, orphaned and refugee children.⁶¹⁸

⁶¹⁵ Australian Human Rights Commission, *About Children's Rights*, above n 583.

⁶¹⁶ Australian Council For International Development, *Child Rights*, above n 542; see 2.3 above for a discussion on the *doli incapax* standard and the various approaches undertaken by Australian states and territories to the setting of criminal responsibility standards for children and juveniles.

⁶¹⁷ Freeman, 'The Future of Children's Rights', above n 539, 278–279; See *UNCRC* arts 6, 7, 8, 12, 14, 16, 18, 19, 20, 24, 26, 27, 28, 32, 33, 34, 36, 37.

⁶¹⁸ *Ibid*; see *UNCRC* arts 20, 22, 23, 27, 30.

3.6.3 *The Right to an Education*

The right to an education under art 28 and the goals of education under art 29, particularly the direction of the child's education toward the development of personality and respect for human rights along with tolerance, is significant as this *UNCRC* provision emphasises both the right to an education in broad terms as well as the wider recognition of the child's rights.⁶¹⁹ Further, primary education is to be available for all children and ought to be free, while human rights and respect for others should be upheld along with cultural diversity. Moreover, the dignity of school children should be respected and schools should be free of violence with any disciplinary action to be respectful of the dignity of the child. Under art 28, policy and procedure should not include physical or mental violence, abuse or neglect.⁶²⁰ The *UNCRC* places much emphasis on education and actively encourages children to achieve the highest possible level of education within their capability. The right to an education under art 28 is further bolstered by art 29, which advocates that children are to be encouraged to develop their talent, ability and personality to the fullest along with developing respect for their own and other cultures and human rights generally.⁶²¹

3.6.4 *Rights Relevant to Those Experiencing Difficulty*

Rights relevant to children experiencing difficulty or who are subject to special circumstances are also prescribed by the *UNCRC*, such as for refugees and orphaned, adopted and handicapped children and juveniles as well as those juveniles in minority and Indigenous groups.⁶²² These rights also encompass protection for children subject to rehabilitative care, for children suffering from deprivation, and a special prohibition on the recruitment of soldiers younger than 15 years of age.⁶²³

⁶¹⁹ Freeman, 'Taking Children's Rights More Seriously', above n 519, 69; see *UNCRC* arts 28 and 29.

⁶²⁰ UNICEF, *Fact Sheet: Summary of Rights Under the Convention on the Rights of a Child* <http://www.unicef.org/crc/files/Rights_overview.pdf>; See *UNCRC* art 28.

⁶²¹ Freeman, 'Taking Children's Rights More Seriously', above n 519, 69; see *UNCRC* arts 28 and 29.

⁶²² Freeman, 'The Future of Children's Rights', above n 539, 278; see *UNCRC* arts 20, 22, 23, 30.

⁶²³ Freeman, 'The Future of Children's Rights', above n 539, 278; see *UNCRC* arts 38, 39.

3.6.5 *Juvenile Justice, Proportionality and Diversion*

With respect to youth justice, the *UNCRC* under art 40 and Beijing Rule 14 requires age appropriate and child focussed justice system treatment of children and juveniles in conflict with the law, incorporating due process principles. Due process, procedural fairness and natural justice refer to essentially common law rules and expectations which necessitate unbiased and equitable judicial and administrative decision-making and include the right to be heard and to receive notice of the hearing whether personally or through legal representation. Art 40 and Beijing Rule 14 require maintenance of the child's worth and the reinforcement of the child's respect for human rights, along with appropriate consideration of their age including the minimum age for criminal responsibility, expeditious processing of judicial or alternative determinations, and ultimately a desire to reintegrate the child into society.⁶²⁴ The *UNCRC* also provides for important processes in juvenile justice to be promoted including the diversion of young offenders under art 40 as well as proportionality in the sentencing of juvenile offenders.

Proportionality of sentence is to be undertaken with due deference to *UNCRC* art 40, including consideration of both the offence and the individual circumstances of the offender such as age, family and socio-economic background, educational level and physical and mental health. This is further buttressed by Beijing Rule 5 which requires that proportionality of sentence be an instrument for curbing punitiveness.⁶²⁵ Under art 3 of the *UNCRC*, the best interest principle is as applicable in the sentencing of juvenile offenders as in any juvenile justice issue.⁶²⁶ Similarly, under Beijing Rule 17 detention is only considered appropriate in extraordinary circumstances and for minimum periods under the provisions of Beijing Rule 19. This includes cases where juveniles have committed serious violent acts as per *UNCRC* art 37 and Havana Rule 1, including situations where there is also no practicable alternative.⁶²⁷ Proportionality of sentence

⁶²⁴ Kilkelly, above n 50, 189; see *UNCRC* art 40 and Beijing Rule 14.

⁶²⁵ Australian Human Rights Commission, *Human Rights Brief No 2*, above n 608; see *UNCRC* art 40 and Beijing Rule 5.

⁶²⁶ Australian Human Rights Commission, *Human Rights Brief No 2*, above n 608; see *UNCRC* art 3.

⁶²⁷ Kilkelly, above n 50, 190; see *Beijing Rules* 17 and 19.

should not allow an increase in penalty beyond the gravity of offences solely for the protection of society from offender recidivism.⁶²⁸

Measures that redirect offenders away from formal punitive criminal justice processes are collectively referred to as diversion.⁶²⁹ Specifically, vulnerable young offenders are to be dealt with without resorting to traditional punitive criminal justice proceedings so long as appropriate human rights and legal safeguards are respected, as juvenile offending is quite often transitory with most juvenile offenders ageing out of offending as they near the end of their teenage years.⁶³⁰ Diversionary options such as cautioning, family group conferencing⁶³¹ and the like are restorative justice principles that are instrumental in lessening the oppressive nature of traditional court processes in juvenile justice systems. However, Kilkelly⁶³² argues that diversion under the auspices of the *UNCRC* must only occur in situations where the accused child or juvenile freely accepts responsibility for the offence and provides his or her consent. There is also a requirement preventing the juvenile's acknowledgement of guilt being used against him or her in any subsequent judicial proceeding. Moreover, access to any diversionary option is not to be arbitrary under Tokyo Rule 3, with agencies being required to follow established legal guidelines when exercising the power to divert children and juveniles from traditional formalised juvenile justice proceedings.⁶³³

3.6.6 Freedom of Expression

Respect for the views of the child is promoted under art 13 of the *UNCRC*. That is, children have the right to acquire and disseminate information as they see fit, so long as they do not impinge on the freedoms, rights or reputations of others and the expression is not damaging or destructive to others or in fact themselves. In addition, the *UNCRC* promotes freedom of conscience and religious freedom in art 14 so long as these

⁶²⁸ Australian Human Rights Commission, *Human Rights Brief No 2*, above n 608.

⁶²⁹ Australian Human Rights Commission, *Human Rights Brief No 5: Best Practice Principles for Diversion of Young Offenders* (2001) <http://www.hreoc.gov.au/human_rights/briefs/brief_5.html>.

⁶³⁰ *Ibid.*

⁶³¹ See 5.5 below for a discussion on family group conferencing amongst other restorative justice methods operating in Australia.

⁶³² Kilkelly, above n 50, 190.

⁶³³ Australian Human Rights Commission, *Human Rights Brief No 5*, above n 629; see Tokyo Rule 3.

freedoms do not restrict or prevent the equivalent rights of others. The parental right to guide and support children in religious matters is encouraged with due acknowledgement of the ability of the maturing child to question religious beliefs. In addition, freedom of association of children is protected under art 15 with the ability to meet and form groups and organisations upheld so long as the rights of others are not impinged, whilst children are equally expected to respect the rights, freedoms and reputations of others.

3.6.7 Freedom From Degrading and Cruel Treatment and Appropriate Minimum Age Requirements

Art 37 of the *UNCRC* and Beijing Rule 17 also prohibit treatment or punishment of children and juveniles that is considered degrading, inhumane or cruel, be it physical or mental in nature,⁶³⁴ whilst art 19 of the *UNCRC* prohibits corporal punishment of a child or juvenile in any shape or form, under any circumstance. This is also reflected in Beijing Rule 17.⁶³⁵ The general substantive rights available under the *UNCRC* are restricted to human beings under the age of 18 years of age under art 1 unless majority is realised earlier, which is fundamental as the *UNCRC* is restricted in its application to children.⁶³⁶ In addition, the provisions of art 40 of the *UNCRC* require that state parties establish an appropriate minimum age of criminal responsibility.⁶³⁷ This is supported by Beijing Rule 3 which acknowledges salient factors including the emotional, intellectual and mental maturity of the juvenile, with an age span of 14–16 considered an acceptable minimum age, although the full application of juvenile justice procedures to those aged 18 years or less is recommended.⁶³⁸

Of particular relevance for this study, the *UNCRC* notions of participation and best interests will now be explored as these elements have significant impact on the rights-

⁶³⁴ Australian Human Rights Commission, *Human Rights Brief No 2*, above n 608; see art 37 of the *UNCRC* and Beijing Rule 17.

⁶³⁵ Australian Human Rights Commission, *Human Rights Brief No 2*, above n 608; see art 19 of the *UNCRC* and Beijing Rule 17.

⁶³⁶ McGoldrick, above n 555; see *UNCRC* Article 1.

⁶³⁷ See 2.3 above for a discussion on the *doli incapax* provisions in Australian states and territories; see *UNCRC* art 40.

⁶³⁸ Kilkelly, above n 50, 190; see Beijing Rule 3.

based approach to school discipline management which will be further explored in Chapter 5 of the thesis.

3.6.8 Participation

Freeman suggests that art 12 of the *UNCRC* is potentially one of the most important provisions, although not without room for improvement including the issue of clarification in the context of separate representation of the child.⁶³⁹ Art 12 essentially gives children the right to participate in all matters concerning them with their views being given suitable credence. This includes the opportunity to be heard in all proceedings against them including those of judicial, familial or administrative nature, with due deference paid to the child's age and maturity such that a teenager's views will be of greater import than those of a pre-schooler, for example. Any proceeding that involves juveniles must provide the opportunity for the accused juvenile to participate in the hearing and express him or herself freely, either directly, through representation, or through an appropriate body in accordance with the procedural rules of the nation state, as recommended by *UNCRC* art 12 and Beijing Rule 14.⁶⁴⁰

Although not dismissive of the rights and responsibilities of parents in expressing their views in matters involving their children, *UNCRC* art 12 actively encourages adults to involve children in decision-making and make allowance for their views and opinions. There seems to be global consensus on this most significant *UNCRC* right, such that participatory rights remain of great importance in the development of citizenship among children and juveniles. Varnham, Booth and Evers suggest that children and juveniles be encouraged to make a meaningful contribution to social, community, legal and political debate in democratic society⁶⁴¹ by enabling them to provide useful input in circumstances where decisions that affect them are determined,⁶⁴² including in school settings as per the tenets of *UNCRC* art 12.

⁶³⁹ Freeman, 'The Future of Children's Rights', above n 539, 288.

⁶⁴⁰ Australian Human Rights Commission, *Human Rights Brief No 2*, above n 608; see *UNCRC* art 12 and Beijing Rule 14.

⁶⁴¹ S Varnham, T Booth and M Evers, 'Let's Ask The Kids – Practicing Citizenship and Democracy in Schools' (2011) 16(2) *International Journal of Law & Education* 77; see *UNCRC* art 12.

⁶⁴² Varnham, Booth and Evers, above n 641, 77, 78; see *UNCRC* art 12.

Instructively, many children and juveniles are of the opinion that they are all too often excluded from information sharing and decision-making processes, and although due deference to maturity must be shown, it has been established that children and juveniles can in fact absorb and competently digest the painful information they are so often denied by adults. However, as Lansdown argues, the right to be heard under *UNCRC* art 12 does not guarantee that their views will necessarily prevail.⁶⁴³ Further, although adults may on occasion feel the need to withhold information for protective purposes, children and juveniles will equally resent being denied access. This will exacerbate their distress and anxiety as they are rights holders rather than simply beneficiaries of adult goodwill and should as a rule be included in decision-making processes.⁶⁴⁴

Federle⁶⁴⁵ comments that, despite due regard for immaturity, questioning the ability of children and juveniles to make a meaningful contribution to legal proceedings on account of their immature age may be misplaced, at least to the extent that participation does not override legal processes such that the child or juvenile is only a participant rather than final arbitrator in proceedings which remains the preserve of courts or other bodies. Equally, the *UNCRC* has provided a much-needed challenge to the notion of the incompetent, vulnerable child that has so long been a staple of the child protection movement, where children and juveniles were largely invisible and discriminated against on the basis of age, seen as little more than adults in waiting, and consequently accorded marginal autonomy and importance.⁶⁴⁶

3.6.9 Best Interests Principle

A central canon of the *UNCRC* is that primary consideration be given at all times to respecting the ‘best interests of the child.’⁶⁴⁷ This is an indistinct statement, although no more so than ‘reasonableness’ or several other fluid terms and statements that courts must routinely decipher. Under art 3 of the *UNCRC*, the best interests of the child are at

⁶⁴³ G Lansdown, ‘Implementing Children’s Rights and Health’ (2000) 83 *Archives of Disease in Childhood* 286; see *UNCRC* art 12.

⁶⁴⁴ Lansdown, above n 643.

⁶⁴⁵ K H Federle, ‘Children’s Rights and the Need for Protection’ (2000–2001) 34(3) *Family Law Quarterly* 440.

⁶⁴⁶ Reynaert, Bouverne-De Bie and Vandervelde, above n 554, 521–522.

⁶⁴⁷ Australian Human Rights Commission, *About Children’s Rights*, above n 583; see *UNCRC* art 3.

all times and in all actions concerning children⁶⁴⁸ to be of primary consideration by courts, legislators, administrative bodies and social welfare institutions.⁶⁴⁹ This article of the *UNCRC* is not without controversy, as while the best interests of the child are to be of primary or paramount consideration, this is not a requirement that excludes other considerations. It can be juxtaposed to circumstances where primary or paramount consideration is unfettered and thus more easily determined, as is the case in some child welfare legislation, for example.⁶⁵⁰

The indeterminacy and subjectivity of the best interests standard also raises issues with regard to both its nature and the attendant rights and duties, along with the complication of adding potential content to the standard, as often such content is grounded in parental rather than child or juvenile rights.⁶⁵¹ It is often the case that what is considered in the best interests by adults is rarely to the advantage of children and juveniles.⁶⁵² Adult-centric interpretation often has a dominant effect on other rights, which has in the past led to unfortunate decision-making, action and treatment of children and juveniles, for example, the institutionalisation and separation of disabled children from families or denial of contact between mother and baby in hospital settings.⁶⁵³

McGoldrick suggests that difficulty in applying the best interests principle can be attributed in part to the multitude of personal, social and economic factors that combine to inform what is in the best interests of a particular child or juvenile.⁶⁵⁴ Cultural and social issues also contribute to obfuscation of the best interests standard with historical context an added difficulty.⁶⁵⁵ However, criticism of the principle's ambiguity is often the result of short-sightedness in reading the *UNCRC*'s articles independently rather

⁶⁴⁸ Australian Human Rights Commission, *Human Rights Brief No 1* (7 December 2009) 2 <http://www.hreoc.gov.au/human_rights/briefs/brief_1.html>; see *UNCRC* art 3.

⁶⁴⁹ Australian Human Rights Commission, *Human Rights Brief No 1*, above n 648, 1.

⁶⁵⁰ Freeman M, 'Children's Rights Ten Years After Ratification' in B Franklin (ed), *The New Handbook of Children's Rights Comparative Policy and Practice* (Routledge, 2002) 98; see, eg, *Children Act 1989* (UK) s 1(1) which requires that courts must uphold the welfare of a child as *the* paramount consideration in matters concerning them. See *UNCRC* art 3.

⁶⁵¹ Federle, 'Children's Rights', above n 645, 423; see *UNCRC* art 3.

⁶⁵² Federle, 'Children's Rights', above n 645, 423; see *UNCRC* art 3.

⁶⁵³ Lansdown, above n 643, 287–8; see *UNCRC* art 3.

⁶⁵⁴ McGoldrick, above n 555, 136; see *UNCRC* art 3.

⁶⁵⁵ Lansdown, above n 643, 288; see *UNCRC* art 3.

than holistically, and more to the point, without necessary acknowledgement that the principle is in fact restricted and guided by the *UNCRC*.⁶⁵⁶ As an example, the *UNCRC* guarantee to protect physical integrity of children and juveniles can be associated with art 6 which acknowledges right to life, art 24 which ensures highest attainable standards in health, art 34 which promotes protection from exploitation and sexual abuse, and art 37 which prohibits cruel and inhumane punishment including torture, other degrading treatment, and the capital punishment of children and juveniles.⁶⁵⁷

By extension, other aspects of the physical wellbeing of children or juveniles are also identified in the *UNCRC*, such as in art 27 which promotes the right to an adequate standard of living including suitable focus on mental, social, moral and spiritual development, as well as the age appropriate responses found in arts 12, 37 and 40.⁶⁵⁸ Factors such as these provide useful guidance in better understanding the *UNCRC*'s best interests principle. In particular, the statements found in *UNCRC* arts 5, 12, 14, 18, 32, 33 and 34 that children and juveniles remain vulnerable and are in various stages of maturation are significant and can also provide context⁶⁵⁹ in assessing the best interests of children and juveniles as per the requirements of *UNCRC* art 3.

Of particular note is the requirement that the best interests of children or juveniles are to be applied in any decision or action affecting them, the rights and freedoms prescribed by the *UNCRC* are to be enjoyed by children and juveniles under art 29, whilst the views freely formed by children and juveniles on their own best interests are to be taken into account at all times under art 12.⁶⁶⁰ Further, if parents fail to uphold the best interests principle on behalf of their children, states can intervene to ensure the principle

⁶⁵⁶ Monohan and Young, above n 516, 44; see *UNCRC* art 3.

⁶⁵⁷ H Blagg and M Wilkie, 'Young People and Policing in Australia: The Relevance of the UN Convention on the Rights of the Child' (1997) 3(2) *Australian Journal of Human Rights* 138; see *UNCRC* arts 6, 24, 34 and 37.

⁶⁵⁸ Blagg and Wilkie, above n 657; see *UNCRC* arts 12, 27, 37 and 40.

⁶⁵⁹ Blagg and Wilkie, above n 657; see *UNCRC* arts 5, 12, 14, 18, 32, 33 and 34.

⁶⁶⁰ Australian Human Rights Commission, *Human Rights Brief No 1*, above n 648, 3; see *UNCRC* arts 12 and 29.

is upheld under art 9, and also that it is in the best interests of Indigenous children and juveniles to be raised in Indigenous communities under art 30.⁶⁶¹

Although not unrestricted, the best interests requirement places a substantial burden on states to justify actions contrary to the best interests of children and juveniles. However, it is not the sole or supreme consideration in relevant decision-making⁶⁶² and can be overridden on occasion by other interests under the *UNCRC* such as in circumstances where other parties or communities have higher interests including those of an economic or religious nature.⁶⁶³ Of concern, however, is the tendency of the best interest principle to be used to justify the prejudices and agendas of individuals and agencies, such as was seen in amendments to the shared parenting presumption in Australian family law⁶⁶⁴ in the mid-2000s, along with the controversial removal of children from Northern Territory Indigenous communities under the guise of promoting the best interests of children.⁶⁶⁵

As will be discussed in Chapter 4 of the study,⁶⁶⁶ the best interests of the child principle has had sporadic exposure in domestic education law and policy, and has been more visible in the areas of medicine, disability and anti-discrimination.⁶⁶⁷ In meeting these aims under the *UNCRC*, due deference to Australia's general human rights obligations under the *ICERD* and *ICCPR* must take place including the presumption of innocence, and the right to silence, access to legal assistance, equal treatment before the law, access to interpreter services and the presence of parents or guardians.⁶⁶⁸ Further, children and juveniles along with their families are to be afforded privacy throughout all stages of juvenile justice procedures under art 40 of the *UNCRC* and Beijing Rule 8.⁶⁶⁹

⁶⁶¹ Australian Human Rights Commission, *Human Rights Brief No 1*. See *UNCRC* arts 9 and 30.

⁶⁶² Monohan and Young, above n 516, 45.

⁶⁶³ Australian Human Rights Commission, *Human Rights Brief No 1*, above n 648, 3.

⁶⁶⁴ *Family Law Act 1975* (Cth) s 65DAA.

⁶⁶⁵ Monohan and Young, above n 516, 45, 373.

⁶⁶⁶ See 4.11.2 below for a summary of the inclusion or otherwise of the best interests principle in domestic legislation and school policy.

⁶⁶⁷ J Cumming, R Mawdsley and E De Waal, 'The Best Interests of the Child, Parents Rights and Educational Decision-Making for Children: A Comparative Analysis of Interpretations in the United States of America, South Africa and Australia' (2006) 11(2) *Australia & New Zealand Journal of Law & Education* 53.

⁶⁶⁸ Australian Human Rights Commission, *Human Rights Brief No 5*, above n 629.

⁶⁶⁹ Kilkelly, above n 50, 190; see art 40 of the *UNCRC* and Beijing Rule 8.

3.6.10 Australia's Human Rights Performance with Respect to the Convention on the Rights of the Child

Australia's human rights performance pursuant to the *UNCRC* was investigated in the 2011 submission to the Committee on the Rights of the Child by the Australian Human Rights Commission in its 4th periodic report. In its findings, the Commission reiterated the need for Australia to improve the legal protective mechanisms for juvenile and child rights. In particular, there is a need to increase the number of *UNCRC* rights enshrined in Australian law, reduce the so-called 'implementation gap' whereby many *UNCRC* rights remain unincorporated into domestic law,⁶⁷⁰ and to address the dearth of available remedies in circumstances where the human rights of juveniles and children are violated.⁶⁷¹ The Commission also recommended the establishment of an independent, adequately resourced National Children's Commissioner⁶⁷² who would be accessible to children and juveniles and oversee the protection and promotion of human rights for children and juveniles from a coordinated nationwide perspective with particular emphasis on their best interests and participation in decision-making that affects them.⁶⁷³ This was subsequently realised in 2013.

Central to the Commission's recommendations was the implementation of a Commonwealth human rights legislation which fully incorporates those human rights obligations to children and juveniles into domestic law not currently addressed by the *Constitution* or common law. The Commission did acknowledge that Victoria and the Australian Capital Territory provide limited protection of human rights through specific

⁶⁷⁰ See 3.6 above for a discussion on *UNCRC* rights.

⁶⁷¹ Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child. Information Concerning Australia and the Convention on the Rights of the Child* (August 2011) [7] <https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2011/201108_child_rights.pdf>.

⁶⁷² Note that all state and territory governments have either guardians or children's commissioners in place to promote the rights of and advocate for children and juveniles; see n 1766 below in regard to the recent appointment of a National Children's Commissioner, Megan Mitchell. Note also that additional information was provided to the United Nations Committee on the Rights of the Child by the Australian Human Rights Commission in 2012. See <https://iswm.humanrights.gov.au/sites/default/files/content/legal/submissions/2012/20120509_childRights.pdf>.

⁶⁷³ Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child*, above n 671, [23]–[28].

human rights legislation in those jurisdictions.⁶⁷⁴ Further and with relevance to this study, the Commission recommended a systemic approach to the voicing of views by children and juveniles in judicial or administrative matters that affect them under *UNCRC* art 12 and Beijing Rule 14.⁶⁷⁵ Moreover, in addition to such views being taken into account and given due weighting, an integrated, interdisciplinary and coordinated approach is to be taken to address violence, harassment and bullying in schools consistent with the upholding of the rights of children and juveniles which also has additional relevance to the right to education under the auspices of *UNCRC* arts 28 and 29.⁶⁷⁶ Also germane to this study is the Commission's recommendation that human rights education be integrated into school curriculum and learning areas.⁶⁷⁷

Despite enthusiasm for the adoption of *UNCRC* provisions, the wholesale incorporation of the *UNCRC* provisions into Australian domestic law has remained elusive since ratification of the Convention in 1990. Instructively, despite its wide ratification amongst member states, the provisions of the *UNCRC* remain sparingly integrated into domestic legal systems globally, which naturally acts as an impediment to the enforcement of *UNCRC* provisions in domestic courts.⁶⁷⁸ However, some member states such as South Africa have adopted constitutions that import *UNCRC* provisions, or at least expressly recognise the human rights of children and juveniles or alternately require that consideration of such rights be espoused as understood under international obligations.⁶⁷⁹ Equally, in countries such as the United States, which is notable for not having ratified the *UNCRC*, and the United Kingdom, the judiciary has on occasion exhibited a language that reflects the human rights of children. This has been evident with pivotal cases decided by courts in these dominions providing a platform for the development and international recognition of children and juveniles as authentic human rights holders. There has been some criticism of the United States judiciary and its efforts with respect to the children's rights tenets espoused by the *UNCRC*, for example

⁶⁷⁴ Ibid [6]–[8].

⁶⁷⁵ Ibid; see *UNCRC* art 12 and Beijing Rule 14.

⁶⁷⁶ Ibid.

⁶⁷⁷ Ibid, [147]–[148].

⁶⁷⁸ J Tobin, 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 20 *Melbourne University Law Review* 25.

⁶⁷⁹ Ibid.

with regard to respecting the views of the child espoused in art 12 and freedom of expression under art 13 of the *UNCRC*.⁶⁸⁰

3.7 Jurisprudence Relevant to Juvenile Rights

3.7.1 Introduction

The human rights of juveniles have progressively been advanced through international human rights instruments and legislation which will now be the focus of discussion. This shift toward the recognition of children and juveniles as individual rights holders rather than simply as parental property has also been reflected in judicial interpretation and application. Although not necessarily concerned with juvenile violence, the cases highlighted in the following discussion have helped shape and cement the context and application of a rights-based approach⁶⁸¹ to juveniles and are useful in tracking the development and implementation of this method by the judiciary. Reference will also be made to foreign case law exemplars in order to provide constructive insight and a more sophisticated understanding of the interpretation, application and development of human rights principles.

3.7.2 Celebrated International Decisions

The capacity of courts to uphold a human rights-based approach on behalf of children and juveniles has been examined in a number of cases dating from the 1960s. A watershed case in children's rights, the decision in *Re Gault*⁶⁸² triggered a significant turning point in the treatment of children by the United States Supreme Court. In this case a 15-year-old juvenile boy was taken into custody and placed into a detention home for several days without notification to his parents', following an accusation of making lewd telephone calls. He was later committed to an industrial school. After an unsuccessful petition to the Arizona Supreme Court, the parents appealed to the United

⁶⁸⁰ Freeman, 'Review Essay: What's Right with Rights for Children', above n 483, 1; see also E Bartholet, 'Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons From a Child Rights Perspective' (2011) 633 *The Annals of the American Academy of Political and Social Science* 89.

⁶⁸¹ The rights-based approach was introduced in Chapter 1 of the thesis and will be expanded upon in Chapter 5, where a rights-based, restorative justice approach to discipline management in Australian schools will be advanced.

⁶⁸² *Re Gault* 387 US 1 (1967).

States Supreme Court which held that the juvenile was denied constitutional rights including the right to confront his accusers and the right to legal counsel, to be provided along with the right to be notified of charges or self-incrimination.

Essentially, the previous welfare model in which children were denied due process rights was substituted with an approach grounded in a universal application of the *Bill of Rights* and the *Fourteenth Amendment* to include all American citizens rather than only adults.⁶⁸³ This attitude was also evident in *Planned Parenthood of Central Missouri v Danforth*,⁶⁸⁴ a case that challenged the validity of a state statute that ordered that a minor could only procure a termination of pregnancy when provided with written endorsement from a parent or spouse. Blackmun J of the United States Supreme Court argued in particular that minors and adults are both provided with constitutional rights which do not magically evolve upon the age of majority but rather are available to all.⁶⁸⁵

The landmark *Tinker v Des Moines*⁶⁸⁶ case decided by the United States Supreme Court is prominent in the activation of judicial regard for advancing the interests of children and juveniles along with *Gillick*,⁶⁸⁷ a House of Lords decision which will be discussed below.⁶⁸⁸ In *Tinker*, school students were prevented by school authorities from wearing black armbands in protest of the Vietnam War, prompting the Supreme Court to famously proclaim that children ‘do not abandon their civil rights at the school gate’ and that ‘they are possessed of fundamental rights which the state must respect’. The House of Lords advanced the notion in *Gillick* that children who have attained sufficient understanding and intelligence are not dependent on parents to make fundamental decisions. This was subsequently labelled a pivotal decision within common law jurisdictions.⁶⁸⁹ *Tinker* serves as a useful illustration of the increased promotion of children’s rights as a consequence of student militancy, which was further buttressed at

⁶⁸³ Tobin, above n 678, 15–16.

⁶⁸⁴ *Planned Parenthood of Central Missouri v Danforth* [1976] USSC160.

⁶⁸⁵ Tobin, above n 678, 16.

⁶⁸⁶ *Tinker v Des Moines School District* 393 US 503 (1969).

⁶⁸⁷ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.

⁶⁸⁸ Monohan and Young, above n 516, 27.

⁶⁸⁹ Tobin, above n 678, 13.

the time by an expansion of underground literature espousing the rights of children.⁶⁹⁰ *Gillick* confirmed that a minor did not lack the capacity to decide on medical treatment and consent to contraception in his or her own best interests, and that parental rights were subordinate to those of the child once the child had obtained an appropriate measure of understanding and intelligence.

3.7.3 Australian Human Rights Case Law

Similarly, within the Australian jurisdiction, *Secretary, Department of Health and Community Services (NT) v JWB and SMB ('Re Marion No. 1')*⁶⁹¹ is also notable for examining the vexed question of upholding the rights of an intellectually disabled juvenile female over parental rights in relation to sterilisation. Seen by the High Court as very much a final option, the right of the parents to arrange for such an invasive and irreversible procedure was declined, endorsing the House of Lords position in *Gillick* that a child displaying sufficiency in both understanding and maturity can in fact participate in legal relationships without parental consent.⁶⁹²

Further judicial examination of this difficult issue followed in *Re Marion No. 2*.⁶⁹³ An unsuccessful attempt to prevent parents from ordering the sterilisation of their severely disabled young daughter can be found in *Re a Teenager*,⁶⁹⁴ where a child through her next friend failed to convince the Family Court of Australia that the procedure was not in her best interests and should not take place, whilst a similar application to allow parents to arrange the sterilisation of a severely disabled child was upheld by the Family Court in *Re Katie*.⁶⁹⁵ Notwithstanding judgement in favour of the parents in *Re a Teenager* and *Re Katie*, the court considered that the best interests doctrine ought to be assessed from the perspective of the child.

⁶⁹⁰ Parker-Jenkins, above n 515.

⁶⁹¹ *Secretary, Department of Health and Community Services (NT) v JWB and SMB (Re Marion No. 1)* (1992) 175 CLR 218.

⁶⁹² Tobin, above n 678, 21.

⁶⁹³ *Re Marion No. 2* (1994) FLC 92-448.

⁶⁹⁴ *Re a Teenager* (1988) 94 FLR 181.

⁶⁹⁵ *Re Katie* (1995) FamCa 130.

A more sympathetic approach to advancing a rights-based approach by Australian courts in legal proceedings involving children and juveniles was demonstrated by the Family Court when examining the legality of a 13-year-old girl obtaining a gender reassignment procedure in the case of *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* ('*Re Alex*').⁶⁹⁶ This case notably diluted the formalities normally associated with legal proceedings and acknowledged the applicant as a young person rather than a child in order to promote her rights during dispute resolution.⁶⁹⁷

This case is notable for the extent to which the court promoted a rights-based approach through the participation of important stakeholders in the proceedings including a child representative entrusted to uphold the child's best interests, members of the Australian Human Rights and Equal Opportunity Commission and other statutory agencies, and other important participants including the child's family members.⁶⁹⁸ Moreover, whilst the rules of the Family Court precluded the child from appointing her/his own legal counsel acting under exclusive instruction, the Chief Justice was prepared to accommodate the child in a private meeting so as to fully appreciate her/his position on the matter.⁶⁹⁹

In *Re the Child: 'Michael' Between John Britton Acting Public Advocate (Victoria) v GP & KP* ('*Re Michael*'), the issue of consent to surgical treatment by children was also explored by the Family Court of Australia.⁷⁰⁰ This case revolved around a child born with serious cardiac difficulties such that medical staff robustly recommended a perilous surgical procedure to the child's parents in order to alleviate the symptoms of the condition, if not to correct the abnormality. Continual pressure was placed upon the child's parents to consent to the procedure over several years. In the meantime, however, they had comprehensively investigated the risks involved with the procedure and had declined to give consent. This prompted medical personnel to initiate an action

⁶⁹⁶ *Re Alex: Hormonal Treatment for Gender Dysphoria* [2004] FamCA 297.

⁶⁹⁷ Tobin, above n 678, 18.

⁶⁹⁸ Ibid.

⁶⁹⁹ Ibid.

⁷⁰⁰ *Re the Child: 'Michael' Between John Britton Acting Public Advocate and G and E 'P' Respondents/Parents and Human Rights and Equal Opportunities Commission Intervener* [1994] FamCA 56; (1994) FLC 92-486.

through the Public Advocate seeking a declaration to allow the surgical procedure contrary to the wishes of the parents.

The parents raised three serious areas of concern regarding the child should the medical procedure take place, including death during the procedure, post-operative complications causing death, and finally the fact that, as the child was the only known survivor of the condition thus far, there was a lack of certainty as to the child's life expectancy rendering expert medical opinion no more than informed speculation. Treuvaud J remarked that where a court is required to intervene in circumstances involving the best interests of a child afflicted with a disability, the court is obligated to remain fundamentally responsible for the child's condition irrespective of the wishes of parents.

However, the court was mindful of the notion grounded in comparative international law that reinforces the importance of a child's view as to whether he or she should in fact have any medical treatment, although in this case the limited understanding and immature age of the child diminished the true value of such an import.⁷⁰¹ In this case the Australian Human Rights Commission was also party to proceedings and Treuvaud J noted the submissions made on behalf of the child, particularly in relation to the notion offered that the welfare jurisdiction of the Family Court was in effect equivalent to the *parens patriae*⁷⁰² jurisdiction and in fact is generated by the Crown's obligation to protect those who cannot provide for themselves. The court ordered a series of interventions and examinations of the child during childhood and adolescence so as to make recommendations regarding treatment, including a thorough explanation to the child at the age of twelve years so as to provide the opportunity for input and participation in any treatment option subsequently decided.

⁷⁰¹ Ibid [18].

⁷⁰² Developed by the English Court of Chancery, the *parens patriae* jurisdiction refers to a court's ability to stand in the place of parents insofar as decision-making on behalf of a minor is concerned and is primarily protective in nature; see also n 691 above *Re Marion No 1* (Mason CJ, Dawson, Toohey and Gaudron JJ); see also Fox, above n 475.

Similarly, in *B v Minister for Immigration and Multicultural and Indigenous Affairs* the Family Court explored another contentious issue involving the capacity of refugee children to seek repatriation in order to end their detention.⁷⁰³ This again saw the court endorse the entitlement of children to independent status rather than being parental property under the common law and the *Australian Constitution*.⁷⁰⁴ However, this was not the posture of the High Court when the decision was appealed, and parental rights were upheld.⁷⁰⁵ This position was also apparent in *Re Woolley: Ex Parte Applicants M276/2003 by their next friend GS*,⁷⁰⁶ in which the High Court upheld parental authority over children including both physical control and possessory rights. This case will be discussed in detail below.

Australia's obligations pursuant to the *ICCPR* were examined in *Hurst v State of Queensland ('Hurst')*,⁷⁰⁷ where the issue of indirect discrimination against a hearing-impaired primary school student was examined in an appeal to the Federal Court. This case was on appeal from a single judge who had decided that, despite the requirement being unreasonable in nature, the student could still 'comply' with a State of Queensland requirement that they be taught in English rather than with the assistance of a sign language interpreter. The appeal turned on the issue of whether or not the student was able to comply with the requirement. It was held that the primary judge had erred in finding that, because the student was able to cope in the classroom without assistance, no breach of the *Disability Discrimination Act*⁷⁰⁸ by the state had occurred.

The decision of the lower court was reversed on appeal largely because the student would be at a significant disadvantage without assistance and could therefore be considered to suffer from an inability to comply with the requirement to complete tuition in English. Essentially, the lower court's assertion that the child could comply physically, albeit with serious disadvantage, was analogous only to a theoretical

⁷⁰³ *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 30 Fam LR 181.

⁷⁰⁴ Monohan and Young, above n 516, 32–33.

⁷⁰⁵ *MIMIA v B* [2004] 219 CLR 365 (Kirby J).

⁷⁰⁶ *Re Woolley: Ex Parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1 (Gummow J).

⁷⁰⁷ *Hurst v State of Queensland* [2006] FCAFC 100.

⁷⁰⁸ *Disability Discrimination Act* 1992 (Cth) s 6(c).

possibility rather than a more preferable practical ability to comply with the requirement, and consequently was evidence of indirect discrimination.⁷⁰⁹ In this case, submissions on behalf of the Australian Human Rights Commission were also provided to the court. It was suggested specifically that the legislation be interpreted broadly and benignly in a manner consistent with Australia's obligations under international law and with general human rights values as espoused under the *UNCRC*, which obligates Australia to veto many forms of discrimination including that of an indirect nature in contravention of the *ICCPR*.⁷¹⁰ The Commission also argued that state parties are to institute measures that promote the self-reliance of children suffering from disability in accordance with the *UNCRC*, which would be offended by a narrow physical interpretation of whether or not the disabled child could comply with the legislation.⁷¹¹

The theoretical capacity to comply with educational requirements in *Hurst* was similarly examined in an early United Kingdom case *Mandla v Dowell Lee* ('*Mandla*'),⁷¹² in which a Sikh student contested the requirement for school entry that students wear school caps and short hair. The House of Lords suggested that 'can' comply be construed with reference to customs and cultural conditions synonymous with racial groups, such that although the student could clearly meet the requirement physically, they could not in a practical sense given their ethnic background. Moreover, the issue in dispute in *Hurst* can neatly be aligned with a similar situation which arose in *Catholic Education Office v Clarke* ('*Clark*').⁷¹³ In this case, a dispute arose as to whether a disabled student, who required the assistance of a sign language interpreter, was treated unfavourably by the administrators of his school. The court's reasoning was subsequently followed in the *Hurst* decision.

In *Clark*, it was seen to be fundamental to the ability of the student to meet an education requirement that the character of the obligation itself be viewed from the perspective of the disabled student. That is, participation by the disabled student should be taken to

⁷⁰⁹ *Hurst v State of Queensland* [2006] FCAFC 100 (Ryan, Finn and Weinberg JJ).

⁷¹⁰ *Ibid.*

⁷¹¹ *Ibid.*

⁷¹² *Mandla v Dowell Lee* [1982] UKHL 7 (Lord Fraser).

⁷¹³ *Catholic Education Office v Clarke* [2004] FCAFC 197.

mean being able to participate fully, free of an interpreter's assistance. As a corollary, discrimination by the court was confirmed as the student in *Clarke*, much like their counterpart in the *Hurst* case, could not fully meet the requirements without interpreter support. Essentially, a student placed at a non-trivial disadvantage when complying with an educational requirement can rightfully be considered to have been subject to discrimination when compared with those students who do not have a disability. Again, practical and reasonableness issues are to be considered in any assessment of this nature such that the ability of the student to comply must include a broad, more liberal approach to compliance rather than a more restrictive theoretical or physical examination.⁷¹⁴

In its intervention in *Clarke*, the Australian Human Rights Commission initially sought to provide the Federal Court with submissions that accurately reflected the intent of the domestic legislation⁷¹⁵ relevant to discrimination along with international human rights standards, especially those with an impact on people with disabilities.⁷¹⁶ The Commission placed particular emphasis on the requirement that the court should interpret the legislation⁷¹⁷ favourably in light of the *ICESCR*, *UNCRC*, *DRDP* and the *CADE*, amongst other international instruments.⁷¹⁸ In assessing whether the school authority's education requirement was reasonable, the Commission was of the view that circumstances where human rights are compromised by a requirement or condition indicate that such a duty is unreasonable, and made specific reference to circumstances where the right to education is effectively withheld in meeting this compulsion.⁷¹⁹

⁷¹⁴ Australian Human Rights Commission, 'Submissions of the Human Rights and Equal Opportunity Commission Seeking Leave to Intervene', Submission in *Catholic Education Office v Clarke*, No N 1693 of 2003, 1 June 2004, [41]

<http://www.hreoc.gov.au/legal/submissions_court/intervention/ceo_clark.html>.

⁷¹⁵ *Disability Discrimination Act 1992* (Cth), *Human Rights and Equal Opportunity Act 1986* (Cth).

⁷¹⁶ Australian Human Rights Commission, 'Submissions of the Human Rights and Equal Opportunity Commission Seeking Leave to Intervene', above n 714, [20].

⁷¹⁷ *Disability Discrimination Act 1992* (Cth).

⁷¹⁸ Australian Human Rights Commission, 'Submissions of the Human Rights and Equal Opportunity Commission Seeking Leave to Intervene', above n 714, [24].

⁷¹⁹ *Ibid* [26].

In *Clarke* the Commission also emphasised that the onus was on courts to consistently adopt both the best interests principle and allow due deference to the view of the child or juvenile when adjudicating the reasonableness or otherwise in disputes of this nature. Moreover, consistent with an approach that was mindful of international obligations, the Commission suggested that proportionality is imperative when examining reasonableness in the context of discrimination, as differentiation of treatment in some circumstances will not necessarily offend the *ICCPR* so long as the actions are reasonable and objective.⁷²⁰ The Commission felt that this methodology was also in harmony with Australia's domestic law, as the question of whether or not a requirement or obligation is indirectly discriminatory should be gauged by appropriateness, whether adapted to realise a non-discriminatory end and whether or not the said activity can realistically be achieved without the imposition of the requirement or obligation.⁷²¹

Australia's obligations with respect to the rights of children in detention was examined by the High Court in *Re Woolley; Ex Parte Applicants M276/2003 by their next friend GS* ('*Woolley*').⁷²² This significant case considered the constitutional validity of the *Migration Act 1958* (Cth) with respect to the lawfulness or otherwise of the forced detention of children. The children at issue were of Afghani origin, aged between seven and 15 years of age, and were held in immigration detention along with their parents as unlawful non-citizens awaiting a determination of their father's protection visa application.⁷²³ In seeking relief for prohibition, injunction and an order for habeas corpus against the manager of the immigration detention centre and the Minister for Immigration and Multicultural and Indigenous Affairs, the children's action was grounded in the notion that the *Act* insofar as it allows for the detention of children is constitutionally invalid.

⁷²⁰ Ibid [36].

⁷²¹ Ibid [37].

⁷²² *Re Woolley; Ex Parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1.

⁷²³ A non-citizen as per the *Migration Act 1958* (Cth) s 5 is defined as a person who is not an Australian citizen, whilst an unlawful non-citizen is one who is within the migration zone who is not a lawful non-citizen. A lawful non-citizen is one who is within the migration zone yet holds a valid visa.

Specifically, the court questioned the validity of detention of children under the legislation in addition to the question of whether the children themselves could demand release, along with the significance of international jurisprudence and human rights instruments with respect to the children's detention. In determining the capacity of children to end their detention by requesting removal from Australia and in so doing ending the enforced confinement, the court considered the applicant's argument that the children's lack of capacity to demand voluntary removal rendered the detention regime punitive and in effect unconstitutional. The applicants raised the notion that the legislation was in effect punitive in regard to its effect on children given their special vulnerabilities. The onus of protection owed by the Crown to the children was also raised. Specifically, the applicants contended that the detention was an unnecessary and unreasonable requirement to allow the processing of the visa applications of the parents, which for the purposes of verification, identification and health checks of the children, was an excessive and gratuitous measure. Further, it was argued that there would likely be adverse and significant psychological and physical health and wellbeing implications for the children as result of the enforced confinement in addition to a denial of the children's practical or legal capacity to request removal.⁷²⁴

In rejecting this contention, the court instead propounded the view that the legislation applied equally to adults, children and unlawful non-citizens and as a consequence is valid and constitutional.⁷²⁵ Further, any lack of capacity to demand removal from detention on the part of the affected children did not of itself lead to unconstitutionality in the legislation. Legal capacity is generated by a measure of understanding and maturity shown by the individual in a given legal circumstance, and children gradually acquire such capacity incrementally until majority age.⁷²⁶ In the absence of this capacity, parents can in fact make decisions on behalf of their children, rendering any detention of a child generated by the refusal of a parent's visa application effectively a parental issue only. However, the Australian Human Rights and Equal Opportunity

⁷²⁴ *Re Wooley; Ex Parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1 [97], [100], [104] (McHugh J).

⁷²⁵ *Ibid* [7]–[8] (Gleeson CJ), [46] (McHugh J), [129] (Gummow), [187] (Kirby J), [227] (Hayne J) (Heydon J agreeing), 263 (Callinan J); Monohan and Young, above n 516, 243.

⁷²⁶ *Ibid* [102] (McHugh J).

Commission has now encouragingly recommended that the detention of children be allowed only as a measure of ‘last resort which has been reflected in legislation.’⁷²⁷

The deleterious effect of separating children from their parents was also of importance in the case. Specifically, although the applicants raised the issue of the vulnerability of children, the High Court suggested that any such vulnerability would be exacerbated by separation from their parents, which is a reality that their application invited. Moreover, the court was of the opinion that the applicants overlooked the practical reality that the lives of children are routinely constrained by parental control and desires, which was the very reason they were detained in Australia as unlawful non-citizens.⁷²⁸

International human rights jurisprudence and its application to the detention of the children was also scrutinised in this case, although the High Court emphasised that the arbitrariness or otherwise of the children’s detention in contravention of international treaties and protocols was not at issue. Rather, the unconstitutionality of the detention in accordance with Australian law was in question, instead of whether Australia was in breach of international obligations.⁷²⁹ Turning its attention to the applicant’s assertion that the children’s lack of capacity to request removal from detention confirmed the legislation’s unconstitutionality, the High Court considered that even in circumstances where a detainee can request removal from detention, this in isolation may yet not be enough to meet international obligations, unlike measures such as periodic review or perhaps defined detention periods only.⁷³⁰

Moreover, the High Court suggested that assuming there had been a breach of international law following the detention due to failure or maladministration of the legislation, such an infraction does not as a consequence empower the court to overlook the provisions of a valid Australian law, although in any ambiguous circumstance the court must be mindful of Australia’s international obligations insofar as is practicable

⁷²⁷ Monohan and Young, above n 516, 243–244.

⁷²⁸ *Re Wooley; Ex Parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1 [152]–[160] (Gummow J).

⁷²⁹ *Ibid* [115] (McHugh J).

⁷³⁰ *Ibid* [114] (McHugh J).

when interpreting a domestic law.⁷³¹ Essentially, the applicants in this case relied upon the *UNCRC* along with the *ICCPR* to buttress their application, which was grounded in the notion that detention was both punitive and unconstitutional. The High Court made specific mention of the continued criticism of Australia's mandatory detention regime domestically and internationally, including condemnation by the United Nations Human Rights Committee in this case, and noted that much controversy and disapproval of Australia's position had followed as a result.⁷³²

The Committee found that breaches of both the *UNCRC* and *ICCPR* have occurred in Australia,⁷³³ with specific focus directed at arbitrary detention that lacks effective review mechanisms, evidence of prolonged and disproportionate detention, and failure to convince the Committee that alternative, less intrusive measures are inadequate to meet and exceed Australia's immigration policies.⁷³⁴ These policies have in turn attracted disparagement from the international community on the basis that Australia has breached international conventions, protocols and customary international laws.⁷³⁵ In a similar fashion to *Re Wooley*, the United Nations Human Rights Committee examined the case of *Bakhtiyari*⁷³⁶ which focussed on whether violation of the rights of a child by the Australian Government was evident following the detention of several Afghani children in a Commonwealth facility for a period of two years and eight months. The Commission felt that the decision to detain the children was arbitrary and in violation of art 9(1) of the *ICCPR*, and that due to the status of the children, all decisions affecting them should be in their best interests, which was to be respected by family, society and state as per art 24(1).⁷³⁷

⁷³¹ Ibid [201] (Kirby J).

⁷³² Ibid [108] (McHugh J).

⁷³³ See, eg, *A v Australia* United Nations Human Rights Committee, UNHCR Communication No 560/1993, CCPR/C/59/D/560/1993, 3 April 1997.

⁷³⁴ *Re Wooley; Ex Parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1 [109] (McHugh J).

⁷³⁵ Ibid [108].

⁷³⁶ Human Rights Committee, *Communication No 1069/2002 Australia*, U.N. Doc. CCPR/C/79/D/1069/2002 (6 November 2003) ('*Bakhtiyari v Australia*').

⁷³⁷ Australian Human Rights Commission, *Case Studies: Complaints Involving Australia* (2009) 2 <https://www.humanrights.gov.au/sites/default/files/content/education/hr_explained/download/case_studies.pdf>. See also Australian Human Rights Commission, *Report No 29* (9 May 2005) <https://www.humanrights.gov.au/publications/hreoc-report-no-29#1_intro> in regard to breach of

The European Court of Human Rights has also been active with several cases focussing on human rights issues in school settings. Of some relevance to this study, *Ali v the United Kingdom* focussed on the question of temporary exclusion from school following investigation into criminal damage of school property as a result of fire.⁷³⁸ In this case, a student was suspected of setting fire to a classroom and was subsequently excluded from the school campus pending a police investigation of the incident. The investigation became protracted with the result that the student did not attend school. The student was, however, granted permission to sit standard assessment examinations and was also provided with school work to complete at home. The maximum exclusion period was exceeded and the student was eventually removed from the school roll despite the police investigation stalling through a lack of evidence. The student subsequently applied to the House of Lords with a claim grounded in denial of the right to education pursuant to art 2 of Protocol No 1 of the 1988 *European Convention on Human Rights*. This was rejected by the Court citing a legitimate and foreseeable procedure of disciplinary action undertaken by the school pursuant to internal school rules, which did not violate the right to education under the convention.

Denial of the right to education under art 2 of Protocol 1 was also investigated by the European Court of Human Rights in *Sampani and Others v Greece*,⁷³⁹ in which an application was made to the Court that the failure of Greek authorities to provide adequate education to children of Roma origin in a segregated primary school amounted to a violation of art 2 of Protocol 1 as well as being discriminatory behaviour under art 14. The court subsequently recommended assimilation of the children into the mainstream Greek primary school system or appropriate adult education services for those students who had attained majority age. A near identical case, again in Greece, was also examined by the European Court of Human Rights, resulting in a similar finding by Greek authorities of discriminatory practices in violation of human rights

UNCRC arts 3 and 19 in a case concerning a 15-year-old Australian Air Force Cadet, which examined the best interests provision of the *UNCRC*.

⁷³⁸ *Ali v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 40305/86, 11 January 2011).

⁷³⁹ *Sampani and Others v Greece* (European Court of Human Rights, First Section, Application No 59608/09, 11 December 2012).

obligations⁷⁴⁰ in orchestrating the denial of access to education services of Roma children in Greece.

3.8 Summary of Key Issues, Trends or Developments in Jurisprudence Relevant to Children and Juvenile Rights

The case law discussed in this chapter reflects advances in the recognition of the human rights of children and juveniles independent of parents. It commenced with a suite of important early international decisions that recognised that the human rights of children must be respected by the state and children are no longer to be considered as parental property and should, for example, be afforded fundamental rights to due process and freedom of speech extending to matters including contraception and termination of the pregnancy of a minor. Another important development in the jurisprudence was the acknowledgement that children and juveniles who have attained sufficient understanding and intellect are capable of decision-making and are not dependent on parental input or consent.

These issues were further explored in Australian jurisprudence which has also played a part in the advancement of the debate on the rights of children and juveniles including promotion of the important *UNCRC* tenets of the best interests of the child in varied areas. Examples include the rights of intellectually disabled children in regard to sterilisation and disputed medical intervention, including for difficult issues such as gender reassignment, and the participation of children and juveniles in decision-making in matters that involve them, respect and due consideration for their views, discrimination in education settings, forced detention and denial of the right to education, including several cases from the European Union that focussed on the validity of exclusion from schools in breach of European Human Rights Conventions.

⁷⁴⁰ *Lavida and Others v Greece* (European Court of Human Rights, First Section, Application No 7973/10, 30 May 2013).

3.9 Conclusion

The aim of this chapter was to provide a platform for the discussion of existing juvenile violence law and policy in Australian schools that will take place in Chapter 4. This will include an examination of the important interplay between domestic and international law germane to the issue. Chapter 3 provided an overview of the historical trends in the violent behaviour of children and juveniles and the emergence of differentiation from adult offending. This included an overview of the development of stand-alone systems for dealing with juvenile violence and the surfacing of delinquency as a discrete social problem warranting attention by legislators and authorities alike.

The next part of the chapter focussed on the development of autonomous children's and juvenile human rights, including the transition from the traditional view that children completely lacked civil rights or other liberties distinct from parents or states to a more contemporary approach where children's and juveniles' rights are the subject of many human rights instruments with none more prominent than the *UNCRC*. This was, at least initially, seen as a major advance in the protection of stand-alone human rights through principles of justice rather than welfare or charity values.

The capacity of courts to uphold a rights-based approach on behalf of children and juveniles was the focus of a discussion on a number of cases dating from the 1960s that examined various aspects of human rights and liberties relevant to children and juveniles, commencing with some celebrated international decisions that helped to prompt the emergence of judicial activism in Australian courts to some extent. This approach was reflected in several important domestic cases that addressed difficult areas such as major medical interventions, involuntary detention and discrimination in education, amongst other important issues. Several of these cases involved discussion of submissions by state agencies empowered to investigate the appropriateness of Australian courts in adjudicating disputes involving human rights principles and provide guidance in order to streamline the interpretation of domestic legislation that is both benevolent and consistent with international human rights instruments and general human rights principles.

In light of these domestic and international law principles, the next chapter will focus on the question of whether disciplinary management policies in force to address juvenile violence in Australian schools adequately reflect and uphold international human rights obligations whilst addressing the multifaceted issue of violent juvenile behaviour.

Chapter 4: Domestic Law and Policy Relevant to School Violence Including Human Rights Implications

4.1 Introduction

The development of a stand-alone children's and juvenile human rights movement was examined in Chapter 3 of this thesis. Specific issues emerged in the chapter that will help set the foundation for the development of appropriate education policy directions in Chapter 5 of the thesis. The three key areas that emerged included important historical junctures such as the recognition of juvenile delinquency as a discrete social problem. This was discussed with an emphasis on the specific institutions enlisted to deal with such juveniles including reformatories and industrial houses. Secondly, in response to these developments, the judiciary and parliaments created and shaped juvenile justice agencies and processes including dedicated juvenile and children's courts and penal policy initiatives that served to distinguish juvenile offenders from their adult counterparts.

Thirdly, and perhaps most prominent in the scope of this thesis, was a discussion on the emergence of an autonomous children's and juvenile human rights movement. This included early, stand-alone human rights advances leading to the establishment of the pivotal *UNCRC* treaty along with other significant instruments such as the *Beijing Rules* and *Riyadh Guidelines*. These aim to afford protection to juvenile offenders with the *UNCRC*'s best interests and participation principles being noteworthy. The discussion also touched upon a degree of scepticism with regard to the potential influence of rights-based protection mechanisms such as the *UNCRC* on juvenile welfare, both domestically and internationally. The chapter concluded with an analysis of case law selected to provide guidance in the development, interpretation and application of children's and juvenile human rights principles in international and more importantly Australian jurisprudence.

This chapter of the thesis will examine the existing domestic law and policy framework relevant to juvenile violence in schools and communities with particular emphasis on the inclusion or otherwise of children's rights within the existing regulatory regime. The initial discussion will cover the existing domestic juvenile justice legislative structures, outlining statutory responses to the problem of juvenile violence within Australia. An examination of school-based discipline management policy introduced by education agencies in response to the arduous challenge of school violence will be followed by an overview of state and territory parental responsibility legislation which is also relevant in addressing juvenile violence in schools. An important Commonwealth policy initiative, the *National Safe Schools Framework*, will also be discussed along with its influence or otherwise on state and territory education agencies. The constitutional implications of education services will be outlined, an issue that will be revisited later in the study in regard to the introduction of uniform school violence structures.

Chapter 4 will conclude with an overview of the extent to which important rights-based measures as discussed in Chapter 3 have been secured within domestic juvenile violence law and education policy structures. In particular, the inclusion or otherwise of salient rights-based issues enunciated in important international treaties, conventions and protocols will be investigated, including the best interests of the child, participation, due process, procedural fairness, natural justice, juvenile justice, proportionality and diversion.

4.2 The Legal Framework of Juvenile Justice Within Australia

4.2.1 Introduction

Juvenile justice is best described as the processes and practices for dealing with children and juveniles who have committed or been found guilty of committing an offence. They are regulated within the Australian jurisdiction by state and territory governments.⁷⁴¹

Within most Western legal systems, little progress had been made in distinguishing

⁷⁴¹ Australian Institute of Health and Welfare, 'Juvenile Justice in Australia 2008–2009: Interim Report – Main Tables' (Juvenile Justice Series No 6, Australian Institute for Health and Welfare, December 2010) 1.

juvenile from adult offenders prior to the mid-19th century,⁷⁴² which routinely resulted in such deleterious outcomes as custodial sentences for children as young as six years of age in Australian prisons.⁷⁴³ Moreover, as late as the early 20th century, children and juveniles were also subjected to hard labour along with corporal and capital punishment.⁷⁴⁴

According to Cunneen and White, in addition to regulation by the general criminal law and criminal procedure,⁷⁴⁵ public order edicts including summary and police offences legislation, juveniles are also subject to numerous stand-alone items of juvenile justice law within the Australian jurisdiction that are typically facilitated through specific legislation and children's courts.⁷⁴⁶ The *Australian Constitution* is identified as a federal system of governance with powers to make laws divided between state and Commonwealth in addition to the establishment of territorial governments.⁷⁴⁷ Essentially the Commonwealth has exclusive⁷⁴⁸ lawmaking powers in addition to concurrent lawmaking powers⁷⁴⁹ shared with states. The remaining powers are referred to as residual power or general powers which allow states to exercise lawmaking power.⁷⁵⁰ Law and order and education remain residual or general powers of the states. States therefore have full legislative authority to pass laws relating to juvenile justice and education.

⁷⁴² K Richards, 'What Makes Juvenile Offenders Different From Adult Offenders?' (Trends & Issues in Crime and Criminal Justice No 409, Australian Institute of Criminology, February 2011) 1 http://aic.gov.au/media_library/publications/tandi_pdf/tandi409.pdf.

⁷⁴³ Australian Institute of Criminology, *Juvenile Justice* (11 November 2013) <http://www.aic.gov.au/crime_types/in_focus/juvenilejustice.html>.

⁷⁴⁴ Richards, 'What Makes Juvenile Offenders Different From Adult Offenders?', above n 742, 1.

⁷⁴⁵ Cunneen and White, above n 204, 89.

⁷⁴⁶ A Stewart, T Allard and S Dennison (eds), *Evidence Based Policy & Practice in Youth Justice* (The Federation Press, 2011) 11.

⁷⁴⁷ See 4.4 below for further discussion on the constitutional basis of the division of lawmaking powers in the Australian jurisdiction.

⁷⁴⁸ See, eg, *Australian Constitution* ss 52, 90; see also 4.4 below for a summary of exclusive Commonwealth lawmaking responsibilities

⁷⁴⁹ See, eg, *Australian Constitution* s 51; see 4.4 below for a summary of concurrent Commonwealth law and state lawmaking responsibilities.

⁷⁵⁰ P Hanks, P Keyzer and J Clarke, *Australian Constitutional Law Materials and Commentary* (Butterworths, 7th ed, 2004) 8.

In spite of limited consistency between jurisdictions, juvenile justice legislation typically focusses on the issues expected to apply to juvenile offenders including definitional issues such as the imperative age classification regime⁷⁵¹ for the purposes of criminal responsibility, which is critical given that age not only serves to classify which system an offender is subject to but also the processes deployed within the system to process the offender.⁷⁵² In addition, juvenile justice legislation dictates children's court jurisdiction and procedures, mechanisms of appeal, sentencing, juvenile detention, bail and custody, police procedure, restitution, compensation and diversionary options including cautioning and conferencing as well as general principles relevant to juvenile offending note Cunneen and White.⁷⁵³

An important facet of juvenile justice within Australia concerns the supervision of alleged youth and juvenile offenders which remains of sizeable concern. 2009–10 data⁷⁵⁴ reveal that more than seven thousand juveniles are under daily juvenile justice supervision across the country, although thankfully this represents an altogether minuscule portion of the aggregate Australian youth demographic.

Despite some disagreement on juvenile justice legislation between Australian jurisdictions, there is consensus on a trio of staple principles that serve to distinguish juveniles from their adult counterparts within the criminal justice system. Essentially, there remains a need to treat juvenile and young offenders differently from their adult counterparts, diversion and non-traditional court processes are to be promoted where possible, and finally the detention of juvenile offenders is to be considered only when other options are exhausted.⁷⁵⁵ Legislation, policy and practice within the Australian jurisdiction acknowledge that children and juveniles are both more at risk and lacking in

⁷⁵¹ See 2.3 above for a discussion on the concept of *doli incapax* and associated juvenile criminal responsibility issues within the Australian jurisdiction.

⁷⁵² Stewart, Allard and Dennison, above n 746.

⁷⁵³ Cunneen and White, above n 204, 87–88.

⁷⁵⁴ Australian Institute of Health and Welfare, 'Juvenile Justice in Australia 2009–10: An Overview' (Juvenile Justice Series No 8, Australian Institute of Health and Welfare, October 2011) 1 <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737420257>>.

⁷⁵⁵ Stewart, Allard and Dennison, above n 746, 9–10.

maturity than their adult counterparts and typically are also more susceptible to peer pressure.⁷⁵⁶

Police agencies, courts and various government agencies comprise the three central stakeholders that play a significant role in the administration of juvenile justice within Australia.⁷⁵⁷ The relevant government agencies include those responsible for accommodation, health, child protection and family and community services.⁷⁵⁸ Other interested parties include political and governmental interests, community lobby groups and media bodies that routinely promote stereotypical juvenile delinquency.⁷⁵⁹ As gatekeepers in the juvenile justice model, the police are pivotal in determining whether the suspect enters and progresses throughout the juvenile justice system initially, and the specific management of the offender whilst in the system⁷⁶⁰ including bail determination, detention of those offenders refused bail, escort to detention centres and prosecutions in the children's court.⁷⁶¹ Further, according to Stewart, Allard and Dennison, the police play a decisive role in the allocation of juvenile offenders to diversionary, non-punitive pathways such as youth conferencing and cautioning.⁷⁶²

The various legislative approaches taken by states and territories to juvenile justice within the Australian jurisdiction will now be examined with a view to providing a concise overview of key principles and possible gaps, which will then be discussed in light of key *UNCRC* principles. Given that each jurisdiction is responsible for juvenile justice and enactment of laws, the following discussion/analysis will be presented on a jurisdictional basis. Although each jurisdiction has comprehensive legislation, for the sake of clarity and focus only the salient principles and key themes will be identified.

⁷⁵⁶ Australian Institute of Criminology, *Juvenile Justice*, above n 743.

⁷⁵⁷ Stewart, Allard and Dennison, above n 746, 18.

⁷⁵⁸ Australian Institute of Health and Welfare, 'Juvenile Justice in Australia 2010–11' (Juvenile Justice Series No 10, Australian Institute of Health and Welfare, 2012), 14
<<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422614&libID=10737422614>>.

⁷⁵⁹ Cunneen and White, above n 204, 82.

⁷⁶⁰ Stewart, Allard and Dennison, above n 746, 18.

⁷⁶¹ Cunneen and White, above n 204, 96.

⁷⁶² Stewart, Allard and Dennison, above n 746, 18.

4.2.2 Australian Capital Territory

The central tenets of the juvenile justice approach of the Australian Capital Territory are enshrined in so-called ‘youth justice principles’ that are to be interpreted with due regard to the provisions of relevant human rights principles and jurisprudence.⁷⁶³ That is, in matters where a child or juvenile has breached a law, the best interests and youth justice principles should be maintained at all times by decision-makers when deciding a course of action.⁷⁶⁴ Essentially, the legislation requires decision-makers to encourage young offenders to accept responsibility for their actions,⁷⁶⁵ to deal with young offenders in a fashion that acknowledges their needs, and to provide them with the opportunity to develop in socially appropriate ways.⁷⁶⁶ The legislation also allows young offenders to participate in decision-making⁷⁶⁷ in matters that concern them, to be dealt with by the criminal justice system⁷⁶⁸ in a fashion that acknowledges their age, maturity and developmental capacity, and to have community representative participation in matters involving Aboriginal and Torres Strait Islander juvenile offenders.⁷⁶⁹ The principles of natural justice are applicable during disciplinary review.⁷⁷⁰

Young offenders in the Australian Capital Territory are also to be afforded expedient access to legal assistance and any proceeding against them must commence promptly.⁷⁷¹ Young offenders can be detained in custody only as a last resort and for minimal periods only,⁷⁷² with a high priority being placed both on juvenile offenders re-entering communities⁷⁷³ and the promotion of offender rehabilitation post-conviction, which must be appropriately balanced with victim rights.⁷⁷⁴ Youth justice principles are also to

⁷⁶³ *Children and Young People Act 2008* (ACT) s 94(3).

⁷⁶⁴ *Ibid* s 94(1).

⁷⁶⁵ *Ibid* s 94(1)(a).

⁷⁶⁶ *Ibid* s 94(1)(b).

⁷⁶⁷ *Ibid* s 94(1)(c).

⁷⁶⁸ *Ibid* s 94(1)(g).

⁷⁶⁹ *Ibid* s 94(1)(d).

⁷⁷⁰ *Ibid* s 323(2)(a).

⁷⁷¹ *Ibid* s 94(1)(e).

⁷⁷² *Ibid* s 94(1)(f).

⁷⁷³ *Ibid* s 94(1)(h).

⁷⁷⁴ *Ibid* s 94(1)(i).

be upheld in circumstances where a juvenile offender is granted bail,⁷⁷⁵ and the juvenile offender's best interests must be promoted at all times.⁷⁷⁶ Further, the juvenile offender is required to accept supervision⁷⁷⁷ and comply with any directives of the director-general, such as attendance at programs or counselling.⁷⁷⁸

In relation to the sentencing of young offenders, it is incumbent on the Australian Capital Territory courts to give considerable weight to juvenile offender culpability, maturation and individual family circumstances in circumstances where sentences are considered appropriate,⁷⁷⁹ and the courts should consider combination sentences that include incarceration in addition to good behaviour bonds.⁷⁸⁰ Further, a juvenile offender must not under any circumstances receive a life term of imprisonment.⁷⁸¹ The principles of restorative justice are also prominent in the Australian Capital Territory where the promotion of harm repair and the rights of victims is to be enhanced by inclusive decision-making processes involving key stakeholders, carried out in safe environments.⁷⁸² However, whilst access to restorative justice is to be available throughout the criminal justice process, it should not act as a substitute in the jurisdiction.⁷⁸³

4.2.3 *New South Wales*

The juvenile justice approach in the New South Wales jurisdiction is centred on the principles espoused in the *Young Offenders Act 1997* (NSW). Appropriately, criminal proceedings are not to be commenced against a young offender in circumstances where an alternative method of progressing matters is available,⁷⁸⁴ and least restrictive sanctions are to be applied to juvenile offenders in breach of the *Act*.⁷⁸⁵ Additionally,

⁷⁷⁵ *Bail Act 1992* (ACT) s 26(1) (b)(i).

⁷⁷⁶ *Ibid* s 26(1)(b)(ii).

⁷⁷⁷ *Ibid* s 26(2)(a).

⁷⁷⁸ *Ibid* s 26(2)(b).

⁷⁷⁹ *Crimes (Sentencing) Act 2005* (ACT) s 133D(1).

⁷⁸⁰ *Ibid* ss 133G(3)(a)–(b).

⁷⁸¹ *Ibid* s 133G(4).

⁷⁸² *Crimes (Restorative Justice) Act 2004* (ACT) ss 6(a)–(c).

⁷⁸³ *Ibid* s 6(d).

⁷⁸⁴ *Young Offenders Act 1997* (NSW) s 7(c).

⁷⁸⁵ *Ibid* s 7(a).

young offenders are to be informed of their right to legal counsel and be provided with the opportunity to obtain the same,⁷⁸⁶ while the involvement of familial and community input to assist reintegration of the juvenile offender is to be encouraged.⁷⁸⁷ Justice processes involving juvenile offenders are also to include parents as they are primarily responsible for the development of children.⁷⁸⁸

Further, victims are to be advised if their involvement in the process is required and about the progression of proceedings against juvenile offenders.⁷⁸⁹ Young offenders may be processed through conferencing in order to promote their acceptance of their responsibility for offences, the enhancement of victim rights, strengthening of familial bonds and the encouragement of culturally appropriate methods that allow perpetrators to overcome offending behaviour and become autonomous members of society.⁷⁹⁰ Likewise, the overrepresentation of Indigenous and Torres Strait Islander offenders in the New South Wales criminal justice system is to be addressed by restorative justice processes including conferencing, cautions and warnings.⁷⁹¹ Criminal proceedings against juvenile offenders are not to be initiated solely for the purpose of providing welfare or similar services to the offender or their family members.⁷⁹²

Additionally, within the New South Wales jurisdiction young offenders are not to receive penalties greater than their adult counterparts,⁷⁹³ or treatment that is detrimental to their physical, psychological or emotional wellbeing, nor should the treatment be cruel, inhumane or degrading.⁷⁹⁴ Further, juvenile offenders within New South Wales are to be afforded equal treatment in the essential rights and freedoms provided by law, such as the right to be heard, and participation in processes that have an impact upon them.⁷⁹⁵ Juvenile offenders are also to be afforded support and direction in light of their

⁷⁸⁶ *Ibid* s 7(b).

⁷⁸⁷ *Young Offenders Act 1997* (NSW) s 7(e); *Children (Criminal Proceedings) Act 1987* (NSW) s 6(f).

⁷⁸⁸ *Young Offenders Act 1997* (NSW) s 7(f).

⁷⁸⁹ *Ibid* s 7(g).

⁷⁹⁰ *Ibid* ss 34(1)(a)(i–vi).

⁷⁹¹ *Ibid* s 7(h).

⁷⁹² *Ibid* s 7(d).

⁷⁹³ *Children (Criminal Proceedings) Act 1987* (NSW) s 6(e).

⁷⁹⁴ *Children (Detention Centres) Act 1987* (NSW) ss 22(f), (g).

⁷⁹⁵ *Children (Criminal Proceedings) Act 1987* (NSW) s 6(a).

dependency and limited maturation, yet should still accept responsibility and make reparations for their actions where feasible.⁷⁹⁶ The education or employment of a juvenile offender is to be continued unimpeded if viable and he or she should remain in residence at home if circumstances permit.⁷⁹⁷

4.2.4 Northern Territory

As with other jurisdictions, the Northern Territory has enshrined general youth justice principles into law that uphold manifold rights and obligations for juvenile offenders. Essentially, young offenders are encouraged to be conscious of their obligations, accept responsibility and be aware of the consequences of their actions,⁷⁹⁸ yet be processed in such a way as to acknowledge their needs while being provided with the opportunity to develop in a socially responsible fashion.⁷⁹⁹ Moreover, juvenile offenders are to be apprised of their legal obligations,⁸⁰⁰ kept in a custodial manner be it arrest, remand or following sentence as a measure of last resort only,⁸⁰¹ and be treated in a manner aligned with maturation and age levels, with protection and rights equivalent to those afforded to adult offenders.⁸⁰² Further, any punishment is to be constructed so as to provide the young offender with the opportunity to foster beneficial, socially acceptable and responsible behaviour.⁸⁰³ This can include the provision of rehabilitation, vocational training and rehabilitation needs whilst in detention.⁸⁰⁴

To that end, under the youth justice principles, the young offender's familial relationships are to be preserved and consolidated as far as is practicable, employment or education not obstructed,⁸⁰⁵ reintegration into communities encouraged.⁸⁰⁶ A balanced approach should be upheld with regard to meeting needs of victims,

⁷⁹⁶ Ibid ss 6(b), (g).

⁷⁹⁷ Ibid ss 6(c), (d).

⁷⁹⁸ *Youth Justice Act* (NT) s 4(a).

⁷⁹⁹ Ibid ss 4(b), (e).

⁸⁰⁰ Ibid s 4(e).

⁸⁰¹ Ibid s 4(c).

⁸⁰² Ibid s 4(d).

⁸⁰³ Ibid s 4(n).

⁸⁰⁴ *Youth Justice Regulations* (NT) reg 69.

⁸⁰⁵ *Youth Justice Act* (NT) s 4(i).

⁸⁰⁶ Ibid s 4(f).

communities and the young offender.⁸⁰⁷ Victim participation in youth justice proceedings is encouraged in the Northern Territory,⁸⁰⁸ as is care and supervision of juvenile offenders by responsible adults.⁸⁰⁹ Any decisions affecting juvenile offenders in the Northern Territory are to be made within acceptable time frames,⁸¹⁰ and in the absence of any public interest concerns, criminal proceedings are to progress against juvenile offenders only where no alternative exists.⁸¹¹ These must also be isolated from adult offender proceedings.⁸¹² The racial, cultural or ethnic identity of young offenders is to be acknowledged and maintained⁸¹³ with an emphasis placed on Aboriginal community engagement by way of culturally sensitive services and programs that promote health, self-respect and responsibility, and are designed to foster skill development in young offenders in order to promote their worth as members of society.⁸¹⁴

4.2.5 Queensland

The principal legislative provision relevant to juvenile justice in Queensland imposes obligations on decision-makers to uphold the rights of children along with their safety, including their physical and mental wellbeing.⁸¹⁵ They are to be handled with dignity and respect including during any period of custodial confinement, which also must not involve physical, emotional or verbal abuse⁸¹⁶ whilst ensuring that communities are adequately protected from the offences perpetrated by young offenders.⁸¹⁷ Juvenile offenders in Queensland are also encouraged to treat other stakeholders in the criminal justice system, such as court personnel and administrators, other youth offenders and victims, with dignity and respect,⁸¹⁸ in addition to meeting conditions contingent with

⁸⁰⁷ Ibid s 4(g).

⁸⁰⁸ Ibid s 4(k).

⁸⁰⁹ Ibid s 4(l).

⁸¹⁰ Ibid s 4(m).

⁸¹¹ Ibid s 4(q).

⁸¹² Ibid s 4(r).

⁸¹³ Ibid s 4(j).

⁸¹⁴ Ibid ss 4(o), (p)(i)–(iii), (iv).

⁸¹⁵ *Youth Justice Act 1992 (Qld)* sch 1 cl 2.

⁸¹⁶ *Youth Justice Act 1992 (Qld)* sch 1 cl 3(a); *Youth Justice Regulations 2003 (Qld)* s 17(3)(a), (4)(c).

⁸¹⁷ *Youth Justice Act 1992 (Qld)* sch 1 cl 1.

⁸¹⁸ Ibid sch 1 cl 3(b).

the provision of bail.⁸¹⁹ In line with other Australian jurisdictions, Queensland encourages the diversion of young offenders away from the criminal justice system except in circumstances where the criminal history of young offenders suggests that a traditional proceeding should commence.⁸²⁰ However, special protection provided by the legislation should be made available to the young offender during any proceeding or investigation given the vulnerability often experienced by children and juveniles when dealing with adults in positions of authority.⁸²¹

Any proceeding commenced against a young offender in Queensland should be conducted in a just, fair and timely manner⁸²² with the young offender being provided with the opportunity to participate in and understand the process⁸²³ and with legal and support services such as advocacy and interpretation,⁸²⁴ as well as having procedural and other issues explained in easily absorbed language.⁸²⁵ Young offenders must also be accountable and accept responsibility for their actions⁸²⁶ and be given adequate opportunity to develop in a beneficial, socially responsible fashion that also promotes health and cohesiveness within their familial circumstances,⁸²⁷ community reintegration,⁸²⁸ and involvement, particularly for offenders of Aboriginal or Torres Strait Islander descent.⁸²⁹ It is incumbent on decision-makers to be cognisant of a young offender's age, maturation and cultural or religious beliefs or practices when making decisions under the legislation.⁸³⁰ This should also be occasioned in a timeframe that is understood by the young offender,⁸³¹ whilst any program or service is to promote health,

⁸¹⁹ *Bail Act 1980* (Qld) ss 20(3)(b)(i), (3)(A)(b)(i), (5), (6)(b), (c)(ii).

⁸²⁰ *Youth Justice Act 1992* (Qld) sch 1 cl 5.

⁸²¹ *Ibid* sch 1 cl 4.

⁸²² *Ibid* sch 1 cl 7(a).

⁸²³ *Ibid* sch 1 cl 7(b).

⁸²⁴ *Ibid* sch 1 cl 15.

⁸²⁵ *Ibid* sch 1 cl 6.

⁸²⁶ *Ibid* sch 1 cl 8(a).

⁸²⁷ *Ibid* sch 1 cls 8(b)–(c).

⁸²⁸ *Ibid* sch 1 cl 16.

⁸²⁹ *Ibid* sch 1 cl 13.

⁸³⁰ *Ibid* sch 1 cl 12.

⁸³¹ *Ibid* sch 1 cl 11.

self-respect, personal development and a sense of responsibility in the young offender.⁸³²

Victims are also to be given a voice in proceedings following the commission of an offence by the young offender,⁸³³ as are parents who are encouraged and supported under the legislation to carry out their parental responsibilities.⁸³⁴ Additionally, young offenders in Queensland should be held in custody for the minimum time period and only as a last resort, in a facility considered suitable for young offenders⁸³⁵ which provides a safe and stable living environment,⁸³⁶ participation and consultation in their health and educational needs,⁸³⁷ contact with family,⁸³⁸ participation in programs⁸³⁹ and participation in decisions and plans regarding their future.⁸⁴⁰ In custodial arrangements, young offenders are also to be assisted in fostering familial and community engagement,⁸⁴¹ be afforded privacy,⁸⁴² given access to appropriate educational⁸⁴³ and medical/dental or therapeutic services,⁸⁴⁴ and receive appropriate post-release assistance.⁸⁴⁵

4.2.6 South Australia

The redevelopment and reintegration of young offenders back into society represents a central precept in the South Australian jurisdiction. As such, the guidance, correction and care necessary in achieving the aim of transforming youths who offend against the criminal law into valued and assiduous community members who strive to realise their promise remains the principal aim of the South Australian young offender legislation.⁸⁴⁶

⁸³² Ibid sch 1 cl 14.

⁸³³ Ibid sch 1 cl 9.

⁸³⁴ Ibid sch 1 cl 10.

⁸³⁵ Ibid sch 1 cls (17)–(18).

⁸³⁶ Ibid sch 1 cl 20 sub-cl (a).

⁸³⁷ Ibid sch 1 cl 20 sub-cl (c)(iii)–(iv).

⁸³⁸ Ibid sch 1 cl 20 sub-cl (c)(ii).

⁸³⁹ Ibid sch 1 cl 20 sub-cl (c)(i).

⁸⁴⁰ Ibid sch 1 cl 20 sub-cl (d).

⁸⁴¹ Ibid sch 1 cl 20 sub-cl (b).

⁸⁴² Ibid sch 1 cl 20 sub-cl (e).

⁸⁴³ Ibid sch 1 cl 20 sub-cl (g).

⁸⁴⁴ Ibid sch 1 cl 20 sub-cl (f).

⁸⁴⁵ Ibid sch 1 cl 20 sub-cl (h).

⁸⁴⁶ *Young Offenders Act 1993 (SA)* s 3(1).

Essentially, this is to be achieved through a binary approach that ensures that young offenders are made aware of their obligations and the consequences of their actions, while providing adequate community protection against the wrongful and harmful actions of young offenders.⁸⁴⁷

When applying sanctions in South Australia, decision-makers are to have regard to both the deterrent effects of the sanction⁸⁴⁸ and in circumstances where a young offender is being tried in an adult court, any deterrent effect on other young people,⁸⁴⁹ as well as expedient bail processing,⁸⁵⁰ sentencing,⁸⁵¹ and an appropriate balance between offender rehabilitation⁸⁵² and community protection.⁸⁵³ Further, policy provisions in the South Australian young offender legislation prevent the unnecessary interruption of a young offender's education, work or familial connection and environment,⁸⁵⁴ and his or her ethnic, cultural or racial identity,⁸⁵⁵ while making allowances for victim compensation and restitution.⁸⁵⁶

Diversionary measures available in the South Australian jurisdiction include family conferencing involving perpetrators, victims, family members and coordinators. This conferencing espouses restorative justice measures⁸⁵⁷ and there is a range of powers available to deal with the offence, including formal cautioning, compensation orders, community service undertakings and apologies to victims.⁸⁵⁸

⁸⁴⁷ *Ibid* ss (2)(a), (b).

⁸⁴⁸ *Ibid* s 3(2a)(a).

⁸⁴⁹ *Ibid* ss 3(2a), (b)(i).

⁸⁵⁰ *Bail Act 1995* (SA) ss 13(1), (2).

⁸⁵¹ *Criminal Law (Sentencing) Act 1988* (SA) s 3(A).

⁸⁵² *Young Offenders Act 1993* (SA) ss 3(2a)(b)(ii)(B).

⁸⁵³ *Ibid* ss 3(2a)(b)(ii)(A).

⁸⁵⁴ *Ibid* ss 3(3)(b)–(d).

⁸⁵⁵ *Ibid* s 3(3)(e).

⁸⁵⁶ *Ibid* s 3(3)(a).

⁸⁵⁷ *Ibid* s 10.

⁸⁵⁸ *Ibid* s 12.

4.2.7 *Tasmania*

Tasmanian young offender legislation encompasses principles of youth justice designed to encourage young offenders to accept responsibility for their actions,⁸⁵⁹ provide community protection from illegal behaviour,⁸⁶⁰ and enforce age, maturation and culturally appropriate punishment for young offenders⁸⁶¹ consistent with a young offender's previous criminal history.⁸⁶² Moreover, detention is to be enforced only for minimum time periods and as a measure of last resort,⁸⁶³ while any punishment ordered against a young offender in Tasmania should provide the opportunity for the malefactor to develop in acceptable, socially responsible and beneficial ways.⁸⁶⁴ A young offender's cultural, ethnic and racial identity should not be diminished under the legislation⁸⁶⁵ nor should a young offender's employment or education,⁸⁶⁶ familial structure, environments or relationships be compromised.⁸⁶⁷

Victims are also given a voice during the processing of juvenile offenders⁸⁶⁸ and are provided with appropriate compensation and restitution post-offence under Tasmanian legislation.⁸⁶⁹ Further, guardians are encouraged and supported in their efforts to provide care and supervision for young offenders⁸⁷⁰ and can also be consulted when sanctions are determined.⁸⁷¹ Community conferencing that promotes restorative justice principles is also a feature of Tasmanian juvenile justice legislation, with conferences being empowered to initiate formal cautioning, payment of victim and property damage compensation, community service undertakings, apologies to victims and any other appropriate measure.⁸⁷²

⁸⁵⁹ *Youth Justice Act 1997* (Tas) s 5(1)(a).

⁸⁶⁰ *Ibid* s 5(1)(c).

⁸⁶¹ *Ibid* s 5(1)(i).

⁸⁶² *Ibid* s 5(1)(j).

⁸⁶³ *Ibid* s 5(1)(g).

⁸⁶⁴ *Ibid* s 5(1)(h).

⁸⁶⁵ *Ibid* s 5(2)(e).

⁸⁶⁶ *Ibid* s 5(2)(d).

⁸⁶⁷ *Ibid* ss 2(b), (c).

⁸⁶⁸ *Ibid* s 5(1)(d).

⁸⁶⁹ *Ibid* s 5(2)(a).

⁸⁷⁰ *Ibid* s 5(1)(e).

⁸⁷¹ *Ibid* s 5(1)(f).

⁸⁷² *Ibid* ss 16(1)(a)–(g).

4.2.8 Victoria

With regard to the incorporation of rights-based notions within legislative frameworks, Victoria could perhaps be considered the most sophisticated of the state and territory juvenile justice regimes. Specifically, the best interests of the young offender are always to be given maximum priority⁸⁷³ when determining action or decisions in the state of Victoria, along with protection from harm, maintenance of rights and promotion of young offender development with due regard for age and maturity.⁸⁷⁴ Victoria's young offender legislation also advocates community protection against wrongful or violent acts by young offenders⁸⁷⁵ and the need to ensure that young offenders are aware of their responsibility for violating the law.⁸⁷⁶ Decision-makers are also to uphold the best interests principle in circumstances where access is being arranged with familial or other significant persons in the young offender's life,⁸⁷⁷ taking into account young offenders' social, individual, religious and cultural identity⁸⁷⁸ including circumstances where out of home care is being provided by a care giver without connection to the young offender's cultural community,⁸⁷⁹ and the detrimental effects of delay in decision-making.⁸⁸⁰

The reduction of offender stigma following a determination⁸⁸¹ and sentence suitability⁸⁸² are also to be well scrutinised by courts, as is the deferral of sentencing for the purposes of conducting group conferencing involving the juvenile offender, victim, police officer or informant, family members, convenor and other stakeholders, in order to realise a restorative justice outcome.⁸⁸³ The conference allows the negotiation of outcome plans designed to deal with the aftermath of an offence, reduce offender recidivism and assist in juvenile offender awareness.⁸⁸⁴

⁸⁷³ *Children, Youth and Families Act 2005* (Vic) s 10(1).

⁸⁷⁴ *Ibid* s 10(2).

⁸⁷⁵ *Ibid* s 362(1)(g).

⁸⁷⁶ *Ibid* s 362(1)(f).

⁸⁷⁷ *Ibid* s 10(3)(k).

⁸⁷⁸ *Ibid* s 10(3)(l).

⁸⁷⁹ *Ibid* s 10(3)(m).

⁸⁸⁰ *Ibid* s 10(3)(p).

⁸⁸¹ *Ibid* s 362(1)(d).

⁸⁸² *Ibid* s 362(1)(e).

⁸⁸³ *Ibid* ss 415(4), (6), (7).

⁸⁸⁴ *Ibid* s 415(4).

Other desirable features in the Victorian legislation include the strengthening and preservation of a young offender's familial relationships,⁸⁸⁵ including minimum intervention in the parent-child relationship to secure the safety and wellbeing of the young offender,⁸⁸⁶ the desirability of maintaining home life,⁸⁸⁷ including the strengthening, preservation and promotion of positive relationships between young offenders, parents, siblings and significant others,⁸⁸⁸ and a lack of disturbance or interruption to young offender education, employment or training.⁸⁸⁹ Likewise, a suite of non-custodial options are available for courts dealing with juvenile offending in Victoria including the dismissal of charges,⁸⁹⁰ imposition of fines,⁸⁹¹ probation,⁸⁹² juvenile supervision orders,⁸⁹³ good behaviour bonds,⁸⁹⁴ and undertaking and accountable undertaking orders.⁸⁹⁵ Decision-makers in Victoria are also to uphold the best interests of Indigenous young offenders by protecting and nourishing their cultural and spiritual identity through the reinforcement of familial and community linkages.⁸⁹⁶

Convicted young offenders in Victoria may be confined to a youth justice centre⁸⁹⁷ or a youth residential centre,⁸⁹⁸ or may receive a youth attendance order of no more than twelve months' duration if over fifteen years of age.⁸⁹⁹ Additionally, a court can defer sentencing a young offender,⁹⁰⁰ direct that restitution or compensation be paid by the young offender,⁹⁰¹ or in fact impose an order for costs.⁹⁰² Further best interests protection for young offenders in the State of Victoria requires that decision-makers are

⁸⁸⁵ Ibid s 362(1)(a).

⁸⁸⁶ Ibid s 10(3)(a).

⁸⁸⁷ Ibid s 362(1)(b).

⁸⁸⁸ Ibid s 10(3)(b).

⁸⁸⁹ Ibid s 362(1)(c).

⁸⁹⁰ Ibid s 360(1)(a).

⁸⁹¹ Ibid s 360(1)(e).

⁸⁹² Ibid s 360(1)(f).

⁸⁹³ Ibid s 360(1)(g).

⁸⁹⁴ Ibid s 360(1)(d).

⁸⁹⁵ Ibid ss 360(1)(b), (c).

⁸⁹⁶ Ibid s 10(3)(c).

⁸⁹⁷ *Children, Youth and Families Act 2005* (Vic) s 360(1)(j), *Sentencing Act 1991* (Vic) s 32(1).

⁸⁹⁸ *Children, Youth and Families Act 2005* (Vic) s 360(1)(h)(i).

⁸⁹⁹ Ibid s 360(1)(h).

⁹⁰⁰ Ibid s 360(2).

⁹⁰¹ Ibid s 360(3)(a).

⁹⁰² Ibid s 360(3)(b).

cognisant of a range of factors such as continuity and stability of care for young offenders,⁹⁰³ removal from parental care only in carefully considered circumstances including the potential for unacceptable risk of harm to the young offender,⁹⁰⁴ although reunification at a later date shall be given due consideration,⁹⁰⁵ and placement of at-risk young offenders with non-parental family members or other significant persons prior to other options being explored.⁹⁰⁶ The rules of natural justice are also to be upheld during hearings involving children and juveniles.⁹⁰⁷

4.2.9 Western Australia

Western Australian young offender legislation espouses general principles relating to young offenders that encourage them to accept responsibility for their actions⁹⁰⁸ and develop in socially responsible, acceptable and beneficial ways,⁹⁰⁹ while ensuring fair treatment.⁹¹⁰ Additionally, young offenders are to be treated in no harsher a fashion than an equivalent adult offender⁹¹¹ and be processed in time frames that they can easily grasp.⁹¹² Under the Western Australian regime, communities are to be protected from illegal behaviour,⁹¹³ although consideration is to be given to alternate non-judicial proceedings where background and individual case circumstances permit, so long as community protection is maintained.⁹¹⁴

Detention of juvenile offenders is to be a last resort measure and for as short a time as is possible⁹¹⁵ in a non-adult facility, although juvenile offenders older than sixteen years may be confined in adult prisons but are not to share living quarters.⁹¹⁶ The culture, age, maturation and background of young offenders should also be considered during the

⁹⁰³ Ibid s 10(3)(f).

⁹⁰⁴ Ibid s 10(3)(g).

⁹⁰⁵ Ibid s 10(3)(i).

⁹⁰⁶ Ibid s 10(3)(h).

⁹⁰⁷ Ibid s 116(1)(d)

⁹⁰⁸ *Young Offenders Act 1994* (WA) s 7(b).

⁹⁰⁹ Ibid s 7(j).

⁹¹⁰ Ibid s 7(a).

⁹¹¹ Ibid s 7(c)

⁹¹² Ibid s 7(k).

⁹¹³ Ibid s 7(d).

⁹¹⁴ Ibid s 7(g).

⁹¹⁵ Ibid s 7(h).

⁹¹⁶ Ibid s 7(i).

processing phase in Western Australia.⁹¹⁷ Young offenders are to be dealt with in a way that recognises their right to belong to a family⁹¹⁸ and strengthens familial bonds,⁹¹⁹ while providing assistance in the development of internal responses to offending within family structures.⁹²⁰ Support under the legislation is also to be provided to both the victims of young offenders, in order to contribute to the process of dealing with them,⁹²¹ and to the responsible adults who are to be encouraged to provide care for and support and supervision of young offenders.⁹²² Diversion of young offenders from traditional juvenile justice processes is available in Western Australia through the use of cautioning and referral to Juvenile Justice Teams.⁹²³

4.3 General Observations on Domestic Juvenile Justice Legislation in Australia

4.3.1 Introduction

Analysis of the salient rights-based issues embedded within domestic juvenile justice legislation reveals some consistency in the acknowledgement of several key safeguards including the best interests principle, participation, juvenile justice, proportionality and diversionary measures.

Representation of the best interests principle in domestic juvenile justice legislation is sufficiently visible, if not overly prolific, in domestic state and territory legal structures. Some states and territories overtly promote the principle, whereas others refer to it more obliquely, often in the promotion of various youth justice or other wholesale principles designed to manage juvenile offenders. Scrutiny of the legislation reveals an overt requirement for the best interests principle to be maintained by decision-makers when dealing with a child or juvenile offender in the Australian Capital Territory and Victoria, with the remaining states and territories promoting the principle more indirectly through the notions of enjoyment of legal rights and freedoms, and the right to safety and

⁹¹⁷ Ibid s 7(l).

⁹¹⁸ Ibid s 7(m)(iii).

⁹¹⁹ Ibid s 7(m)(i).

⁹²⁰ Ibid s 7(m)(ii).

⁹²¹ Ibid s 7(e).

⁹²² Ibid s 7(f)

⁹²³ *Young Offenders Act 1994* (WA) pt 5. See also 3.2.2 above for a brief discussion on the role of Juvenile Justice Teams in Western Australia.

physical and mental wellbeing. Similarly, the intent of the best interests principle is promoted through the opportunity for offenders to develop in socially responsible ways through guidance, care and correction, the provision of strict guidelines regarding removal from parental or familial environments, and the encouragement of education or vocational training and the like. This suggests that some common ground exists across the domestic Australian legal landscape in the area of juvenile justice.

The participation of offender and victim in domestic juvenile justice legislation is similarly inconsistent. Only the Australian Capital Territory, New South Wales and Queensland advocate offender participation in decision-making processes, with victims provided with a voice in Northern Territory and Tasmania. Victoria and Western Australia are largely silent on the matter, although restorative options in both states call for offender participation in decision-making.

Juvenile justice and proportionality of sentencing are well supported notions in domestic juvenile justice legislation. For example, the imposition of a custodial sentence only as a last resort is required in the Australian Capital Territory, Northern Territory, Queensland, Tasmania and Western Australia, and Victoria takes into consideration the immaturity, age and suitability of sentence. The least restrictive sanctions are to be applied to children and juveniles in breach of New South Wales legislation.

Diversionary measures are also well supported in juvenile justice across the various Australian jurisdictions, including several examples of restorative justice options such as family group conferencing.⁹²⁴ Principles of natural justice, procedural fairness and due process are largely absent from domestic juvenile justice legislation, except for reference to natural justice in the Australian Capital Territory and Victoria.

⁹²⁴ See 5.5 below for a discussion on family group conferencing in the Australian juvenile justice domain including recent trends.

4.3.2 *Emerging Issues in Juvenile Justice in Australia*

Emerging and topical issues in the domestic Australian juvenile justice arena include the continual overrepresentation of Aboriginal and Torres Strait juveniles in the juvenile justice system. This unevenness has a lengthy history in Australia and can be illustrated by the detention rates on a daily basis with juvenile justice supervision rates for Indigenous juveniles being up to fifteen times greater than that of non-Indigenous juveniles across the Australian jurisdiction. There was a very slight improvement in this statistic in 2010–11 compared to 2007–08.⁹²⁵ Indigenous juvenile offenders were also typically younger in age than non-indigenous offenders.⁹²⁶

Mandatory sentencing of juveniles is another issue of note in the Australian juvenile justice landscape following the introduction of legislative changes by the Western Australian and Northern Territory governments during the 1990s that targeted young offenders.⁹²⁷ The legislation has attracted criticism that judicial discretion has been removed from magistrates and judges,⁹²⁸ who are required to impose custodial sentences for often trivial property offences⁹²⁹ that attract the so-called ‘three strikes’ rule in Western Australia, for example. This often targets Indigenous juvenile offenders and conflicts with *UNCRC* guidelines.⁹³⁰ The arbitrariness of mandatory sentencing and the disproportionate effect compared to the crime have also attracted concern, as has the discriminatory nature of the mandatory sentencing towards low socio-economic and

⁹²⁵ Australian Institute of Health and Welfare, ‘Juvenile Justice in Australia 2010–11’, above n 758, 6, 10.

⁹²⁶ Australian Institute of Health and Welfare, ‘Youth Justice in Australia 2012–13’ (Bulletin No 120, Australian Institute of Health and Welfare, April 2014), 13
<<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129546897>>.

⁹²⁷ *Criminal Code Act 1913* (WA) s 401(4); *Juvenile Justice Act 1993* (NT) s 53AE; *Sentencing Act 1995* (NT) s 78A.

⁹²⁸ ‘Former WA Judge Justice Michael Murray Slams Mandatory Sentences’, *PerthNow* (online), 19 February 2013 <<http://www.perthnow.com.au/news/western-australia/former-wa-judge-justice-michael-murray-slams-mandatory-sentences/story-e6frg13u-1226581122402?nk=2c42354a762a8d9b2a3c925216dbb2df>>.

⁹²⁹ Law Council of Australia, *News From the Law Council: The Mandatory Sentencing Debate* (6 May 2014) <<http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/news/352-mandatory-sentencing-debate>>.

⁹³⁰ Monohan and Young, above n 516, 20.

Indigenous juvenile offenders, breaching several provisions of the *UNCRC* including the best interests of the child and deprivation of a child's liberty.⁹³¹

The rights-based issues of best interests, participation, juvenile justice, proportionality and diversion will be further discussed later in the chapter with regard to human rights safeguards contained in domestic juvenile justice, school discipline management policy and parental responsibility legislation relevant to violence in Australian school settings. Prior to this discussion, an overview of the policy approaches taken by several Australian education agencies will be provided that address the issue of juvenile violence within school settings. Scrutiny of existing domestic policy in these associated areas is useful in the identification of areas of similarity and departure in the provision of key human rights safeguards amongst the agencies.

The discussion will now turn to the constitutional implications of the provision of education services within Australia. This matter will be revisited later in the study in relation to the development of an effective strategy to address school violence.

4.4 Education as a State Matter Under the *Constitution*

As with law and order, primary and secondary education remain within state lawmaking ambits, with each state and territory being responsible for its own legislation and policy regime.⁹³² The Commonwealth *Constitution* distributes lawmaking power amongst the states in addition to the Commonwealth itself.⁹³³ The Commonwealth lawmaking areas are often referred to as exclusive in nature. Generally, however, lawmaking power is shared between the Commonwealth and states or territories in the so-called concurrent lawmaking areas found in s 51 of the *Constitution*.⁹³⁴ Section 122 of the *Constitution*

⁹³¹ Australian Human Rights Commission, *Mandatory Sentencing* (10 October 2013) <https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/submissions_un_hr_committee/5_mandatory_sentencing.pdf>.

⁹³² Hanks, Keyser and Clarke, above n 750, 8.

⁹³³ The distribution of legislative powers between the Commonwealth and states/territories will be further expanded upon in the recommendations advanced in Chapter 6.

⁹³⁴ The concurrent lawmaking areas are categorised into 40 areas and include subject matters such as trade and commerce with other countries and amongst the states s 51(i), marriage s 51(xxi), postal, telegraphic, telephonic and similar services s 51(v), naval and military defence s 51 (vi), and external affairs s 51(xxix). In the event of a conflict in shared lawmaking between the Commonwealth and states under

also allowed the Commonwealth to enact law for territories until they achieved self-government, which in the case of the Northern Territory occurred in the late 1970s⁹³⁵ and the Australian Capital Territory in the late 1980s.⁹³⁶ Section 122 controversially allowed the Commonwealth to override a law of a territory at any time without reference to the parliament, although it was seldom triggered, and in the last decade this power of veto has been abolished.⁹³⁷

Essentially, matters relating to schooling in Australia can be identified as being general or less precisely residual lawmaking powers,⁹³⁸ with each state and territory being responsible for the provision of services relevant to education. This category of state and territory lawmaking capability contains powers that remain after the Commonwealth powers have been defined, and include responsibility in significant and important areas including environmental protection, local government, law and order, corrective services, mining and transport among others.⁹³⁹

Although education remains a constitutional domain of state and territory parliaments by virtue of residual or general lawmaking powers, and by extension, the administrative arms of those jurisdictions, according to Reid, involvement by the Commonwealth in education matters has been evident at least since the early 1960s.⁹⁴⁰ Since then, Commonwealth funding of private and public schooling has resulted in some difficulty in balancing the nation-building pursuits of the Commonwealth in education matters against state and territory constitutional responsibilities, and has, for example, resulted in the introduction of a number of Commonwealth initiatives designed to influence yet

s 51, the s 109 mechanism will declare state legislation inoperative or invalid at least to the extent of the inconsistency, leaving the Commonwealth law to prevail.

⁹³⁵ *Northern Territory (Self Government) Act 1978* (NT).

⁹³⁶ *Australian Capital Territory (Self Government) Act 1988* (ACT).

⁹³⁷ Parliamentary Education Office, *Governing Australia – Making Laws*, Parliament of the Commonwealth of Australia <<http://www.peo.gov.au/learning/closer-look/governing-australia/making-laws.html>>.

⁹³⁸ Hanks, Keyser and Clarke, above n 750, 8, 20.

⁹³⁹ Parliamentary Education Office, *Governing Australia*, above n 937.

⁹⁴⁰ A Reid, 'Is this a Revolution?: A Critical Analysis of the Rudd Government's National Education Agenda' (2009) 29(3) *Curriculum Perspectives* 1–13.

not encroach upon state responsibilities.⁹⁴¹ These programs include councils⁹⁴² and embryonic national curriculum-based projects during the 1980s and 1990s and the formation of various bodies,⁹⁴³ although the states and territories remained resolute regarding their constitutionally-provided independence.⁹⁴⁴

This autonomy was tested by the exercising of more robust federalism during the early to mid-2000s by the conservative government, which threatened to withhold funding to states and territories if agreement was not reached on a national curriculum, performance payments for teaching staff and benchmark literacy and numeracy testing programs.⁹⁴⁵ Commonwealth funding of education is exercised through legislation including the *Schools Assistance Act 2008* (Cth) and manifold independent and non-government school assistance statutes,⁹⁴⁶ along with the introduction of the *Australian Education Act 2013* (Cth) which is intended to provide financial assistance to schools to assist in achieving high quality and equitable education services.⁹⁴⁷ It is expected that initiatives such as these will elevate Australia to a top five global ranking by 2025, principally in the important areas of reading, science and mathematics, and will lead to a significant reduction in Indigenous student achievement discrepancy gaps as well as improvements in teaching and learning, school leadership, transparency, accountability and meeting student needs.⁹⁴⁸

Animosity toward the Commonwealth amongst state and territory education sectors increased as a result of the Commonwealth's activism in the area before a change of government in 2007 saw the incoming Labour administration promising an end to

⁹⁴¹ Ibid.

⁹⁴² See, eg, Ministerial Council on Education, Employment and Youth Affairs (MCEETYA), which was established during the early 1990s as an amalgamation of several ministerial councils including the Australian Education Council and the Youth Ministers Council, among others. MCEETYA was in turn replaced in 2009 by the Ministerial Council for Education, Early Childhood Development and Youth Affairs, or MCEECDYA.

⁹⁴³ See, eg, National Curriculum Development Centre (2014) <<http://www.ncdc.gov.au/who-we-are.html>> and the Curriculum Corporation <http://www.curriculum.edu.au/verve/_resources/cc_flyer_v3.pdf>.

⁹⁴⁴ Reid, above n 940.

⁹⁴⁵ Ibid 3.

⁹⁴⁶ See, eg, *Independent Schools (Loans Guarantee) Act 1969* (Cth); *Non-Government Schools (Loan Guarantee) Act 1977* (Cth).

⁹⁴⁷ *Australian Education Act 2013* (Cth) s 3(1)(a).

⁹⁴⁸ Ibid s 3(1)(a)(i),(v)–(vi), (4)–(8).

coercive federalism and a new spirit of cooperation between Commonwealth and states on education matters. This culminated in the so-called education revolution that aimed to deliver an education-focussed society⁹⁴⁹ and put an end to Commonwealth and state hostility. It also witnessed the establishment of a national curriculum authority⁹⁵⁰ enlisted with state cooperation, although bipartisan support does not alter constitutional precepts regarding state powers in education matters.⁹⁵¹ Not without controversy, the 'Building the Education Revolution' policy of the Labour Party attracted much debate predominantly focussed on government waste and cost effectiveness.⁹⁵² A return to a conservative government in late 2013 has once again generated uncertainty in the area of education reform and the role of the Commonwealth,⁹⁵³ despite initial enthusiasm expressed by the incoming administration towards continuing the education reform initiated by the ousted government.⁹⁵⁴

Notwithstanding the greater involvement of the Commonwealth in education matters, the states and territories remain primarily responsible for the provision of education services. The next section of the discussion will focus on education policy and legislation pertinent to school violence in Australia.

⁹⁴⁹ M Rout, 'Crusade to Build on Education Revolution', *The Australian* (online), 15 September 2012 <<http://www.theaustralian.com.au/news/features/crusade-to-build-on-education-revolution/story-e6frg6z6-1226474366880>>.

⁹⁵⁰ Australian Curriculum, Assessment and Reporting Authority (ACARA) <<http://www.acara.edu.au/default.asp>>.

⁹⁵¹ Reid, above n 940.

⁹⁵² A Klan, 'Election 2010. Building the Education Revolution', *The Australian* (online), 20 August 2010 <<http://www.theaustralian.com.au/national-affairs/election-2010-building-the-education-revolution/story-fn69ugyj-1225907809740>>.

⁹⁵³ 'Pyne's Simple Lesson on Voter Betrayal', *The Australian* (online), 2 December 2013 <http://www.theaustralian.com.au/subscribe/news/1/index.html?sourceCode=TAWEB_WRE170_a&mode=premium&dest=http://www.theaustralian.com.au/opinion/columnists/pyne-simple-lesson-on-voter-betrayal/story-fnbcok0h-1226772527030&mentype=anonymous>.

⁹⁵⁴ 'It's Quality not Quantity for Christopher Pyne', *News.com.au* (online), 25 September 2013 <<http://www.news.com.au/national/its-quality-not-quantity-for-christopher-pyne/story-e6frfkp9-1226726435733>>.

4.5 Overview of Education Policy and Legislation Relevant to School Violence in Australia

Within the Australian jurisdiction, regulation of juvenile violence within the school domain is facilitated by disparate school acts, regulations and policies that are typically fashioned and sustained by state and territory education authorities in response to issues such as violence, harassment and bullying in schools. Scrutiny of the existing education law and policy structure reveals some consistency across state and territory agencies relating to the development and implementation of policy for the management of student behaviour. Some states maintain a more sophisticated legislative and policy structure, such as in the Victorian jurisdiction. Nonetheless, common to all state and territory regimes is an emphasis on a number of germane core principles which will be discussed below.

A responsibility of school administrators, school policy is, of course, commonplace. Courts will recognise the authority of school managers and governors, for example, to develop policy that reflects national and state legislation, codes and other guidelines.⁹⁵⁵ The benefit of informative, timely, clear, accessible, concise and well-written rules and guidelines that can communicate not only the underlying meaning but also the reason and tone of the policy should not be underestimated.⁹⁵⁶ It should also be recognised, however, that courts are inclined to exercise more scrutiny of school policy in circumstances where rights are impinged upon by policy.⁹⁵⁷

Prior to a discussion on these important education law and policy matters, the Commonwealth government's school safety policy strategy, the *National Safe Schools Framework*, will be discussed. This school safety initiative is an overarching Commonwealth framework that informs state and territory education policy on school safety and wellbeing, and also illustrates the increased involvement of the Commonwealth in education matters that was outlined above. The *National Safe*

⁹⁵⁵ J Squelch, 'Banning Religious Dress and Symbols in Public Schools: Implications for School Policy Makers' (2010) 15(2) *Australian and New Zealand Education Law Journal* 20.

⁹⁵⁶ D Meador, *Writing Policy and Procedures for Schools* (5 September 2012) About.comTeaching <<http://teaching.about.com/od/admin/a/Writing-School-Policies-And-Procedures.htm>>.

⁹⁵⁷ Squelch, above n 955.

Schools Framework will also provide the vehicle for the introduction of uniform model restorative justice methodology and practice in Australian schools that will be outlined in Chapter 5 of the thesis.

4.6 The National Safe Schools Framework

The prevalence of worrying issues such as violence, harassment and bullying in Australian schools prompted the Commonwealth government to initiate the *National Safe Schools Framework*,⁹⁵⁸ a project aimed at providing Australian school communities with both a vision and effective standards to enable the establishment of safe, supportive and respectful teaching and learning communities that actively promote student wellbeing. The framework aimed to promote whole of school strategies and programs to address physical and emotional safety and wellbeing for all Australian school students, and emerged following a Commonwealth⁹⁵⁹ investigation into school safety conducted in the 1990s. The Australian government was among the first to demonstrate collaborative national leadership including the provision of limited funding to assist schools and communities in addressing school violence.⁹⁶⁰

In addition, by building on the original 2003 policy, the *Framework* also aims to respond to emerging threats to student and school safety such as cyberbullying and use of weapons by young people, in addition to acknowledging the advances that individual schools, school systems and the education sector itself have achieved.⁹⁶¹ Launched in March 2011 to coincide with the National Day of Action Against Bullying and Violence, the revised document is an update of the original framework and was made in conjunction with state and territory governments and endorsed by all education

⁹⁵⁸ Education Services Australia, *Safe Schools: National Safe Schools Framework* (2013) <<http://www.safeschoolshub.edu.au/documents/nationalsafeschoolsframework.pdf>>.

⁹⁵⁹ House of Representatives Standing Committee on Employment Education and Training, *Sticks and Stones Report*, above n 348.

⁹⁶⁰ D Cross et al, 'National Safe Schools Framework: Policy and Practice to Reduce Bullying in Australian Schools' (2011) *International Journal of Behavioural Development* 1.

⁹⁶¹ Education Services Australia, above n 958, 2.

ministers and jurisdictions⁹⁶² through the patronage of the Ministerial Council for Education, Early Childhood Development and Youth Affairs.⁹⁶³

The whole of school approach taken under the *Framework* acknowledges the robust interconnectedness between student wellbeing, safety and the learning process, such that harassment, bullying and other forms of aggression are less inclined to occur within caring and supportive school communities.⁹⁶⁴ A whole of school approach has important dividends in the emotional and behavioural development of students, as these two factors influence the social context in schools to which students are exposed.⁹⁶⁵ The framework is buttressed by several guiding principles for Australian schools including the right for all those within school communities to both feel and be safe, the development and maintenance of a safe school environment where diversity is respected, the provision of safe and supportive teaching and learning communities consistent with schoolchild protection obligations, and the provision of support to young persons to enable the development of skills and strategies so they and others feel safe.⁹⁶⁶

Moreover, there are legitimate expectations by the Australian community that every measure is taken by education systems and their leaders to safeguard students and the broader school community and provide continued support and protection, all of which is expressed in explicit, transparent and clear policy and procedures.⁹⁶⁷ An important feature of the framework is the opportunity given to parents, guardians, carers and members of the wider community to contribute to the creation and maintenance of

⁹⁶² Safe and Supportive School Communities (SSSC) Working Group, *National Safe Schools Framework* (2014) <<http://www.bullyingnoway.gov.au/teachers/nssf/index.html>>.

⁹⁶³ Note that the National Safe Schools Framework was revised in 2013 and is now under the control of the Standing Council on School Education and Early Childhood (SCSEEC) which has superseded the Ministerial Council for Education, Early Childhood Development and Youth Affairs or MCEECDYA which previously supported the framework. See also ACARA, above n 950.

⁹⁶⁴ Education Services Australia, above n 958, 2.

⁹⁶⁵ L Rowling, 'Strengthening 'School' in School Mental Health Promotion' (2009) 109(4) *Health Education* 361.

⁹⁶⁶ Education Services Australia, above n 958, 3.

⁹⁶⁷ *Ibid* 5–8.

schools as safe, supportive teaching and learning communities that shape respectful relationships.⁹⁶⁸ A resource manual is also a feature of the *Framework*.

Essentially, the *Framework* embraces nine key elements that are designed to assist Australian schools in achieving the manifold objectives of safe, protective and supported learning communities that actively promote student wellbeing and safety.

4.6.1 Leadership Commitment

In this element of the *Framework*, it is anticipated that all members of school communities shoulder responsibility for both the development and maintenance of a safe, supportive and respectful learning environment for school community members, including the identification and support of strategic personnel with student safety and wellbeing responsibilities as well as adequate awareness of mandatory requirements and other legal responsibilities regarding student maltreatment, harassment, aggression and violence.⁹⁶⁹ Leadership also requires planning for and commitment to a clear vision for safe, supportive and respectful school environments, in which staff are encouraged to follow suit and provided with the necessary resources to achieve this aim.⁹⁷⁰ Other expectations include the requirement for school leaders to have a thorough knowledge of school community, student and staff safety issues occurring beyond school hours and premises, and robust incident record keeping that can evaluate and inform policy and procedure.⁹⁷¹

4.6.2 Supportive and Connected School Culture

This element outlines the expectations for connectedness and positive, caring and respectful relationships between the school and the student, parent or carer, in addition to appropriate monitoring of and response to issues of child protection and staff safety and wellbeing.⁹⁷² It is also anticipated under the *Framework* that there is clear recognition and respect for the specific needs of diverse school community groups

⁹⁶⁸ Ibid.

⁹⁶⁹ Ibid.

⁹⁷⁰ Ibid.

⁹⁷¹ Ibid.

⁹⁷² Ibid.

including Aboriginal, Torres Strait Islander, refugee and other immigrant groups. Staff performance and behaviour in areas such as teaching, promotion and staff modelling should also reflect these important values and expectations including pro-social values.⁹⁷³

4.6.3 Policies and Procedure

Policies and procedure under the *Framework* are to be supportive of safety and wellbeing and include a whole of school collaborative methodology with clearly communicated procedures available for students, staff, parents and carers to confidentially report violence, bullying, harassment or child maltreatment incidents, along with effective staff, student and familial induction protocols.⁹⁷⁴ Effective staff record keeping and communication in regard to safety and wellbeing issues, regular risk assessment and management of physical school environs, both on campus and externally, responsible staff and student use of technology agreements, well established and understood protocols regarding appropriate and inappropriate adult-student interaction and representative groups responsible for school safety and wellbeing issues are also espoused under this principle.⁹⁷⁵

4.6.4 Professional Learning

This element is typified by a commitment to ongoing professional learning in research and technology in the areas of student safety and wellbeing as well as the inclusion of selected non-specialist, casual or visiting staff in appropriate professional learning roles and staff evaluation of their knowledge, skill and capacity to effectively respond to occurrences of violence, bullying, child maltreatment and harassment.⁹⁷⁶

4.6.5 Positive Behaviour Management

The *Framework* recommends in this element that schools select and implement evidence-guided behaviour management policy that is cognisant of school community

⁹⁷³ Ibid.

⁹⁷⁴ Ibid.

⁹⁷⁵ Ibid.

⁹⁷⁶ Ibid.

requirements, in addition to recognising and promoting positive student behaviour, effective use of technology and out of hours, off campus risk prevention planning.⁹⁷⁷ A clear understanding of and consistency in staff implementation of positive behaviour approaches within the classroom and wider school settings is also a characteristic of this element.⁹⁷⁸

4.6.6 Engagement, Skill Development and Safe School Curriculum

This element is exemplified by the teaching of skills and knowledge that promote protective behaviour, cyber safety, and personal safety, counter harassment, aggression, bullying, and violence, and promote the development of social and emotional skills that can be used at any school year level.⁹⁷⁹ Student engagement with learning processes and an extensive use of relational teaching strategy in addition to cooperative learning is also promoted under this element of the *Framework*.⁹⁸⁰

4.6.7 Focus on Student Wellbeing

This element defines strategies and structures to enable the enhancement of student wellbeing, adoption of strengths-based approaches to student participation and learning, and the provision of opportunities for student ownership and decision-making. Peer teaching and the development of a voice and sense of purpose and meaning by students is also seen as important.⁹⁸¹

4.6.8 Early Intervention and Targeted Student Support

Effective processes for early intervention with students displaying antisocial behaviour or peer difficulty, or for those students and families requiring supplementary support as well as adequate ongoing and follow up support are the expectations of this *Framework* element.⁹⁸²

⁹⁷⁷ Ibid.

⁹⁷⁸ Ibid.

⁹⁷⁹ Ibid.

⁹⁸⁰ Ibid.

⁹⁸¹ Ibid.

⁹⁸² Ibid.

4.6.9 *Partnerships with Families and Community*

This *Framework* element is characterised by collaboration with parents, carers and community organisations to provide instruction and deliver a consistent message on student safety and wellbeing issues, as well as extending support services to students and families as required.⁹⁸³ The element also recommends collaboration with the justice system at both the preventative and legal levels in regard to violence, aggression, cyber safety and child maltreatment.⁹⁸⁴ Useful human rights-based initiatives articulated in the *National Safe Schools Framework* have attracted a less than universal level of support within the Australian landscape with many states making only perfunctory reference to the *Framework* itself, while it is conspicuous by its absence in the education policy structures of others, including New South Wales, Victoria and Western Australia.⁹⁸⁵ However, the wholesale aim of the *Framework*, to provide vision and effective standards to enable safe, supportive and respectful teaching and learning communities which actively promote student welfare and safety, are reflected generally in Australian school policy to some extent.

According to Cross et al, research has suggested that more training of teaching staff and greater support is needed in implementation of the *Framework*.⁹⁸⁶ The *Framework* has identified several rights-based values that are reflected in the *UNCRC* and other attendant instruments and protocols, and these will be discussed in the following section which focusses on domestic education policy, and extended in the subsequent discussion on the status of rights-based issues in Australia.⁹⁸⁷ Notwithstanding the mixed uptake of the *Framework* by state and territory jurisdictions, this Commonwealth policy may yet

⁹⁸³ Ibid.

⁹⁸⁴ Ibid.

⁹⁸⁵ Education and Training, *Providing Safe Schools*, below n 990, 1; Department of Education, Training and Employment, *Building a Safe and Supportive School Environment*, below n 1046; Department for Education and Child Development, *Safer DECD Schools*, below n 1001, 7; Department of Education and Training, *Wellbeing and Behaviour Policy Guide*, below n 1035.

⁹⁸⁶ Cross et al, above n 960, 6.

⁹⁸⁷ See 3.5 above for an overview of juvenile rights derived from the *Convention of the Rights of the Child (UNCRC)* and other international instruments such as the *Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)* and the *Rules for the Protection of Juveniles Deprived of Their Liberty (Havana Rules)*.

be of benefit in the introduction of the model restorative justice methodology and practice advocated in this thesis, which will be expanded upon in Chapter 5.

An overview will now be given of domestic education legislation and policy responses to school violence. This will commence with definitional aspects, followed by an outline of individual state and territory policy frameworks that address school violence in Australian schools including the take up or otherwise of principles enunciated in the *National Safe Schools Framework*.

4.7 Definitional Implications in Education Policy and Legislation Relevant to School Violence

Education policy relevant to school violence throughout the Australian jurisdiction is located principally in the analogous and concomitant areas of school discipline, school behaviour, provision of safe schools, prevention of harassment, bullying and student wellbeing management. In this part of the discussion, various definitions of core terminology in the school violence debate will be reviewed that extend the definitions provided in Chapter 2 of the thesis.

Definitions⁹⁸⁸ of violence or violent acts are a recurring theme within policy directions in many jurisdictions including the Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Victoria and Western Australia. Within these jurisdictions, violence is typically defined in school policy as the circumstances where a person is threatened, intimidated, abused or physically assaulted, or where property is deliberately damaged, by another person. Further, violent acts are often characterised as extreme uses of force including physical, verbal and sexual⁹⁸⁹ acts that can but do not necessarily involve a power imbalance, and are either one-off,

⁹⁸⁸ See Chapter 2 above for general definitions of ‘juvenile’, ‘violence’, and ‘school violence’, amongst other terms relevant to this study.

⁹⁸⁹ See, eg, Department of Education and Early Childhood Development, *Building Respectful and Safe Schools*, above n 111.

random events⁹⁹⁰ or continue over time. Threatened violence can involve words or gestures to communicate intent to utilise force against another.⁹⁹¹

The definition of violence in Australian education policy is extended on occasion with the inclusion of injury caused to another through weapon use, bullying, including cyber-bullying, behaviour that incites emotional distress in another or retaliation against a reporter of any violent acts.⁹⁹² Further, violent acts can be either provoked or unprovoked in nature and involve damaging or destructive uses of force against persons, groups or property.⁹⁹³ Acts of violence can affect the rights, freedoms and safety of others,⁹⁹⁴ can include both sexual or indecent assault,⁹⁹⁵ and can obviously cause death in some cases.⁹⁹⁶ Whilst definitions of violence such as these are manifest in domestic education policy across Australia, Tasmania is silent on the issue.

Harassment has also been identified as a key school violence concern. Described variously as offensive, humiliating, threatening, intimidating,⁹⁹⁷ belittling, unwelcome, unsolicited, unreciprocated and often repeated⁹⁹⁸ behaviour, harassment can be either directly or indirectly targeted at individuals or groups.⁹⁹⁹ Harassment can be designed to

⁹⁹⁰ Education and Training, *Providing Safe Schools P-12* (2007) Australian Capital Territory Government, 3 <http://www.det.act.gov.au/__data/assets/pdf_file/0005/19499/Providing_Safe_Schools_updated.pdf>; Department of Education and Training WA, *Behaviour Management in Schools*, above n 110.

⁹⁹¹ Department of Education and Early Childhood Development, *Building Respectful and Safe Schools*, above n 111.

⁹⁹² Department of Education and Training, *Bullying, Harassment & Violence Version 2* (15 April 2013) Northern Territory Government, 2 <http://www.education.nt.gov.au/__data/assets/pdf_file/0017/12662/BullyingHarassmentViolencePolicy15Apr2013.pdf>.

⁹⁹³ Department of Education and Early Childhood Development, *Building Respectful and Safe Schools*, above n 111.

⁹⁹⁴ Department of Education, Training and Employment, *Act Smart Be Safe* (17 July 2012) Queensland Government <<http://education.qld.gov.au/actsmartbesafe/violence/index.html>>.

⁹⁹⁵ Department of Education & Communities, Public Schools, *Suspension and Expulsion of School Students – Procedures* (October 2014) New South Wales Government, 8 <https://www.det.nsw.edu.au/policies/student_serv/discipline/stu_discip_gov/suspol_07.pdf>.

⁹⁹⁶ Department of Education, Training and Employment, *Act Smart Be Safe –Physical Violence* Queensland Government <<http://education.qld.gov.au/actsmartbesafe/violence/physical.html>>.

⁹⁹⁷ Department of Education WA, *Behaviour Management in Schools*, above n 110, 16.

⁹⁹⁸ Department of Education and Training, *Bullying, Harassment & Violence*, above n 992.

⁹⁹⁹ Ibid.

annoy, disturb, upset or threaten¹⁰⁰⁰ and create hostile environments.¹⁰⁰¹ Additionally, harassment can be directed at perceived or real attributes including gender, religion, culture, physical characteristics or differences, disability, socio-economic status, sexually-based traits,¹⁰⁰² as well as ethnicity, sexual orientation,¹⁰⁰³ age, parenting, marital or economic status.¹⁰⁰⁴

Australian state and territory education authorities provide further definitional guidance including in the area of breach or serious breach of school discipline. For example, in Western Australia such an infringement is described as a violation of a school's code of conduct that adversely threatens or affects personal safety whilst at school.¹⁰⁰⁵ The Australian Capital Territory uses the term 'critical incidents' to refer to incidents or series of incidents that pose a significant threat to student or staff safety and result in considerable disruption to school procedure, possibly involving school closure, evacuation or lock down and police intervention.¹⁰⁰⁶

4.8 School Violence Education Law and Policy Structure in Australia

4.8.1 Introduction

Public education policies initiated across the Australian landscape to address the school violence obstacle have at their core an ambition to provide for all school community members, including students and teachers, a supportive, disciplined and safe learning environment free from victimisation, bullying, harassment and other forms of violence, while promoting respectful, productive and stimulating teaching and learning environments.¹⁰⁰⁷ The strategic importance of school discipline law, policy and

¹⁰⁰⁰ Department of Education and Early Childhood Development, *Building Respectful and Safe Schools*, above n 111, 7.

¹⁰⁰¹ Department for Education and Child Development, *Safer DECD Schools* (2011) Government of South Australia, 4 <<http://www.saasso.asn.au/wp-content/uploads/2012/11/Safer-DECD-schools.pdf>>.

¹⁰⁰² Education and Training, *Providing Safe Schools P-12*, above n 990, 2.

¹⁰⁰³ Department of Education and Early Childhood Development, *Building Respectful and Safe Schools*, above n 111, 7.

¹⁰⁰⁴ Department for Education and Child Development, *Safer DECD Schools*, above n 1001.

¹⁰⁰⁵ Department of Education and Training WA, *Behaviour Management in Schools*, above n 110.

¹⁰⁰⁶ Education and Training, *Providing Safe Schools P-12*, above n 990.

¹⁰⁰⁷ Education and Training, *Providing Safe Schools P-12*, above n 990, 1; Education & Communities, *Student Discipline in Government Schools Policy* (8 May 2006) New South Wales Government, 2 <https://www.det.nsw.edu.au/policies/student_serv/discipline/stu_discip_gov/PD20060316.shtml>;

procedure should not be underestimated as a component in confronting school violence and should further inform and guide stakeholders such as students, teachers, parents, carers, administrative staff and the like in critical areas of concern including expectations, obligations, philosophies and objectives. Further, departmental procedure and policies are to be reflected at school or college level within the relevant state or territory. In order to facilitate this, government schools and colleges are to fashion effective and consultative policy and procedure in accordance with the relevant school education legislation in order to promote a safe learning environment for stakeholders.

The provision of education services is a state or territory matter. Each state and territory is responsible for its own legislation and policy as a result. Therefore, key issues and themes will be discussed according to each jurisdiction.

4.8.2 Australian Capital Territory

In accordance with legislation¹⁰⁰⁸ such as the *Education Act 2004* (ACT), *Human Rights Act 2004* (ACT), *Discrimination Act 1991* (ACT) and the *Children and Young People Act 1999* (ACT), Australian Capital Territory school policy and procedure aims to consistently demonstrate equity and fairness when supporting and dealing with students and is to be aligned with the strategic aims of the *National Safe Schools Framework*¹⁰⁰⁹ in order to promote a code of conduct that protects safety and welfare in education

Department of Education and Children's Services, *Safe Schools NT Code of Behaviour* (April 2013) Northern Territory Government, 2

<http://www.education.nt.gov.au/__data/assets/pdf_file/0003/2298/safe_schools_code_of_behaviour.pdf>; Department of Education, Training and Employment, *The Code of School Behaviour*, Queensland Government, 1 <<http://education.qld.gov.au/behaviour/docs/code-school-behaviour-a4.pdf>>; Department of Education and Children's Services, *School Discipline* (1 March 2007) Government of South Australia, 2 <<http://www.decd.sa.gov.au/docs/documents/1/SchoolDisciplinePolicy.pdf>>; Department of Education, *Learner Wellbeing and Behaviour* (28 August 2012) Government of Tasmania, 2

<<https://www.education.tas.gov.au/documentcentre/Documents/Learner-Wellbeing-and-Behaviour-Policy.pdf>>; Department of Education and Early Childhood Development, *Effective Schools are Engaging Schools – Student Engagement Policy Guidelines* (27 March 2009) State Government of Victoria, 5 <<https://www.eduweb.vic.gov.au/edulibrary/public/stuman/wellbeing/segpolicy.pdf>>; Department of Education and Training WA, *Behaviour Management in Schools*, above n 110, 4.

¹⁰⁰⁸ Commonwealth legislation including the *Racial Discrimination Act 1975* (Cth) and *Human Rights and Equal Opportunity Commission Act 1986* (Cth) also impacts on school policy and procedure in the Australian Capital Territory as does the *ACT Civil and Administrative Tribunal Act 2008* (ACT).

¹⁰⁰⁹ Education and Training, *Providing Safe Schools P-12*, above n 990, 1.

settings whilst promoting human rights.¹⁰¹⁰ School principals in the Australian Capital Territory are required to develop policy and procedure that reflects a whole of school approach and a commitment to safe and supportive school environments that espouse positive practices and social skills. This should contribute to an impression of safety and wellbeing for staff and students alike,¹⁰¹¹ counter harassment, bullying and violence¹⁰¹² including sexual violence, such as assault, as well as abuse¹⁰¹³ and racism.¹⁰¹⁴ These procedures are to be reviewed regularly as part of school planning and improvement processes and made available to students, staff, parents and carers, and they must include the opportunity for development of positive interpersonal skills and due regard for the rights of others in the school curriculum.¹⁰¹⁵

There are also relevant legislative requirements¹⁰¹⁶ in the Australian Capital Territory for the reporting of incidents, non-accidental injury, sexual assault or abuse,¹⁰¹⁷ as well as recording, intervention and professional staff development procedures for incidents of school violence.¹⁰¹⁸ Additionally, school policy and procedure in the Australian Capital Territory must be aligned with departmental policies targeting non-critical incidents involving bullying, harassment, accident, injury and conflict along with student transfer,

¹⁰¹⁰ Education and Training, *Our School: A Safe and Happy Place for Everyone*, Australian Capital Territory Government

<http://www.det.act.gov.au/__data/assets/pdf_file/0014/22730/Code_of_Conduct_Brochure.pdf>.

¹⁰¹¹ Education and Training, *Providing Safe Schools P-12*, above n 990, 4.

¹⁰¹² Education and Training, *Countering Bullying, Harassment and Violence in ACT Public Schools* (2007) Australian Capital Territory Government, 1

<http://www.det.act.gov.au/__data/assets/pdf_file/0004/17608/Countering_Bullying_and_Harassment_updated.pdf>.

¹⁰¹³ Education and Training, *Countering Sexual Harassment in ACT Public Schools* (2007) Australian Capital Territory Government, 1

<http://www.det.act.gov.au/__data/assets/pdf_file/0017/19511/Sexual_Harassment_updated.pdf>.

Procedures delineated in *Children and Young People Act 1999* (ACT) s 159 for dealing with this category of violence are to be followed by ACT schools.

¹⁰¹⁴ Threats to student and staff safety in Australian Capital Territory schools through the medium of racism also requires schools to develop policies and procedures targeted at countering racism. This is outlined in the Australian Capital Territory *Countering Racism in Schools* (2007) policy. Education and Training, *Countering Racism in Schools* (2007) Australian Capital Territory Government

<http://www.det.act.gov.au/__data/assets/pdf_file/0015/19500/countering_racism.pdf>.

¹⁰¹⁵ Education and Training, *Providing Safe Schools P-12*, above n 990, 1.

¹⁰¹⁶ *Children and Young People Act 2008* ACT ss 356(1)(c)(i)–(ii).

¹⁰¹⁷ Education and Training, *Providing Safe Schools P-12*, above n 990, 2.

¹⁰¹⁸ Education and Training, *Countering Bullying, Harassment and Violence in ACT Public Schools*, above n 1012.

exclusion and suspension,¹⁰¹⁹ which must also meet standards of natural justice¹⁰²⁰ and procedural fairness¹⁰²¹ under the main school legislation.¹⁰²² There are also policy and procedure requirements centred on the reporting and management of so-called critical incidents, which are defined as severe impact school events that involve violence or serious physical assault and emergency situations.¹⁰²³ Critical incidents can also involve the use of weapons, abduction, loss of a sense of control, acute threat to the safety of students and staff and extreme danger, and can involve police and emergency personnel among others.¹⁰²⁴

4.8.3 New South Wales

In response to school-based violence in New South Wales, schools are required to consider multifarious policy directives that are consistent with legislation, including the *Education Act 1990* (NSW), *Disability Discrimination Act 1992* (NSW), *Anti-Discrimination Act 1977* (NSW) and the *Summary Offences Act 1988* (NSW) amongst others, when developing policy and procedure for implementation at school level. There is to be a focus on key departmental policy initiatives addressing student discipline and core school rules.¹⁰²⁵ In addition, other supporting policy directives are provided to schools to assist in the implementation of school policy and procedure.¹⁰²⁶ However, although there is much common ground between departmental school violence policy directives in New South Wales and the *National Safe Schools Framework*, there is no

¹⁰¹⁹ Education and Training, *Providing Safe Schools P-12*, above n 990, 1.

¹⁰²⁰ See 3.6.5 above for a definition of due process and procedural fairness in addition to natural justice.

¹⁰²¹ Education and Training, *Suspension, Exclusion or Transfer of Students in ACT Public Schools* (2010) Australian Capital Territory Government, 8
<http://www.det.act.gov.au/__data/assets/pdf_file/0004/19516/Suspension_Exclusion_Transfer_Policy_2010_updated.pdf>.

¹⁰²² *Education Act 2004* (ACT) s 36.

¹⁰²³ Education and Training Directorate, *Critical/Non-Critical Incident Management and Reporting* (2013) Australian Capital Territory Government, 1–3
<http://www.det.act.gov.au/publications_and_policies/policy_a-z>.

¹⁰²⁴ *Ibid* 1–2.

¹⁰²⁵ Education & Communities, *Student Discipline in Government Schools Policy*, above n 1007; Department of Education and Training, *Core Rules Student Discipline in NSW Government Schools*, New South Wales Government
<https://www.det.nsw.edu.au/policies/student_serv/discipline/stu_discip_gov/core_rules.pdf>.

¹⁰²⁶ Department of Education & Communities, Public Schools, *Student Discipline in Government Schools Policy Support Materials* (28 October 2014) New South Wales Government
<https://www.det.nsw.edu.au/policies/student_serv/discipline/stu_discip_gov/disc_implement.pdf>.

reference to the strategic aims of the *Framework* in departmental policy guidelines in the jurisdiction.

Essentially, school discipline within New South Wales is to be developed by schools in consultation with school community personnel and is to embrace codes of discipline and school rules in addition to strategies and practices that manage inappropriate student behaviour, reinforce student achievement and advance positive student comportment and a climate of respect that is free of bullying, harassment, victimisation and intimidation, where students are treated fairly and with dignity.¹⁰²⁷ School discipline policy is to be aligned with legislation and both government and departmental policy, is to reflect procedural fairness¹⁰²⁸ and define the responsibilities of students, teachers and parents in New South Wales.¹⁰²⁹

It is expected that a rigorous student welfare context that reflects identified community requirements and expected standards of behaviour will be developed from existing procedure and policy.¹⁰³⁰ Additional policy initiatives that impact upon school violence in New South Wales include anti-bullying strategies that are to be supported by schools through the encouragement of appropriate behaviour and respectful relationships among all members of school communities.¹⁰³¹ In circumstances where a school student in New South Wales indulges in physical violence or significant disobedience,¹⁰³² including repeated refusal to follow school discipline codes that seriously interferes with safety or wellbeing, the student may be suspended from the school.¹⁰³³ This can be extended to expulsion in more serious circumstances.¹⁰³⁴

¹⁰²⁷ Education & Communities, *Student Discipline in Government Schools Policy*, above n 1007, 1.

¹⁰²⁸ Department of Education & Communities, Public Schools, *Suspension and Expulsion of School Students – Procedures*, above n 995, 24.

¹⁰²⁹ Education & Communities, *Student Discipline in Government Schools Policy*, above n 1007, 1.

¹⁰³⁰ *Ibid.*

¹⁰³¹ Education & Communities, *Bullying: Preventing and Responding to Student Bullying in Schools Policy* (18 November 2014) New South Wales Government
<https://www.det.nsw.edu.au/policies/student_serv/discipline/bullying/PD20100415.shtml?level=>.

¹⁰³² This may for example involve the use of a weapon such as a knife by the student without lawful excuse in contravention of the *Weapons Prohibition Act 1998* (NSW) sch 1.

¹⁰³³ Department of Education & Communities, Public Schools, *Suspension and Expulsion of School Students – Procedures*, above n 995.

¹⁰³⁴ *Ibid* 12.

4.8.4 Northern Territory

Pursuant to legislation including the *Education Act* (NT), *Anti-Discrimination Act* (NT) and the *Care and Protection of Children Act* (NT), school discipline policy initiatives in the Northern Territory reflect the provisions of departmental codes of conduct for schools, but more specifically wellbeing and behaviour policies, in addition to bullying, harassment and violence directives.¹⁰³⁵ Schools are encouraged to refer to the recommendations of the *National Safe Schools Framework* when implementing suitable school policy.¹⁰³⁶ In a similar fashion to other states and territories, Northern Territory school policy is to promote wellbeing and positive behaviour along with constructive learning communities, and provide for the imposition of consequences for unacceptable behaviour including detention, mediation, suspension, exclusion and other measures following instances of physical and verbal assault, intimidation, threatening conduct and other examples of unacceptable behaviour by school students.¹⁰³⁷

The application of consequences for unacceptable behaviour in Northern Territory schools is to take into account the rights and needs of school communities in addition to the actions and individual circumstances of the student involved.¹⁰³⁸ The principles of natural justice are to be applied by Northern Territory schools in circumstances where infractions of school behaviour codes occur, while restorative processes are available for use¹⁰³⁹ in addition to the more traditional responses outlined above. In response to a disturbing school violence incident during 2011 in the Northern Territory, policy changes were recommended, particularly in the areas of extreme student behaviour and concomitant suspension and exclusion of offending students, professional staff

¹⁰³⁵ Department of Education and Training, *Code of Conduct for Schools* (February 2011) Northern Territory Government
<http://www.education.nt.gov.au/__data/assets/pdf_file/0017/692/CodeOfConductForSchoolsPolicy.pdf>; Department of Education and Training, *Code of Conduct for Schools Guidelines* (February 2011) Northern Territory Government
<http://www.education.nt.gov.au/__data/assets/pdf_file/0018/693/CodeOfConductForSchoolsGuidelines.pdf>; Department of Education and Training, *Wellbeing and Behaviour Policy Guide* (2009) Northern Territory Government, 2
<http://www.education.nt.gov.au/__data/assets/pdf_file/0004/2299/SSNT_policy_guidelines.pdf>.

¹⁰³⁶ Ibid.

¹⁰³⁷ Ibid.

¹⁰³⁸ Department of Education and Children's Services, *Safe Schools NT Code of Behaviour*, above n 1007, 8.

¹⁰³⁹ Ibid.

development to de-escalate extreme student behaviour, whole of school approaches to behaviour management, adolescent behaviour and the exploration of alternative school options for recidivist disruptive and or violent school students.¹⁰⁴⁰

4.8.5 Queensland

The policy approach taken in Queensland in harmony with legislation¹⁰⁴¹ such as the *Education (General Provisions) Act 2006* (Qld) and the *Education (General Provisions) Regulations 2006* (Qld) promotes appropriate student behaviour and provides consequences for unacceptable behaviour including suspension, exclusion and enrolment cancellation pursuant to a responsible student behaviour plan.¹⁰⁴² Moreover, a general code of behaviour applies to all members of school communities, including an obligation that members conduct themselves in a safe, ethical and responsible manner respectful of the rights of others. There are particular expectations placed on students to demonstrate appropriate standards of behaviour, respect for themselves and others, and cooperation with school staff and similar persons in authority.¹⁰⁴³

Prior to the enrolment of a student in Queensland government schools, students and parents or carers are to sign a covenant known as the ‘enrolment agreement’ which requires compliance with the school behaviour code policy and other endorsed conditions as well as stipulating the rights and obligations of school members.¹⁰⁴⁴

Principals are to provide appropriate review mechanisms, staff support and professional development and leadership in order to allow effective and fair implementation of student behaviour plans that are aligned with school behaviour code policy and legislation.¹⁰⁴⁵

¹⁰⁴⁰ Department of Employment Education and Training, *Report on Review into Extreme Student Behaviour*, Northern Territory Government
<http://www.education.nt.gov.au/__data/assets/rtf_file/0019/23086/ReportReviewIntoExtremeStudentBehaviour.rtf>.

¹⁰⁴¹ Other related legislation includes the *Criminal Code Act 1899* (Qld), *Anti-Discrimination Act 1991* (Qld) and the *Judicial Review Act 1991* (Qld).

¹⁰⁴² Department of Education, Training and Employment, *The Code of School Behaviour*, above n 1007, 1–2.

¹⁰⁴³ *Ibid* 2.

¹⁰⁴⁴ *Ibid* 1.

¹⁰⁴⁵ *Ibid* 3.

In addition, when implementing policy and procedure Queensland schools are encouraged to adopt the guiding principles of the *National Safe Schools Framework* in relation to school violence, harassment, aggression and bullying as well as the developing concerns regarding cyber safety and weapons on school premises.¹⁰⁴⁶ However, direct reference to the *Framework* remains cursory at present. Further policy support is provided to school administrators in Queensland in the form of additional materials that outline the procedures to be followed in order to uphold safe and supportive school environments, including physical restraint of students to ensure school safety and other pertinent issues such as student detention, exclusion and expulsion for infractions of the student behaviour plan.¹⁰⁴⁷

Grounds for student detention and suspension include misconduct, disobedience and conduct that is injurious to the management and good order of schools, whilst exclusion is deemed appropriate in instances of gross disobedience or misconduct where suspension is deemed unsatisfactory.¹⁰⁴⁸ The expulsion of students from Queensland government schools¹⁰⁴⁹ can follow students' refusal to participate in the school educational program, for example. In dealing with student discipline in Queensland, school principals are to uphold fair and equitable practice and the principles of natural justice,¹⁰⁵⁰ along with non-discriminatory language, behaviour and safe legal procedure.¹⁰⁵¹

¹⁰⁴⁶ Department of Education, Training and Employment, *Building a Safe and Supportive School Environment* (2005–2014) Queensland Government
<<http://education.qld.gov.au/actsmartbesafe/schoolleaders/building-safe-environment.html>>.

¹⁰⁴⁷ Department of Education, Training and Employment, *Safe, Supportive and Disciplined School Environment* 7.2 (13 February 2014) Queensland Government
<<http://ppr.det.qld.gov.au/education/learning/Pages/Safe,-Supportive-and-Disciplined-School-Environment.aspx>>.

¹⁰⁴⁸ *Ibid.*

¹⁰⁴⁹ Exclusion must be made in accordance with *Education (General Provisions) Regulations 2006* (Qld) ch 12 pt 3 div 1A.

¹⁰⁵⁰ Department of Education, Training and Employment, *Safe, Supportive and Disciplined School Environment*, above n 1047.

¹⁰⁵¹ *Ibid.*

4.8.6 South Australia

In South Australia there is an altogether more sophisticated approach to policy initiation at school level with a sizeable school discipline framework provided to school principals and district directors to enable the establishment of safe and positive learning communities that enhance student learning and responsibility.¹⁰⁵² In collaboration with school communities, South Australian schools are to develop behaviour codes aligned with legislation including the *Education Act 1972 (SA)*, *Education Act Regulations 1977 (SA)*, *Equal Opportunity Act 1984 (SA)* and the *Disability Discrimination Act 1992 (Cth)* that effectively manage student behaviour in partnership with students, families and school staff to provide inclusive, orderly, productive and safe learning communities devoid of harassment, bullying and other forms of violence.¹⁰⁵³ As with other jurisdictions, behaviour codes are buttressed by student development plans in South Australia which address learning goals and student behaviour. These are collaboratively managed between schools, students, families, agencies and other services that support both learning and behaviour management, particularly in the case of persistent and serious student misconduct.¹⁰⁵⁴

Under the South Australian regime, schools develop consequences for irresponsible student behaviour which are to be applied in a consistent fashion by school staff who manage issues in the school environment such as bullying and sexual and racial harassment. Students will be apprised of the need to respect others and fulfil their responsibilities, and students who are unresponsive to school level consequences will be subject to system level procedures including exclusion and expulsion.¹⁰⁵⁵ Policy responses to inappropriate student behaviour will necessarily involve a non-violent approach devoid of physical, verbal or emotional harassment or hurt and reflect departmental school discipline policy.¹⁰⁵⁶ Other departmental policies in South Australia include bullying reduction and protective staff practices along with departmental instruments such as child protection, mandatory notification of abuse, harm and

¹⁰⁵² Department of Education and Children's Services, *School Discipline*, above n 1007, 6.

¹⁰⁵³ *Ibid* 2–4.

¹⁰⁵⁴ *Ibid* 4.

¹⁰⁵⁵ *Ibid* 3.

¹⁰⁵⁶ *Ibid* 10.

exploitation, anti-racism and student disability in addition to the guidelines provided in the *National Safe Schools Framework*.¹⁰⁵⁷

In South Australia, school behaviour codes encourage government schools to use non-punitive responses in dealing with school discipline infractions. These responses are devoid of physical punishment and emotional or verbal offence and are encouraged through the use of restorative justice and reconciliatory responses.¹⁰⁵⁸ A salient example of these non-punitive initiatives in South Australia is the process of suspension or exclusion of disruptive school students following an identified incident of violent behaviour that threatens the safety and wellbeing of others.¹⁰⁵⁹ In these circumstances, conferencing involving the key stakeholders is employed to produce an appropriate student development plan itemising the responsibilities of students, parents or carers, and important personnel such as family support representatives, interpreters and counsellors.¹⁰⁶⁰ Following consensus on the student development plan by stakeholders, a focus on the learning and behavioural targets to be met by the student following the violent and or disruptive act is outlined.¹⁰⁶¹

The management of trespassers and other non-welcome entrants on South Australian school grounds has also been enhanced through amendments to legislation¹⁰⁶² that aim to deal with circumstances where a school student is being disruptive or violent at a school other than their own, as well as other intruders who jeopardise school safety and wellbeing.¹⁰⁶³

¹⁰⁵⁷ Ibid 10.

¹⁰⁵⁸ Ibid 3.

¹⁰⁵⁹ Department for Education and Child Development, *Suspension and Exclusion From School* (2015) Government of South Australia <<https://www.sa.gov.au/topics/education-skills-and-learning/schools/school-life/behaviour-management-and-discipline/suspension-and-exclusion>>.

¹⁰⁶⁰ Ibid.

¹⁰⁶¹ Ibid.

¹⁰⁶² *Education Regulations 2012 (SA)* regs 6(2)(a)(i)–(iii), 8.

¹⁰⁶³ See Department of Education and Children's Services, *Managing Trespass and Disruptive Behaviour* (5 December 2014) Government of South Australia <http://www.decd.sa.gov.au/mediacentre/files/pages/LinkED/managing_trespass_and_disr.pdf>.

4.8.7 *Tasmania*

School policy in the state of Tasmania upholds the right of Tasmanian students to be treated with respect and courtesy in addition to providing purposeful, supportive, safe and friendly learning environments.¹⁰⁶⁴ The regulation of school discipline in Tasmania is in accordance with legislation including the *Education Act 1994* (Tas) and associated *Education Regulations 2005* (Tas), and requires schools to adhere to the requirements of the Department of Education's discipline guidelines when initiating policy that is also to be negotiated and developed by members of the school community.¹⁰⁶⁵ Schools and colleges should also inform school community associations about what constitutes acceptable and unacceptable behaviour, and this is to be grounded in individual school discipline policy directives.¹⁰⁶⁶

Essentially, unacceptable behaviour under the legislation¹⁰⁶⁷ is classed as refusal to participate in the education program, as well as disobedience to instructions that can hinder the learning of other students, is likely to be detrimental to the health, safety or welfare of other students, or can cause damage or bring the school into disrepute.¹⁰⁶⁸ Consequences for breach of Tasmanian school disciplinary requirements include suspension,¹⁰⁶⁹ detention, exclusion or expulsion.¹⁰⁷⁰ Like other states and territories, Tasmanian schools are entrusted to apply fairness and consistency in applying disciplinary measures which are to be combined with policy clarity in order to ensure objectivity in the application of school discipline policy regimes¹⁰⁷¹ including the *National Safe Schools Framework*.¹⁰⁷²

¹⁰⁶⁴ Department of Education, *Learner Wellbeing and Behaviour*, above n 1007, 3.

¹⁰⁶⁵ *Ibid* 2.

¹⁰⁶⁶ *Ibid* 4.

¹⁰⁶⁷ *Education Act 1994* (Tas) s 36(1).

¹⁰⁶⁸ Department of Education, *Student Behaviour Procedure* (May 2014) Government of Tasmania, 3 <<https://www.education.tas.gov.au/documentcentre/Documents/Student-Behaviour-procedure.pdf>>.

¹⁰⁶⁹ *Education Act 1994* (Tas) s 37.

¹⁰⁷⁰ *Education Act 1994* (Tas) ss 38(2)(a)–(c).

¹⁰⁷¹ Department of Education, *Learner Wellbeing and Behaviour*, above n 1007, 4.

¹⁰⁷² See Department of Education, Government of Tasmania, 'Bullying Not Acceptable in Tasmanian Schools' (Media Release, 16 July 2012)

<https://www.education.tas.gov.au/_layouts/mobile/dispform.aspx?List=aac6c0d2-bab5-481b-922b-67c4ecf9d5b6&View=b6b38d93-b12e-44e1-a370-c4bac38c6d83&ID=5>.

Supportive, non-punitive problem-solving measures for student behavioural change in the restorative justice tradition are also championed in the Tasmanian jurisdiction, including the use of parental conferencing following suspension of a disruptive or violent student in order to apprise parents of the seriousness of the disruptive or violent behaviour, encourage a mutually supportive position between school and parent, and help to develop an acceptable school re-entry plan for the student.¹⁰⁷³

4.8.8 Victoria

Under the Victorian regime, school discipline is regulated by school policy and procedure aligned with legislation including the *Education and Training Reform Act 2006* (Vic) and the *Education and Training Reform Regulations 2011* (Vic).¹⁰⁷⁴ In Victoria, extensive student engagement policy guidelines¹⁰⁷⁵ in conjunction with supporting discipline procedural documentation¹⁰⁷⁶ provide schools with the necessary scaffolding to effect appropriate school discipline policy and procedure to ensure that students are provided with a safe and secure learning environment that is both physically and emotionally protected whilst minimising the risk of harm. Entitled the *Student Engagement Policy*, this discipline regime provides the processes, actions and consequences that schools are to follow when dealing with negative student behaviour or irregular attendance and is also supported by school communities.¹⁰⁷⁷

At its core, the *Policy* aims to have an educational role, help foster positive relationships and student dignity, and place due emphasis on early intervention and prevention rather than punishment along with equal weighting for both rewards for high achievement and negative consequences for unacceptable behaviour.¹⁰⁷⁸ As is the case with other Australian states and territories, procedures for the suspension and expulsion of

¹⁰⁷³ Department of Education, *Student Behaviour Procedure*, above n 1068, 2–6.

¹⁰⁷⁴ Other Victorian legislation with relevance to school violence and discipline includes the *Charter of Human Rights and Responsibilities Act 2006* (Vic), *Equal Opportunity Act 1995* (Vic) and the *Disability Discrimination Act 1992* (Vic).

¹⁰⁷⁵ Department of Education and Early Childhood Development, *Building Respectful and Safe Schools*, above n 111, 9–32.

¹⁰⁷⁶ Department of Education and Early Childhood Development, *Effective Schools are Engaging Schools – Student Engagement Policy Guidelines*, above n 1007, 16.

¹⁰⁷⁷ *Ibid* 5.

¹⁰⁷⁸ *Ibid* 15.

Victorian government school students for threatening the health, safety and wellbeing of others, committing extremely violent acts and other behavioural issues are also to be upheld.¹⁰⁷⁹

Moreover, the focus on restorative justice practices and procedures by Victorian government schools in dealing with disruptive and violent student behaviour has increased in an attempt to improve student behaviour management outcomes and schools in general, with a particular emphasis on social skills and enhancement of student engagement.¹⁰⁸⁰ Restorative practices in the Victorian government school system include both formal and informal strategies, such as class circles¹⁰⁸¹ and conferencing, and are best utilised within a whole of school approach that promotes social equality, values and personal accountability.¹⁰⁸² Further, public authorities including the government in the state of Victoria are required to be compliant with human rights when making decisions and delivering services.¹⁰⁸³

4.8.9 Western Australia

Subject to legislation including the *School Education Act 1999* (WA) and the *School Education Act Regulations 2000* (WA), Western Australian school principals will plan for effective management of school discipline and student behaviour in order to maintain a safe and positive learning environment for all stakeholders in the learning process. School principals in Western Australia are empowered to initiate policy and procedural responses that promote student wellbeing, pro-social behaviour and self-discipline, are preventative in nature, focus on early intervention and effectively manage serious or ongoing student misbehaviour.¹⁰⁸⁴ To that end, school policy and procedure necessarily will include a school council endorsed code of conduct that has been developed in consultation with the school community, an anti-bullying regime, practical

¹⁰⁷⁹ Authorised under *Education and Training Reform Act 2006* (Vic) s 2.2.19.

¹⁰⁸⁰ Department of Education and Early Childhood Development, *Effective Schools are Engaging Schools – Student Engagement Policy Guidelines*, above n 1007, 37.

¹⁰⁸¹ See 5.9.4 below for an explanation of class circles and other restorative justice techniques.

¹⁰⁸² Department of Education and Early Childhood Development, *Effective Schools are Engaging Schools – Student Engagement Policy Guidelines*, above n 1007, 25.

¹⁰⁸³ *Ibid* 14.

¹⁰⁸⁴ Department of Education and Training WA, *Behaviour Management in Schools*, above n 110, 4.

guidance on breach and serious breach of school discipline which has been designed in collaboration with school councils, and appropriate conflict resolution processes and consequences and sanctions in response to disruptive student behaviour.¹⁰⁸⁵ The management of school discipline breach in Western Australian government schools also includes the use of conflict resolution and restorative practices which at their core are directed to repairing harm and augmenting relationships.¹⁰⁸⁶

In response to inappropriate student behaviour in Western Australia, schools are also to be mindful of procedural fairness and behaviour management policy that acknowledges a duty to take reasonable care of staff and students in order to adequately ensure a safe environment. In turn, staff are to demonstrate accountability for evidence-based decision-making and use of appropriate referral mechanisms for additional support, reporting and record keeping.¹⁰⁸⁷ Instructively, school discipline policy must also address disruptive student behaviour not in isolation but rather as part of an effective interaction between stakeholders including students, staff and members of the community.¹⁰⁸⁸ For serious breach of school discipline which is defined as behaviour that adversely affects or threatens the safety of persons at schools, Western Australian schools can suspend¹⁰⁸⁹ or exclude students in circumstances of serious isolated incidents¹⁰⁹⁰ or patterns of behaviour that have continued despite intervention.¹⁰⁹¹

¹⁰⁸⁵ Ibid 5.

¹⁰⁸⁶ Ibid.

¹⁰⁸⁷ Ibid 4.

¹⁰⁸⁸ Ibid.

¹⁰⁸⁹ Ibid 13; Suspension of students in Western Australia is authorised under *School Education Act 1999* (WA) s 90.

¹⁰⁹⁰ See, eg, Department of Education, *CEO Instruction: Weapons in Schools Version 1.0 Final* (29 March 2010) Government of Western Australia <<http://www.det.wa.edu.au/policies/detcms/policy-planning-and-accountability/policies-framework/ceo-instructions/ceo-instruction-weapons-in-schools.en?cat-id=3458013>>. This policy has been introduced following recent serious acts involving weapon use in Western Australian schools.

¹⁰⁹¹ See, eg, Department of Education, *Exclusions Version 1.2*, Government of Western Australia, 6 <<http://www.det.wa.edu.au/policies/detcms/policy-planning-and-accountability/policies-framework/policies/exclusions.en?cat-id=3457115>>. Exclusion of students from government schools is authorised under *School Education Act 1999* (WA) s 91.

4.9 General Observations on Education Policy and Law in Australia Relevant to School Violence

Treading a familiar path, the salient issues promoted in domestic education policy generally incorporate the overarching aim of a safe, protective, disciplined learning environment for all stakeholders that promotes fairness and equity, natural justice and other essential safeguards, typically enshrined in a whole of school approach to combatting the issue of school violence, harassment and bullying, including notification and reporting. As has been discussed, these policies are often presented as codes or plans variously labelled student development, engagement or behaviour plans, codes of conduct, enrolment agreements and the like. Additionally, Australian school violence and discipline policy and procedure includes non-punitive disciplinary practices such as conferencing and restorative approaches in several states and territories, whilst the take-up of actual measures espoused in the Commonwealth *National Safe Schools Framework* by state and territory education agencies appears more cursory than substantive. However, there is a sizeable overlap between the *Framework* and state and territory policy, most notably in the area of safe and supportive learning environments that promote student welfare and incident reporting.

In light of the above discussion on juvenile justice legislation and education policy relevant to school violence within the Australian jurisdiction, it would now be appropriate to extend the discussion to incorporate the various legislative approaches toward parental responsibility taken by states and territories which recognises the important roles and responsibilities of parents as this specific legislation flows from the general juvenile justice and school violence law and policy framework. As parental responsibility legislation also raises children's rights implications, a concise overview of key principles will be provided which are relevant to the success of the rights-based restorative justice approach to the management of school violence that will be discussed in Chapter 5.

4.10 Overview of Domestic Parental Responsibility Legislation in Australia

4.10.1 Introduction

The legislative obligations associated with parental rights and obligations in Australia are typically absorbed into various parental responsibility, youth justice, education and care and protection acts in the various state and territories.¹⁰⁹² These laws define and specify the various parental powers, duties and responsibilities that are to be considered by decision-makers such as courts and government agencies when assessing juvenile related issues such as offending. Generally, the prescribed areas will include fundamental parenting issues including decision-making responsibilities¹⁰⁹³ involving living arrangements, contact, appearance of the child or young person, general health and wellbeing, cultural, racial and spiritual identity,¹⁰⁹⁴ daily and long-term care provisions,¹⁰⁹⁵ in addition to definitions of parent or care giver¹⁰⁹⁶ and status of the child or young person.¹⁰⁹⁷ An overarching element in the various legislative approaches remains the protection, promotion, guidance, wellbeing and care of children and juveniles who are in contact with criminal justice agencies, for example.

Parental responsibility is perhaps best described as elevating the interests and welfare of existing or future children and juveniles above one's own needs, desires and wellbeing.¹⁰⁹⁸ Despite difficulty in contextualising the notion of welfare, particularly given the value-laden nature of the concept, there should be a minimum standard of welfare for children and juveniles that ought to be satisfied by parents or those professing to become parents in order that they can succeed.¹⁰⁹⁹ This minimum undertaking will involve parental sacrifice to some extent including, for example, the need to provide continual accommodation, schooling, sustenance and the like for a reasonable time period for the upbringing of their offspring to a reasonable standard.

¹⁰⁹² See, eg, *Children and Young People Act 2008* (ACT); *Care and Protection of Children Act* (NT); *Young Offenders Act 1993* (SA); *Education and Training Reform Act 2006* (Vic).

¹⁰⁹³ See, eg, *Children and Young People Act 2008* (ACT) s 19(1).

¹⁰⁹⁴ See, eg, *Children's Protection Act 1993* (SA) ss 4(4)(a)-(c).

¹⁰⁹⁵ See, eg, *Parental Support and Responsibility Act 2008* (WA) s 3.

¹⁰⁹⁶ See, eg, *Care and Protection of Children Act* (NT) s 17(1).

¹⁰⁹⁷ See, eg, *Youth Justice Act 1997* (Tas) s 3(1).

¹⁰⁹⁸ M Freeman, 'Do Children Have a Right Not to be Born' in M Freeman (ed), *The Moral Status of Children. Essays on the Rights of the Child* (Martinus Nijhoff Publishers, 1997) 180.

¹⁰⁹⁹ *Ibid.*

4.10.2 Australian Capital Territory

Parental responsibility law in the Australian Capital Territory is enshrined predominantly in the *Children and Young People Act 2008* (ACT), which provides that a parent is a person who has duties, powers, authorities and responsibilities by law including daily and long-term care responsibility¹¹⁰⁰ for both a child who is deemed a person under 12 years of age¹¹⁰¹ and a young person who is over 12 but yet not 18 years of age or over, at which point they are to be considered an adult.¹¹⁰² Conversely, a parent may in fact not be an adult.¹¹⁰³ In the Australian Capital Territory the term parent is also defined under the *Education Act 2004* (ACT)¹¹⁰⁴ as a person who has parental responsibility for a child as per the auspices of the *Children and Young People Act 2008* (ACT).¹¹⁰⁵

Daily parental care responsibilities for children and young people in the Australian Capital Territory extend to decision-making powers and responsibilities concerning accommodation, location and cohabitation arrangements, contact, daily issues regarding education, training, employment and those concerning the personal appearance of the child or young person,¹¹⁰⁶ in addition to health-related decisions not including consent to surgical procedures.¹¹⁰⁷ Long-term parental care responsibilities in the Australian Capital Territory involve the provision for the extended care, development and protection of the child or young person and encompass decision-making responsibilities involving administration, management and control of a child or young person's property, religiosity or ethnic and cultural traditions, passport application and decisions involving education, training and employment,¹¹⁰⁸ as well as health care treatment and

¹¹⁰⁰ *Children and Young People Act 2008* (ACT) ss 15(a)–(b).

¹¹⁰¹ *Ibid* s 11.

¹¹⁰² *Children and Young People Act 2008* (ACT) ss 12, 529B. Note that persons 18 years of age or over are considered to be adult, whilst young adults are aged between 18 and 25 years of age in the Australian Capital Territory.

¹¹⁰³ *Children and Young People Act 2008* (ACT) s 16(2).

¹¹⁰⁴ *Education Act 2004* (ACT) s 6(2).

¹¹⁰⁵ *Children and Young People Act 2008* (ACT) ss 15(a)–(b).

¹¹⁰⁶ *Ibid* s 19(1).

¹¹⁰⁷ *Ibid* s 19(2).

¹¹⁰⁸ *Ibid* s 20(1).

related issues that extend to consent for surgical procedures.¹¹⁰⁹ Parental responsibility can be transferred¹¹¹⁰ or shared¹¹¹¹ in the Australian Capital Territory subsequent to a family group conference agreement, temporary parental responsibility provisions, care and protection orders or emergency action. It is worth noting also that a parent can include a carer under the *Education Act 2004* (ACT).¹¹¹²

Parental responsibilities in the Australian Capital Territory are also integrated into the promotion of wellbeing and the protection of children and young people by recognising their right to develop in safe, nurturing and stable environments, whilst acknowledging similar responsibilities vested in communities and governments.¹¹¹³ Children and young people are also to be free of abuse and neglect, and their needs, views, participation, dignity, health, education and ethnic, religious and cultural requirements are to be fostered and respected by governments.¹¹¹⁴ Further governmental obligations are extended in the Australian Capital Territory to shared support with parents, families and communities for the rehabilitation and reintegration of young offenders.¹¹¹⁵

Decision-makers are also to be aware of such important parent-child issues including the nature of relationships, attitude toward responsibilities, effect of contact or separation, stability, living arrangements and parental capacity to provide emotional and intellectual needs when assessing the best interests of the child.¹¹¹⁶ The best interests of the child are also to be considered by decision-makers in the Australian Capital Territory including such pertinent issues as the nature of the parent-child relationship, potential ramifications of a separation of the parent and child, the capacity of parents to provide for the child's needs, including those of emotional or intellectual character, and the practicalities associated with parent-child contact.¹¹¹⁷

¹¹⁰⁹ *Ibid* s 20(2).

¹¹¹⁰ *Ibid* s 17(1).

¹¹¹¹ *Ibid* s 18(1).

¹¹¹² *Education Act 2004* (ACT) s 6(1).

¹¹¹³ *Children and Young People Act 2008* (ACT) ss 7(a)(i)–(ii), (b).

¹¹¹⁴ *Ibid* ss 7(c), 7(e), (i)–(iv).

¹¹¹⁵ *Ibid* ss 7(f)(i)–(ii).

¹¹¹⁶ *Ibid* ss 349(1)(c)–(f), (h), (j).

¹¹¹⁷ *Ibid* ss 349(1)(c)–(f).

4.10.3 New South Wales

Guidance as to the definition of parent, parental responsibilities and child in New South Wales is provided in legislation including the *Children (Protection and Parental Responsibility) Act 1997* (NSW), *Education Act 1990* (NSW) and the *Children and Young Persons (Care and Protection) Act 1998* (NSW). A parent in New South Wales is defined as a person who has parental responsibility for a child, which in turn is considered to be a person under the age of 16 years¹¹¹⁸ or a young person who is older than 16 years but under the age of 18 years.¹¹¹⁹ In this jurisdiction, a parent is defined as a person who has custody or care¹¹²⁰ and parental responsibility involving powers, duties and authorities conferred by law over a child or young person,¹¹²¹ and can include a guardian or custodian¹¹²² or a carer irrespective of whether a custodian or not.¹¹²³ The education of the child is considered a primary parental responsibility in New South Wales.¹¹²⁴

In New South Wales, parental responsibilities are also linked with the wellbeing and protection of children and young people in the juvenile justice process through guiding legislative principles. Essentially, these principles require the parents of juvenile offenders to be considered as primarily responsible for childhood development and are pivotal in the post-offence period in providing support to those young offenders being dealt with at a community level in order to facilitate reintegration along with bolstering familial and community connections.¹¹²⁵ In promoting the best interests of the child,

¹¹¹⁸ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3. Note that under *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 3 a child is a person under the age of 18 years.

¹¹¹⁹ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3. Note also that under *Young Offenders Act 1997* (NSW) s 4 a child is defined as a person over the age of 10 but under the age of 18 years.

¹¹²⁰ *Education Act 1990* (NSW) s 3.

¹¹²¹ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3.

¹¹²² *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 3; *Education Act 1990* (NSW) s 3.

¹¹²³ *Young Offenders Act 1997* (NSW) s 4.

¹¹²⁴ *Education Act 1990* (NSW) s 4.

¹¹²⁵ *Young Offenders Act 1997* (NSW) s 7(f), (e).

courts in New South Wales are to be cognisant of the nature of the child-parent relationship, parental responsibility and welfare when dealing with young offenders.¹¹²⁶

Courts in New South Wales can also impose obligations on the parents of young offenders granted conditional release following a determination of guilt, including undertakings that the child or juvenile will comply with a court order, assistance in the development of the young offender including recidivism prevention, provision of security, financial or otherwise, for the good behaviour of young offenders, in addition to parental supervision and cohabitation.¹¹²⁷ Parents of young offenders in New South Wales may also be issued with a notice to appear in the event of a breach by the young offender.¹¹²⁸

4.10.4 Northern Territory

A child in the Northern Territory is defined by the *Care and Protection of Children Act* (NT) as a person less than 18 years of age or apparently under 18 if their age cannot be proven,¹¹²⁹ whilst a parent can be defined as the child's father or mother and can extend to any other person bestowed with parental responsibility,¹¹³⁰ although not those who have responsibility on a temporary or a professional basis only, such as a childcare worker.¹¹³¹ However, the definition can also be extended in the case of Indigenous children and juveniles to include parental status under Aboriginal customary law or tradition.¹¹³² In this jurisdiction, parental responsibility refers to the right to exercise all rights and powers and execute responsibilities that would as a rule be entrusted to the parents of the child¹¹³³ and extends to daily care and control in addition to long-term care and development commitments.¹¹³⁴

¹¹²⁶ *Children (Protection and Parental Responsibility) Act 1997* (NSW) ss 6(1), (2)(a)–(c).

¹¹²⁷ *Ibid* ss 8(1)(a)–(d), (9)(1)(a)–(c).

¹¹²⁸ *Ibid* s 8(2).

¹¹²⁹ *Care and Protection of Children Act* (NT) s 13.

¹¹³⁰ *Ibid* s 17(1).

¹¹³¹ *Ibid* ss 17(3)(b)–(c).

¹¹³² *Ibid* s 17(2).

¹¹³³ *Ibid* s 22(1).

¹¹³⁴ *Ibid* ss 22(2)(a)–(b).

Like other jurisdictions, the capacity and willingness of parents as agents in ensuring that the best interests of the child are maintained must be at the forefront for decision-makers such as courts¹¹³⁵ and includes the need to provide a nurturing environment and stability.¹¹³⁶ This extends to the protection of children from exploitation and harm, the provision of permanency in living arrangements, the familial relationship, and the participation and views of the child with due regard to their maturation and capacity to understand.¹¹³⁷ Parental responsibility is also key in ensuring the provision of physical, emotional, intellectual, spiritual, educational, cultural, ethnic and religious needs, development and stability. The effect of any change in the child's circumstances and permanency in living arrangements is also to be recognised by decision-makers in the Northern Territory jurisdiction.¹¹³⁸ Further, the capacity and likelihood of parents to provide suitable care for the child must also be considered by decision-makers.¹¹³⁹ In addition, parental relationships are to be considered when assessing harm to a child and extend to the effect of witnessing of any domestic violence.¹¹⁴⁰

4.10.5 Queensland

The definition of parent in the Queensland jurisdiction is contained in both the *Child Protection Act 1997* (Qld) and the *Education (General Provisions Act) 2006* (Qld). A mother or father of a child or other person entrusted with parental responsibility is considered a parent in the Queensland jurisdiction,¹¹⁴¹ including those considered a parent under Aboriginal or Torres Strait Islander customary law in the case of an Indigenous or Islander child,¹¹⁴² but not those persons substituting for a parent on a temporary basis.¹¹⁴³ Further, a parent in the Queensland jurisdiction is identified as one who has day-to-day care and control of a child or alternately lawful custodians other

¹¹³⁵ *Ibid* s 10.

¹¹³⁶ *Ibid* s 10(2)(f).

¹¹³⁷ *Ibid* ss 10(2)(a), (c), (d)

¹¹³⁸ *Ibid* ss 10(2)(e), (g)–(h), (j).

¹¹³⁹ *Ibid* s 10(2)(b).

¹¹⁴⁰ *Ibid* s 15.

¹¹⁴¹ *Education (General Provisions) Act 2006* (Qld) s 10(1); *Child Protection Act 1999* (Qld) s 11(1). Note also that a parent is also defined more narrowly under the *Act*. See ss 23, 37, 51, 52, 205.

¹¹⁴² *Child Protection Act 1999* (Qld) s 11(3), (4); *Education (General Provisions) Act 2006* (Qld) s 10(3), (4).

¹¹⁴³ *Child Protection Act 1999* (Qld) s 11(2); *Education (General Provisions) Act 2006* (Qld) s 10(2).

than in situations where detention of the child is required or where offence proceedings are pending.¹¹⁴⁴ However, Queensland youth justice and child protection legislation is silent on the topic of parental responsibility save for reference to rights attached to a child's daily and long-term care, development, wellbeing and responsibility including decision-making under the guise of guardianship which provides some clarification of parental responsibility.¹¹⁴⁵

In Queensland a child is an individual under the age of 18 years,¹¹⁴⁶ and similarly to other states and territories, the best interest principle must always be given priority by decision-makers which therefore impacts to some extent upon parental responsibility.¹¹⁴⁷ Parents in the Queensland jurisdiction are to be actively encouraged to fulfil parental supervisory duties¹¹⁴⁸ as the family unit has primary responsibility for the child's upbringing, development and protection.¹¹⁴⁹ The relationships between child, parent and relatives, if appropriate, are to be sustained.¹¹⁵⁰ In promoting the best interests of the child, states are only to place children into parental care when a parent exhibits the capacity and willingness to care for the child. In circumstances where this is not the case, alternative long-term substitute care must be arranged, as the state has an additional obligation to protect the child if an able and willing parent is unavailable.¹¹⁵¹ In removing children from parents and familial relationships, the state is to provide support for the purpose of facilitating the return of the child if this is assessed as being in the best interests of the child.¹¹⁵²

¹¹⁴⁴ *Youth Justice Act 1992* (Qld) sch 4.

¹¹⁴⁵ *Child Protection Act 1999* (Qld) ss 13(a)–(c).

¹¹⁴⁶ *Ibid* s 8. Note also that under the *Youth Justice Act 1992* (Qld) sch 4 a child is a person under the age of 17 years or 18 years in prescribed circumstances.

¹¹⁴⁷ *Child Protection Act 1999* (Qld) s 5(A).

¹¹⁴⁸ *Youth Justice Act 1992* (Qld) sch 1 cl (10) sub-cl (a).

¹¹⁴⁹ *Child Protection Act 1999* (Qld) s 5(B)(b).

¹¹⁵⁰ *Ibid* ss 5(B)(k), (l).

¹¹⁵¹ *Ibid* ss 5(B)(j), (g), (d).

¹¹⁵² *Ibid* s 5(B)(f).

4.10.6 South Australia

In the South Australian jurisdiction as per the *Children's Protection Act 1993* (SA), a person under the age of 18 years is considered a child while a parent is defined as a person who has legal custody or guardianship of a child but not in circumstances where a parent has exclusive custodial rights to the exclusion of another parent under the *Education Act 1972* (SA).¹¹⁵³ A parent can also be a stepfather or stepmother in this jurisdiction.¹¹⁵⁴ Similarly, examination of the nature of guardianship determines that a guardian can be a parent of the child or legal custodian, or those who have stood in loco parentis¹¹⁵⁵ and have done so for a considerable amount of time.¹¹⁵⁶ A central aim of the youth justice legislation in South Australia is to maintain the family unit as the central plank in maintaining the nurturing, protection and care of the child, with a high priority placed on assisting and supporting the family unit to fulfil obligations.¹¹⁵⁷ There is also a focus on the preservation and strengthening of parent-child and other familial relationships including preventing the unnecessary removal of a young offender from the familial environment.¹¹⁵⁸

These parent-child and familial strengthening aims also align neatly with the requirement that, as in other states and territories, the best interests and wellbeing of the child are to be given primary consideration by decision-makers in the South Australian jurisdiction, including that parental and familial input to the child's lifestyle in the areas of cultural, ethnic, religious, racial and spiritual identity is to be maintained and enhanced.¹¹⁵⁹ Participation by children and expression of their views of their own best interests is also to be considered by decision-makers.¹¹⁶⁰

¹¹⁵³ *Education Act 1972* (SA) s 5(1).

¹¹⁵⁴ *Children's Protection Act 1993* (SA) s 6(1).

¹¹⁵⁵ In loco parentis refers to a person who is in place of or has the role of a parent.

¹¹⁵⁶ *Children's Protection Act 1993* (SA) s 6(1); See also *Education Act 1972* (SA) s 5(1) where a parent can also include those persons standing in loco parentis.

¹¹⁵⁷ *Children's Protection Act 1993* (SA) s 3(d).

¹¹⁵⁸ *Young Offenders Act 1993* (SA) ss 3(b)–(c).

¹¹⁵⁹ *Children's Protection Act 1993* (SA) ss 4(4)(a)–(c).

¹¹⁶⁰ *Ibid* s 4(4)(d).

4.10.7 Tasmania

A person under the age of 18 years is considered a child in the Tasmanian jurisdiction.¹¹⁶¹ This includes an Aboriginal child within the meaning of relevant legislation,¹¹⁶² while youth refers to a person over the age of 10 years but not yet 18 years.¹¹⁶³ Tasmanian youth justice and child- and family- specific legislation is silent with respect to definition of parent or parental responsibility, but some insight is found in the area of guardianship where the guardian of a child can be a parent, custodian or another person who acts in the place of a parent and has done so for an extended time period,¹¹⁶⁴ including a stepmother or father.¹¹⁶⁵

Nonetheless, the contribution of parental input in upholding the best interests of the child favoured under Tasmanian youth justice and child- and family-specific legislation to be considered by courts includes consideration of salient issues such as the relationships with parents, family members and guardians,¹¹⁶⁶ demonstrated parental performance including the capacity to meet the child's needs (including emotional or intellectual requirements), and the attitude of the child.¹¹⁶⁷ Moreover, the potential implications of a child's separation from parents, guardians and other significant persons, their cultural, traditional, lifestyle and other characteristics which courts consider pertinent¹¹⁶⁸ are also to be considered. Another objective under Tasmanian youth justice and child- and family-specific legislation is the important issue of preservation and bolstering of familial relationships.¹¹⁶⁹

¹¹⁶¹ *Children, Young Persons And Their Families Act 1997* (Tas) s 3(1).

¹¹⁶² *Aboriginal Lands Act 1995* (Tas).

¹¹⁶³ *Youth Justice Act 1997* (Tas) s 3(1). Note also that a child refers to a person under 18 years of age while a 'young person' is defined as a child who is aged 16 or 17 years under the *Children, Young Persons and Their Families Act 1997* (Tas) s 3(1).

¹¹⁶⁴ *Children, Young Persons and Their Families Act 1997* (Tas) s 3(1); *Youth Justice Act 1997* (Tas) s 3(1).

¹¹⁶⁵ *Children, Young Persons and Their Families Act 1997* (Tas) s 3(1).

¹¹⁶⁶ *Ibid.*

¹¹⁶⁷ *Ibid.*

¹¹⁶⁸ *Ibid* s 3(1).

¹¹⁶⁹ *Youth Justice Act 1997* (Tas) s 5(1)(b).

4.10.8 Victoria

Under the provisions of the *Children, Youth and Families Act 2005* (Vic), a child is defined generally as a person under 18 yet over 10 years of age¹¹⁷⁰ at the time of committing an offence or in other instances such as family violence and personal safety proceedings. A parent is classified as either a father or mother, domestic partner, custodian or the domestic partner or spouse of the father or mother.¹¹⁷¹ Moreover, the *Education and Training Reform Act 2006* (Vic) defines parents as persons who have parental responsibility for a child including guardians and those persons with whom a child regularly or normally resides.¹¹⁷² Insofar as parental responsibilities and obligations are concerned, decision-makers in the State of Victoria are to be aware of and actively promote the best interests of children by active protection from harm, promotion of their development and upholding of their rights,¹¹⁷³ which necessarily impacts upon parental relationships and performance.

Specifically, decision-makers such as courts are to provide expansive protections and support to parents and family units in order to secure the safety and welfare of the child including the bolstering and promotion of positive parent-child relationships.¹¹⁷⁴ Further, any potential removal of the child from parental care due to unacceptable risk of harm is to be carefully considered under the Victorian regime including the desirability of placing the child with family or a significant other person before other placement options are explored, and need for appropriate planning of parent-child reunification at a suitable future time.¹¹⁷⁵ Parental capacity to provide for a child's needs and the desirability of maintaining continuity and stability in the child's care are also important issues, along with the child's participation and the ability to express his or her views and desires in the process.¹¹⁷⁶ The cultural, social, individual and religious

¹¹⁷⁰ *Children, Youth and Families Act 2005* (Vic) s 3(1)(a). Note however that under *Children, Youth and Families Act 2005* (Vic) s 3(1)(b) a child can alternately be defined as under the age of 17 years in all other circumstances.

¹¹⁷¹ *Children, Youth and Families Act 2005* (Vic) s 3(1).

¹¹⁷² *Education and Training Reform Act 2006* (Vic) s 1.1.3.

¹¹⁷³ *Children, Youth and Families Act 2005* (Vic) s 10(2).

¹¹⁷⁴ *Ibid* ss 10(3)(a)–(b).

¹¹⁷⁵ *Ibid* ss 10(3)(g)–(i).

¹¹⁷⁶ *Ibid* ss 10(3)(d), (f), (j).

identity of the child under the legislation also have some impact on parental responsibility in Victoria.¹¹⁷⁷

4.10.9 Western Australia

As is the case in New South Wales,¹¹⁷⁸ Western Australia has enacted stand-alone parental support and responsibility legislation under the *Parental Support and Responsibility Act 2008* (WA) that seeks to acknowledge and provide assistance and support to parents to safeguard and promote the wellbeing of children, with the exercise of behavioural control over children being another core objective.¹¹⁷⁹ Within the context of this legislation, parental responsibility includes but is not necessarily restricted to the duties, responsibilities, powers and authorities that parents have in relation to children by law.¹¹⁸⁰ For the purposes of this legislation, a child is defined as a person under the age of 15 years while a parent is a person who has responsibility for both daily and long-term care of the child, including welfare and development, which is also mirrored in the *School Education Act 1999* (WA) and can extend under that *Act* to adult persons considered by the Minister of Education as suitable substitutes for a parent if none are located.¹¹⁸¹

Once again, the best interests of the child are to be considered paramount under the legislation when performing a task or exercising a power,¹¹⁸² and whilst this not specified, it would be instructive to refer to general youth justice principles espoused in Western Australian legislation in order to capture relevant parental responsibility obligations that are aligned with best interest philosophies. These include recognition of the right of a juvenile offender to belong to a family and be treated in such a way as to bolster familial bonds and provision of assistance to the family group in order to deal

¹¹⁷⁷ *Ibid* s 10(3)(1).

¹¹⁷⁸ *Children (Protection and Parental Responsibility) Act 1997* (NSW).

¹¹⁷⁹ *Parental Support and Responsibility Act 2008* (WA) ss 5(a)–(b).

¹¹⁸⁰ *Ibid* s 5(2).

¹¹⁸¹ *Parental Support and Responsibility Act 2008* (WA) s 3; *School Education Act 1999* (WA) s 11(a).

Note also that a young person refers to a person under the age of 18 years in Western Australia under the *Young Offenders Act 1994* (WA) s 3.

¹¹⁸² *Parental Support and Responsibility Act 2008* (WA) s 6.

with the young offender.¹¹⁸³ Responsible adults such as parents are also to be provided with assistance and encouraged in their responsibility to provide care for and supervision of young offenders under the Western Australian regime.¹¹⁸⁴ In addition, under Western Australian parental responsibility legislation, parents can be required by courts to engage in effective parenting which may include, for example, attendance at counselling and personal development sessions, compliance with undertakings to ensure school attendance of their children,¹¹⁸⁵ and support for diversion from formal justice processes where appropriate.¹¹⁸⁶ The views and participation of children and juveniles in matters that affect them as victims is also to be upheld.¹¹⁸⁷

The various parental responsibility legislation across the domestic Australian jurisdictions provide a framework for the decision-making responsibilities of parents or those in a position to exercise parental powers, including living arrangements, general health and wellbeing, and the educational, cultural, racial and spiritual identity of children or juveniles. Protective human rights safeguards also feature in the legislation, notably the best interests of the child and participation elements enshrined in the *UNCRC*.

The next section will examine the incorporation of juvenile human rights as voiced in the *UNCRC* and other important international instruments within Australian juvenile justice, education policy and parental responsibility legislation order to establish the extent to which domestic law and policy has adopted or neglected such safeguards.

4.11 The Status of Essential Human Rights Safeguards in Legislation and Policy Relevant to School Violence in Australia.

4.11.1 Introduction

Within the domestic legislation and policy framework, several rights-based issues associated with juvenile violence in Australian schools will now be scrutinised with a

¹¹⁸³ *Young Offenders Act 1994* (WA) ss 7(m)(i)–(iii).

¹¹⁸⁴ *Ibid* s 7(f).

¹¹⁸⁵ *Parental Support and Responsibility Act 2008* (WA) ss 14(2)(a), (b), (e).

¹¹⁸⁶ *Young Offenders Act 1994* (WA) s 7(g).

¹¹⁸⁷ *Ibid* s 7(e).

view to establishing whether the human rights of juveniles are adequately safeguarded in domestic education law and policy. Chapter 3 discussed the essential human rights-based protections promoted by conventions such as the *UNCRC*, *ICCPR*, *CAT* and other relevant instruments such as the *Beijing* and *Tokyo Rules* and the *Riyadh Guidelines* as they applied to juveniles. It is the purpose of the next section to thematically examine the translation of domestic Australian law and education policy in response to the main rights-based obligations in relation to juvenile violence including best interests, participation, natural justice, due process, procedural fairness, juvenile justice, proportionality and diversion.

Various imports of human rights safeguards are in fact evident in Australian law, such as the *Disability Services Act 1993* (WA) sch 1 cl 2 which makes specific mention of affording the same basic human rights to disabled as non-disabled persons. In addition, the *Northern Territory Anti-Discrimination Act* (1992) s 100 protects the anonymity of individuals. However, only two Australian jurisdictions boast stand-alone human rights legislation.¹¹⁸⁸ In the last decade, the parliament of the Australian Capital Territory enacted the *Human Rights Act 2004* (ACT) whilst the State of Victoria followed suit with the introduction of the *Charter of Human Rights and Responsibilities Act 2006* (Vic),¹¹⁸⁹ which both promote the interests of the child through the promotion of the family unit and entitlement to protection,¹¹⁹⁰ separation of accused children from their adult counterparts, expeditious processing, age appropriate treatment that promotes offender rehabilitation and quarantine on publication of judgements in certain circumstances.¹¹⁹¹

¹¹⁸⁸ Monohan and Young, above n 516, 191.

¹¹⁸⁹ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹¹⁹⁰ *Human Rights Act 2004* (ACT) ss 11(1)–(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 17(1)–(2); Monohan and Young, above n 516, 31.

¹¹⁹¹ *Human Rights Act 2004* (ACT) ss 19, 20, 21(3), 22(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 23, 24(3), 25(3); Monohan and Young, above n 516, 31.

4.11.2 Best Interests Principle

Prolific in juvenile human rights investigation, the notion of upholding a perspective consistently aligned with the challenging notion of the ‘best interests of the child’¹¹⁹² is reflected within Australian juvenile justice legislation and school policy. In the Australian jurisdiction, patronage of the ‘best interests of the child’ principle can be found within the Australian Capital Territory juvenile justice legislation¹¹⁹³ and school policy in promoting student safety and wellbeing free of violence,¹¹⁹⁴ and in New South Wales where the right to counsel, to be heard and participate in proceedings and enjoy legal rights and freedoms is reflected in both juvenile justice legislation¹¹⁹⁵ and school policy where a climate of respect and the dignified treatment of students is to be maintained.¹¹⁹⁶ Similarly, in the Northern Territory a number of juvenile rights are upheld in legislation, such as the cognisance and responsibility for both actions and consequences,¹¹⁹⁷ as well as in school policy.¹¹⁹⁸ This is also the case in Queensland where children’s rights, safety and physical and mental wellbeing are reflected in juvenile justice legislation¹¹⁹⁹ although as far as Queensland school policy is concerned, the idea that the best interests of school children are upheld is more generally encased in a holistic notion of safe supportive school environments that display respect for the rights of others within school communities.¹²⁰⁰

South Australian juvenile justice legislation makes provision for the transformation of juvenile offenders into valued community members through redevelopment and reintegration through guidance, care and correction which, it could be said, reflects the

¹¹⁹² See 3.6.9 above for an overview of the best interests notion derived from the *Convention of the Rights of the Child* (‘UNCRC’); See 3.7 above for a discussion on international and domestic case law pertaining to the *UNCRC*.

¹¹⁹³ *Children And Young People Act 2008* (ACT) s 94(1)

¹¹⁹⁴ Education and Training, *Providing Safe Schools P-12*, above n 990.

¹¹⁹⁵ *Children (Criminal Proceedings) Act 1987* (NSW) s 6(a); *Young Offenders Act 1997* (NSW) s 7(b).

¹¹⁹⁶ Education & Communities, *Student Discipline in Government Schools Policy*, above n 1007; Education & Communities, *Bullying: Preventing and Responding to Student Bullying in Schools Policy*, above n 1031.

¹¹⁹⁷ *Youth Justice Act* (NT) s 4(a).

¹¹⁹⁸ Department of Education and Training, *Code of Conduct for Schools*, above n 1035; Department of Education and Training, *Code of Conduct for Schools Guidelines*, above n 1035.

¹¹⁹⁹ *Youth Justice Act 1992* (Qld) sch 1 cl 2.

¹²⁰⁰ Department of Education, Training and Employment, *The Code of School Behaviour*, above n 1007, 2.

best interest philosophy,¹²⁰¹ as does the promotion of positive and safe learning environments which is reflected in other states and territory education agencies.¹²⁰² Elsewhere the development of juvenile offenders into socially responsible, acceptable and beneficial ways is an object of Tasmanian juvenile offender legislation which displays a best interest focus,¹²⁰³ as does school policy upholding the best interests of students through safe, supportive environments in which rights are respected.¹²⁰⁴ The best interests of young offenders are a significant feature of Victorian juvenile justice legislation¹²⁰⁵ which is complemented by school policy that aims to protect students both physically and emotionally whilst minimising risk of harm.¹²⁰⁶ In Western Australia, young offender legislation actively encourages decision-makers to be cognisant of the need to help young offenders develop in a beneficial, responsible and acceptable fashion¹²⁰⁷ and is buttressed by school legislation and policy that fosters student wellbeing, pro-social behaviour and self-discipline in safe supportive and positive learning environments,¹²⁰⁸ again in the best interests of the student.

Identification of the best interests of the child in domestic Australian education law and education policy presents some difficulty due to the inconsistent incorporation of the notion into prevailing frameworks. This is unfortunate as the principle is of fundamental importance in human rights analysis, with much of the protection provided by the *UNCRC* centred on this imperative. For example, whilst common ground as to the best interests of juveniles in juvenile justice legislation can be found across the various jurisdictions, it should be conceded that it is more often the intent of the principle that emerges rather than wholesale adoption. A more piecemeal endorsement of the best interests principle is evident in education policy where a less than clear application of

¹²⁰¹ *Young Offenders Act 1993* (SA) s 3(1). Note also that 'best interests' are to be considered when assessing the interstate transfer of young offenders in South Australia. See *Young Offenders Act 1993* (SA) s 44(c).

¹²⁰² See, eg, Department of Education and Children's Services, *School Discipline*, above n 1007.

¹²⁰³ *Youth Justice Act 1997* (Tas) s 5(1)(h).

¹²⁰⁴ Department of Education, *Learner Wellbeing and Behaviour*, above n 1007.

¹²⁰⁵ *Children, Youth and Families Act 2005* (Vic) s 10(1).

¹²⁰⁶ Department of Education and Early Childhood Development, *Effective Schools are Engaging Schools – Student Engagement Policy Guidelines*, above n 1007, 9.

¹²⁰⁷ *Young Offenders Act 1994* (WA) s 7(j).

¹²⁰⁸ Department of Education and Training WA, *Behaviour Management in Schools*, above n 110, 4.

the principle appears to be the case in many jurisdictions. However, as discussed above, it is comforting that at least the intent of the principle is upheld to some extent.

Domestic Australian parental responsibility legislation is unambiguous in promoting the best interests of the child, however, which is to be paramount in considerations by decision-makers such as courts on the pivotal parent-child relationship, including matters such as living arrangements, provision of short- and long-term care, emotional and intellectual needs, stability and cultural, social and religious identity amongst other requirements.¹²⁰⁹ Clearly, there is space for improvement in the adoption and application of the best interests principle in legislation and school behavioural management policy in the domestic setting.

4.11.3 Participation

Participation by juvenile offenders in judicial process is a notion that has support yet cannot be considered holistic in its coverage by the various domestic juvenile justice legislative structures. Participation in decision-making is encouraged in the Australian Capital Territory,¹²¹⁰ New South Wales¹²¹¹ and Queensland,¹²¹² with the participation of victims in juvenile justice processes advocated in both the Northern Territory¹²¹³ and Tasmania.¹²¹⁴ Victoria and Western Australia remain largely silent on the participation of juvenile offenders, although indirect participation of offenders is promoted through the juvenile conferencing process in Victoria¹²¹⁵ and other diversionary options in Western Australia.¹²¹⁶ Restorative processes, including conferencing that logically require offender participation, are available equally in all jurisdictions. Insofar as school

¹²⁰⁹ *Children and Young People Act 2008* (ACT) ss 349(1)(c)–(f), (h), (j); *Children (Protection and Parental Responsibility) Act 1997* (NSW) ss 6(1), (2)(a)–(c); *Care and Protection of Children Act* (NT) s 10; *Child Protection Act 1999* (Qld) ss 5(A),(B)(f), (j), (g), (d); *Children’s Protection Act 1993* (SA) ss 4(4)(a)–(d); *Children, Young Persons and Their Families Act 1997* (Tas) ss 8(2)(a), (b)(i)–(vii); *Children, Youth and Families Act 2005* (Vic) ss 10(1), (2), (3)(a)–(r); *Parental Support and Responsibility Act 2008* (WA) s 6.

¹²¹⁰ *Children and Young People Act 2008* (ACT) s 94(1)(c).

¹²¹¹ *Children (Criminal Proceedings) Act 1987* (NSW) s 6(a).

¹²¹² *Youth Justice Act 1992* (Qld) sch 1 cl 7 sub-cl (b).

¹²¹³ *Youth Justice Act* (NT) s 4(k).

¹²¹⁴ *Youth Justice Act 1997* (Tas) s 5(1)(d).

¹²¹⁵ *Children, Youth & Families Act 2005* (Vic) ss 415(4), (6), (7).

¹²¹⁶ See *Young Offenders Act 1994* (WA) pt 5.

policy is concerned, less overt reference to participation in disciplinary processes by school-based offenders is visible across domestic Australian jurisdictions.

In the Australian Capital Territory,¹²¹⁷ principles of natural justice and procedural fairness necessarily require the participation of accused offenders, and this is mirrored in New South Wales,¹²¹⁸ Northern Territory,¹²¹⁹ Queensland¹²²⁰ and Western Australian education policy.¹²²¹ Effective interaction between stakeholders is also promoted under Western Australian education policy¹²²² which clearly incorporates participation by juvenile student offenders, whilst the strategic aims of the *National Safe Schools Framework*,¹²²³ which also promotes the participation of all school community members in creating the ideal of a safe, supportive school environment, are advocated in the Australian Capital Territory,¹²²⁴ Northern Territory,¹²²⁵ Queensland,¹²²⁶ South Australia¹²²⁷ and Tasmania.¹²²⁸

However, as discussed earlier,¹²²⁹ reference to the *Framework* is perfunctory at best in these jurisdictions with New South Wales, Victoria and Western Australia being noticeably absent, although there is a sizeable overlap between the *Framework's* guiding principles and school policy across the domestic Australian landscape. Moreover, parental responsibility legislation makes some reference to upholding and respecting the

¹²¹⁷ Education and Training, *Suspension, Exclusion or Transfer of Students in ACT Public Schools*, above n 1021.

¹²¹⁸ Department of Education & Communities, Public Schools, *Suspension and Expulsion of School Students – Procedures*, above n 995.

¹²¹⁹ Department of Education and Children's Services, *Safe Schools NT Code of Behaviour*, above n 1007, 8.

¹²²⁰ Department of Education, Training and Employment, *Safe, Supportive and Disciplined School Environment*, above n 1047.

¹²²¹ Department of Education and Training WA, *Behaviour Management in Schools*, above n 110, 17.

¹²²² *Ibid* 4.

¹²²³ See 4.6 above for a summary of the guiding principles of the National Safe Schools Framework.

¹²²⁴ Education and Training, *Providing Safe Schools P-12*, above n 990, 1.

¹²²⁵ Department of Education and Training, *Wellbeing and Behaviour Policy Guide*, above n 1035, 2.

¹²²⁶ Department of Education, Training and Employment, *Building a Safe and Supportive School Environment*, above n 1046.

¹²²⁷ Department of Education and Children's Services, *School Discipline*, above n 1007, 10.

¹²²⁸ Department of Education, Government of Tasmania, 'Bullying Not Acceptable in Tasmanian Schools', above n 1072.

¹²²⁹ See 4.9 above for a discussion on the incorporation or otherwise of the National Safe Schools framework into domestic Australian education policy.

views of children and juveniles in the Australian Capital Territory,¹²³⁰ Northern Territory¹²³¹ and South Australia,¹²³² with no overt reference in the remaining states' legislative provisions. Once again there appears to be much room for improvement in the adoption and expansion of the participation human rights safeguard in domestic legislation and policy structures.

4.11.4 Natural Justice, Due Process and Procedural Fairness

Equity and fairness in dealing with behavioural management and juvenile violence through the promotion of staff and student body safety and welfare in school settings is reflected variously in domestic Australian school policy by embracing the notions of due process, procedural fairness and natural justice,¹²³³ whilst effectively upholding human rights remains an important tenet of Australian Capital Territory school policy.¹²³⁴ Likewise, procedural fairness is espoused in New South Wales¹²³⁵ and Western Australia,¹²³⁶ and natural justice in the Northern Territory¹²³⁷ and Queensland,¹²³⁸ while parental responsibility legislation in the Australian Capital Territory,¹²³⁹ Northern Territory,¹²⁴⁰ South Australia¹²⁴¹ and Victoria¹²⁴² also promotes principles of natural justice. It remains a notion that is largely absent from juvenile justice legislation at least insofar as notification in statutes, except in the Australian Capital Territory¹²⁴³ and Victoria.¹²⁴⁴ Fundamental safeguards such as these can be said to provide important

¹²³⁰ *Children and Young People Act 2008* (ACT) s 7(e)(ii).

¹²³¹ *Care and Protection of Children Act* (NT) s 10(2)(d).

¹²³² *Children's Protection Act 1993* (SA) ss 4(4)(d), (6)(c).

¹²³³ See 3.6.5 above for a definition of due process, procedural fairness and natural justice.

¹²³⁴ Education and Training, *Our School: A Safe and Happy Place for Everyone*, above n 1010; Education and Training, *Suspension, Exclusion or Transfer of Students in ACT Public Schools*, above n 1021.

¹²³⁵ Education & Communities, *Student Discipline in Government Schools Policy*, above n 1007; Department of Education & Communities, Public Schools, *Suspension and Expulsion of School Students – Procedures*, above n 995.

¹²³⁶ Department of Education and Training WA, *Behaviour Management in Schools*, above n 110, 4.

¹²³⁷ Department of Education and Children's Services, *Safe Schools NT Code of Behaviour*, above n 1007, 8.

¹²³⁸ Department of Education, Training and Employment, *Safe, Supportive and Disciplined School Environment*, above n 1047.

¹²³⁹ *Children and Young People Act 2008* (ACT) ss 7(c), (e)(i)–(iv).

¹²⁴⁰ *Care and Protection of Children Act* (NT) ss 10(2)(a), (c), (d).

¹²⁴¹ *Children's Protection Act 1993* (SA) s 4(4)(d).

¹²⁴² *Children, Youth and Families Act 2005* (Vic) ss 10(3)(d), (f), (j).

¹²⁴³ *Children and Young People Act 2008* (ACT) s 323(2)(a).

¹²⁴⁴ *Children, Youth and Families Act 2005* (Vic) s 116(1)(d).

scaffolding for domestic school policy that is cognisant of human rights safeguards with regard to disciplinary review, while the scant attention paid in juvenile justice legislation leaves room for improvement.

4.11.5 Juvenile Justice, Proportionality and Diversion

Age-appropriate responses¹²⁴⁵ to juvenile justice and the imposition of custodial sentencing as a last resort measure only¹²⁴⁶ is a feature of juvenile justice legislation in the Australian Capital Territory, Northern Territory, Queensland, Tasmania and Western Australia, along with proportionality¹²⁴⁷ in sentencing in the Australian Capital Territory.¹²⁴⁸ South Australia and Victoria also champion young offender development by accounting for immaturity and age¹²⁴⁹ and sentence suitability following an offence,¹²⁵⁰ whilst school policy in that state places due emphasis on early intervention and prevention rather than reprimand.¹²⁵¹ In New South Wales least restrictive sanctions are to be applied to juveniles in breach of criminal laws¹²⁵² in light of their limited maturity, and support is to be provided.¹²⁵³

Diversionary¹²⁵⁴ measures including restorative justice and non-punitive principles are evident in the juvenile justice legislation of the Australian Capital Territory,¹²⁵⁵ New South Wales¹²⁵⁶ (including for Aboriginal and Torres Strait Islander offenders),¹²⁵⁷

¹²⁴⁵ *Children and Young People Act 2008* (ACT) s 94(1)(g); *Youth Justice Act* (NT) s 4(d); *Youth Justice Act 1992* (Qld) sch 1 cl 12; *Youth Justice Act 1997* (Tas) s 5(1)(i); *Young Offenders Act 1994* (WA) s 7(l).

¹²⁴⁶ *Children and Young People Act 2008* (ACT) s 94(1)(f); *Youth Justice Act* (NT) s 4(c); *Youth Justice Act 1992* (Qld) schs 1 cls 17–18; *Youth Justice Act 1997* (Tas) s 5(1)(g); *Young Offenders Act 1994* (WA) s 7(h).

¹²⁴⁷ See 3.6.5 above for a discussion on the concept of proportionality.

¹²⁴⁸ *Crimes (Sentencing) Act 2005* (ACT) s 133D(1).

¹²⁴⁹ *Criminal Law (Sentencing) Act 1988* (SA) s 3(A); *Children, Youth And Families Act 2005* (Vic) s 10(2).

¹²⁵⁰ *Children, Youth And Families Act 2005* (Vic) s 362(1)(e).

¹²⁵¹ Department of Education and Early Childhood Development, *Effective Schools are Engaging Schools – Student Engagement Policy Guidelines*, above n 1007, 15.

¹²⁵² *Young Offenders Act 1997* (NSW) s 7(a).

¹²⁵³ *Children (Criminal Proceedings) Act 1987* (NSW) ss 6(b), (g).

¹²⁵⁴ See 3.6.5 above for a discussion of the diversion of offenders from traditional punitive justice regime practices.

¹²⁵⁵ *Crimes (Restorative Justice) Act 2004* (ACT) ss 6(a)–(c).

¹²⁵⁶ *Young Offenders Act 1997* (NSW) ss 34(1)(a)(i–vi).

¹²⁵⁷ *Ibid* s 7(h).

Northern Territory and Queensland,¹²⁵⁸ South Australia,¹²⁵⁹ Tasmania,¹²⁶⁰ Victoria¹²⁶¹ and Western Australia,¹²⁶² in addition to school policy in the Northern Territory¹²⁶³ South Australia,¹²⁶⁴ Tasmania,¹²⁶⁵ Victoria¹²⁶⁶ and Western Australia.¹²⁶⁷ It is reinforced in that state by legislative provisions regarding diversionary options in the area of treatment of juvenile offenders.¹²⁶⁸

Within this assembly of rights the notion that in the sentencing of juveniles a measured approach is to be maintained appears to be generally well supported across the domestic Australian jurisdictions, as well as diversion from punitive justice procedures and practices. In addition, restorative justice interventions are well supported in both the criminal justice arena and schools through policy initiatives. It could be said, however, that while reasonable juvenile justice legislative safeguards exist in the domestic Australian jurisdictions for sentence proportionality, school policy support regarding exclusion and suspension in school settings is less than comprehensive. It would therefore be useful to have more coverage of the appropriateness of sanctions and removal from school as a measure of last resort, aligned with a rights-based approach in domestic school policy provisions.

Other rights-based notions such as the maintenance and recognition of the importance of maintaining familial bonds is evident across all state and territory juvenile justice legislation,¹²⁶⁹ as is the encouragement of self-responsibility and social development for

¹²⁵⁸ *Youth Justice Act* (NT) s 39; *Youth Justice Act 1992* (Qld) sch 1 cl 5.

¹²⁵⁹ *Young Offenders Act 1993* (SA) s 10.

¹²⁶⁰ *Youth Justice Act 1997* (Tas) ss 16(1)(a)–(g).

¹²⁶¹ *Children, Youth & Families Act 2005* (Vic) ss 415(4), (6), (7).

¹²⁶² *Young Offenders Act 1994* (WA) pt 5.

¹²⁶³ Department of Education and Children's Services, *Safe Schools NT Code of Behaviour*, above n 1007, 8.

¹²⁶⁴ Department of Education and Children's Services, *School Discipline*, above n 1007, 3.

¹²⁶⁵ Department of Education, *Student Behaviour Procedure*, above n 1068, 3.

¹²⁶⁶ Department of Education and Early Childhood Development, *Effective Schools are Engaging Schools – Student Engagement Policy Guidelines*, above n 1007, 25.

¹²⁶⁷ Department of Education and Training WA, *Behaviour Management in Schools*, above n 110, 5, 18.

¹²⁶⁸ *Young Offenders Act 1994* (WA) s 7(g).

¹²⁶⁹ *Crimes (Sentencing) Act 2005* (ACT) s 133D(1); *Young Offenders Act 1997* (NSW) s 7(e); *Children (Criminal Proceedings) Act 1987* (NSW) s 6(f); *Youth Justice Act* (NT) s 4(i); *Youth Justice Act 1992* (Qld) sch 1 cl 8 sub-cl (b)–(c); *Young Offenders Act 1993* (SA) ss 3(3)(b)–(c); *Youth Justice Act 1997*

juvenile offenders.¹²⁷⁰ Likewise, acknowledgement of the cultural identity of juvenile offenders has engendered widespread but not complete support across the domestic Australian legal landscape,¹²⁷¹ with the Australian Capital Territory and New South Wales being silent on the issue except for the encouragement of Aboriginal and Torres Strait Islander community participation in the juvenile justice process.¹²⁷²

Outside this suite of fundamental human rights themes, the vexed issue of corporal punishment as related to the issue of school violence is well worth investigating in this discussion, given that this practice is prohibited under both the *UNCRC* and the *Beijing Rules*,¹²⁷³ as is degrading, inhumane or cruel treatment.¹²⁷⁴ Corporal punishment is perhaps best described¹²⁷⁵ as the use of some physical force against a child or juvenile in order to elicit control, discipline or correction,¹²⁷⁶ or an intentional dispensation of pain or confinement as a sanction.¹²⁷⁷ Somewhat paradoxically, it is used to correct student misbehaviour and violent acts and also raises the issue of the boundary between legitimate and non-legitimate or criminal use of force, as suggested by Alexander and Curtis.¹²⁷⁸ There remains some ambiguity within the Australian jurisdiction as to the legality or otherwise of corporal punishment in government schools, principally in

(Tas) ss 2(b)–(c); *Children, Youth and Families Act 2005* (Vic) s 362(1)(a); *Young Offenders Act 1994* (WA) s 7(m)(i).

¹²⁷⁰ *Children and Young People Act 2008* (ACT) s 94(1)(a); *Children and Young People Act 2008* (ACT) s 94(1)(b); *Children (Criminal Proceedings) Act 1987* (NSW) ss 6(b), (g); *Youth Justice Act* (NT) s 4(a); *Youth Justice Act* (NT) ss 4(b), (e); *Youth Justice Act 1992* (Qld) sch 1 cl 8 sub-cl (a); *Youth Justice Act 1992* (Qld) sch 1 cl 8 sub-cl (b)–(c); *Young Offenders Act 1993* (SA) ss 3(2)(a)–(b); *Youth Justice Act 1997* (Tas) s 5(1)(h); *Children, Youth & Families Act 2005* (Vic) s 10(2); *Children, Youth and Families Act 2005* (Vic) s 362(1)(f); *Young Offenders Act 1994* (WA) ss 7(b), (j).

¹²⁷¹ *Youth Justice Act* (NT) s 4(j); *Youth Justice Act 1992* (Qld) sch 1 cl 12; *Young Offenders Act 1993* (SA) s 3(3)(e); *Youth Justice Act 1997* (Tas) s 5(2)(e); *Children, Youth and Families Act 2005* (Vic) s 10(3)(l); *Young Offenders Act 1994* (WA) s 7(l).

¹²⁷² *Children and Young People Act 2008* (ACT) s 94(1)(d); *Young Offenders Act 1997* (NSW) s 7(h).

¹²⁷³ The *UNCRC* art 19; *Standard Minimum Rules for the Administration of Juvenile Justice 1985* ('*Beijing Rules*') 17.

¹²⁷⁴ The *UNCRC* art 37, *Beijing Rules* 17.

¹²⁷⁵ See, eg, *Education Act 1990* (NSW) s 3 which describes the corporal punishment of a student as the application of physical force in order to punish or correct the student, but does not include the application of force only to prevent personal injury to, or damage to or the destruction of property of, any person (including the student).

¹²⁷⁶ Australian Institute of Family Studies, *Corporal Punishment – Key Issues Child Family Community Australia Fact Sheet* (March 2014) Australian Government

<<https://www3.aifs.gov.au/cfca/publications/corporal-punishment-key-issues>>.

¹²⁷⁷ Hyman and Perone, above n 106, 17.

¹²⁷⁸ Alexander and Curtis, above n 311, 78.

Queensland and Western Australia where the use of corporal punishment is banned although it remains possible under criminal statutes in those states for a parent or *person in place* of a parent to exercise reasonable corrective force. However, education legislation has been amended to disallow corporal punishment in schools.¹²⁷⁹

The administration of discipline by teachers in Australian schools was the subject of an early High Court examination in *Ramsay v Larsen*¹²⁸⁰ where the status of teacher-pupil relationships was examined and led to the court endorsing the notion that teachers have reasonable powers of chastisement at their disposal and in doing so override parental authority.¹²⁸¹ The situation in non-government Australian schools is yet more unclear, with only New South Wales, Tasmania and Victoria unequivocal in the wording of their education legislation to banish the use of corporal punishment in government and non-government schools.¹²⁸²

The uptake of juvenile rights linked with school violence amongst states and territory juvenile justice and education agencies as illustrated above suggests that there is room for improvement in the safeguarding and fortification of juvenile human rights within the Australian jurisdiction.

4.12 Conclusion

This chapter provided an overview of the formal law and policy measures in place within the Australian jurisdiction in response to juvenile violence. Domestic juvenile justice legislative structures were initially reviewed on a state and territory basis including an overview of the background of legislative responses such as the important stand-alone juvenile justice legislation in place as well as the issue of inconsistency in response between state and territory agencies. There is, however, consensus on certain distinguishing features of juvenile justice between states and territories, including

¹²⁷⁹ Australian Institute of Family Studies, *Corporal Punishment – Key Issues Child Family Community Australia Fact Sheet*, above n 1276.

¹²⁸⁰ *Ramsay v Larsen* [1964] HCA 40.

¹²⁸¹ Law Handbook, *Your Practical Guide to the Law in Victoria: Disciplinary Procedures* (2015) <<http://www.lawhandbook.org.au/handbook/ch06s03s04.php#Ch1299Se254587>>.

¹²⁸² Australian Institute of Family Studies, *Corporal Punishment – Key Issues Child Family Community Australia Fact Sheet*, above n 1276.

important issues such as diversion from retributive processes and the need to treat juvenile offenders differently to adult offenders. The constitutional implications of providing education services were also examined in this chapter.

An overview of state and territory education school policy and legislation was the focus of the next part of the chapter including an initial summary of the *National Safe Schools Framework*, a Commonwealth initiative that aims to provide vision and direction for Australian education agencies to maintain safe and respectful learning communities with student wellbeing paramount. As discussed, this initiative has seen perfunctory reception by state and territory education agencies to date, although there remains some common ground with domestic school violence policy. Initially, the definitional aspects of domestic school violence policy were examined, followed by an overview of both legislative and school policy responses to the problematic issue of school violence and an overview of domestic parental responsibility legislation in Australia.

Finally, the chapter discussed key domestic rights-based issues including bests interests, participation, youth justice, proportionality and diversion that are concomitant with the problem of juvenile violence as they are represented in juvenile law and education policy. These were examined along with the difficult issue of corporal punishment in schools. This scrutiny was undertaken in an attempt to identify the incorporation or otherwise into domestic juvenile law and education policy of essential human rights canons as discussed in Chapter 3, which are championed by important international conventions such as the *UNCRC* and other relevant instruments and protocols including the *Beijing Rules*.

The chapter established that the existing domestic legislative and policy regime does, in the main, incorporate a number of the key rights issues, although there appear to be shortcomings in the wholesale incorporation of these salient rights. For example, insofar as the 'best interests' philosophy is concerned, there is perhaps more recognition of the right's intent than a wholesale application of stand-alone best interests principles within contemporary Australian juvenile legislative and school policy endeavours, as with

participation, which has limited focus in juvenile justice legislation but for incidental incorporation in restorative strategies such as conferencing. Participation in school disciplinary processes across the domestic Australian landscape is also sporadic. Similarly, the important and complementary principles of natural justice, due process and procedural fairness appear to be entrenched within the education policy framework in most jurisdictions. Youth justice and proportionality principles are evident in most jurisdictions including restrictions on custodial sentencing, and proportionality of sentence can be found in many jurisdictions whilst diversion and restorative measures are, perhaps encouragingly, to be found in the juvenile justice legislation and education policy of several jurisdictions.

It is anticipated that the examination undertaken in this chapter will provide the necessary scaffolding for the development of rights-based discipline management strategies which will be the focus of the Chapter 5 of the thesis.

Chapter 5: A Rights-based Restorative Justice Approach For Australian Schools – A Framework for Implementation

5.1 Introduction

Chapter 4 of the thesis commenced with an overview of domestic law to identify the human rights aspects of the juvenile justice legal framework in Australia, which was extended later in the chapter. The chapter also discussed the constitutional implications for the Commonwealth pursuant to the provision of school services, a notion that will be important with respect to recommendations for the introduction of an apposite rights-based disciplinary management regime at the end of the thesis. This was followed by a discussion of domestic school behavioural management law and policy commencing with definitional aspects including the Commonwealth-initiated *National Safe Schools Framework*. The *Framework* has had a cursory reception from state and territory education agencies although, as discussed later in the chapter, some common ground between education policy and the *Framework* emerged. A significant portion of Chapter 4 focussed on a discussion of key domestic rights-based issues including those of best interests and participation, amongst others. The chapter also examined the diversion from traditional punitive juvenile justice processes with a view to judging the incorporation or otherwise into domestic law and policy of essential human rights safeguards found in the *UNCRC* and other instruments previously introduced in Chapter 3.

This chapter of the thesis extends the examination started in Chapter 4 and introduces the important concept of a rights-based approach, which will be further expanded to a juvenile-centric approach to human rights. The chapter will then discuss the important notion of restorative justice which will form the bedrock for the development of useful rights-based school behavioural management policy that incorporates and champions essential human rights safeguards in order to establish safer school environments. The development of such an approach also accords with the recommendations made by the United Nations Committee on the Rights of the Child that Australia intensifies its

response to the challenge of reducing school violence primarily through educational and socio-pedagogical methodology that also incorporates parental input. The chapter will initially examine restorative justice practices in domestic Australian juvenile justice settings and then will give an overview of examples of the use of restorative justice in Australian schools to date. The discussion will then be broadened to highlight linkages and benefits between the use of restorative justice methodology in schools and the wider community. The chapter will conclude with an extended discussion of the uniform adoption of model rights-based restorative justice practices in Australian schools culminating in the development of a suitable framework for use in Australian schools.

5.2 A Rights-based Approach

5.2.1 Defined

A rights-based approach¹²⁸³ can usefully be described as one that seeks to respect, protect and fulfil the human rights that are enshrined within international human rights frameworks.¹²⁸⁴ The approach places a focus on structural causes and manifestations, process and outcomes, with an emphasis on the realisation of rights against legal and moral rights bearers while acknowledging the entitlement of individuals to assistance.¹²⁸⁵ Fundamental to a rights-based approach is the expansion of laws, practices, mechanisms and administrative procedures to ensure both the fulfilment of entitlements and the opportunity to address violation or denial of rights.¹²⁸⁶ The centrality of the relationship between nation states or governments, known as duty bearers, and rights holders, represented by citizens, remains a focal element of a rights-based approach, in addition to participation by rights holders in the decision-making

¹²⁸³ A rights-based approach was introduced in Chapter 1 of the thesis.

¹²⁸⁴ Australian Council for International Development ('ACFID'), *Practice Note: Human Rights-based Approaches to Development* (July 2010) 1 <<http://www.acfid.asn.au/resources-publications/publications/practice-notes/human-rights-based-approaches-to-development>>.

¹²⁸⁵ Danish Institute for Human Rights, above n 491, 10.

¹²⁸⁶ United Nations Children's Fund ('UNICEF'), *A Human Rights-based Approach to Education for All* (2007) 11 <http://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf>.

processes of the duty bearers.¹²⁸⁷ Fundamentally therefore, every human being is effectively a rights holder whilst in turn each human right is bestowed a duty bearer.¹²⁸⁸

This relationship is at the core of a rights-based approach as rights rather than needs trigger obligations and attendant responsibilities.¹²⁸⁹ In addition, it is necessary to determine who exactly is encumbered with the obligations and responsibilities with respect to such rights, along with duty bearer accountability and behaviour.¹²⁹⁰ Under a rights-based approach, duty bearers are responsible to rights holders for human rights obligations under both international and domestic legislation.¹²⁹¹ In a rights-based regime, support mechanisms strive to ensure that entitlements are both attained and safeguarded whilst developing the capacity of duty holders to meet their obligations and rights holders to claim their rights whilst maintaining the dignity of individuals.¹²⁹²

Effectively, this participative process allows rights holders to contribute to the process and to claim the rights to which they are entitled from duty bearers who owe responsibility toward the rights holders.¹²⁹³ The duty bearer is held accountable rights holders themselves have a responsibility to respect the rights of others.¹²⁹⁴ In the context of a rights-based philosophy, nation states are more correctly termed ‘legal duty bearers’ whilst entities such as private corporations, non-government organisations and other institutions are referred to as ‘moral duty bearers’.¹²⁹⁵ However, the regulation of moral duty bearer actions remains with governments.¹²⁹⁶

¹²⁸⁷ ACFID, *Practice Note: Human Rights-based Approaches to Development*, above n 1284, 2.

¹²⁸⁸ Danish Institute for Human Rights, above n 491.

¹²⁸⁹ *Ibid* 10.

¹²⁹⁰ *Ibid*.

¹²⁹¹ ACFID, *Practice Note: Human Rights-based Approaches to Development*, above n 1284, 2.

¹²⁹² Victorian Equal Opportunity & Human Rights Commission, *From Principle to Practice: Implementing the Human Rights-based Approach in Community Organisations* (2008) 7 <<http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/toolkits/item/303-from-principle-to-practice-implementing-the-human-rights-based-approach-in-community-organisations-sept-2008>>.

¹²⁹³ *Ibid* 11.

¹²⁹⁴ Danish Institute for Human Rights, above n 491.

¹²⁹⁵ Insightshare, *Orientation to a Rights-based Approach*, 10 <[http://insightshare.org/sites/default/files/A%20Rights-Based%20Approach%20to%20Participatory%20Video%20-%20toolkit%20\(CHAPTER%202\).pdf](http://insightshare.org/sites/default/files/A%20Rights-Based%20Approach%20to%20Participatory%20Video%20-%20toolkit%20(CHAPTER%202).pdf)>.

¹²⁹⁶ Danish Institute for Human Rights, above n 491, 12.

It is also incumbent on nation states or governments in a rights-based regime to ensure that a trio of rights-based obligations are routinely satisfied, including the respect of rights by preventing the violation of rights,¹²⁹⁷ the protection of rights that are equally available to all through the enactment of legislation prohibiting the denial or violation of rights by governments or non-state actors,¹²⁹⁸ and the taking of appropriate measures, including the necessary allocation of resources, to ensure that rights are enjoyed and promoted.¹²⁹⁹ It is also important in a rights-based approach to identify the key relationships between rights claimants and duty bearers, and to accord the necessary dignity and individual respect that empowers rights claimants to seek remedy for grievances using both formal and informal justice structures.¹³⁰⁰

5.2.2 Structure

Structurally, a rights-based approach requires that accountability and transparency between duty bearers and rights holders¹³⁰¹ be upheld in order to determine which human right is to be addressed, to what standard and by which party.¹³⁰² Accountability in this sense endeavours to promote respect for the rule of law,¹³⁰³ encourage transparency in policy development¹³⁰⁴ and the discharging of positive obligations such as protection, fulfilment and promotion of human rights, in addition to negative obligations including abstinence from rights violations.¹³⁰⁵

The concept of universality and individual dignity is also significant in a rights-based approach, as all persons are born of equal worth and are entitled to rights and dignity.¹³⁰⁶ Capacity development and empowerment is an additional lynchpin in a rights-based approach in order to establish an environment conducive to the realisation

¹²⁹⁷ Hallgath and Tarantola, above n 485, 159.

¹²⁹⁸ UNICEF, *A Human Rights-based Approach to Education for All*, above n 1286.

¹²⁹⁹ Hallgath and Tarantola, above n 485, 159. See 3.3 above for a discussion on the notion of human rights.

¹³⁰⁰ UNICEF, *A Human Rights-based Approach to Education for All*, above n 1286, 11, 14.

¹³⁰¹ ACFID, *Practice Note: Human Rights-based Approaches to Development*, above n 1284, 3.

¹³⁰² Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, above n 484, 17.

¹³⁰³ UNICEF, *A Human Rights-based Approach to Education for All*, above n 1286, 11.

¹³⁰⁴ ACFID, *Practice Note: Human Rights-based Approaches to Development*, above n 1284, 17.

¹³⁰⁵ UNICEF, *A Human Rights-based Approach to Education for All*, above n 1286, 11.

¹³⁰⁶ Monohan and Young, above n 516, 41.

of human rights¹³⁰⁷ by allowing rights holders to expand their capacity to demand and have their human rights upheld.¹³⁰⁸

The participatory process is paramount in the establishment of a rights-based approach, including in policy and legislative development, as contributions from stakeholders like rights holders and duty bearers ought to reflect unanimity between those who have a duty to act and those who are subject to rights violations.¹³⁰⁹ The ability to participate, contribute and enjoy fundamental freedoms is also a feature of many human rights instruments¹³¹⁰ including the *ICCPR* and *ECESCR*. Finally, the interrelationship and interdependence between competing human rights is also a necessary consideration in a rights-based approach such that strategic alliances and partnerships, including those between rights holders,¹³¹¹ can be beneficial, for example in circumstances where the right to health may also depend on satisfaction of the right to acquire information.¹³¹² In this thesis, along with the participation element, particular emphasis has been placed on the best interests principle which remains of significant importance in a juvenile-oriented rights-based approach.

5.2.3 Shortcomings

The adoption of a rights-based approach is not without difficulties, however. Prominent among the potential shortcomings of a rights-based approach is the constant need to address the tension between the competing interests of rights holders or the balancing of rights and responsibilities¹³¹³ with resource allocation. This is an area of difficulty given that all persons are rights holders, which means that prioritisation is essential because not all problems can be effectively addressed together.¹³¹⁴ The extension of a rights-

¹³⁰⁷ ACFID, *Practice Note: Human Rights-based Approaches to Development*, above n 1284, 3.

¹³⁰⁸ UNICEF, *A Human Rights-based Approach to Education for All*, above n 1286, 11.

¹³⁰⁹ ACFID, *Practice Note: Human Rights-based Approaches to Development*, above n 1284, 17.

¹³¹⁰ *Ibid* 4.

¹³¹¹ *Ibid* 3.

¹³¹² UNICEF, *A Human Rights-based Approach to Education for All*, above n 1286, 10.

¹³¹³ *Ibid* 2.

¹³¹⁴ Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, above n 484, 16.

based approach to one centred on the interests of children and juveniles will now be discussed.

5.3 The Juvenile-oriented Rights-based Approach

5.3.1 Defined

Ensuring the welfare of and respect for juveniles remains a social and moral imperative in civil society,¹³¹⁵ and this has generated a heightened focus on the relevance of domestic and international human rights regimes as they apply to young people.¹³¹⁶ In preference to generalist human rights that merely include juveniles, a human rights-based approach that places particular emphasis on the rights of younger people with their attendant vulnerabilities, familial and community structure positioning and evolving capacities¹³¹⁷ is more likely to safeguard and promote juvenile rights.¹³¹⁸ In this regard, it is worth examining a rights-based approach as it applies to children and juveniles in the area of school violence.

5.3.2 Structure

Not unexpectedly, a rights-based approach to children and juveniles in the arena of school violence extracts much substance from the *UNCRC*. Principally, the notion of the best interests of the child, in concert with guiding rights-based principles such as accountability and transparency, capacity and empowerment, universality, interdependence and participation are pivotal in generating a useable rights-based approach. Interdependence is fundamental to a rights-based approach as, for example, the participation element cannot act in isolation from associated rights such as freedom of expression under *UNCRC* art 13. Thought, conscience, religion and association under arts 14 and 15 are also important in the context of the interdependence of rights being a key factor in any rights-based approach. Similarly, the provision of children's rights to

¹³¹⁵ See Chapter 2 above for a discussion on the nature of juvenile violence including school-based violence in Australia.

¹³¹⁶ R Wilson, 'Forward' (1996) 2(2) *Australian Journal of Human Rights* 169
<<http://www.austlii.edu.au/au/journals/AJHR/1996/1.html>>.

¹³¹⁷ See Chapter 3 above for a discussion on the evolution of juvenile-oriented human rights including those provided by international legal instruments such as the *UNCRC*.

¹³¹⁸ Australian Council For International Development, *Child Rights*, above n 542.

education with respect to Indigenous students should not be divorced from rights protecting the linguistic or cultural traditions of these students.¹³¹⁹

Expanding the capacity and empowerment of children and juveniles is a significant challenge in a juvenile rights-based approach given the difficulty in rights construction for young people caused by the real or perceived powerlessness of this class of rights holder. In effect, a rights-based approach directed at this class of persons will attempt to remedy shortcomings by providing them with rights that can be exercised while giving attention to any interference with their liberty in the exercising of these rights.¹³²⁰ The capacity to both demand and uphold rights also has relevance to the universality element of a rights-based approach which promotes the universality and individual dignity of rights. The accountability and transparency of child rights demands that states are to secure entitlements for children and juveniles and meet obligations to respect, protect and fulfil rights on their behalf, which extends to the discharge of legislative, administrative and judicial action.¹³²¹

Insofar as this thesis is concerned, however, the participation element along with the pivotal best interests of the child will, in the main, provide the necessary underpinning for the development of a useful children and juvenile rights-based policy approach to managing the problem of school violence in Australian schools. This will be expanded upon at the end of this chapter.

5.3.3 Participation in a Restorative Justice Approach to Juvenile School Violence

As discussed above,¹³²² a rights-based approach sees the practical benefit of consultative participation between stakeholders such as duty bearers and rights holders in the construction and development of policy and legislative bulwarks as a more sophisticated societal response to the issue of school violence. That the *UNCRC* enunciates the

¹³¹⁹ Monohan and Young, above n 516, 40.

¹³²⁰ K H Federle, 'Looking Ahead: An Empowerment Perspective on the Rights of Children' (1995) 68 *Temple Law Review* 1586–1587.

¹³²¹ Monohan and Young, above n 516, 40–41.

¹³²² See 5.2 above for a discussion on a rights-based approach.

participation of children in decisions personal to them¹³²³ provides a useful structural foundation for any new approach to the challenge. Lundy and McEvoy suggest that the adaptation of a rights-based regime to one focussed on juveniles requires a binary approach which both identifies these persons as members of a larger ensemble of rights holders and provides them with not only a voice, but due weight and deference to their views as per *UNCRC* art 12.¹³²⁴ In according rights, state actors effectively acknowledge the importance of the participation and individual views of children and juveniles,¹³²⁵ which goes some distance towards empowering them as rights holders and therefore should not be undersold.

The views of juveniles have, in the main, been unnoticed, especially in the legal domain. While Australian courts have shown some guarded interest in admitting the views of children to be heard in matters personal to them, such concessions remain of limited impact.¹³²⁶ The adoption of a juvenile rights-based approach ought to provide an opportunity for juveniles to have an impact on decisions that affect them, although such participation may not necessarily be decisive as due consideration should also be given to the age and maturation of the child.¹³²⁷ Under art 12(2) of the *UNCRC*, the participatory rights of children or juveniles in judicial and administrative proceedings that affect them directly or indirectly are to be upheld by state parties to the *UNCRC*, including Australia, in a manner aligned with the procedural requirements of domestic law, with such participation being either personal or through a representative of the child or juvenile.¹³²⁸

Nonetheless, despite the requirements of *UNCRC* art 12(2), a child in Australia, for example, does not as a matter of right have the ability to contribute to a legal proceeding, such as in matters involving sexual assault.¹³²⁹ Respecting a juvenile's right

¹³²³ Jones, above n 545.

¹³²⁴ L Lundy and L McEvoy, 'Developing Outcomes For Educational Services: A Children's Rights-based Approach' (2009) 1(1) *Effective Education* 56.

¹³²⁵ Federle, 'Children's Rights', above n 645, 434.

¹³²⁶ Monohan and Young, above n 516, 47; see, eg, *Re Marion No.1* at 3.6 above. Please delete #

¹³²⁷ *Ibid.*

¹³²⁸ Cumming and Mawdsley, above n 559, 38.

¹³²⁹ *Ibid* 42.

to be heard should ostensibly inform decision-making in matters that have an impact upon them, suggests Lansdowne,¹³³⁰ which has implications for practice given that juveniles will need to be provided with information that enables their engagement in such decision-making. Moreover, bodies such as the Australian Law Reform Commission have suggested moving away from a traditional view espousing a lack of maturity and reasoning by juveniles toward a position that increasing consideration should be given to their opinions as ‘mature minors’ in litigation, for example, as a result of better sensibleness and judgement on the part of juveniles.¹³³¹

5.3.4 Best Interests of the Child in a Restorative Justice Approach to Juvenile School Violence

Incorporating the best interests principle under art 3(1) of the *UNCRC*¹³³² into a juvenile rights-based approach is of particular consequence given the expectation that the principle is to be appropriately and sympathetically incorporated into all ‘actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.’¹³³³ By extension, the application of the principle to programs and policies further reinforces the need for a considered approach that adequately reflects and respects the intent of the best interests principle.

In obligating state parties to ensure that the care and protection of children is their primary consideration, the difficult transition of the best interests concept to practical application in a useful juvenile rights-oriented approach is compounded by the many personalities and attendant rights and duties intertwined in situations involving juvenile school violence, including parents, guardians and school or teaching staff. There is no guidance, however, as to the definition of those rights and duties.¹³³⁴ Nonetheless, whilst states are obligated to justify their actions or omissions contrary to the best interests of

¹³³⁰ Lansdowne, above n 643.

¹³³¹ Cumming and Mawdsley, above n 559, 42.

¹³³² See 3.6.9 above for a discussion of the best interests principle.

¹³³³ Monohan and Young, above n 516, 44; see also McGoldrick, above n 555, 136; Australian Human Rights Commission, *Human Rights Brief No 1*, above n 648, 1.

¹³³⁴ McGoldrick, above n 555, 137.

the child, the principle is not without some dilution as the best interests of the child remains of pivotal but not sole or absolute consideration, and does not necessarily displace other legitimate or justified concerns.¹³³⁵

With this in mind, it would be useful to develop a rights-based discipline management regime for use in schools that reflects the participation of children and juveniles and the best interests of the child, yet also acknowledges the input of parents and other stakeholders. Parental responsibility in the administration of discipline management raises some interesting issues given the import of art 5 of the *UNCRC*, which requires State parties to respect the ‘responsibilities, rights and duties of parents’ along with ‘legal guardians’ or ‘other persons legally responsible for the child’ to ‘provide in a manner consistent with the evolving capacities and development of the child appropriate direction and guidance in the exercise of the child’s rights pursuant to the *UNCRC*’.¹³³⁶ The potential for the rights of the child to emasculate parental rights under the *UNCRC* has led to some contention in the Academy.¹³³⁷

Parental responsibility legislation throughout the domestic Australian jurisdiction provides some guidance as to the control and responsibility provided under the law for parents and guardians. It would be useful to now examine these provisions in light of the potential involvement of parents and guardians in a *UNCRC*-compliant, rights-based approach to dealing with the issue of school violence. Before this important discussion takes place, however, the previously introduced critical notion of restorative justice will be examined more comprehensively, prior to its incorporation in a juvenile rights-based approach to managing school violence in Australian settings, which represents the main aim of the thesis.

¹³³⁵ Monohan and Young, above n 516, 45.

¹³³⁶ McGoldrick, above n 555, 138.

¹³³⁷ Cumming and Mawdsley, above n 559, 39.

5.4 The Notion of Restorative Justice

5.4.1 Introduction

The concept of restorative justice was introduced in Chapter 3 of the study in the context of various approaches to juvenile offending undertaken by justice agencies and authorities.¹³³⁸ The discussion will now turn to a more detailed exploration of the origins of restorative justice, the concepts, advantages and disadvantages, the Australian experience, and most importantly, the application of the process to the development of suitable discipline management policies for use in the management of school violence.

The restorative approach is essentially seen as a superior method of dealing with offending to costly, punitive criminal justice regimes, and eschews the retributive traditional approach in favour of one that seeks reconciliation, healing, accountability and forgiveness¹³³⁹ and embeds the criminal justice system into social contexts.¹³⁴⁰ At its core, the restorative justice model views crime as principally a violation of people and relationships and aims to correct such wrongs while instigating a restoration process that is assisted with community, victim and offender input suggest White, Haines and Asquith.¹³⁴¹ The restorative justice model is premised on some fitting assumptions including that, as a balanced approach, restorative justice should deny single objectives and justice measures and should instead be adaptable enough to respond to personal needs and exigencies and that the aftermath of offences should not be resolved without the personal involvement of stakeholders.¹³⁴² Flexible in nature, a restorative justice approach encompasses various procedures and processes including diversion from traditional punitive court processes, victim-offender consultations and other varied actions which can be taken in concert with formal court procedures.

¹³³⁸ See 3.2.2 above for a discussion on the introduction of diversionary options by Juvenile Justice Agencies in Australia.

¹³³⁹ J Considine, 'A Future Paradigm: Restorative Justice in Aotearoa?' (1995) *Restorative Justice, Healing the Effects of Crime* 172.

¹³⁴⁰ T Marshall, 'Restorative Justice. An Overview' (1999) *British Home Office, Research Development and Statistics Directorate* 5.

¹³⁴¹ White, Haines and Asquith, above n 478.

¹³⁴² Marshall, 'Restorative Justice. An Overview', above n 1340, 6.

5.4.2 Suppositions that Underpin the Restorative Justice Framework

White, Haines and Asquith¹³⁴³ draw upon three interrelated suppositions that underpin the restorative justice framework. Essentially, the restorative approach is grounded in the notion that individual and collective liabilities and obligations result from violations including offender obligations to right as much of their wrongdoing as possible, while community obligations should be directed toward victims, offenders and general welfare of community members. In addition, the harm to victims and communities alike caused by the wrongdoing requires the input of stakeholders including victim, offender and familial and community representatives who have been harmed and therefore should be included in the justice process while Marshall adds that the input of these stakeholders is required in order to negotiate a collective resolution which extends to the charting of future implications for all involved.¹³⁴⁴ Finally, according to White, Haines and Asquith, the restorative process seeks to maximise dialogue, participation, information exchange and mutual consent between victim and offender culminating in validation, vindication, restitution, testimony, safety and support for victims.¹³⁴⁵ Effectively, restorative justice aims to focus on and treat offenders in a way that attempts to change future behaviour, whereas retributive justice attempts to focus on, punish and blame for past behaviour.¹³⁴⁶

5.4.3 The Development of the Restorative Justice Movement

Contemporary in theory but aged in practice, restorative justice can be identified in the traditions of the ancient world including the Arab, Greek, Hebrew and Roman civilisations, in addition to religious cultures as diversified as Buddhist, Taoist and Indian Hindu. The emergence of Anglo-European punitive approaches to the dispensing of justice, principally in the Norman philosophy of redirecting the responsibility of

¹³⁴³ White, Haines and Asquith, above n 478, 228–229.

¹³⁴⁴ Marshall, ‘Criminal Mediation in Great Britain’, above n 479.

¹³⁴⁵ White, Haines and Asquith, above n 478, 228–229.

¹³⁴⁶ K Daly, ‘Restorative Justice in Unequal Societies’ (2000) 17(1) *Law in Context* 185.

wrongdoers from fellow person to sovereign states, has impeded the influence of restorative justice effectively for centuries.¹³⁴⁷

Nonetheless, the re-emergence of a restorative justice movement can be traced to a focus on community justice measures dispensed by non-Western cultures including those of the Maori and Native American, who have long embraced the notion of group or familial response to crimes.¹³⁴⁸ From the 1970s onward, burgeoning victims' rights and nascent informal justice initiatives surfaced including victim-offender reconciliation and victim-offender mediation or dialogue.¹³⁴⁹ These grouped victims, offenders and intermediaries together to determine appropriate damage repair in the aftermath of an offence and were instrumental in the expansion of the restorative justice movement.¹³⁵⁰ In contrast to the suppression of emotion typically found in retributive criminal justice methods that centre on fact establishment rather than the social, emotional and spiritual elements of individuals and communities, emotional engagement is fundamental to the restorative justice model which aims instead to build positivism through empathy, interest and excitement whilst suppressing the negativity contained in anger, fear, humiliation and disgust.¹³⁵¹

Other programs and events that also helped formulate the modern restorative justice movement include victim advocacy, alternative conflict resolution practices, increased community and citizen participation in informal justice initiatives, and an increase in prisoner rights.¹³⁵² Social justice, prison abolition and peacemaking criminology movements also contributed to the development of the restorative justice as an alternative justice system as did growth in restitution from the 1960s as a vehicle for

¹³⁴⁷ B Morrison, *Restoring Safe School Communities* (The Federation Press, 2007) 77; see also W Northey, *A Brief Look at Restorative Justice* (August 2013) 1–2 <<http://m2w2.com/wp/wp-content/uploads/2009/08/A-Brief-Look-At-Restorative-Justice2.pdf>>.

¹³⁴⁸ Marshall, 'Restorative Justice. An Overview', above n 1340, 7.

¹³⁴⁹ K Daly and H Hayes, 'Restorative Justice and Conferencing in Australia' (Trends & Issues in Crime and Criminal Justice No 186, The Australian Institute of Criminology, February 2001) 1 <http://aic.gov.au/media_library/publications/tandi_pdf/tandi186.pdf>.

¹³⁵⁰ K Daly and R Immarigeon, 'The Past, Present and Future of Restorative Justice: Some Critical Reflections' (1998) *Issues in Criminal, Social and Restorative Justice, Contemporary Justice Review* 21.

¹³⁵¹ B E Morrison and D Vaandering, 'Restorative Justice: Pedagogy, Praxis and Discipline' (2012) 11 *Journal of School Violence* 140.

¹³⁵² Daly and Immarigeon, above n 1350, 24–26.

promoting the rights of victims rather than through the punitive traditional justice system.¹³⁵³ Sentencing or peacemaking circles were another initiative in the growth of restorative justice from the 1980s onwards and involve the use of consensus-based forums premised in healing and harmony. They require considerable citizen involvement and are comprised of offender, victim, familial and community stakeholders who engineer appropriate sanctions for offenders in order to achieve the twofold aim of conflict resolution and improvement in social conditions.¹³⁵⁴ King et al suggest that circle methods are derived from methods long employed by Indigenous people and on occasion are utilised as part of court systems.¹³⁵⁵

5.4.4 The Concept of Restorative Justice

Restorative justice conceptually embraces many different applications at different stages of the criminal process ranging from diversion from court prosecution, meetings between stakeholders affected by an offence such as victim and offender, to actions taken in concert with court determinations. These applications are engaged not only in juvenile and some adult criminal matters but also in civil determinations.¹³⁵⁶ Aside from the criminal justice and education applications which are germane to this thesis it should also be acknowledged that there have been inroads into the use of restorative justice reform in other important areas such as industrial law, diplomacy, peacekeeping and family welfare, which points to a growing appreciation for a restorative methodology that embraces personal and collective wellbeing.¹³⁵⁷

With respect to practical, wide-scale use, family group conferencing forms the bulk of restorative justice initiatives and will be the focus of school violence policy development in this chapter of the thesis. This approach to repairing the harm caused by an offence requires the input of stakeholders such as the victim, offender, family members, community representatives and the like, to discuss the impact of the offence

¹³⁵³ M King et al, *Non-Adversarial Justice* (The Federation Press, 2009) 43.

¹³⁵⁴ G Bazemore, 'The Community in Justice: Issues, Themes and Questions for the New Neighbourhood Sanctioning Models' (1997) *The Justice System Journal* 207.

¹³⁵⁵ King et al, above n 1353, 42.

¹³⁵⁶ Daly and Hayes, above n 1349.

¹³⁵⁷ Morrison, *Restoring Safe School Communities*, above n 1347, 79.

on the persons involved and strategies to enable the offender to repair the harm caused by her or his actions suggest Cunneen and White.¹³⁵⁸

5.4.5 Benefits of Restorative Justice

Although not without difficulties, the restorative justice approach can claim numerous advantages over the existing punitive retributive criminal justice method. Face-to-face encounters such as those experienced in a group conference can be sobering and confrontational for the offender as the forum itself prevents avoidance of the consequences of the offence due to the presence of victim and familial support representatives. This is in contrast with the retributive criminal justice approach which to some extent encourages the depersonalisation of the offence and a culture of denial and passivity by offenders.¹³⁵⁹ Benefits of diversionary policy and practice include avoidance of stigmatisation associated with the prosecution and conviction of young offenders, cost and resource savings for criminal justice and law enforcement agencies, increased opportunities to identify familial, health or behavioural factors that contribute to offending, active participation in proceedings by the child or juvenile offender, and averting the association of first or minor offenders with recidivist or serious offenders in traditional punitive criminal justice systems.¹³⁶⁰

However, whilst victim empowerment is a by-product of conferencing rather than the anonymity often experienced under traditional justice methods, it must also be acknowledged that offenders can in fact ‘orient’ themselves to the conference in order to repair their own reputation rather than the harm caused by the offending behaviour.¹³⁶¹ Nonetheless, the social benefits of the restorative method include the opportunity for positivity on the part of offenders, which can promote the sense that they will be reintegrated and re-accepted by society compared to traditional retributive justice methods.¹³⁶² Another important relational element of restorative practices is the notion

¹³⁵⁸ Cunneen and White, above n 204, 361.

¹³⁵⁹ H Bowen and J Consedine, ‘Making Justice Work’ (1998) *Restorative Justice-Contemporary Themes and Practice* 20.

¹³⁶⁰ Australian Human Rights Commission, *Human Rights Brief No 5*, above n 629.

¹³⁶¹ K Daly, ‘Restorative Justice, The Real Story’ (2002) 4(1) *Punishment & Society* 70.

¹³⁶² Marshall, ‘Restorative Justice. An Overview’, above n 1340, 11.

that crimes in effect violate human relationships and damage communities. Therefore, even though it is often committed by a stranger, an offence effectively forms a relationship between the offender and victim that can potentially be repaired through the restorative method, which may contribute to healthier communities.¹³⁶³

Bowen and Consedine argue that, significantly, it is this entirely appropriate community empowerment implicit in restorative methods rather than traditional criminal justice methods¹³⁶⁴ that potentially offers broader societal advantage by enabling community members to utilise their strengths as credible participants by contributing toward the expansion of community justice solutions including restoration, rehabilitative and public safety objectives and community healing more generally.¹³⁶⁵ Further collective advantage can be found in the potential for victim and offender alike to view each other not stereotypically but rather as people, leading to an improvement in the victim's interests as a result of reparation that extends further than simply financial recompense, for example, including apologies along with the performance of work for victims, and seeking appropriate counselling.¹³⁶⁶ Restorative justice methods can also offer increased levels of comprehension and flexibility for participant stakeholders compared to traditional justice methods.

The benefit or otherwise of restorative justice as a factor in the reduction of recidivism is deserving of some focus. It is seen very much as a tertiary crime prevention method in that prevention of re-offending is the focus of the restorative methodology, rather than primary prevention which logically is targeted at stopping offending in the first instance. Local and international research into restorative measures has been inconclusive in terms of recidivism reduction, although as is often the case with research evidence, structural and methodological difficulties may have skewed the data.¹³⁶⁷ An obvious

¹³⁶³ King et al, above n 1353, 47–48.

¹³⁶⁴ Bowen and Consedine, above n 1359.

¹³⁶⁵ Bazemore, above n 1354, 221.

¹³⁶⁶ Marshall, 'Restorative Justice. An Overview', above n 1340, 11.

¹³⁶⁷ Australian Institute of Criminology, *AIC Crime Reduction Matters – Restorative Justice as a Crime Prevention Measure No 20* (24 February 2004)

<http://aic.gov.au/media_library/publications/crm/crm020.pdf>.

example would be the classification of recidivism narrowly in the research data as new convictions, whilst a broader view would also encompass arrest rates.¹³⁶⁸

The effect of restorative measures on recidivism is controversial and remains an impediment to the widespread acceptance of restorative measures as a legitimate alternative to traditional retributive methods. It should however be conceded that restorative justice is primarily concerned with relationship repair, empowerment and the opportunity to formulate a better future following the aftermath of an offence, rather than the reduction of recidivism. However, until mainstream research justifies the worth of restorative methods with respect to recidivism reduction or general crime prevention, there is potential for the approach to occupy only peripheral or tangential space in the criminal justice system,¹³⁶⁹ even though encouraging results in youth offending reduction have been recorded in Australia, New Zealand, Singapore, Germany and the United States while cause for some cautious optimism in recidivism reduction was also expressed recently by Larsen.¹³⁷⁰

Promising Australian research in the New South Wales jurisdiction suggests that juvenile conferencing can lead to a sizeable reduction in recidivism amongst juvenile offenders irrespective of criminal history, gender, age and Aboriginality.¹³⁷¹ Varnham notes that a large scale Australian violent crime study has also revealed a significant decline in recidivism rates for randomly selected conference participants compared to those processed in court,¹³⁷² and there is some research evidence suggesting a reduction in the severity of reoffending that can be attributed to restorative justice practices.¹³⁷³ Conversely however, a 2012 study that compared the recidivism rates of juvenile

¹³⁶⁸ King et al, above n 1353, 58.

¹³⁶⁹ T Wachtel (1999) 'Restorative Justice in Everyday Life: Beyond Formal Ritual' (Paper presented at the Reshaping Australian Institutions Conference: Restorative Justice and Civil Society, The Australian National University, February 16–18 1999) 1.

¹³⁷⁰ S Varnham, 'Keeping Them Connected: Restorative Justice in Schools in Australia and New Zealand – What Progress?' (2008) 13(1) *Australia & New Zealand Journal of Law & Education* 75. See J Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25(1) *Crime and Justice: A Review of Research* 54 for studies demonstrating recidivism reduction in Australia, New Zealand, Singapore, Germany and the United States. J Larsen, 'Restorative Justice in the Criminal Justice System' (Research and Public Policy Series No 127, The Australian Institute of Criminology, 2014) 26 <http://aic.gov.au/media_library/publications/rpp/rpp127.pdf>.

¹³⁷¹ Australian Institute of Criminology, *AIC Crime Reduction Matters*, above n 1367.

¹³⁷² Varnham, 'Keeping them Connected', above n 1370.

¹³⁷³ D Roche, 'Dimensions of Restorative Justice' (2006) 62(2) *Journal of Social Issues* 221.

offenders who participated in youth justice conferencing in New South Wales with those processed through the state children's court found minuscule differences in juvenile recidivism, seriousness or timing of further offences.¹³⁷⁴

5.4.6 Criticisms of Restorative Justice

Notwithstanding the potential benefits of and enthusiasm for the notion of non-retributive, restorative justice models such as diversion, particularly in the treatment of juvenile offenders, criticism has not been avoided. It would be useful at this junction to examine the perceived shortcomings of the restorative justice method. Criticism of diversionary policy and practice has been directed toward the requirement that participants are for the most part voluntary, which creates difficulty within the confines of a criminal justice system as a lack of participation severely limits the restorative options.¹³⁷⁵ Neutrality amongst facilitators is of concern, as diversionary proceedings such as conferences should ideally be administered by parties independent of law enforcement, including judicial officers or perhaps community based lawyers. Caution should be exercised in the imposition of penalties to ensure that they do not exceed those ordered by courts in like determinations.¹³⁷⁶ Moreover, diversionary proceedings should not operate more oppressively or in a fashion intimidating to young offenders, nor should more offenders than necessary be either inserted into the criminal justice system or become more involved in restorative programs¹³⁷⁷ due to so-called 'net widening.'¹³⁷⁸ Also of concern are the apparent limitations in access to legal advice for child or juvenile offenders.¹³⁷⁹

More broadly, restorative justice methods have also attracted censure by judges, magistrates, prosecutors and police who remain sceptical of the deterrence quality of

¹³⁷⁴ 'Meetings With Victims Don't Reduce Reoffending – Study' *The Daily Telegraph* (online), 15 March 2012 <<http://www.dailytelegraph.com.au/meetings-with-victims-dont-reduce-reoffending-study/story-e6freuyi-1226300410052>>.

¹³⁷⁵ Marshall, 'Restorative Justice. An Overview', above n 1340, 8.

¹³⁷⁶ Australian Law Reform Commission, above n 563, [18.54].

¹³⁷⁷ *Ibid.*

¹³⁷⁸ Net widening refers to situations where programs that are designed to divert juveniles from the traditional juvenile justice system actually have the effect of capturing juveniles who would not normally have contact with juvenile justice systems which effectively expands social control.

¹³⁷⁹ Australian Human Rights Commission, *Human Rights Brief No 5*, above n 629.

restorative programs, instead seeing restorative methods as a second class form of justice that does little to dissuade criminal elements. They cite an overemphasis on personal issues rather than punishment and an excessive focus on prevention and diversion, which has further engendered a perception of leniency amongst detractors.¹³⁸⁰ Similarly, although important in operation, the diverse nature of restorative justice methods may present a less than coherent image to mainstream consumers more accustomed to traditional criminal justice methods¹³⁸¹ leading to the potential risk of reducing restorative methods to little more than tokenism within the confines of a traditional criminal justice system, for example when pilot restorative practices and procedures are incorporated only at the periphery.¹³⁸² In a similar fashion, Zehr and Mika suggest that the use of progressive humane language to describe what amounts to little more than traditional punitive responses repackaged as restorative justice initiatives reflects similar disdain and remains a source of concern.¹³⁸³

Likewise, notes White, some confusion has arisen regarding the use of family group conferences to dispense traditional retributive justice punitive outcomes, which are labelled restorative justice purely because of the forum employed.¹³⁸⁴ Detractors often point to the potential erosion of legal safeguards and protection that underpin traditional criminal justice practices, for example, the coercion of defendants to accept excessive punishment in a conference,¹³⁸⁵ while a small but consistent band of victims have also voiced concerns about feeling worse after having participated in a conference.¹³⁸⁶ Secondary victimisation is also an issue to be considered within the restorative justice model, in that victims should not be obligated to face an offender in family group conferencing when they have already been intimidated by the offender or the offender has been in an unequal position of power over the victim, for example in circumstances

¹³⁸⁰ Marshall, 'Restorative Justice. An Overview', above n 1340, 26.

¹³⁸¹ Daly and Immarigeon, above n 1350, 30.

¹³⁸² M Umbreit, 'Restorative Justice Through Victim-Offender Mediation. A Multi-Site Assessment' (1998) *Western Criminological Review* 11.

¹³⁸³ H Zehr and H Mika, 'Fundamental Concepts of Restorative Justice' (1998) *Contemporary Justice Review* 49.

¹³⁸⁴ R White, 'Communities, Conferences and Restorative Social Justice' (2003) 3(2) *Criminal Justice* 146.

¹³⁸⁵ Marshall, 'Restorative Justice. An Overview', above n 1340, 23.

¹³⁸⁶ Roche, above n 1373.

of sexual or violent assault.¹³⁸⁷ However, there have also been some encouraging outcomes in sexual assault conferencing¹³⁸⁸ and a reduction in the incidence of post-traumatic stress disorder symptoms, which has important implications for school bullying victims.¹³⁸⁹

A further complication in the participation of victims in restorative practices is the question of their actual status in conferences, for example in relation to compensation or reparation for the effects of an offence.¹³⁹⁰ Specifically, does the legitimate interest of the victim extend beyond reparation or compensation, such as the right to receive services and other support, to ‘actual’ punishment of offenders in addition to other issues including proportionality of sentence and impartiality, such as in the case of a particularly malevolent victim as opposed to one who is more forgiving?¹³⁹¹ The notion that victims have a stake in the offence is predictable, but the question of whether victims have any part in the punishment of offenders is a difficult one and raises further issues regarding independence, impartiality and by extension the question as to whether offenders actually receive a fair hearing in restorative interventions such as conferencing.¹³⁹² Additionally, teaching staff are oft ignored victims in school-based restorative conferencing. Although it may be incumbent on educators to deal with school violence incidents professionally, surely they are entitled to feel valued and safe.¹³⁹³ This is an area in which restorative methodology could be a useful tool as it allows teaching staff the opportunity to participate in the process as well as encouraging offending students to confront the affected teaching staff, fostering awareness and understanding in the offending student and ensuring that the incident will be dealt with seriously.¹³⁹⁴

¹³⁸⁷ Marshall, ‘Restorative Justice. An Overview’, above n 1340, 23.

¹³⁸⁸ King et al, above n 1353, 51.

¹³⁸⁹ B Morrison, ‘School Bullying and Restorative Justice: Toward a Theoretical Understanding of the Role of Respect, Pride and Shame’ (2006) 62(2) *Journal of Social Issues* 389.

¹³⁹⁰ A Ashworth, ‘Responsibilities, Rights and Restorative Justice’ (2002) 42 *British Journal of Criminology* 585.

¹³⁹¹ Ibid.

¹³⁹² Ibid 586.

¹³⁹³ Costello B, J Wachtel and T Wachtel, *The Restorative Practices Handbook for Teacher, Disciplinarians and Administrators* (International Institute for Restorative Practices, 2009) 61.

¹³⁹⁴ Ibid.

Given that community involvement is an essential ingredient in the restorative justice process, any practice or process that requires such a contribution must contend with discrepancies in the levels of skill and resources typically present in communities. Contemporary societies routinely display age and cultural social divides¹³⁹⁵ which are increasingly exaggerated in aging populations typical of most Western societies. There are also racial, social, religious and secular dissimilarities that engender social injustice and general inequity. Further, whilst delay and excessive cost pressures in traditional judicial proceedings are ubiquitous in many jurisdictions, a potential benefit of restorative measures such as conferencing would seem to be efficiency and expediency. However, this may not necessarily be the case as similar cost cutting and administrative shortcomings may also be experienced with conferencing regimes, for example in high volume jurisdictions.¹³⁹⁶

Notwithstanding difficulties such as these, there is the potential for offences to be personalised by the victim and offender, and for anguish and pain to be articulated, which can be remedial for the stakeholders involved.¹³⁹⁷ These are features conspicuous by their absence in the traditional retributive justice system. The discussion will now turn to the nature of restorative juvenile justice measures within the Australian landscape, followed by the identification and overview of important linkages between restorative justice methodology and practices in juvenile justice and school-based discipline management.

5.5 Restorative Practices in the Juvenile Criminal Justice System: The Australian Experience

Diversion from retributive criminal justice processes is practiced across all domestic jurisdictions in Australia and is in the main limited to police cautioning or the conference option although other options include mediation and circle sentencing. Seen as an expedient and efficient response to juvenile offending, which is often transient and

¹³⁹⁵ Marshall, 'Restorative Justice. An Overview', above n 1340, 8.

¹³⁹⁶ K Daly, 'Mind the Gap: Restorative Justice in Theory and Practice' in von Hirsh et al (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing, 2003) 219–236.

¹³⁹⁷ Bowen and Consedine, above n 1359, 24.

less serious in nature compared to adult criminality, it is also thought to lessen the criminogenic effect of labelling and stigmatisation.¹³⁹⁸

5.5.1 Cautioning

Cautions can take the form of an informal warning from a police officer to a young offender or a formal caution that will deflect the offender away from the formal court system. This second category of caution involves an officially recorded warning from police which is recorded often on police premises in the presence of the juvenile's family members.¹³⁹⁹ Cautioning is practiced across all Australian jurisdictions and is often covered by legislation.¹⁴⁰⁰

5.5.2 Conferencing

The emergence of family group conferencing in the 1990s generated much debate in the Australian jurisdiction. Although ultimately replaced by a statutory based scheme in New South Wales, the so-called Wagga or police facilitated model of conferencing represents the foundation of widespread acceptance across the Australian juvenile criminal justice jurisdictions.¹⁴⁰¹ The mechanics and philosophy of conferencing were heavily scrutinised in the 1990s, principally with regard to the merits or otherwise of the Wagga model as compared with the so-called New Zealand conferencing model. The New Zealand model is in the main facilitated by non-police personnel and has been widely taken up in the Australian jurisdiction.¹⁴⁰² The Wagga conferencing approach relies on the concept of 'reintegrative shaming', which invokes a measure of remorse in the offender yet does not promote stigmatisation. It is a concept that has been influential in the restorative justice movement although not without criticism, principally in the

¹³⁹⁸ T Allard et al, 'Police Diversion of Young Offenders and Indigenous Over-Representation' (Trends & Issues in Crime and Criminal Justice No 390, Australian Institute of Criminology, March 2010) 1 <http://aic.gov.au/media_library/publications/tandi_pdf/tandi390.pdf>.

¹³⁹⁹ Cunneen and White, above n 204, 364.

¹⁴⁰⁰ Australian Human Rights Commission, *Human Rights Brief No 5*, above n 629. See, eg, *Juvenile Justice Act 1992* (Qld) s 326; *Young Offenders Act 1994* (WA) s 22A.

¹⁴⁰¹ King et al, above n 1353.

¹⁴⁰² Daly and Hayes, above n 1349, 2.

area of significant structural inflexibility for indigenous juvenile offenders who display sizeable cultural and social variation from other offenders.¹⁴⁰³

The New Zealand model promotes the reintegration of juvenile offenders into communities and has been adopted generally across the Australian jurisdiction at the expense of the Wagga model, although both police and non-police facilitated conferencing is in operation at present.¹⁴⁰⁴ Consequently, conferencing for juvenile offenders across the Australian landscape has become ubiquitous, unlike the largely sporadic restorative justice options for adult offenders. These are less extensive and largely varied, although victim-offender mediation is generally available domestically and other restorative justice programs are offered for example in New South Wales for adults¹⁴⁰⁵ including conferencing as does South Australia.

The various methodological approaches to juvenile conferencing across the Australian landscape typically require admission of guilt by the juvenile offender and range from police-initiated diversion from court processes, conferencing ordered by courts as a diversion, sentencing and pre-sentence options or alternatives to a supervised order, for example, with recidivism reduction in juvenile offenders being an obvious imperative.¹⁴⁰⁶ In accordance with restorative justice aims, the conference generally seeks to involve the victim, offender and other participants such as parents, police representatives, support persons, etc in an attempt to apprise the offender of the effect of the offence on victim and community alike, encourage behavioural change, repair the harm caused by the offence and establish a future behaviour strategy typically described as an action plan to make amends for the offence. The overarching aim is to reintegrate the juvenile offender into the community.

¹⁴⁰³ H Blagg, 'A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia' (1997) 37(4) *British Journal of Criminology* 487.

¹⁴⁰⁴ Daly and Hayes, above n 1349, 2; K Richards, 'Police-Referral Restorative Justice for Juveniles in Australia' (Trends & Issues in Crime and Criminal Justice No 398, Australian Institute of Criminology, August 2010) 2-7 <http://aic.gov.au/media_library/publications/tandi_pdf/tandi398.pdf>.

¹⁴⁰⁵ King, et al above n 1353.

¹⁴⁰⁶ *Children and Young Persons Act 2008* (ACT) s 75; *Young Offenders Act 1997* (NSW) s 34; *Youth Justice Act* (NT) s 39; *Juvenile Justice Act 1992* (Qld) s 22; *Young Offenders Act 1993* (SA) s 10; *Youth Justice Act 1997* (Tas) s 37; *Children, Youth and Families Act 2005* (Vic) s 415; *Young Offenders Act 1994* (WA) s 24.

Conferencing also allows victims to participate in judicial proceedings in appropriate circumstances, play a role in determining the specifics of harm repair, seek answers and communicate their views to offenders. An advantage of conferencing that should not be underestimated particularly in the context of juvenile offending is the immediate response to offending behaviour that conferencing provides, effectively reducing contact with criminal justice agencies. This is a tangible benefit given the tendency for increased contact that is routinely experienced by juvenile offenders following initial exposure, particularly at an early age.¹⁴⁰⁷ Conferencing is generally not available where serious crimes have taken place such as unlawful killing.¹⁴⁰⁸ A brief summary of current juvenile justice conferencing measures employed by Australian states and territories will now be provided.

5.5.3 Australian Capital Territory

Conferencing programs for juvenile offenders commenced in a police-convened, unlegislated form during the 1990s in the Australian Capital Territory, which now has comprehensive restorative justice legislation¹⁴⁰⁹ allowing referral for juvenile offenders to conferencing by police, courts or post sentence.¹⁴¹⁰ Conference eligibility criteria include the juvenile offender's perceived impact of the offence, personal characteristics, motivation, remorse and contrition.¹⁴¹¹ Excluded offences include unlawful death, sexual offences, some drug offences and crimes of domestic and personal violence, with generally less serious offences being eligible for conferencing.¹⁴¹² Essential conference participants include the victim and their parent or substitute and the child or juvenile offender, while other participants can involve police, parent of offender, and various support persons.¹⁴¹³

¹⁴⁰⁷ Commonwealth of Australia, *National Youth Policing Model* (2010) 16
<<http://www.ag.gov.au/CrimeAndCorruption/CrimePrevention/Documents/NationalYouthPolicingModel.pdf>>.

¹⁴⁰⁸ *Ibid.*

¹⁴⁰⁹ *Crimes (Restorative Justice) Act 2004* (ACT).

¹⁴¹⁰ Richards, 'Police-Referred Restorative Justice for Juveniles in Australia', above n 1404, 1.

¹⁴¹¹ *Ibid.* 2.

¹⁴¹² *Crimes (Restorative Justice) Act 2004* (ACT) s 12.

¹⁴¹³ Richards, 'Police-Referred Restorative Justice for Juveniles in Australia', above n 1404, 2.

5.5.4 *New South Wales*

Unlegislated and police-convened during the 1991–1994 time period,¹⁴¹⁴ conferencing was implemented state-wide in New South Wales following the enactment of the *Young Offenders Act 1997* (NSW) in the late 1990s and requires that juvenile offenders consent to the conference. Attendees include the child offender, victim, legal representatives, parent and family members, and in suitable circumstances, other participants including community members, school personnel and social workers, amongst other parties.¹⁴¹⁵ Unlawful death, various sexual and drug offences and personal or domestic violence cases are excluded from conferencing determination.¹⁴¹⁶ Conferencing in New South Wales can be referred by both police and courts.¹⁴¹⁷

5.5.5 *Northern Territory*

The *Youth Justice Act* (NT) provides a legislative foundation for youth justice conferencing in the Northern Territory.¹⁴¹⁸ A ‘presumption of diversion’ is to be upheld whereby juveniles believed to have committed offences must be diverted from the traditional retributive criminal justice system unless a serious offence has been committed, including unlawful killing, inflicting grievous harm, robbery and some sex offences, or where the juvenile offender’s previous history deems her or him unsuitable.¹⁴¹⁹ Participants in the youth justice conference include the offender, victim and family members, although the legislation is silent on other likely attendees.

5.5.6 *Queensland*

In the Queensland jurisdiction, no specific offences are excluded from conferencing although police officers have discretionary power to consider the nature of the offence as to its suitability for conferencing.¹⁴²⁰ Police referrals to youth justice conferencing are

¹⁴¹⁴ Daly and Hayes, above n 1349, 3.

¹⁴¹⁵ Richards, ‘Police-Referred Restorative Justice for Juveniles in Australia’, above n 1404, 4.

¹⁴¹⁶ *Young Offenders Act 1997* (NSW) s 8.

¹⁴¹⁷ *Ibid* pt 5.

¹⁴¹⁸ *Youth Justice Act* (NT) s 39.

¹⁴¹⁹ Government of Northern Territory, *Questions & Answers. Youth Justice Act, 2* <http://www.nt.gov.au/justice/docs/legservs/youth_justice_questions_answers.pdf#search=%22diversion%22>.

¹⁴²⁰ Richards, ‘Police-Referred Restorative Justice for Juveniles in Australia’, above n 1404, 4.

the only available avenue in Queensland as of 2013 when court referrals were abolished subsequent to Queensland legislative amendments to the controlling *Youth Justice Act 1992* (Qld). Essential participants in conferencing are not specifically identified under the Queensland legislation but logically, in a similar fashion to other jurisdictions, offender, victim, parent or responsible person, conveners, legal representatives and police officers would likely be permitted as attendees in addition to other parties including Indigenous participants where appropriate.

5.5.7 South Australia

Conferencing buttressed by statutory recognition has long been available in the South Australian jurisdiction which is also high volume in nature.¹⁴²¹ Under the provisions of the *Young Offenders Act 1993* (SA), youth justice conferencing is available for minor offences and may involve the juvenile offender, police representative and youth justice coordinators who are either Youth Court magistrates or appointed to the role.¹⁴²²

Suitability is determined with reference to the amount of harm caused, the probability of recidivism, the offender's character, offence history and parental or guardian attitude.¹⁴²³ Conferencing can be initiated by courts and police whilst juvenile offenders and the Commissioner of Police are to agree on undertakings or decisions made in family conferences.¹⁴²⁴ In a similar fashion to other jurisdictions, participants in conferencing can include victims, offenders and support persons including parents and guardians.

5.5.8 Tasmania

In Tasmania youth justice conferencing was previously conducted by police in an unlegislated format during the mid to late 1990s, prior to the enactment of the supporting legislation.¹⁴²⁵ Offences excluded from youth justice conferencing determination in Tasmania include prescribed offences committed by juvenile offenders such as unlawful killing including murder, manslaughter, attempted murder, rape and

¹⁴²¹ Australian Law Reform Commission, above n 563, [18.47].

¹⁴²² Ibid.

¹⁴²³ Richards, 'Police-Referred Restorative Justice for Juveniles in Australia', above n 1404, 3.

¹⁴²⁴ Daly and Hayes, above n 1349, 4.

¹⁴²⁵ *Youth Justice Act 1997* (Tas).

sexual assault and serious property offences such as armed robbery.¹⁴²⁶ Youth justice conferencing can be instigated by police as diversion from court¹⁴²⁷ or by courts in sentencing. Essential attendees at youth justice conferences include offender, convener and police representative, while victims, familial and support persons, including Indigenous elders if required and other appropriate persons, can also be invited to proceedings. Outcomes must be agreed to by offender, police representative and victim if present.¹⁴²⁸

5.5.9 Victoria

Conferencing of juvenile offenders in Victoria commenced in an unlegislated non-government framework in 1995 that provided conferencing options for juvenile offenders who had previously appeared in courts.¹⁴²⁹ At present, conferencing is conducted pursuant to provisions in the *Children, Youth and Families Act 2005* (Vic). It is unique in that diversion to conferences is an available option for courts only with no police referrals permitted. It further requires the essential attendance of juvenile offender and legal practitioner, convener and police representative, whilst parents, victim and other personnel permitted by the convener, such as other significant persons, may also attend.¹⁴³⁰ Conferencing in Victoria is conducted by community-based concerns and provides courts with a diversionary alternative to youth supervision or probation orders, while courts must also consider conference participation by juvenile offenders during sentencing.¹⁴³¹

¹⁴²⁶ Ibid s 3(1).

¹⁴²⁷ Ibid s 15.

¹⁴²⁸ Richards, 'Police-Referred Restorative Justice for Juveniles in Australia', above n 1404, 3, 5.

¹⁴²⁹ Daly and Hayes, above n 1349, 3.

¹⁴³⁰ *Children, Youth and Families Act 2005* (Vic) ss 415(6)–(7).

¹⁴³¹ Richards, 'Police-Referred Restorative Justice for Juveniles in Australia', above n 1404, 2, 5.

5.5.10 Western Australia

Since the 1990s, Western Australia has engaged Juvenile Justice Teams¹⁴³² comprised of police officers, coordinators and cultural or ethnic group representatives¹⁴³³ in several locations to coordinate family group conferencing. The aim is to facilitate an ‘action plan’ or contract for the young offender to make amends for the offence that will not be recorded as a conviction if the plan is followed. Of particular relevance for this thesis is the ability of school representatives to participate in conference proceedings.¹⁴³⁴ Typical of conferencing and restorative methods generally, young offenders in Western Australia are entitled to dispense with the conference and return to the traditional juvenile justice system. The promotion of responsible citizenship is also an aim of the conference which is inextricably linked with parental influence in the development of the juvenile. As such, parental or alternative responsible adult contribution to the conference proceedings is fundamental to the success or otherwise of the conference process, as is the attendance of victims, although they are not obligated to do so and can instead articulate their views regarding the offence in writing.¹⁴³⁵ According to Malcolm, since the introduction of conferencing in Western Australia, positive results have been realised including program completion rates and solid outcomes following conference interventions.¹⁴³⁶ Schedule 1 and 2 offences committed by juveniles in Western Australia including unlawful killing, sexual and drug offences, criminal damage by fire and offences against the administration of justice are not able to be conferenced, however.¹⁴³⁷

5.5.11 Trends in Juvenile Justice Conferencing in Australia

Demographically, there is a consistent theme throughout the various Australian jurisdictions in the prevalence of male offenders being referred to conferences compared to females. This is unsurprising given the proportionally higher contact rates of juvenile males with the criminal justice system, most usually in a 3:1 ratio bracket, with a large

¹⁴³² *Young Offenders Act 1994* (WA) pt 5.

¹⁴³³ See 3.2.2 above for a brief discussion on Juvenile Justice Teams in Western Australian.

¹⁴³⁴ *Young Offenders Act 1994* (WA) s 37.

¹⁴³⁵ Department of Corrective Services, *Fact Sheet – Juvenile Justice Teams* (February 2010) Government of Western Australia <http://www.correctiveservices.wa.gov.au/_files/youth-justice/jjt-fact-sheet.pdf>.

¹⁴³⁶ Malcolm, above n 23, 32.

¹⁴³⁷ Richards, ‘Police-Referred Restorative Justice for Juveniles in Australia’, above n 1404, 5.

percentage of male offenders aged from mid to high teens often facing determination for property-related offences.¹⁴³⁸ Also common across the Australian jurisdictions is the preponderance of property offences referred to conferences, with substantial numbers of juveniles aged in the 10–14-year-old bracket being referred to conferences suggesting some disproportionality. In addition, similar numbers of male and female juveniles are referred to conferences¹⁴³⁹ indicating the possibility of net widening.¹⁴⁴⁰

Also of concern is the disproportionately higher representation of Indigenous juvenile offenders in criminal justice systems throughout Australia. These are not paired with conferencing rates suggesting that, although many diversionary measures for Indigenous offenders may be unavailable, particularly in remote areas, after controlling for age, gender, offending history and offence type there is a large discrepancy in Indigenous conferencing rates.¹⁴⁴¹ There are also similar Indigenous to non-Indigenous discrepancies in the use of other diversionary methods such as cautioning.¹⁴⁴² The overrepresentation of Indigenous youth offenders is of major concern as research has shown that such a discrepancy cascades with each discretionary stage in the criminal justice process, resulting in even higher levels in more serious processes and outcomes. This highlights the importance of adequate restorative measures to reduce the high initial contact of Indigenous youth with criminal justice systems.¹⁴⁴³ Although beyond the scope of this study, there have been some useful adult restorative justice programs¹⁴⁴⁴ such as in the ACT under legislation,¹⁴⁴⁵ for both serious and lesser offences,¹⁴⁴⁶ Western Australia,¹⁴⁴⁷ South Australia,¹⁴⁴⁸ New South Wales, Queensland, Victoria¹⁴⁴⁹ and other states.¹⁴⁵⁰

¹⁴³⁸ Ibid 8, 9.

¹⁴³⁹ Ibid 9.

¹⁴⁴⁰ See n 1378 above for a definition of net widening.

¹⁴⁴¹ Richards, 'Police-Referred Restorative Justice for Juveniles in Australia', above n 1404, 7.

¹⁴⁴² Allard et al, above n 1398, 4.

¹⁴⁴³ Ibid 1.

¹⁴⁴⁴ See Daly and Hayes, above n 1349, 3 for a discussion of the so-called 'reintegrative shaming experiments or RISE' during the mid-1990s in the Australian Capital Territory, which utilised conferencing for offenders aged up to the late 20s in specific categories including drink-driving.

¹⁴⁴⁵ *Crimes (Restorative Justice) Act 2004* (ACT) s 15.

¹⁴⁴⁶ Ibid.

¹⁴⁴⁷ See H Strang, *Restorative Justice Programs in Australia: A Report to the Criminology Research Council* (March 2001) 28 <<http://crg.aic.gov.au/reports/strang/report.pdf>> for a discussion on a pilot

As discussed earlier, restorative justice processes put forward an alternative justice script grounded in social relations and broader community participation combined with the direct participation of victim, offender and other stakeholders. The use of restorative justice methods in school discipline management therefore advances an alternative approach to punitive justice methods. This will be now be discussed, initially in light of experiences in Australian schools, then further expanded through the development of a rights-based approach to juvenile violence in schools framed in restorative justice methodology later in the chapter.

5.6 Australian Schools and the Use of Restorative Justice Practices

Restorative methods have some history in the domestic education arena as Australian schools have been viewed as pioneering in the approach to some extent.¹⁴⁵¹ The escalation of violent incidents and lethality in school violence,¹⁴⁵² in concert with the perceived inadequacy of existing school-based disciplinary management methods, have fuelled a search for new approaches and strategies to buttress student and staff safety in schools and by extension a heightened focus on alternative behavioural management scripts including those offered by restorative justice methods and practices.¹⁴⁵³ As a result, an increased focus on restorative methodology and practices has emerged as the mechanisms through which safety and behaviour are regulated at school level are indelibly linked to the behaviours that schools aim to strengthen and enhance during the

program conducted through the Fremantle Magistrates Court during the early 2000s that involved conferencing of male adult offenders who had entered a guilty plea in response to assault charges or property offences including larceny, stealing and burglary and fraud.

¹⁴⁴⁸ See R Sarre, 'An Adult Restorative Justice Pilot Project in South Australia' (Paper Presented at Third Conference of the European Forum for Victim-Offender Mediation and Restorative Justice, Budapest, Hungary, October 14–16 2004) 1 for a discussion on programs that offered victims and offenders an opportunity to discuss harm caused and restorative options for Magistrate Court offences in 2004, excluding those under control of the Mental Impairment Court.

¹⁴⁴⁹ See King et al, above n 1353, for a discussion on post-sentence restorative justice programs for adult offenders available in the New South Wales jurisdiction. Dispute Resolution Centres and active victim-offender mediation at all stages of the justice process are available in Queensland albeit restricted to the Magistrates Court, while designated Victorian neighbourhood justice centres can provide adult restorative justice initiatives.

¹⁴⁵⁰ Varnham, 'Keeping them Connected', above n 1370, 74.

¹⁴⁵¹ Morrison, *Restoring Safe School Communities*, above n 1347, 80.

¹⁴⁵² Noguera, above n 278.

¹⁴⁵³ Ibid.

restoration and regulation of safe school communities.¹⁴⁵⁴ This is an area in which restorative practices have the potential to make a positive impact.

5.6.1 Existing Formalised School Disciplinary Management

Notwithstanding the examples of restorative justice experiences to date that will soon be discussed, school disciplinary management in Australian schools has predominantly been grounded in familiar formal approaches. The primary form of school safety management can be described as so-called regulatory formalism, which is an approach reliant on institutional representatives that formalise moral assessment on the wrongfulness of actions followed by a legal assessment of appropriate punishment,¹⁴⁵⁵ where both problems and responses are essentially predetermined and are assigned through school rules and codes of conduct, including suspension and exclusion for more serious infractions.

Formalised responses include zero tolerance type approaches to school disciplinary management which typically identify disruptive and violent student behaviour and impose sanctions for infractions irrespective of magnitude.¹⁴⁵⁶ At first blush, suggests Morrison, punitive retributive responses such as these appear to be clear, consistent and responsive, yet lack flexibility in that they are not reactive to pivotal school community requirements as well as having a negative effect on emotional resilience and responsibility, resulting in a numbing rather than nurturing effect in both character and

¹⁴⁵⁴ Morrison, *Restoring Safe School Communities*, above n 1347, 96.

¹⁴⁵⁵ B Morrison, 'Schools and Restorative Justice' in G Johnstone and D W Van Ness (eds) *Handbook of Restorative Justice* (Routledge Press, 2013) 331. See 5.7.4 below for discussions on school punishment regimes in addition to the positive effects of suspension and exclusion of students for disobedience and misconduct. See 4.81 above for an overview of school disciplinary policy across Australia. See, eg, Education and Training, *Providing Safe Schools P-12*, above n 990, Education & Communities, *Student Discipline in Government Schools Policy*, above n 1007, Department of Education and Children's Services, *Safe Schools NT Code of Behaviour*, above n 1007, Department of Education, Training and Employment, *The Code of School Behaviour*, above n 1007, Department of Education and Children's Services, *School Discipline*, above n 1007, Department of Education, *Learner Wellbeing and Behaviour*, above n 1007, Department of Education and Early Childhood Development, *Building Respectful and Safe Schools*, above n 111, Department of Education and Training WA, *Behaviour Management in Schools*, above n 110.

¹⁴⁵⁶ M L Teasley, 'Shifting From Zero Tolerance to Restorative Justice in Schools' (2014) 36(3) *Children and Schools* 131.

practice.¹⁴⁵⁷ In their existing form, however, school discipline management plans and procedures largely focus on what should happen to offending students in the form of sanctions/penalties as a consequence of breach of school rules, whilst the impact on school community members who are affected by the disruptive behaviour is given scant regard.¹⁴⁵⁸

With limitations such as these inherent in retributive methods and the enthusiasm for the use of restorative methodology, it would now be opportune to track the implementation of group conferencing in Australian schools, which has in fact had a long gestation. A brief overview of selected Australian school conferencing programs will now be provided, with some focus on the more highly developed and successful innovations in Australian school settings.

5.6.2 Conferencing in Australian Schools

Conferencing in Australian schools had its genesis in the state of Queensland commencing in the mid-1990s. A significant number of schools pioneered the use of so-called community accountability conferencing modelled on juvenile justice practices to deal with serious incidents of school violence, including assault and serious victimisation in addition to school property damage and theft.¹⁴⁵⁹ This program resulted in some useful findings including low recidivism rates amongst the student cohort, high agreement compliance, general overall satisfaction with the conferencing process, and a sense that restorative methods offered wholesale advantage over punitive school disciplinary management policy.¹⁴⁶⁰ Other positive responses to the intervention included feelings of respect experienced by participants with fair outcomes, positive school perceptions by family members post-conference, and a belief that safer school environments with reinforced school values had been achieved.¹⁴⁶¹ It should also be noted that restorative justice practice and procedure can be complemented by more

¹⁴⁵⁷ Morrison, *Restoring Safe School Communities*, above n 1347, 97.

¹⁴⁵⁸ *Ibid* 183.

¹⁴⁵⁹ Varnham, 'Keeping them Connected', above n 1370, 76.

¹⁴⁶⁰ M Armstrong, M Tobin and M Thorsborne, 'Community Conferencing in Victorian Schools: Maximising Protective Factors' (Paper Presented at the Role of Schools in Crime Prevention Conference Melbourne, Australia 30 September–1 October 2002) 2.

¹⁴⁶¹ Morrison, *Restoring Safe School Communities*, above n 1347, 123.

familiar techniques of conflict resolution, such as counselling and mentoring for at-risk students, which can contribute to reducing episodic school violence by instructing students in non-violent dispute resolution, along with instructional curricula that explore ethical and moral violent behaviour issues for student benefit as well as conflict avoidance strategies.¹⁴⁶²

Restorative conferencing pilot programs and evaluations have been conducted in Victorian schools¹⁴⁶³ across a diverse band of government, non-government, metropolitan and rural schools dating from the late 1990s and early 2000s. These trialled conferencing using a professional development strategy encompassing training for school staff in restorative philosophy and methodology in order to resolve incidents of school violence and other behavioural infractions without resort to suspension or exclusion.¹⁴⁶⁴ This survey also reinforced that a whole of school approach to restorative methods is preferable in view of the inevitable frictions with traditional punitive disciplinary methods, a focus on the input of school leadership in conferencing, and the ongoing need for both collegiate support and adequate time allocation for solid training and instruction as well as conference facilitation.¹⁴⁶⁵ Another important finding from the survey concerned the difficulty of enmeshing restorative practice and policy in the administration of school discipline, resulting in a recommendation that reframing discipline management as relationship management could be a worthwhile strategy to infuse restorative justice methodology and practices at system and policy levels which would facilitate practical application within schools.¹⁴⁶⁶

These early experiences in Queensland and Victorian schools also highlighted a need for the inclusion of restorative practices within wider school disciplinary frameworks allowing broader coverage, in addition to further student development in the area of emotional learning in order for them to better articulate feelings. It is suggested that this

¹⁴⁶² Noguera, above n 278, 190.

¹⁴⁶³ G Shaw and A Wierenga, *University of Melbourne Restorative Practices/Community Conferencing Pilot 2002 Evaluation Final Report* (November 2002) 7
<http://www.varj.asn.au/Resources/Documents/02Vic_Schools_RestPract_Pilot_Report.pdf>.

¹⁴⁶⁴ Armstrong, Tobin and Thorsborne, above n 1460.

¹⁴⁶⁵ Morrison, *Restoring Safe School Communities*, above n 1347, 125.

¹⁴⁶⁶ Armstrong, Tobin and Thorsborne, above n 1460, 5.

will go some way toward curbing conflict when it arises and also better equip them as conference participants.¹⁴⁶⁷ A research project completed in the mid-2000s examined the use of restorative methods in Victorian schools and championed the whole of school approach in the use of restorative measures including in the teaching and learning area and more generally in the use of school-wide restorative language. This was combined with a shift in focus from behaviour to that of relationship management including the repair, nurturing and building of relationships across schools.¹⁴⁶⁸ This project employed a whole of school approach combined with a band of restorative strategies in four regional centres involving public and Catholic primary and secondary schools. It emphasised conflict resolution, relationship enhancement and educational inclusion, eschewing the existing methods in favour of preventative, early intervention and specific behaviour management. The project achieved encouraging outcomes including the use of restorative strategies in teaching and learning and curriculum development.¹⁴⁶⁹

Conferencing was introduced New South Wales schools during the late 1990s in the form of a pilot scheme that proposed conferencing as an alternative to exclusion and suspension, initially in response to school bullying and then extended to other school conflict issues. It enjoyed significant success, measured in the reduction of lost school days by students for disciplinary infractions.¹⁴⁷⁰ The success of school-based restorative methods within the New South Wales jurisdiction are worthy of some focus. For example, there is the case of the Churchill Fellowship Award winning Rozelle Public School in inner city Sydney which experienced a whole of school culture change over a two year period that included decreases in school suspensions and bullying incidents, increased community connectedness, better academic results by the student cohort and increased parental participation following the introduction of conferencing and other

¹⁴⁶⁷ Morrison, *Restoring Safe School Communities*, above n 1347, 125.

¹⁴⁶⁸ Melbourne Graduate School of Education, *Projects – Restorative Practice. Timeframe 2004-2005* (23 December 2013) University of Melbourne
<<http://web.education.unimelb.edu.au/yrp/projects/restorative.html>>.

¹⁴⁶⁹ *Ibid.*

¹⁴⁷⁰ H Strang, *Restorative Programs in the School Setting* (8 May 2014) Australian Institute of Criminology, Criminology Research Council
<<http://www.criminologyresearchcouncil.gov.au/reports/strang/school.html>>.

restorative measures such as circle processes and mediation.¹⁴⁷¹ The school achieved a worthwhile increase in capacity, leadership and sense of community, with particular emphasis on linkages between behavioural change and academic achievement and stakeholder empowerment and respect for the diversity of the student cohort, which was particularly prevalent at the school.¹⁴⁷²

Similarly, the inner city Lewisham Primary School in Sydney also represents a notable achievement in the use of restorative measures, principally in the form of conflict resolution and behaviour management systems in collaboration with local police and other agencies that aimed to provide safe, supportive and relevant learning conditions for students and safer environs for families and local communities.¹⁴⁷³ School teachers were provided with extensive training and ongoing instruction in restorative measures, which contributed to a change in behaviour management culture at the school.¹⁴⁷⁴ Ultimately, police attendance at the school was reduced whilst conferencing outcomes involving key stakeholders such as student offenders and victims, parents and teaching staff were also encouraging.¹⁴⁷⁵ Other worthwhile school-based restorative justice initiatives in New South Wales include community forum projects which complemented other promising measures such as peer mediation in response to school bullying and antisocial behaviour by students.¹⁴⁷⁶

The Australian Capital Territory has been particularly proactive in implementing and maintaining restorative methodology in the school behaviour management area, as seen in a series of studies dating from the mid-1990s that examined the important issue of shame management as a component of the healing process intrinsic in restorative practices, specifically in the context of how students both acknowledge and displace

¹⁴⁷¹ Welden L, 'Restorative Practices in Australia's Schools: Strong Relationships and Multi-School Summits Help Schools "Be and Learn" Together' (2008) *International Institute for Restorative Practices* 1.

¹⁴⁷² Ibid.

¹⁴⁷³ Morrison, *Restoring Safe School Communities*, above n 1347, 135.

¹⁴⁷⁴ Strang, *Restorative Programs in the School Setting*, above n 1470.

¹⁴⁷⁵ Morrison, *Restoring Safe School Communities*, above n 1347, 136.

¹⁴⁷⁶ Ibid 130.

shame management while oscillating into and out of school bullying behaviours.¹⁴⁷⁷ Important findings that support flexibility in behavioural change interventions such that risk and protective factors can be adequately addressed, socially responsible relationship building and appropriate and contextual response to school violence in the form of bullying are all key factors in dealing with forms of school violence.¹⁴⁷⁸

In 2000 the Australian Capital Territory Education Department provided support for training in restorative methodology for staff facilitated by independent consultants in order to address bullying and harassment, inter-staff disputes and other conflicts.¹⁴⁷⁹ Research conducted by the Australian National University showed that shame management is a useful mediation variable in addressing the linked issues of bullying and victimisation in school settings.¹⁴⁸⁰ In recognising that cultural change is required for the sustainable success of restorative methodology in schools, the Australian Capital Territory has employed a multifaceted approach to professional development and support for school-based practitioners in order to engage and nourish leadership, the development of localised expertise and support networks, quality of planning and a high concentration of quality restorative practices in schools.¹⁴⁸¹ A further salient characteristic of the program relates to the need to first change adult behaviour in the process, as students necessarily gain expertise and understanding in the process of conflict resolution principally through the role modelling of effective and equitable practice by teachers.¹⁴⁸²

South Australian pilot restorative justice in schools programs commenced in 2005 and identified similar requirements to the Victorian, Australian Capital Territory and New South Wales based programs that should be addressed to by schools when implementing

¹⁴⁷⁷ E Ahmed and V Braithwaite, 'Learning to Manage Shame in School Bullying: Lessons for Restorative Justice Interventions' (2012) 20 *Critical Criminology* 79.

¹⁴⁷⁸ *Ibid.*

¹⁴⁷⁹ Strang, *Restorative Programs in the School Setting*, above n 1470.

¹⁴⁸⁰ Varnham, 'Keeping them Connected', above n 1370, 77.

¹⁴⁸¹ P Blood, 'The Australian Context-Restorative Practices as a Platform for Cultural Change in Schools' (Paper Presented at the XIV World Congress of Criminology Preventing Crime & Restorative Justice: Voices for Change Philadelphia, USA August 7-11 2005) 11.

¹⁴⁸² *Ibid* 12.

useful, practical and sustainable school-based restorative measures. Essentially, the need for leadership, skills training for staff and essential community relationship building which assists in effective framework building and encourages self-regulation.¹⁴⁸³

Significantly, the South Australian pilot was found to be compliant with departmental policy directives and also resulted in: support from school staff following training in restorative methods, encouragement of staff-student relationships that manifested in more effective teaching and learning in addition to increased potential for reduced staff stress as a consequence, partnership development between schools and parents following behavioural incidents, encouragement of personal responsibility by students, improved social skills and an overarching sharing of responsibility for behavioural management across schools, staff teams, parent groups and students.¹⁴⁸⁴

In the Western Australian jurisdiction, school-based restorative justice programs were evident by the mid-1990s. For example in 2005 a rural high school commenced staff training in restorative methodology techniques for use in dealing with incidents of school violence along with theft and vandalism offences with a focus on building respect amongst the student cohort and reduction in interpersonal conflict and antisocial behaviour¹⁴⁸⁵ with a number of schools also participating in restorative behaviour management philosophies.¹⁴⁸⁶

5.6.3 Lessons Learned From Conferencing in Australian Schools

Trends emerging from the introduction of conferencing in Australian schools are encouraging with positive outcomes reported by facilitators, students, administrators, teaching staff and family members. Among other positive results, there have been good

¹⁴⁸³ Standing Committee on Education, Training and Young People, Parliament of the Australian Capital Territory *Inquiry into Restorative Justice Principles in Youth Settings: The Management of Bullying, Harassment and Violence in ACT Government Schools* (2007) 58.

¹⁴⁸⁴ *Ibid* 59.

¹⁴⁸⁵ Department of Education and Training, Government of Western Australia, 'EGSHS Takes Innovative Approach to Misconduct' (Media Statement, 16 December 2004) <https://www.det.wa.edu.au/docs/EGSHS_Restorative_Justice_Dec_2004a.pdf>.

¹⁴⁸⁶ See, eg, Dalyellup College, an independent school located in the south west of Western Australia that has committed to the Positive Behaviour Support Approach using restorative justice practices. See Dalyellup College, Business Plan 2013–2015 (2013) <<http://www.dalyellupcollege.wa.edu.au/wp-content/uploads/2013/05/Business-Plan-PDF.pdf>>.

compliance agreement rates and improved facilitator confidence and expertise,¹⁴⁸⁷ low reoffending rates, an increased sense of safety among victims and reinforcement of school values.¹⁴⁸⁸ Despite enthusiasm for the use of restorative practices and methodologies in schools, accomplishing substantial change will be challenging,¹⁴⁸⁹ not least in the area of resource allocation and legislative change which is also common to initiating change in criminal justice systems, according to Varnham.¹⁴⁹⁰

It is important not to underestimate the challenges faced by school administrators in addressing the tension between generating a positive and engaging learning environment while holding students accountable for their actions.¹⁴⁹¹ As discussed above with regard to the Australian experience of restorative practices in schools, it is critical that a whole of school approach underpins the restorative justice in schools strategy, in order to achieve a sustainable cultural change in school discipline management.¹⁴⁹² The effectiveness of a whole of school approach is also contingent on the significance and participation of both students and parents in the scheme, as is effective alignment with policy, practice, professional learning and effective leadership in order to provide a sound structure for the implementation and success of restorative justice methodology and practice in schools.¹⁴⁹³

Nonetheless, in spite of enthusiasm and positive feedback for restorative practice initiatives in Australian schools such as those mentioned above, widespread implementation remains scant and sporadic with wholesale change reliant on legislative and policy activism along with professional staff development and training.¹⁴⁹⁴ Policy development at governmental level, legislative change and training of student teachers

¹⁴⁸⁷ Armstrong, Tobin and Thorsborne, above n 1460, 4.

¹⁴⁸⁸ Varnham, 'Keeping them Connected', above n 1370, 76, 77.

¹⁴⁸⁹ Blood, above n 1481, 13–14.

¹⁴⁹⁰ Varnham, 'Keeping them Connected', above n 1370, 79–80.

¹⁴⁹¹ Ibid 80.

¹⁴⁹² G Shaw, 'Restorative Practices in Australian Schools: Changing Relationships, Changing Culture' (2007) 25(1) *Conflict Resolution Quarterly* 133.

¹⁴⁹³ Ibid.

¹⁴⁹⁴ Varnham, 'Keeping them Connected', above n 1370, 79.

as well as existing teachers and other school staff in the techniques and philosophies of restorative justice practices is preferred.¹⁴⁹⁵

Also of concern is the lack of suitability of conferencing for less serious behavioural concerns, which has compromised the widespread uptake of restorative practice and methodology in Australian schools despite the promising use of conferencing in defusing serious school behavioural incidents.¹⁴⁹⁶ Mindful of this shortcoming, the development of a more sustainable restorative justice approach to discipline management in Australian schools that displays due deference to the human rights of children and juveniles, incorporating conferencing as well as other strategies targeted at lower level intervention, will be outlined later in the chapter. The discussion will now turn to the important linkages and synergies between the juvenile criminal justice system and school disciplinary management, in addition to the broader society and community implications of a restorative justice approach to school violence. This includes the encouragement of behavioural change in at-risk juvenile offenders in education settings in order to interrupt the schoolyard to jail yard passage common in juvenile offenders.

5.7 Linkages Between Restorative Justice in the Juvenile Criminal Justice System and in Schools

Prior to a discussion on the development of a rights-based restorative justice approach for more widespread uptake in Australian schools, important synergies and linkages associated with the use of restorative practices for dealing with school disciplinary management will be discussed. The sustained use of restorative justice practices and methodology in Australian schools will be beneficial in attenuating school violence and interrupting the schoolyard to jail yard passage of at-risk juveniles. Importantly for the purposes of this thesis, important associations between criminal justice and education agencies when addressing juvenile violence will be addressed. Fundamentally, the criminal justice system is one that is grounded in correction for illegal behaviour whereas schools are concerned with engagement in the education process and teaching

¹⁴⁹⁵ Ibid.

¹⁴⁹⁶ Blood, above n 1481, 10.

and learning.¹⁴⁹⁷ The prevention of antisocial behaviour does, however, remain a legitimate objective for schools.

More to the point, according to Morrison, the two systems operate under different mandates as the criminal justice system is concerned with human and social order whilst the education system is concerned with human social development.¹⁴⁹⁸ Distinct differences between the two agencies are also prominent, such as in the language used. For example, the victim and offender are unlikely to know of each other in the criminal justice system in contrast to the school environment which is typically a tight knit community where social influence patterns change on a daily basis.¹⁴⁹⁹ Therefore, as Gonzalez suggests, the escalation of relatively minor incidents in school settings is exacerbated due to the increased likelihood that offender and victim will see each other again in short order, which is not the case in the criminal justice system.¹⁵⁰⁰

An illustration of the differing purposes of the of the two agencies can be seen in *R v Ng*,¹⁵⁰¹ where Keene JA was of the opinion that punishment, insofar as the provisions of the *Education (General Provisions) Act*¹⁵⁰² is concerned, is designed to facilitate school management for the benefit of the school and the extended community through the maintenance of order in the state enterprise of universal education. It is not analogous with state-sanctioned punishment for infractions of the criminal law.¹⁵⁰³ Therefore, as was the case in *R v Ng*, it is not possible to successfully claim that school chastisement necessarily prevents additional state-initiated criminal sanction against the student in the form of double punishment.¹⁵⁰⁴

¹⁴⁹⁷ Varnham, Booth and Evers, above n 641, 92.

¹⁴⁹⁸ Morrison, 'Schools and Restorative Justice', above n 1455, 344.

¹⁴⁹⁹ Ibid.

¹⁵⁰⁰ T Gonzalez, 'Keeping Kids in School: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline' (2012) 41(2) *Journal of Law & Education* 304.

¹⁵⁰¹ *R v Ng* [2006] QCA 218.

¹⁵⁰² *Education (General Provisions) Act 1989* (Qld).

¹⁵⁰³ *R v Ng* [2006] QCA 218, 73 (Keene JA).

¹⁵⁰⁴ Varnham, 'Seeing Things Differently', above n 38, 100; Monohan and Young, above n 516, 319.

5.7.1 Synergies Between Schools and Criminal Justice Systems

As a consequence of this fundamental point of departure between the criminal justice and education systems, some resistance has emerged with regard to the introduction and use in school settings of restorative methods and philosophy originating in the criminal justice system.¹⁵⁰⁵ However, schools do have some kinship with criminal justice agencies in the important areas of order, justice and punishment, which are areas in which restorative practice and methodology have something to offer. This is because these ideals can be associated with educational inclusion and the enhancement of social relationships through the restorative process which aims to achieve the binary goals of offender accountability and the repair of severed relationships.¹⁵⁰⁶

Also of significance is the notion that schools by their very nature are obligated to maintain a somewhat delicate balance in their environment by managing both student-student and student-teacher behaviour. Caution should be exercised in distinguishing criminal conduct that ought to be reported to police from behaviour that can and should be within the scope of school community resolution.¹⁵⁰⁷ Nonetheless, there is an apparent synergy between the two agencies as an offence is seen as a violation against the 'state' which must not go unpunished by the criminal justice system, and this philosophy is imitated in school discipline management policy, legislation and attendant processes as school rule infractions or antisocial behaviour are likewise viewed as an offence deserving of punishment by schools who are in effect representing the 'state' by ordering sanctions such as detention or exclusion.¹⁵⁰⁸

According to commentators such as Drewery and Winslade,¹⁵⁰⁹ schools have to some extent traditionally mirrored the machinations of the criminal justice system, as discipline management in schools is often quasi-judicial in nature and in both criminal justice and school disciplinary contexts, offences are arguably an affront to authority. In

¹⁵⁰⁵ Morrison, *Restoring Safe School Communities*, above n 1347, 151.

¹⁵⁰⁶ Shaw, above n 1492, 128.

¹⁵⁰⁷ *Inquiry into Restorative Justice Principles in Youth Settings Report*, above n 1483, 72.

¹⁵⁰⁸ Varnham, 'Keeping them Connected', above n 1370, 72.

¹⁵⁰⁹ W Drewery and J Winslade, 'Developing Restorative Practices in Schools: Flavour of the Month or Saviour of the System?' (Paper Presented at the AARE/NZARE Conference. Auckland, December 2003) 6.

both systems there is seemingly more concern for the infraction than the damage to victims, who are predominantly valued for their evidentiary input and ability to assist in upholding authority. The major difference is that the criminal justice response to serious offences is to incarcerate offenders, whereas serious offenders in a school-based system are excluded from the institution.¹⁵¹⁰

Moreover, this can result in the reestablishment of community ties rather than the sense of alienation often experienced by victim and offender following an act of violence. This is of greater benefit to the societies who must support those who traverse the justice and health care systems.¹⁵¹¹ Likewise, in addressing juvenile violence, it would be more useful for juvenile criminal justice agencies to recognise that schools represent a central community focus that justifies a practical working relationship extending to information and resource sharing and other responsibilities, in order to achieve the common goal of reduced juvenile violence in schools, communities and within domestic situations.¹⁵¹²

5.7.2 Behavioural Change in At-risk Juvenile Offenders

Another important union between the management of school violence and community violence concerns prospective offending and behavioural change such as the indoctrination of individual and community responsibility in juvenile offenders. This remains largely absent from the traditional punitive criminal justice systems that are typically counterintuitive to such social purposes and teachings.¹⁵¹³ Moreover, individual character deficit is conceptualised in both arenas as a core focus of disciplinary action as a result of offenders being routinely defined by their offence.¹⁵¹⁴ The reintegration of those affected by wrongdoing, including victim and offender, as valued, responsible and resilient community members who uphold values and laws is a

¹⁵¹⁰ Ibid 7.

¹⁵¹¹ B Morrison, 'Restorative Justice and School Violence: Building Theory and Practice' (Paper Presented at the International Conference on Violence in Schools and Public Policies, Palais de l'UNESCO, Paris, France, March 5–7 2001) 1.

¹⁵¹² K Cann, 'Do Schools Have a Role to Play in Crime Prevention? Use of the Protective Behaviours Program in Schools as a Primary Prevention Strategy' (Paper Presented at the Role of Schools in Crime Prevention Conference, Melbourne, Australia September 30–October 1 2002) 2.

¹⁵¹³ Varnham, 'Keeping them Connected', above n 1370.

¹⁵¹⁴ Drewery and Winslade, above n 1509, 7.

more than worthwhile benefit of restorative methods such as conferencing which effectively connects them with law supporting rather than law neutralising identities.¹⁵¹⁵

Despite a deficiency in policy development and academia's lack of appreciation¹⁵¹⁶ for the contribution of schools in restorative justice literature,¹⁵¹⁷ it is worth pursuing the potential for schools to have a positive effect on future behaviour patterns of juveniles through early intervention using discipline management policy and practice grounded in restorative methodology, particularly as disengagement from education can lead to misbehaviour within and outside school settings.¹⁵¹⁸ This viewpoint is especially relevant given the lack of flexibility inherent in juvenile criminal justice systems where such timely influence is generally unavailable and ramifications are typically imposed post offence, diluting rehabilitative and behavioural change prospects.¹⁵¹⁹ Constructive, school-wide discipline management can therefore have a positive effect on delinquency and risk in schools when an active effort is made by schools to initiate and maintain comprehensive emotional, educational and social support services with clear expectations for all stakeholders in school communities.¹⁵²⁰ This accords a potential wider community benefit in reduced levels of juvenile violence and offending in at-risk school-aged juveniles.

The community benefit aspect is of fundamental importance given the preferred ageing out of juvenile offenders rather than escalation toward adult offending that so often is the case. Insofar as meaningful focus on antisocial and criminality patterns in children and juveniles is concerned, schools may in fact represent the most influential of all societal institutions,¹⁵²¹ as well as being principal developmental institutions.¹⁵²²

¹⁵¹⁵ B Morrison, 'Bullying and Victimisation in Schools: A Restorative Justice Approach' (Trends & Issues in Crime and Criminal Justice No 219, Australian Institute of Criminology, February 2002) 3 <<http://aic.gov.au/documents/0/B/7/%7B0B70E4C9-D631-40D2-B1FA-622D4E25BA57%7Dt219.pdf>>.

¹⁵¹⁶ Cann, above n 1512.

¹⁵¹⁷ Roche, above n 1373, 224.

¹⁵¹⁸ Varnham, 'Keeping them Connected', above n 1370, 72.

¹⁵¹⁹ Ibid.

¹⁵²⁰ J D Sharkey and P A Fenning, 'Rationale For Designing School Contexts in Support of Proactive Discipline' (2012) 11 *Journal of School Violence* 97.

¹⁵²¹ Armstrong, Tobin and Thorsborne, above n 1460, 4.

¹⁵²² Morrison, 'Bullying and Victimisation in Schools', above n 1515, 6.

According to Cann, schools offer an unparalleled opportunity as a platform for early prevention,¹⁵²³ particularly as a primary developmental institution in that the implementation of restorative justice and responsible regulation in school programs can provide an investment in justice that goes beyond simplistic one-off opportunities following school violence incidents and encompasses the multifarious and emergent difficulties experienced by those in the school system.¹⁵²⁴

Early intervention and prevention in the form of school-based initiatives targeted at juvenile offenders is of fundamental importance in diminishing the escalation of offending and violent acts toward adult criminal activity.¹⁵²⁵ Further, juveniles who have developed a solid attachment, commitment and belief in pivotal societal institutions such as schools are more inclined to conform with social norms and less likely to engage in delinquent and deviant behaviour with reduced exposure to violence being a useful result.¹⁵²⁶ Educators would therefore be well advised to create school climates where norms and values are viewed positively and improvement in school hour socialisation is a worthwhile goal.¹⁵²⁷ Reyneke suggests that improvement in student academic performance generated by a climate of safety and security is also a benefit, along with the enhanced relationships with teaching staff that follow improved classroom discipline.¹⁵²⁸

In operating as a risk component that potentiates school violence or alternately as adaptive adjustment for at-risk children,¹⁵²⁹ schools can be a locus for the prevention and reduction of both crime and violence. This is particularly so in the dilution of crime pathway precursors or recognised risk factors along with the important advancement of

¹⁵²³ Cann, above n 1512.

¹⁵²⁴ B Morrison, 'Building Safe and Healthy School Communities: Restorative Justice and Responsible Regulation' (Paper Presented at the Sixth Annual Conference on Conferencing, Circles and Other Restorative Practices: Building a Global Alliance for Restorative Practices and Family Empowerment, Sydney, Australia, 3–5 March 2005) 97.

¹⁵²⁵ Malcolm, above n 23, 25.

¹⁵²⁶ A A Peguero, 'Opportunity, Involvement and Student Exposure to School Violence' (2009) 7(4) *Youth, Violence and Juvenile Justice* 301.

¹⁵²⁷ Alexander and Curtis, above n 311, 75.

¹⁵²⁸ Reyneke M, 'The Right to Dignity and Restorative Justice in Schools' (2011) 14(6) *Potchetstroom Electronic Law Journal*, 154.

¹⁵²⁹ Baker, above n 281, 30.

resiliency and protective factors at formative stages in a juvenile's life such as adolescence.¹⁵³⁰ By contrast, punitive disciplinary measures in schools have the potential at least to perpetuate violence and antisocial behaviour as a result of inflexible adherence to social control, which can be burdensome for students, staff and wider school communities. Noguera argues that this is particularly the case when enforcing zero-tolerance type strategies that contribute little to school safety and actually interrupt learning and engender mistrust and resistance.¹⁵³¹ Retributive school behavioural management approaches typically employ an adversarial process centred on an authoritarian figure such as a principal or teacher who administers the process and seeks to establish the offending student's guilt and punishment, in order to deter and prevent future offending, frequently through school suspension or exclusion. The consequence is that one social injury is substituted for another.¹⁵³²

Instead, comprehensive school-based crime and violence prevention strategies which target risk factors such as low self-esteem, social competency and performance, lack of self-control and victimisation while enhancing protective elements including positive and caring relationships, achievement, attachment to significant others and participation are useful initiatives, particularly when combined with family and community stakeholder involvement.¹⁵³³ Further, healthy school-based relationships are a consistent theme of pedagogy and discipline in education theory and are also an area where evidence and research support the effectiveness of restorative methodology and practice in both the creation and enhancement of such relationships.¹⁵³⁴ This can bolster the protective and resilience elements so important in the lives of at-risk juveniles.

This potential enhancement in the life skills of at-risk juveniles raises an important issue. The traditional role of schools has seemingly been to impart knowledge and skills

¹⁵³⁰ M O'Connell, 'Crime Prevention Curriculum in South Australian Schools: A Study of Programmes, Materials and Initiatives' (Paper Presented at the Role of Schools in Crime Prevention Conference, Melbourne, Australia, 30 September–1 October 2002) 2.

¹⁵³¹ Noguera, above n 278.

¹⁵³² Reyneke, above n 1528, 134.

¹⁵³³ O'Connell, above n 1530.

¹⁵³⁴ Blood, above n 1481, 3.

in a number of areas and reflect and uphold the social mores of the time, such as in hygiene, discipline, morality, fitness and good manners. However, a metamorphosis of sorts has taken place in schools and in the wider community that has resulted in an increased recognition for the child or juvenile as a whole person.¹⁵³⁵ As a consequence of this anthropological shift, schools have become more prominent in the lives of children and juveniles at the expense of parents who have become less visible in their children's lives for a variety of reasons including the demise of the extended family, increased prevalence of single parent and blended families, economic uncertainty, and the absence of traditional frames of reference like the church.¹⁵³⁶ As a corollary of the increased expectations of personal autonomy and nurturing demands, schools are in effect parenting more, and parents less so, with schools now filling voids and assuming social and emotional roles once the preserve of families. However, this has not resulted from an increased understanding of the plight of children and juveniles or increased respect.¹⁵³⁷

In the context of a rights-based restorative justice approach in school, participation remains a decisive factor that will be explored more comprehensively in the next part of the chapter. The focus on risk and protective factors is salient in the context of school-based violence intervention programs. Research in this context has indicated that even in the presence of risk factors, the development and maximisation of protective factors has a positive effect on diminishing antisocial juvenile behaviour and escalation to increased contact with the criminal justice system.¹⁵³⁸ Regulation and restorative justice within the school setting calls for an appropriate response to behavioural issues and the restoration of relationships which, according to Morrison,¹⁵³⁹ is very different from existing school disciplinary management approaches that target behaviour and the rules associated with behaviour. Such incident based responses are compromised in the sense that school administrators are reacting to what is known about a specific incident instead of having

¹⁵³⁵ R Sullivan, 'Schools and Their Response to Children as Victims of Crime' (Paper Presented at the Children and Crime: Victims and Offenders Conference, Brisbane, Australia 17–18 June, 1999) 3.

¹⁵³⁶ Ibid.

¹⁵³⁷ Ibid.

¹⁵³⁸ O'Connell, above n 1530.

¹⁵³⁹ Morrison, 'Building Safe and Healthy School Communities', above n 1524, 108.

a focus on promoting the unacceptability of school violence through the promotion of a whole of school culture that denounces such behaviour based upon systemic conflict resolution embedded in schools.¹⁵⁴⁰

The behavioural change conundrum is salient in school-based discipline management regimes given that offenders are typically unaware of the true extent of the impact that violence and other offences has on victims, school communities and other stakeholders.¹⁵⁴¹ In this respect, restorative justice methods such as conferencing can offer an opportunity for a ‘teachable moment.’ That is, consequences can be more clearly communicated to the offender in the form of relationship repair following an offence, including a greater understanding and sharing of the harm and its outcomes,¹⁵⁴² and in a sense transformation. Offending students are provided with an opportunity to gain insight into justice, citizenship and the benefit of positive relationships as restorative environments inculcate the notions of student voice, democracy and participation.¹⁵⁴³ Consequently, a change in the focus from offending as character flaw and deficit to relationship building within school communities, such that school violence offences are viewed as harmful to relationships rather than personal challenges against school authority, will require a culture change from demand for retribution toward the repair of injured relationships.¹⁵⁴⁴

5.7.3 Broader Community Implications

In contrast, it would seem that retributive school behavioural management fails to adequately safeguard the pivotal relationship building and maintenance that effectively sustains the health and wellbeing of school communities,¹⁵⁴⁵ with students exposed to restorative methods typically experiencing a distinct sense of belonging, commitment and a sense of shared enterprise centred on academic achievement.¹⁵⁴⁶ Further,

¹⁵⁴⁰ L M Christensen, ‘Sticks, Stones and Schoolyard Bullies: Restorative Justice, Mediation and a New Approach to Conflict Resolution in Our Schools’ (2009) 9(3) *Nevada Law Journal* 551, 574.

¹⁵⁴¹ Costello, Wachtel and Wachtel, above n 1393, 53.

¹⁵⁴² Ibid.

¹⁵⁴³ Shaw, above n 1492, 131.

¹⁵⁴⁴ Drewery and Winslade, above n 1509, 7.

¹⁵⁴⁵ Morrison, ‘Building Safe and Healthy School Communities’, above n 1524, 108.

¹⁵⁴⁶ Baker, above n 281, 30.

restorative justice conferencing in school settings upholds the rights of innocent members of school communities who have suffered because of the actions of relatively few offenders and promotes school community involvement as well as the voicing of school community concerns.¹⁵⁴⁷

From the perspective of psychological analysis, school violence is a manifestation of a misfit between the developmental capacity of violent students and the social context of the school discouraging school community participation¹⁵⁴⁸ and diminishing benefits of school community membership. The school community aspect is worthy of some unpacking given the status that schools occupy within the wider community. Schools themselves can quite correctly be considered communities as they reflect the bureaucracy, shared cultural values, including a focus on education, social mechanisms and behavioural patterns that are effectively mirrored in wider communities.¹⁵⁴⁹

Reyneke¹⁵⁵⁰ emphasises that school communities are of course entitled to a sustainable learning culture where there is respect for all involved in interventions following a violent incident, establishing a community of care around victim and offender through the use of restorative methodology and practices.

In turn, restorative justice practices enrich school community connectedness through the formation, nourishment and maintenance of healthy relationships which remain essential protective mechanisms for young people, in addition to helping create a more compassionate, resilient and respectful school community.¹⁵⁵¹ The collective relationships present in functioning school communities can be enhanced through the use of successful restorative practices and methodologies as pivotal relationship building such as between staff, student cohort, administrators and the like can engender a sense

¹⁵⁴⁷ Reyneke, above n 1528, 153.

¹⁵⁴⁸ Baker, above n 281, 30.

¹⁵⁴⁹ Peguero, above n 1526, 300.

¹⁵⁵⁰ Reyneke, above n 1528, 141.

¹⁵⁵¹ G Fouracre, 'The Restorative School. Building a Respectful School Culture Through Restorative Justice' (2010) 35(2) *Independence* 18.

of belonging, dependence and faith in greater school communities with attendant implications for the school's efficacy, safety and overall success.¹⁵⁵²

In addition, school communities can better respond to an incident by facilitating the transfer of harm or wrongdoing back to the community most acutely effected. The school community then enables the damage to be addressed through the processes of resolution by taking the initiative to address and reduce the risk of recidivism, promote restitution or harm repair, and finally facilitate reconciliation or emotional healing.¹⁵⁵³

Another school community advantage that can be attributed to restorative methods is the redeeming quality of allowing offending students to reclaim their good name and status within school communities following confrontation of their offence and the conferencing process, whereas stigmatisation and labelling can be both a lasting impediment in reclaiming vital school community membership and a decisive factor in the adjustment of future conduct by misbehaving students.¹⁵⁵⁴ Stigmatisation, labelling and negative stereotyping remain of significant importance given research findings into school shooting incidents overseas, particularly in the United States,¹⁵⁵⁵ that identified alienation, marginalisation, lack of respect and social status, and insufficient connectedness with school communities amongst juvenile shooters who symbolically targeted schools in their attacks.¹⁵⁵⁶

Moreover, the feeling of respect and pride in school community membership and the resultant emotional value also has implications for the use of restorative practices in schools where power imbalances that compromise social relationships in school settings can be addressed by the strengthening of support and accountability mechanisms.¹⁵⁵⁷ It is also important to note that the creation of safe spaces to ventilate stories of harm and

¹⁵⁵² Peguero, above n 1526, 300.

¹⁵⁵³ Morrison, *Restoring Safe School Communities*, above n 1347, 97.

¹⁵⁵⁴ Costello, Wachtel and Wachtel, above n 1393, 63.

¹⁵⁵⁵ See n 339 above for examples of fatal episodic school violence in the United States and other locations.

¹⁵⁵⁶ B Morrison, 'Restorative Justice in Schools' in E Elliot and R Gordon (eds) *New Directions in Restorative Justice* (Taylor and Francis, 2013) 31.

¹⁵⁵⁷ Morrison, 'School Bullying and Restorative Justice', above n 1389, 372.

hope using restorative practices remains an important social agenda for schools and society at large. This has been reinforced by research into deadly school shootings which suggests that students are eminently concerned with their social standing and see threat to status in the same light as threat to life and as a result feel that it must be vigorously defended.¹⁵⁵⁸ Restorative practices such as conferencing provide forums where juveniles can feel valued, powerful and needed, which is pivotal in the journey toward adulthood and plays a role in addressing school violence.¹⁵⁵⁹

Restorative interventions in school communities also encourage stakeholder participation to address school safety which is seen as a community rather than a third party problem and therefore necessitates a community-based solution that differs fundamentally from traditional punitive methods which are structured formally and effectively deny school community input into school safety.¹⁵⁶⁰ Restorative school policy and practices therefore need to be not only responsive to individual needs but also community needs which effectively demands the bridging of the school and the wider community and continuous monitoring and development as difficulties are likely to arise relatively frequently, including non-conformity by students.¹⁵⁶¹

The dignity of students following restorative interventions such as conferencing is also a positive consequence that should not be underestimated. Working in an environment where harm has been repaired encourages an improved work ethic in students where the development of talent and achieving of potential is enhanced whilst feelings of exclusion are diminished.¹⁵⁶² Membership of school communities remains a pivotal issue for juveniles given the tendency for at-risk students to not engage with school community life to the detriment of emotional attachment and perceived care.¹⁵⁶³ This being the case, Calhoun and Daniels suggest that restorative justice methodology through the use of conferencing, for example, can contribute to safer and more caring

¹⁵⁵⁸ Ibid 390.

¹⁵⁵⁹ Ibid.

¹⁵⁶⁰ Morrison, *Restoring Safe School Communities*, above n 1347, 97.

¹⁵⁶¹ Morrison, 'Building Safe and Healthy School Communities', above n 1524, 109.

¹⁵⁶² Reyneke, above n 1528, 154.

¹⁵⁶³ Baker, above n 281, 30.

learning communities that are equipped to deal with acts of wrongdoing in an inclusive fashion which requires the active involvement of the many stakeholder parties.¹⁵⁶⁴

5.7.4 Punishment Regimes

In the debate of restorative versus punitive justice in school environments, there is continued tension between the merits or otherwise of traditional methods compared to healing approaches when dealing with antisocial or violent offending in school settings. There remains, of course, much conjecture among many in society as to what constitutes school-based punishment, with anything less than visible punishment and retribution often seen as excessively lenient. These are societal attitudes that will take some time to change which also demand that the sustainable and successful implementation of restorative practices in school environments be combined with better understanding of the processes, philosophy and advantages by schools and the wider community.¹⁵⁶⁵

Philosophical differences continue to exist between educators and school policy over the merit or otherwise of existing school-based disciplinary management and those of restorative methodology, particularly as positive relationship building and sustainment of restorative methodology is at odds with the traditional control and punishment approach for dealing with disruptive and violent behaviour in school settings.¹⁵⁶⁶ Given that this landscape is further exacerbated by perceptions held by many educators and parents that punishment is the appropriate response to disruptive behaviours such as school-based violence, with an intentional focus on power and control elements, it would be prescient to provide quality explanation combined with extensive consultation before the implementation of restorative practices such as family group conferencing in schools.¹⁵⁶⁷

In this context however, restorative methodology offers an opportunity within the arena of school violence behavioural management to straddle elements of both punitive and

¹⁵⁶⁴ A Calhoun and G Daniels, 'Accountability in School Responses to Harmful Incidents' (2008) 7(4) *Journal of School Violence* 44.

¹⁵⁶⁵ Reyneke, above n 1528, 160.

¹⁵⁶⁶ Ibid 163.

¹⁵⁶⁷ Ibid.

restorative practices. Advocates of traditional responses call for accountability and responsibility for those actions which are not condoned by communities, while respect, care, support and forgiveness for the offender is championed by those in favour of the restorative approach, which as a rule separates the action from the offender when dealing with the offence.¹⁵⁶⁸ An important difference between punitive methodology and restorative practice is the significance attached to values. That is, restorative justice philosophy should be underpinned by positive values including openness, respect, tolerance, inclusion, integrity and congruence, which represent the tenets that should be adopted by schools when incorporating restorative methodology in discipline management policy.¹⁵⁶⁹

In spite of the non-traditional forum, conventional retributive forms of sanction can, however, also be dispensed following conferencing. For example, punishment may well be of a punitive nature yet differ from traditional school behaviour-based sanctions in that offending students are participants in the disciplinary process rather than remaining largely passive, in addition to having the opportunity to reflect on their behaviour and better understand the consequences of their action. The result is that many students subsequently view restorative conferencing as being far from a token, superficial act of punishment.¹⁵⁷⁰ More to the point, emerging research has suggested that engaging students in a restorative justice behavioural management approach to address wrongdoing and acts of violence in schools settings is superior to existing school discipline methods.¹⁵⁷¹ Costello, Wachtel and Wachtel¹⁵⁷² emphasise that increased success in school-based restorative practices like conferencing is often indicative of increased student participation rates, with higher input and engagement typically corresponding with superior relationship repair following the restorative intervention. It is worth noting also that rates of compliance with restorative agreements undertaken in schools are relatively high amongst transgressors.¹⁵⁷³

¹⁵⁶⁸ Morrison, 'Restorative Justice and School Violence: Building Theory and Practice', above n 1511, 5.

¹⁵⁶⁹ Reyneke, above n 1528, 152.

¹⁵⁷⁰ Fouracre, above n 1551, 20.

¹⁵⁷¹ Costello, Wachtel and Wachtel, above n 1393, 51.

¹⁵⁷² Ibid.

¹⁵⁷³ Reyneke, above n 1528, 150.

Restorative justice methodologies and practices in school settings are not necessarily restricted to minor matters as has been the case in criminal justice systems on occasion. Some criticism in juvenile justice domains has been directed at the use of juvenile conferencing at the minor or entry level offence range, which can actively underpin the logic of dispensing retributive, ‘real’ justice sanctions for more serious offences at the hard end of the scale and in a sense legitimise the traditional methods instead of promoting restorative methods as a viable alternative justice script.¹⁵⁷⁴ Rather, the use of conferencing in school settings can be triggered for a wide range of school violence offences ranging from minor to serious in nature, and can be applied in informal classroom situations as well as more official hearings, and more broadly between students or staff members for dispute resolution purposes.¹⁵⁷⁵

Although unsupported by evidence, there is a continued belief in the use of punishment as the foundation of most school behavioural management policies around the world. However, Costello, Wachtel and Wachtel¹⁵⁷⁶ argue that retribution tends to work only initially such as when an offending student is brought to account in front of school authority figures, but does little to generate empathy or encourage students to internalise the commitment to improve their behaviour. Equally, the practice of exclusion or humiliation often leads to alienation from well behaved students, teachers and school administrators, as well as attracting offenders to likeminded peers, thus engendering negative subcultures within schools.¹⁵⁷⁷ The effect of this form of estrangement should not be underplayed as severe alienation and isolation have been identified as contributing factors in acts of severe school violence such as those experienced in the United States involving multiple fatality shooting incidents at University campuses.¹⁵⁷⁸

Naturally, the removal of offending students from school environments may be necessary to address immediate school safety and order concerns by separating bad

¹⁵⁷⁴ Cunneen and White, above n 204, 370.

¹⁵⁷⁵ Reyneke, above n 1528, 151–152.

¹⁵⁷⁶ Costello, Wachtel and Wachtel, above n 1393, 63.

¹⁵⁷⁷ Ibid.

¹⁵⁷⁸ K Rigby, *Bullying Interventions in Schools: Six Basic Approaches* (Australian Council for Educational Research, 2010) 74.

students from good. This appears to be a logical approach on the surface, but is deficient in that many of the highly mobile and socially connected students will remain acquainted and connected with each other outside of the school setting,¹⁵⁷⁹ for example by means of social media, which represents yet another dimension to school bullying and harassment and further compromises offender deterrence.

In fairness however, the use of retributive approaches such as suspension and exclusion may yet have some value in combination with evidenced-based techniques including restorative methodology in the development of more self-discipline in students and positive school environments with reduced behavioural problems.¹⁵⁸⁰ This is despite evidence suggesting that suspension and exclusion serve to interrupt the education process instead of encouraging accountability in student offenders.¹⁵⁸¹ Notwithstanding an association with deviant behaviour and a sense of reward for misbehaving and violent students,¹⁵⁸² the use of suspension may be worthy of some investigation as the practice can be both a legal and social sanction which can have deterrent value particularly when viewed as fair and reasonable by peers.¹⁵⁸³ Caution must be exercised, according to Alexander and Curtis,¹⁵⁸⁴ as suspension and exclusion of students for minor offences can in fact be counterproductive. Some research has argued that punitive and harsh penalties actually aggravate the potential for school violence. Another issue that has emerged from the use of conferencing in schools is the so-called double jeopardy or double punishment difficulty, where students are excluded or suspended by schools and then processed by the criminal justice system following an incident of violence.¹⁵⁸⁵

5.7.5 Broader Society Implications

During the formative years of the restorative justice movement when meaningful definition and direction was still being developed, the school environment emerged as a

¹⁵⁷⁹ Calhoun and Daniels, above n 1564, 42.

¹⁵⁸⁰ G G Bear, 'Both Suspension and Alternatives Work, Depending on One's Aim' (2012) 11 *Journal of School Violence* 174.

¹⁵⁸¹ Calhoun and Daniels, above n 1564, 23.

¹⁵⁸² See 2.7 above for an overview of the nature of school violence.

¹⁵⁸³ Bear, above n 1580, 177.

¹⁵⁸⁴ Alexander and Curtis, above n 311, 75.

¹⁵⁸⁵ Cunneen and White, above n 204, 372.

central component in the promotion of restorative justice and more restorative societies, because schools are effectively micro-societies with young people effectively seeking the adult citizenship contained within.¹⁵⁸⁶ As microcosms of broader society and equipped with the ability to both nurture and stigmatise, schools are effectively dynamic institutions. However, it must be said that, compared to broader society, there has been an unhurried rate of cultural, economic or social change in schools in the last half century, to the detriment of human and social capital. There is an opportunity to address this concern through the expansion of school-based restorative justice methodology and responsible regulatory processes in order to achieve social justice.¹⁵⁸⁷

Citizenship in this sense includes a notion that young people will develop into respectful, principled and law-abiding citizens free of criminal association or participation, yet perhaps through experience and understanding of restorative methods, citizenship can also be enhanced through the development of instructive internalised values in young people dictating their behaviour in the absence of sanction or supervision.¹⁵⁸⁸ Society will also benefit from young people being educated in the skills required to resolve conflict and nurture productive relationships with a spirit of respect for human dignity, non-discrimination and tolerance that goes some way toward upholding democratic citizenship.¹⁵⁸⁹ Christensen¹⁵⁹⁰ argues that these qualities are also of community benefit. For example, offending juveniles are held accountable post conference and ought to have accepted responsibility for their behaviour, whilst victims are supported by adults and peers. Holistically, the restorative process encourages the assimilation of both back into communities at large.

In addition, schools can promote social responsibility, health and resilience and so provide a useful footing for early intervention strategies and programs along with

¹⁵⁸⁶ Morrison, *Restoring Safe School Communities*, above n 1347, 79.

¹⁵⁸⁷ Morrison, 'Building Safe and Healthy School Communities', above n 1524, 109.

¹⁵⁸⁸ H Cislowski, 'Schools and the Community' (Paper Presented at the Role of Schools in Crime Prevention Conference, Melbourne, Australia September 30–October 1, 2002) 1.

¹⁵⁸⁹ Morrison, 'Restorative Justice and School Violence: Building Theory and Practice', above n 1511, 7.

¹⁵⁹⁰ Christensen, above n 1540, 579.

student wellbeing.¹⁵⁹¹ The focus on school environments in this context is expected to some extent, given that there is a large proportion of the population base involved, including not only children and juveniles at a determinative age bracket, but parents at their most influential, and supporting parties including teachers, coaches, instructors, grandparents, friends and acquaintances.¹⁵⁹² Moreover, the effective use of restorative justice in schools provides society with an opportunity to promote justice within and outside schools which will go some way toward a more just society.¹⁵⁹³ Further, restorative justice practices seek and promote emotionally intelligent justice and effectively act as an institutionally responsive problem solving approach that offers a viable alternative to the zero tolerance, structured regulatory formalism approach.¹⁵⁹⁴

The continued use and development of restorative practices such as conferencing to confront school violence effectively encourages those implicated in the offending, such as the offender, victim, family, school staff and community representatives, to address the conflict while being aware that it represents an opportunity for both learning and change.¹⁵⁹⁵ It allows collaborative conflict resolution and relationship building through the use of open dialogue,¹⁵⁹⁶ especially amongst diverse school populations.¹⁵⁹⁷ Calhoun and Daniels¹⁵⁹⁸ are of the opinion that conference participation and family and community assistance encourages accountability in offenders without excusing actions by addressing the harm caused and victim reparation, free of the stigmatisation and labelling common under traditional methods, and according victims an increased opportunity to move forward post offence. Another benefit of restorative practices is potentially the ability of family and community members to make an active contribution to identifying the core reasons for violence in schools.¹⁵⁹⁹

¹⁵⁹¹ Armstrong, Tobin and Thorsborne, above n 1460, 4.

¹⁵⁹² Morrison, 'Restorative Justice and School Violence: Building Theory and Practice', above n 1511.

¹⁵⁹³ Morrison, 'Building Safe and Healthy School Communities', above n 1524, 110.

¹⁵⁹⁴ Morrison, *Restoring Safe School Communities*, above n 1347, 119.

¹⁵⁹⁵ Calhoun and Daniels, above n 1564.

¹⁵⁹⁶ Fouracre, above n 1551, 20.

¹⁵⁹⁷ Reyneke, above n 1528, 150.

¹⁵⁹⁸ Calhoun and Daniels, above n 1564.

¹⁵⁹⁹ Ibid.

5.7.6 Selected Examples of Collaboration Between Juvenile Justice and Education Agencies

Despite the traditional and unfortunate associations between the juvenile criminal justice and school areas, there are examples of more promising interconnectedness between school discipline management and juvenile criminal justice agencies in the wider community. This includes some worthwhile initiatives aimed at addressing juvenile violence within and outside schools premises. The use of restorative justice practices and procedures translated for use in school settings also provides a useful platform for more useable and beneficial partnership and synergies between the criminal justice and education agencies.¹⁶⁰⁰

An encouraging example of criminal justice and school agency collaboration is a worthwhile initiative undertaken by police in the Australian Capital Territory which has seen Youth Liaison Teams conduct school forums in order to identify cultures of offending, behaviours and motivation in juveniles disengaged from schools and communities to determine appropriate referral pathways.¹⁶⁰¹

The promotion of healthy school community relationships is also enhanced through the restorative method by providing school-based mechanisms for prevention and management of risk and incident,¹⁶⁰² in addition to building care communities and support systems around offenders while holding them accountable and importantly, not condoning their actions.¹⁶⁰³ The benefits of this broader community repair and patronage should not be underestimated as school violence not only damages but also ensnares victims, offenders and communities in a web of harm that nurtures cyclical antisocial behaviour, fear and distrust.¹⁶⁰⁴ The restoration of safer and healthier school communities is also inextricably linked with their regulation.¹⁶⁰⁵

¹⁶⁰⁰ Morrison, 'Schools and Restorative Justice', above n 1455, 343.

¹⁶⁰¹ Commonwealth of Australia, above n 1407, 16.

¹⁶⁰² Armstrong, Tobin and Thorsborne, above n 1460, 4.

¹⁶⁰³ Morrison, 'Restorative Justice and School Violence: Building Theory and Practice', above n 1511, 5.

¹⁶⁰⁴ *Ibid* 1.

¹⁶⁰⁵ Morrison, *Restoring Safe School Communities*, above n 1347, 119.

An early example of Australian police-school cooperation on crime and violence prevention involving specially trained police officers and school communities dates from the late 1980s in Victoria. Largely at the behest of the Chief Commissioner, Victoria Police identified a need to involve police in both formal and informal school curricula which culminated in the Police Schools Involvement Program. Previously, there had been little or no opportunity to relate police operations to school curriculum, nor had there been possibilities to develop relationships between police and school students.¹⁶⁰⁶

Essentially, the program was initiated to enable police to address social concerns and equip young people with the skills to make positive life choices by educating them on their rights and obligations and the maximisation of personal and community safety through the imparting of relevant information, personal development and positive relationships with police in order to enhance protective factors and resiliency skills.¹⁶⁰⁷ Although for the purposes of this thesis school and criminal justice agency focus is central to the management and prevention of juvenile violence, a multi-disciplinary approach involving social workers, psychologists, religious identities, organisations and the like that enhance school and criminal justice agency intervention is preferred, despite the ubiquitous cost and time concerns of such a broad approach.¹⁶⁰⁸

5.8 Challenges in the Implementation of Restorative Practices in Australian Schools

As discussed in Chapter 2,¹⁶⁰⁹ school violence in the Australian jurisdiction has become of great concern with an increase in pervasive lethality emerging, including knife attack incidents, serious physical assault and ultimately fatal school violence episodes. The embedding of a restorative justice behavioural management regime in Australian schools underpinned by a whole of school approach that relies upon cultural change and

¹⁶⁰⁶ L Sutton, 'Police/School/Kids – A Safety Partnership' (Paper Presented at the Role of Schools in Crime Prevention Conference, Melbourne, Australia September 30–October 1, 2002) 2.

¹⁶⁰⁷ Ibid.

¹⁶⁰⁸ Reyneke, above n 1528, 159.

¹⁶⁰⁹ See 2.9 above for a discussion on the nature of school violence in the Australian jurisdiction.

empowerment of students in resolution of conflict can have a positive effect upon school violence.

Although the implementation and upkeep of restorative practices for use in school behavioural management may not be a panacea¹⁶¹⁰ and may yet require continued modification and regulation, the benefits to school discipline practice, procedures and wider communities along with the juvenile criminal justice agencies would suggest that the strategy is one worth pursuing. After all, if existing forms of school discipline or criminal justice for that matter reduced recidivism simply through the use of punishment, suggest Costello, Wachtel and Wachtel,¹⁶¹¹ there would be little for school administrators or courts to do save for dispensing penalties for infractions and increasing punishment should offending continue. Caution should be exercised, however, in the assumption that true restorative outcomes are necessarily realised in school settings, as school-based programs that self-identify as restorative may be deficient in the inclusion of or granting of respect to victims or other stakeholders in the process, or may in fact lack the effective enforcement of accountability in the offending student.¹⁶¹² Such shortcomings have also been identified in the criminal justice system where restorative practices and methodologies are viewed by some as lacking rigour and being misplaced in a system that ought to enforce punishment and retribution rather than so-called soft, libertarian options.¹⁶¹³

In fact, according to Abregu, restorative options require more effort and are more burdensome than traditional retributive justice practices such as suspension or detention, as offenders are required to confront the reality and face the consequences of their offences as well as participating in response and remedy rather than avoidance.¹⁶¹⁴ Resistance can also be experienced in the implementation of the restorative school

¹⁶¹⁰ Fouracre, above n 1551, 20.

¹⁶¹¹ Costello, Wachtel and Wachtel, above n 1393, 62.

¹⁶¹² S Pavelka, 'Practices and Policies for Implementing Restorative Justice Within Schools' (2013) 20(1) *The Prevention Researcher* 17.

¹⁶¹³ See 5.4 above for a discussion on the notion of restorative justice including shortcomings and criticisms.

¹⁶¹⁴ L Abregu, 'Restorative Justice in Schools: Restoring Relationships and Building Community' 2012 18(4) *Dispute Resolution* 13.

model as a result of reluctance on the part of teaching and school administration staff to either act respectfully toward students or consider that students have any part to play in the determination of punishment,¹⁶¹⁵ with an increase in student voice and responsibility likely to result from the cultural change in school settings due to restorative justice programs.¹⁶¹⁶ Further difficulties faced by school personnel in the introduction of sustainable restorative justice practice and procedure is a meaningful transition between the existing retributive school disciplinary management, including zero tolerance or harsh penalty programs, toward the restorative model and philosophy which contradict well established institutional models¹⁶¹⁷ and require significant effort to overcome and convert.

Another impediment concerns the competency of mediators who manage the all-important dynamic in peer mediation programs, for example, and are important contributors to the success or otherwise of the restorative process. Haft suggests that school administrators should not assume that student peers are necessarily equipped to fully understand the gradations of culpability or blame.¹⁶¹⁸ Further, specific power imbalances can potentially occur in restorative mediation processes conducted in school settings. Offenders, for example, may have diminished procedural safeguards compared to those found in traditional justice processes including the right to review, representation, and statutory punishment limitations, in addition to potential coercion into restorative agreements by stakeholders and the awareness of possible criminal consequences of the student offender's actions.¹⁶¹⁹

Budgetary and financial considerations should not be overlooked in any transition between existing methods and restorative methodology and practices in school settings. Although a beneficial reduction of teacher and administrator demand is a real possibility in the long term, the introduction of sustainable restorative programs in schools requires

¹⁶¹⁵ Ibid.

¹⁶¹⁶ Sumner, Silverman and Frampton, above n 35, 26.

¹⁶¹⁷ Teasley, above 1456, 131–132.

¹⁶¹⁸ W Haft, 'More Than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools' (1999–2000) 77(4) *Denver University Law Review* 811.

¹⁶¹⁹ Ibid 811–812.

an initial investment of resources and time that should be combined with faculty and administrative support including training, timely response to school violence incidents and a well-integrated and coordinated disciplinary regime that also includes suitable response to serious school violence episodes.¹⁶²⁰ Comprehensive resource allocation, suggests Vaandering,¹⁶²¹ should also allow for the development of specific support structures in school settings over and above the initial introduction of restorative justice methodology and practice. Similarly, Sumner, Silverman and Frampton¹⁶²² emphasise that it is the initial phases of embedding restorative practice and methodology in school settings that require the greatest commitment, with the allocation of adequate time particularly problematic, although it is arguable that this initial time allocation will generate advantages given the reduction of disruptive student behaviour over the long term. Adequate monitoring of restorative agreements determined in conferencing or accountability panels, for example, is also required in the successful integration of restorative methodology and practice in school settings.¹⁶²³

The more visible link between schools and the criminal justice system also highlights what has been a tendency of school personnel to treat violent and on occasion non-violent incidents in school settings as criminal incidents to be processed through the criminal justice system, often in an attempt to complement the tough on crime, law and order type punitive agenda common to many jurisdictions.¹⁶²⁴ This has often resulted from existing policy and procedure including zero tolerance school behavioural management agendas, resulting in excessive suspension and exclusion of students which can lead to deprivation of opportunity and increased likelihood of contact with the juvenile justice system.¹⁶²⁵ Moreover, an alarming trend has emerged by which school administrators uphold punitive type disciplinary policy and defer relatively minor infractions to the juvenile criminal justice system that would previously have been dealt with at school level, without considering the deleterious effect on juveniles. This

¹⁶²⁰ Abregu, above n 1614.

¹⁶²¹ D Vaandering, 'Implementing Restorative Justice Practice in Schools: What Pedagogy Reveals' (2014) 11(1) *Journal of Peace Education* 78.

¹⁶²² Sumner, Silverman and Frampton, above n 35, 22.

¹⁶²³ Morrison, 'Schools and Restorative Justice', above n 1455, 343.

¹⁶²⁴ Noguera, above n 278, 190.

¹⁶²⁵ Teasley, above 1456, 131–132.

propagates cyclic failure among students, prompting commentary in the United States, for example, suggesting that American public school students are the most policed society grouping other than jail inmates.¹⁶²⁶

When translated to school settings, punitive criminal justice policy and practice such as the zero tolerance agenda typically punishes both minor and major incidents with excessive severity,¹⁶²⁷ yet is unlikely to actually improve school safety, increase deterrence or aid in academic achievement¹⁶²⁸ despite political resonance.¹⁶²⁹ Many students view suspension as a sanctioned holiday from school, effectively reinforcing problematic behaviour¹⁶³⁰ and encouraging academic failure and negative attitudes amongst the excluded students, who often develop an increased likelihood of permanent school disengagement, according to Gonzalez.¹⁶³¹ Punitive school behavioural policy such as zero tolerance agendas can actually damage educational environments and are generally unsuccessful in the remedy of problems they were designed to address, effectively encouraging delinquency rather than actively controlling or reforming problematic students,¹⁶³² with suspension and exclusion having little influence on future offending.¹⁶³³

Haft argues that the excessively inflexible zero tolerance policy translated to school settings also has the unfortunate effect of contradicting traditional views that juveniles lack the capacity required to form the intent required in criminal offending by attaching liability for establishing injury and intent on single incidents.¹⁶³⁴ Further, exposure to draconian juvenile justice agendas including mandatory sentencing¹⁶³⁵ and subsequent confinement in juvenile detention is often the result of such school policy, again

¹⁶²⁶ Gonzales, above n 1500, 288–289.

¹⁶²⁷ Pavelka, above n 1612.

¹⁶²⁸ Teasley, above 1456.

¹⁶²⁹ Gonzales, above n 1500, 292.

¹⁶³⁰ J Chin et al, 'Alternatives to Suspensions: Rationale and Recommendations' 2012 (11) *Journal of School Violence* 159.

¹⁶³¹ Gonzales, above n 1500, 294.

¹⁶³² Haft, above n 1618, 804.

¹⁶³³ Gonzales, above n 1500, 297.

¹⁶³⁴ Haft, above n 1618, 801.

¹⁶³⁵ See 4.3.2 above for an outline of mandatory sentencing in Australia.

encouraging the schoolyard to jail yard passage often experienced by at-risk youth. Gonzalez suggests that this may be one of the most worrisome civil and human rights challenges in contemporary society.¹⁶³⁶

In light of the useful examples of restorative justice practice and methodologies in both juvenile criminal justice and school settings in Australia in addition to synergies, broader community and societal implications, the preferred interruption of the schoolyard to jail yard passage of at-risk juveniles and challenges to the implementation of restorative justice practices in school settings, the development of an implementation framework for widespread application in Australian schools will now be advanced.

5.9 The Development of a Framework for the Implementation of a Rights-based Uniform Approach to Discipline Management in Australian Schools Grounded in Restorative Justice Practices.

5.9.1 Background Discussion

The use of restorative practices in a school-based environment in Australia is worthy of expansion and development beyond the useful experiences discussed above.¹⁶³⁷ The introduction of sustainable restorative practices and methodology in Australian schools should be progressive, incorporating a whole of school approach that is not merely reactive. It should align with research suggesting that ad hoc restorative practice in schools is unhelpful with a culture change of whole school communities preferred,¹⁶³⁸ encouraging administrators, students, families and community members to view the intervention as an opportunity for both change and learning.¹⁶³⁹ Commitment from school communities is also essential in the successful implementation of restorative justice practice and methodologies in school settings, which requires the establishment of drivers and reasons for implementation and contributions from pivotal school community stakeholders.¹⁶⁴⁰ It must be noted, however, that when confronted with

¹⁶³⁶ Gonzales, above n 1500, 292.

¹⁶³⁷ See 5.6 above for a discussion on the use of restorative practice and procedure in Australian schools to date.

¹⁶³⁸ Varnham, Booth and Evers, above n 641, 81.

¹⁶³⁹ Calhoun and Daniels, above n 1564, 42.

¹⁶⁴⁰ Gonzales, above n 1500.

restorative practices some teachers suggest that these measures have long been carried out through the confronting of disputing students and apprising of consequences leading to a search for an appropriate solution, although informal methodology tends to vary significantly.¹⁶⁴¹

Makeshift approaches such as these combined with the disciplinary regimes of many schools that employ suspension and exclusion restricts alternative behavioural management structures.¹⁶⁴² Instead, a restorative regime is preferable that adds value to school systems and daily practices, culminating in a school environment that is grounded in restorative principles including respect, repair and inclusion in school communities, celebration of diversity and reintegration underpinned by robust support networks.¹⁶⁴³ In addition, suggests Roche,¹⁶⁴⁴ a case can be made for the extension of restorative practices to regular uptake rather than simply in response to incidents by the incorporation of the methodology into school curricula, allowing teachers, friends and family members to pilot students throughout their educational journey. The use of restorative practice and procedure in school disciplinary management also provides students with a voice and the vehicle to accept responsibility for their actions, yet also the requisite authority to uphold safe school environments for administrators and teaching staff.¹⁶⁴⁵

It is the purpose of the next discussion to formulate a useful uniform restorative justice approach to behavioural management in Australian schools directed at reducing the Australian school violence problem through the effective inculcation and advancement of restorative school cultures. Whilst schools are not responsible for many risk factors that affect at-risk juveniles, they do provide an opportunity to affect the vulnerability of juveniles to adverse future outcomes.¹⁶⁴⁶ The use of restorative practices in schools would potentially capture those students who are disengaged from the education process

¹⁶⁴¹ Roche, above n 1373, 225.

¹⁶⁴² Ibid.

¹⁶⁴³ Varnham, 'Keeping them Connected', above n 1370, 78.

¹⁶⁴⁴ Roche, above n 1373, 225.

¹⁶⁴⁵ Gonzales, above n 1500, 335.

¹⁶⁴⁶ Ibid.

and have participated in acts of school violence along with other behavioural indiscretions. The restorative justice approach will offer an ability to participate in a process of restoration, repair and accountability that will go some way toward strengthening school and wider communities and most importantly help to attenuate the likelihood of a journey from schoolyard to jail yard so often seen in juvenile offenders. Also of importance is the promotion of essential human rights safeguards incorporated in a rights-based restorative justice approach to address school violence that is cognisant of Australia's obligations with respect to international human rights instruments including the pivotal *UNCRC*.

An effective practical approach to uniform restorative methodology will utilise a collaboration between responsive reactions to school violence incidents and support for pre-emptive responses that are designed to ensure a safe school environment buttressed with appropriate programs that are integrated across a continuum of restorative practices.¹⁶⁴⁷ To be effective, policy development must be entrenched into the cultural fabric of the school as anything less would perpetuate the traditional and less effectual passage of policy downwards from higher authority, neglecting the needs of individuals and communities alike.¹⁶⁴⁸ Cultural change in school environments can be problematic, argue Blood and Thorsborne,¹⁶⁴⁹ as schools with entrenched traditional cultures can be resilient and hard to adapt to new methodologies such as restorative practices, which warrant a targeted approach to cultural change focussing on school leadership. This type of change requires useful engagement with school communities espousing the merit of restorative methodology in disciplinary management,¹⁶⁵⁰ including a shift in focus from traditional compliance-based disciplinary management to a paradigm shift that requires an alternate level of enquiry grounded in a relational approach, compelling educators to

¹⁶⁴⁷ Gonzales, above n 1500, 302; Morrison, *Restoring Safe School Communities*, above n 1347, 106.

¹⁶⁴⁸ Morrison, 'Building Safe and Healthy School Communities', above n 1524, 109.

¹⁶⁴⁹ P Blood and M Thorsborne, 'The Challenge of Cultural Change: Embedding Restorative Practice in Schools' (Paper Presented at the Sixth International Conference on Conferencing, Circles and Other Restorative Practices: Building a Global Alliance for Restorative Practices and Family Empowerment, Sydney, Australia March 3–5 2005) 5.

¹⁶⁵⁰ *Ibid.*

examine the existing nature of relationships between stakeholders in school communities.¹⁶⁵¹

Suffice it to say, effective school-based restorative practice and methodology requires a more sophisticated approach to implementation beyond the simplistic adding of programs or practices to existing school structures and environments¹⁶⁵² or superimposing a criminal justice conferencing model to school environments.¹⁶⁵³ It is a long-term strategic approach that will enable sustainable change to take place given the cultural difficulties that are more than likely to be faced in a shift away from traditional punitive discipline management.¹⁶⁵⁴ Therefore, a positive process is preferred that enacts institutional change responsive to the needs of stakeholders and communities and encapsulates the management of student outcomes as well as institutional cultural change, which is an area in which school-based restorative justice practice has in the main fallen short of expectation.¹⁶⁵⁵

Restorative practices such as conferencing in schools are not, however, simply a forum for officialdom to speak and adjudicate. Rather, according to Drewery and Winslade,¹⁶⁵⁶ they are a medium to repair relationships, redress offending and help generate and maintain more peaceful school communities than existing punitive actions that often propagate a feeling of isolation and little shared investment among school community members. Increasing the worth of relationships along with mutual respect and understanding amongst school community members remains a challenge in the restorative approach which values the relationships that are by their very nature embedded in schools and societies. This will compromise the impact of restorative practice and methodology until such a time that a critical mass adopts the approach, as individuals alone cannot sustain the culture change, language and discourse around

¹⁶⁵¹ Blood, above n 1481, 2–3.

¹⁶⁵² Morrison, ‘Building Safe and Healthy School Communities’, above n 1524, 107.

¹⁶⁵³ Blood and Thorsborne, above n 1649, 17.

¹⁶⁵⁴ Ibid 6.

¹⁶⁵⁵ Morrison, ‘Building Safe and Healthy School Communities’, above n 1524, 107.

¹⁶⁵⁶ Drewery and Winslade, above n 1509, 9.

compliance and deviance which requires both time and commitment.¹⁶⁵⁷ Equally, quality engagement with students is preferred when using restorative practices in school settings as, not unexpectedly, the greater the participation of students in the restorative process, the more likely a greater restorative effect will be realised to the benefit of all concerned.¹⁶⁵⁸

Given the desirability for restorative practice methodology to be not only reactive but also proactive, effective and sufficiently flexible for widespread uptake in Australian schools, it would appear that grounding the framework in a continuum of responses¹⁶⁵⁹ that range from proactive to reactive in character and dictate the level of stakeholder participation in the intervention is preferred suggests Blood.¹⁶⁶⁰ Essentially, in order to embed the restorative language and culture required in schools, a multifaceted approach is called for that successfully navigates from awareness development to robust intervention in response to serious school violence incidents underpinned by strategic early intervention, again in a whole of school approach. In this fashion, school-based restorative justice methodology and practice provides schools with useful institutional mechanisms to address school safety, student discipline, suspension and exclusion, while reducing the potential for at-risk students to journey from schoolyard to jail yard without resorting to punitive policies that promote exclusion and separation from school communities.¹⁶⁶¹

The implementation of a restorative justice rights-based approach to school violence is essentially underpinned by initial reassertion and enhancement of relationships within the school community, progressing to relationship repair and culminating in the reconstruction of pivotal school community relationships so significant in establishing and maintaining school communities. Something of a revolution has occurred since the

¹⁶⁵⁷ Morrison, *Restoring Safe School Communities*, above n 1347, 182–183.

¹⁶⁵⁸ Costello, Wachtel and Wachtel, above n 1393, 51.

¹⁶⁵⁹ Blood, above n 1481, 10; Morrison, *Restoring Safe School Communities*, above n 1347, 121; Morrison, 'Building Safe and Healthy School Communities', above n 1524, 106; Gonzales, above n 1500, 303.

¹⁶⁶⁰ Blood, above n 1481.

¹⁶⁶¹ Gonzales, above n 1500, 303.

embryonic use of restorative practice in schools¹⁶⁶² because, although conferencing at the intensive or serious level modelled on juvenile justice practices and community accountability conferencing provided the bedrock of a new language of school behavioural management methodology, it is now recognised that a strong, broad-based foundation at a school community level encompassing all members is more useful in the development of climates promoting fairness, dignity and safety.¹⁶⁶³

As a consequence, the use of restorative practices and methodology in schools should begin with skill development for all school community members, progressing to relationship repair and finally rebuilding with a decided early intervention emphasis. A key ingredient in the successful introduction and maintenance of a rights-based restorative justice approach to disciplinary management in Australian schools remains legislative and policy reform, which is necessary in order to provide the best potential for success including adequate funding, professional development and community involvement needed in the preferred whole of school approach to conflict resolution.

Mindful of these imperatives and challenges, an effective implementation framework for widespread uptake in Australian schools will now be outlined.

5.9.2 A Framework for Implementation

With due deference to the essential rights-based principles of the best interests of the child and participation,¹⁶⁶⁴ and mindful of lessons learned from early engagement with restorative justice practice and methodology in Australian schools, an appropriate framework for the sustainable use of restorative justice methodology and practice for use in Australian schools to address school violence¹⁶⁶⁵ will now be advanced. The framework is presented as a flexible and adaptable guide rather than a prescriptive, formulistic model and includes levels of intervention, responses and structured

¹⁶⁶² See 5.6 above for a discussion on the use of restorative justice initiatives in Australian schools to date.

¹⁶⁶³ Morrison, *Restoring Safe School Communities*, above n 1347, 121.

¹⁶⁶⁴ See 4.11 above for a discussion on the status of essential human rights safeguards, best interests and participation in education law and policy in Australian education law and policy.

¹⁶⁶⁵ See 2.9 above for an overview of violence in Australian schools.

implementation. Initially, the levels of intervention and responses will be discussed prior to the implementation structures and finally the implementation strategies.

a. Primary or Universal Intervention

The development of conflict resolution skills among all school community members such as students, educators, parents and administrators at the primary or entry level in order to restore relationships in wider school communities frames the primary or universal level in a restorative school culture¹⁶⁶⁶ which also relies upon the effective management of relationships between stakeholders in school settings.¹⁶⁶⁷ This level of intervention in the restorative school model, suggests Morrison,¹⁶⁶⁸ is very much a preventative type involving entire school communities and utilising social and emotional literacy development to enable school conflict resolution through restorative methodology and practice that re-affirms relationships in a caring and respectful fashion in the aftermath of a school violence episode.

Framed as an entry or defence strategy, the primary or universal level of restorative intervention is designed to prevent the escalation of conflict into a violent incident when differences first appear, and encourages members of the student cohort to determine differences with empathy whilst engendering a normative climate of respect and a sense of school community inclusion and procedural fairness.¹⁶⁶⁹ Significantly, the whole school relational practices, policies and procedures, curriculum development and social skills that support this level of intervention also serve to promote desirable attributes including self-responsibility, accountability, collaboration and personal potency within school settings, including at classroom level, which contributes decidedly to the school values base.¹⁶⁷⁰ This entry element supports prevention and proactivity which remain fundamental in the preferred extension of restorative practice and methodology from reactive response to violence and harm, and can be likened to community disease

¹⁶⁶⁶ Morrison, *Restoring Safe School Communities*, above n 1347, 107.

¹⁶⁶⁷ Morrison, 'Schools and Restorative Justice', above n 1455, 339.

¹⁶⁶⁸ Morrison, 'Building Safe and Healthy School Communities', above n 1524, 107.

¹⁶⁶⁹ Morrison, 'Restorative Justice in Schools', above n 1556, 37, 38.

¹⁶⁷⁰ Morrison, *Restoring Safe School Communities*, above n 1347, 107, 116.

immunisation in a health care system by equipping all members of school communities with conflict resolution skills.¹⁶⁷¹

b. Secondary or Targeted Intervention

More intensive yet broader in reach, the secondary or targeted element of the restorative school methodology and practice model includes a smaller portion of school communities than the primary level of intervention and is triggered when relationship repair is needed for at-risk students who have shown indications of chronic behavioural attitudes or have been involved in in school incidents that have not been resolved.¹⁶⁷²

This type of intervention is participatory in nature and calls for the use of facilitated and supported dialogue¹⁶⁷³ including individual and small group conferencing, peer mediation and problem solving circles. According to Blood and Thorsborne, it is an approach that addresses conflict that has degenerated into protracted issues affecting others, often requiring the intervention of third parties to help determine the issue.¹⁶⁷⁴

This approach in effect also builds the capacity of participants to take advantage of so-called teachable moments where empathy, responsibility and accountability are generated and everyday problem solving skills are developed by students, administrators and parents during daily school life.¹⁶⁷⁵ Significantly, the targeted participatory intervention level aims to reconnect at-risk students to the school community which by extension involves those students not at risk in the relationship repair process. The process may also capture students with behavioural issues who will drift to and from this intervention, while others will have single or minimal contact or avoid this level of intervention entirely.¹⁶⁷⁶ Targeted responses also are useful in circumstances where conflict has not escalated to more serious levels but which require a third party

¹⁶⁷¹ Blood and Thorsborne, above n 1649, 11–12.

¹⁶⁷² Morrison, *Restoring Safe School Communities*, above n 1347, 108.

¹⁶⁷³ *Ibid* 109.

¹⁶⁷⁴ Blood and Thorsborne, above n 1649, 11.

¹⁶⁷⁵ Morrison, *Restoring Safe School Communities*, above n 1347, 117.

¹⁶⁷⁶ *Ibid* 108–109.

intermediary to intervene and increase dialogue between stakeholders in the aftermath of school violence incidents.¹⁶⁷⁷

c. Intensive or Tertiary Response

Intensive or tertiary response relies on the use of face-to-face restorative conferencing involving small portions of school populations drawn from members of the wider school community, including parents, social workers, guardians and participants who have been entangled in the aftermath of the offence, to assist in the rebuilding of relationships through the medium of intensive facilitated dialogue involving broad social networks.¹⁶⁷⁸ This level of intervention is designed to provide a response to school offenders who have been involved in more severe incidents of disciplinary breach and have displayed serious, chronic behavioural problems,¹⁶⁷⁹ and aims to encourage responsibility in offending students and hold them to account, to promote awareness of the ramifications of their actions to others and above all other concerns, seeks to uncover the common humanity in participants while also exercising resolve and fairness.¹⁶⁸⁰ Given the nature of the three levels of restorative intervention it is clear that students who have already participated in previous levels of intervention at the primary and secondary levels will be exposed to this intervention as a consequence of continued behavioural difficulties.¹⁶⁸¹

5.9.3 Implementation Structure

Structurally, the implementation of effective restorative school-based practice and procedure for widespread use in Australian schools would include the following stages of implementation representing prevention and intervention strategies designed to meet educational, disciplinary and student wellbeing objectives¹⁶⁸² that are formalised to give effect to the human rights principles that were discussed in Chapter Three:

¹⁶⁷⁷ Morrison, 'Schools and Restorative Justice', above n 1455, 337.

¹⁶⁷⁸ Morrison, *Restoring Safe School Communities*, above n 1347, 107, 109.

¹⁶⁷⁹ Blood and Thorsborne, above n 1649, 11.

¹⁶⁸⁰ Morrison, *Restoring Safe School Communities*, above n 1347, 117.

¹⁶⁸¹ *Ibid* 109.

¹⁶⁸² Shaw, above n 1492, 128.

a. Commitment

It is important to gain commitment by establishing a basis for change through questioning the status quo of current discipline management practice in schools. This includes the debunking of discipline management myths¹⁶⁸³ including that surrounding existing punitive methodology where suspension, exclusion and referral to juvenile justice agencies does not yield either academic advancement or deterrence from offending in school settings, while simultaneously fuelling the schoolyard to jail yard journey.¹⁶⁸⁴ According to Shaw, in attempting to initiate change in traditional hierarchical structures, a systematic, comprehensive approach is favoured, given the inertia often encountered in such cultural shifts away from existing disciplinary management and current practice in schools which in effect represents a fundamental change in school justice and discipline management.¹⁶⁸⁵ As a consequence, suggests Vaandering, teaching staff, administrators and policymakers must actively confront resistant hierarchical structures that advocate conformity and instead adopt leadership roles in their relationships with students and actively encourage student participation in the restorative process such as in circles, peer mediation or conferencing.¹⁶⁸⁶

b. Shared Vision

Another aspect is the development of a shared vision aligned with preferred outcomes, including the pursuit of balance in the areas of prevention, intervention and crisis management by the establishment of a framework for restorative practice and the development of a common language grounded in restorative justice for discipline management and improvement of key indicators.¹⁶⁸⁷ According to Morrison, Blood and Thorsborne, these indicators include those relating to suspension, exclusion and detention or staff and policy development, such as support for staff facing difficulty in

¹⁶⁸³ Blood and Thorsborne, above n 1649, 6; S Varnham, 'Getting Rid of Troublemakers: The Right to Education and School Safety – Individual Student vs School Community' (2004) 9(2) *Australia & New Zealand Journal of Law & Education* 67.

¹⁶⁸⁴ Teasley, above 1456.

¹⁶⁸⁵ Shaw, above n 1492, 131.

¹⁶⁸⁶ Vaandering, above n 1621.

¹⁶⁸⁷ Blood and Thorsborne, above n 1649, 6.

disciplinary management and achieving balance in prevention, intervention and management of school emergency incidents.¹⁶⁸⁸

In this sense, a shared vision of restorative practice and methodology will provide agency for students to contribute to school safety as self-regulatory problem solvers, as well as key components of the circles, peer mediators or conference personnel, while teaching staff also contribute to problem solving. It is in this component that the importance of short, medium and long-term goal measurement and the identification of remaining gaps¹⁶⁸⁹ are most apparent as schools attempt to traverse the space between punitive disciplinary management and a restorative school culture.

c. Responsive and Effective Practices

The development of responsive and effective practices allows school staff to respond appropriately to school violence incidents without the need to refer to third parties. It effectively empowers teaching staff who can intervene and avert escalation to more serious outcomes.¹⁶⁹⁰ According to Blood and Thorsborne,¹⁶⁹¹ this requires continual training, support and maintenance along with quality standard monitoring that allows management and staff to conceptualise a restorative justice framework in a straightforward way. Development in this sense will necessarily include the pyramid typology of interventions grounded in the universal/defensive, targeted/secondary and intensive/tertiary responses discussed above. Effective strategy requires the establishment of respectful and inclusive dialogue among the participants in school communities that addresses the safety and health of school communities and is committed to the avoidance of lethal, violent incidents in school settings.¹⁶⁹²

¹⁶⁸⁸ B Morrison, P Blood and M Thorsborne, 'Practising Restorative Justice in School Communities: The Challenge of Culture Change' (2005) 5 *Public Organization Review: A Global Journal* 348–349.

¹⁶⁸⁹ *Ibid* 348.

¹⁶⁹⁰ *Ibid* 349.

¹⁶⁹¹ Blood and Thorsborne, above n 1649, 6.

¹⁶⁹² Morrison, 'Schools and Restorative Justice', above n 1455, 332.

d. Implementation, Transition Management and Best Practice

Primarily, the development of a structural base in the form of a whole of school approach is imperative in the introduction and continuance of sustainable restorative justice practices in Australian school settings in order to provide the scaffolding for the primary, secondary and tertiary intervention levels¹⁶⁹³ discussed above. A whole of school approach provides continual support for the acquisition of and improvement in skills and practices with continual monitoring of programs that are cognisant of daily variations in behaviour and social life within school communities being a feature.¹⁶⁹⁴ Shaw¹⁶⁹⁵ anticipates that the congruence of new practice and procedures with school policy, supportive and effective leadership and a professional learning environment is also necessary in order to establish best practice in the sustainable use of restorative justice practice and procedure in Australian school settings.

Effective transition management with an emphasis on school needs, system imperatives and appropriate review mechanisms that allow for the timely establishment of best practice in new systems and structures such as data to support decision-making,¹⁶⁹⁶ including for example reoffending rates of at-risk students post mediation or conferencing, systems that facilitate the peer mediation process or selection of suitable student members for accountability panels and scripting for use in conferences. The use of appropriate systems and data collection remains of prime importance across the primary, secondary and tertiary levels of intervention by providing support and importantly, accountability.¹⁶⁹⁷ Effective management in a whole of school approach is vital given the tensions that arise in transitioning from the traditional punitive approach to that of restorative methodology in Australian school settings.¹⁶⁹⁸

¹⁶⁹³ Morrison and Vaandering, above n 1351, 144.

¹⁶⁹⁴ Varnham, 'Seeing Things Differently', above n 38, 100; Morrison, 'Restorative Justice in Schools', above n 1556, 48.

¹⁶⁹⁵ Shaw, above n 1492.

¹⁶⁹⁶ Morrison, 'Restorative Justice in Schools', above n 1556, 48.

¹⁶⁹⁷ Ibid.

¹⁶⁹⁸ Blood and Thorsborne, above n 1649, 6.

e. Staff Development

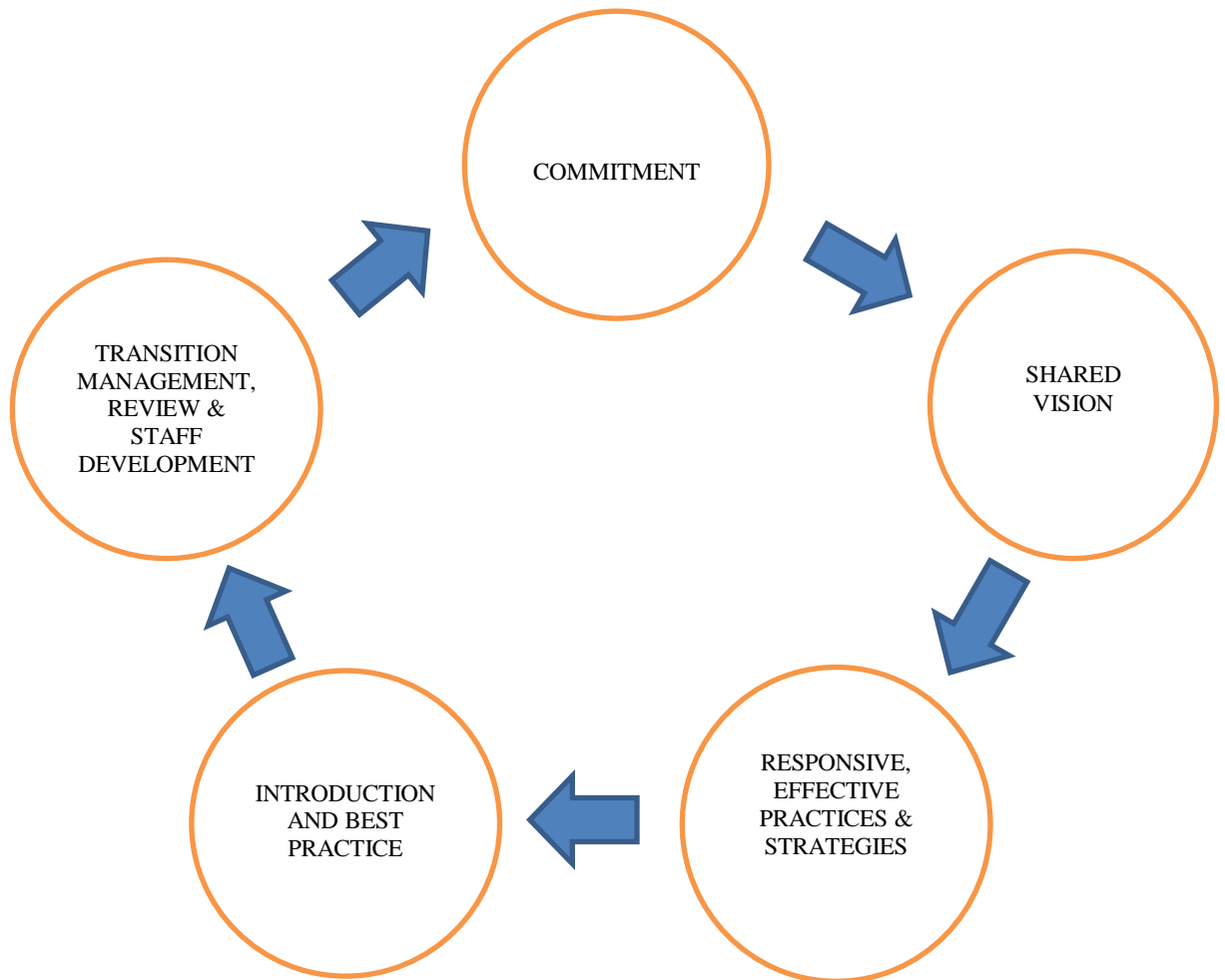
In order to generate the cultural change and educational reform required to implement sustainable restorative justice methodology and practice in school settings, individual staff development must complement institutional change.¹⁶⁹⁹ As a consequence, suggest Blood and Thorsborne, professional relationship development including the extension of restorative practices to the management of staff disputation and conflict, promotion of open, transparent and equitable working relationships, and the building of integrity of process through the challenging of practice and behaviour is needed.¹⁷⁰⁰ In developing a restorative culture, the professional engagement of staff and wider school communities in restorative philosophy and practice with due focus on the importance of upholding a professional environment is desirable and should be applied to daily structures, processes and communication between participants for maximum effect.¹⁷⁰¹

¹⁶⁹⁹ Morrison, Blood and Thorsborne, above n 1688, 353.

¹⁷⁰⁰ Blood and Thorsborne, above n 1649, 6.

¹⁷⁰¹ Morrison, Blood and Thorsborne, above n 1688, 353.

IMPLEMENTATION STRUCTURE



5.9.4 School Violence Discipline Management Implementation Strategies

For the purposes of this thesis, four strategies that are consistent with essential rights tenets will be advanced that form the main thrust of a school violence discipline management regime. Although there will be an emphasis on conferencing, there remains adequate space within school-based restorative practice methodology for the beneficial use of classroom circles, peer mediation and peer/accountability panels.

a. Problem Solving Circles

By their very nature, circles are amongst the most fluid and distinctive form of restorative practice which, when translated to the classroom or school setting, help to engender a sense of community and connectedness amongst participants. This is further

enhanced by the inclusion of teaching staff in the process, adding to the quality of the relationships amongst participants.¹⁷⁰² The flexibility inherent in problem solving circles allows significant variance in operation¹⁷⁰³ but essentially the aim of this restorative approach is to provide a forum arranged in a circular fashion where issues such as response to wrongdoing or alternately building of social capital, or creation of classroom norms and values are discussed and evaluated by participants including students, teachers and other invited participants.¹⁷⁰⁴ Described by Morrison and Vaandering¹⁷⁰⁵ as a proactive rather than reactive approach, circles allow the effective communication of expectations in the circle forum rather than traditional unilateral decision-making and enforcement of behavioural expectations. This effectively changes the nature of classroom management¹⁷⁰⁶ and represents a targeted restorative intervention strategy that offers benefits in many areas including effective conflict resolution, open dialogue and the ventilation of problems in a safe environment.¹⁷⁰⁷

Students bring problems or concerns to the circle with only one participant contributing at a time in an effort to resolve conflict productively, establish ground rules for projects or excursions, progress, and planning of future directions or other common school concerns within an environment that engenders respect, support and effective communication.¹⁷⁰⁸ An approach to the use of problem solving circles in Australian schools that encourages positivity and connectedness through mutual understanding and empathy is preferred, with clear topic choice and setting of goals, an emphasis on maintaining the conversation on topic and active participation in the process by teachers, resulting in a climate of respect amongst participants that deters misbehaviour and disrespect amongst participants.¹⁷⁰⁹

¹⁷⁰² Costello, Wachtel and Wachtel, above n 1393, 23.

¹⁷⁰³ Morrison, *Restoring Safe School Communities*, above n 1347, 127.

¹⁷⁰⁴ Costello, Wachtel and Wachtel, above n 1393, 23, 25.

¹⁷⁰⁵ Morrison and Vaandering, above n 1351, 143.

¹⁷⁰⁶ Costello, Wachtel and Wachtel, above n 1393, 23, 25.

¹⁷⁰⁷ Morrison, 'Schools and Restorative Justice', above n 1455, 338.

¹⁷⁰⁸ Varnham, 'Seeing Things Differently', above n 38, 100; Morrison, *Restoring Safe School Communities*, above n 1347, 127.

¹⁷⁰⁹ Costello, Wachtel and Wachtel, above n 1393, 23, 33.

b. Peer Mediation

Peer mediation is a negotiation-based, targeted intervention approach that utilises students as third party mediators to resolve conflict amongst disputants with a focus on the instruction of students in the art of deflating minor conflicts before their escalation into more serious incidents, and requires the training and instruction of small cohorts of students to act in the mediation process.¹⁷¹⁰

Morrison¹⁷¹¹ states that peer mediation as adapted for use in Australian school settings is aimed at immersing self-regulating processes into the fabric of schools. It involves the training of small cohorts of students to act as neutral third party intermediaries, often arranged in teams who are then required to listen to the disputant concerns and assist in negotiated settlement and development of suitable options as well as the encouragement of self-responsibility by student disputants for decision-making and the welfare of other students.

Peer mediation specific to the school setting aims to resolve conflict in a positive fashion by providing students, disputants and mediators with skills and non-violent tools to enable conflict that would otherwise descend into violent and self-destructive behaviour to be dealt with in a positive fashion. It has been used by schools as a safeguard and structured mechanism to deal with peer to peer conflict, according to Christensen.¹⁷¹² Evidence to date has indicated that the immersing of peer mediation into school cultures is useful and that dispute resolution by students be positively positioned within student welfare frameworks and also aligned with school philosophies such that citizenship in schools is developed through self-regulation.¹⁷¹³ Self-regulation is a process that can become self-empowering to students which remains an important element in the school violence challenge, as violent incidents in schools demonstrate

¹⁷¹⁰ Christensen, above n 1540, 562.

¹⁷¹¹ Morrison, *Restoring Safe School Communities*, above n 1347, 128.

¹⁷¹² Christensen, above n 1540, 562.

¹⁷¹³ Morrison, *Restoring Safe School Communities*, above n 1347, 128.

that victims routinely have compromised power bases, for example in cases of bullying where domination over victims is commonplace.¹⁷¹⁴

With an emphasis on the development of conflict resolution skills in students,¹⁷¹⁵ the use of peer mediation in school settings is not without merit with many thousands of programs in operation internationally, often achieving good outcomes. However, the practice has attracted some criticism particularly regarding its suitability as a remedy for serious or prolonged conflict,¹⁷¹⁶ and disapproval for being overly reactive and excessively focussed on perpetrators instead of contributing to whole of school cultural change, which is preferred.¹⁷¹⁷ Further criticism of school-based peer mediation strategies relates to the unrealistic use of young mediators in difficult cases and re-victimisation of the violence target through the use of mediation which necessarily involves the perpetrator and victim in proceedings, and inequality of bargaining power between the two participants as victims are rarely on level terms with perpetrators.¹⁷¹⁸

c. Peer or Accountability Panels

An extension of peer mediation, peer or accountability panels are comprised of panel members typically derived from school resource officers and facilitators and student peers who are combined in a dialogue with offender and victim in order to develop an individualised consensual case plan or contract for the offender to follow after assessment. The case plan or contract identifies the actual impact of the offence at issue, accountability and responsibility before being agreed to and signed by all participants following the panel's determination.¹⁷¹⁹ Peer or accountability panels reflect a targeted intervention approach.

O'Brien suggests that in school settings, accountability boards are useful in addressing student behavioural issues and encourage prevention and early intervention with the

¹⁷¹⁴ Ibid 129.

¹⁷¹⁵ Morrison, 'Schools and Restorative Justice', above n 1455, 338.

¹⁷¹⁶ Ibid.

¹⁷¹⁷ Christensen, above n 1540, 562.

¹⁷¹⁸ Ibid 562, 564.

¹⁷¹⁹ Pavelka, above n 1612, 16.

support of school and wider community members.¹⁷²⁰ Post case plan monitoring is also an important feature of peer or accountability panels, as valuable assessment of the student offender's progress with respect to key indicators and deadlines is required so as to accurately assess the need for further intervention or assistance.¹⁷²¹ This category of restorative justice practice adapted for school use typically requires that offenders complete counselling and community service tasks, provide apologies and restitution to victims, and complete tutoring and mentoring.¹⁷²²

d. Conferencing

Conferencing is placed at the intensive or tertiary level of intervention. Conferencing in various forms as discussed in Chapter 5 makes up the bulk of restorative interventions in school settings and thus will form the main thrust of a restorative justice strategy for use in Australian schools. Typically, conferencing in schools will be initiated as an alternative to detention, suspension or expulsion in addition to a condition employed prior to the return to school of previously suspended students.¹⁷²³ Again, established processes that incorporate conferencing strategies which offer proactive responses to enhance teaching and learning, along with reactive approaches that are designed to adequately respond to harmful, disruptive behaviour and wrongdoing in school settings are useful suggest Morrison.¹⁷²⁴ A strategy currently in use in Australian schools that is compatible with restorative methodology and practice is the training and trialling of senior students in conference protocol in order to conduct lower level conferencing for junior students will, according to Fouracre, go some way toward student empowerment as well as fostering truly restorative school environments.¹⁷²⁵

¹⁷²⁰ S O'Brien, 'Restoring Schools: A Case for School Accountability Boards' 2005 (Fall) 21 *Victim Offender Mediation Association Connections*, 8.

¹⁷²¹ *Ibid* 9.

¹⁷²² Pavelka, above n 1612, 15.

¹⁷²³ T O'Connell, B Wachtel and T Wachtel *Conferencing Handbook. The New Real Justice Training Manual* (The Pipers Press, 1999) 31.

¹⁷²⁴ Morrison, *Restoring Safe School Communities*, above n 1347, 113.

¹⁷²⁵ Fouracre, above n 1551, 20.

Proceedings in conferences are guided by an enquiry based script that provides the space for victims and offenders to outline their version of events and an explanation of the harm stemming from the violent or disruptive incident in question, culminating in a collective agreement satisfactory to all participants.¹⁷²⁶ Conference scripts are a simple, flexible and reliable instrument well supported by psychological and sociological theory that allow facilitators to conduct conferences without extensive or sophisticated training in mediation or counselling. They provide stability and focus to facilitators even in emotionally charged circumstances¹⁷²⁷ and have their origin in early experiments in juvenile justice restorative procedures.¹⁷²⁸ Whilst the function of facilitators when conducting conferences is to remain impartial and ask scripted questions of all participants, the responses they receive are not. This aligns with an overarching conferencing objective. The aim is to allow participants to drive proceedings with limited intervention by facilitators who in the main have roles limited to the opening and closing of conferences and the asking of prescribed questions of participants rather than undue interference in discussion and decision-making, save for limited interjections to maintain the conference process.¹⁷²⁹

The importance of the restorative script should not be undersold, as the following of a structured approach allows offenders to be presented with the opportunity to accept responsibility for their actions, define specific steps toward harm repair and display good faith, with the social interaction inherent in the conference process also providing participants with a sense of relief and a demonstrable opportunity for reconciliation.¹⁷³⁰ Conferences come in many guises but the following versions are considered suitable for Australian school behavioural management purposes.

¹⁷²⁶ Shaw, above n 1492, 130.

¹⁷²⁷ O'Connell, Wachtel and Wachtel, above n 1723, 21, 29.

¹⁷²⁸ See 5.4 above for a discussion on the notion of restorative justice and the development of conferencing.

¹⁷²⁹ Costello, Wachtel and Wachtel, above n 1393, 34.

¹⁷³⁰ O'Connell, Wachtel and Wachtel, above n 1723, 26.

(i) Proactive Classroom Conferences

In this type of conference limits are emphasised, behavioural boundaries outlined and relationship importance is combined with aid in the enhancement of teaching and learning outcomes by linking discipline management with pedagogy and curriculum that enhances school life,¹⁷³¹ including teaching strategy, approaches and the student learning experience.

(ii) Reactive Classroom Conferences

This category of conference is particularly flexible in nature and includes individual conference arrangements involving single or small groups of students involved in incidents and teachers, to whole class conferences where teachers and entire classes of students are involved, or circumstances where entire grades or years of students and teachers assemble for the conferencing process.¹⁷³²

(iii) Reactive Community Conferences

Reactive community conferences are initiated in response to wrongdoing,¹⁷³³ such as when harmful or violent behaviour extending beyond classrooms has occurred. They require the participation of multiple stakeholders over and above students implicated in the incident, teachers, parents, siblings, other teaching staff members, other family members and members of school and wider communities.¹⁷³⁴

As more formalised responses, reactive classroom and reactive community conferencing options are typically organised by administrative personnel rather than teaching staff,¹⁷³⁵ unlike less formalised restorative options such as circles.

(iv) Family Group Conferences or Family Group Decision-making Conferences

In this most comprehensive conference type, personnel include trained professional assistants to facilitate the required behavioural change. They combine with families,

¹⁷³¹ Morrison, 'Restorative Justice in Schools', above n 1556, 39.

¹⁷³² Morrison, *Restoring Safe School Communities*, above n 1347, 113.

¹⁷³³ Morrison, 'Restorative Justice in Schools', above n 1556, 39.

¹⁷³⁴ Morrison, *Restoring Safe School Communities*, above n 1347, 113.

¹⁷³⁵ Costello, Wachtel and Wachtel, above n 1393, 34.

student offenders and victims to devise plans and make decisions regarding the future direction of the student offender. The professional assistance may take the form of school counsellors, probation officers, social workers, police representatives, and members of religious groups, amongst others, who combine with the student offender and extended members of her or his family in a forum where the behavioural problem, legal status and resources available to serve the student offender and family are outlined.¹⁷³⁶ A feature of family group conferencing is the ability for the offending student and those included in their immediate circle of care, such as family members and religious representatives for example, to formulate a written behavioural plan without input from professionals or other members of the conference, who are presented with the plan and can exercise veto rights on the proposal.¹⁷³⁷

5.9.5 Essential Procedures and Undertakings

In order to ensure the introduction and upkeep of successful, sustainable restorative conferencing in Australian schools, a number of important procedures and undertakings need to be put into place by schools and education agencies. The simplistic adaptation of restorative justice processes from juvenile justice settings to schools is described by Blood and Thorsborne¹⁷³⁸ as short-sighted because the maintenance of robust and healthy school community relationships that allow learning outcomes to be met requires a more sophisticated approach with a concerted effort made to provide support and the engagement of school staff and wider school communities. Principal amongst these procedures and undertakings is the need for careful analysis by individual schools as to exactly where conferencing is placed within school cultures,¹⁷³⁹ because the successful entrenching of restorative ideology rather than a regime of punishment into school culture is critical for success, as is the need for a comprehensive consultative approach with school management, staff and school communities.¹⁷⁴⁰

¹⁷³⁶ Ibid 36.

¹⁷³⁷ Ibid.

¹⁷³⁸ Blood and Thorsborne, above n 1649, 17.

¹⁷³⁹ See 5.9.1 above for a background discussion on the use of restorative justice practices and philosophies in Australian schools.

¹⁷⁴⁰ J Wearmouth, R McKinney and T Glynn, 'Restorative Justice in Schools: A New Zealand Example' (2007) 49(1) *Educational Research* 45.

Further, clear and concise policy is needed to clarify the disciplinary functions of school management and the conferencing process from the outset, as boundaries are often blurred between these concomitant areas, particularly in reporting responsibility and the effect of meeting agreed outcomes on the suspension and exclusion of students.¹⁷⁴¹ The best potential for the successful implementation of restorative practices in schools has been found to be where there is an identifiable need for and commitment to changing the school ethos.¹⁷⁴² This is best achieved through the creation and maintenance of positive school community relationships in circumstances where schools are satisfied that they have the capacity and agency to make productive changes.¹⁷⁴³ The input of community support representatives who can attend to administrative requirements is also of importance in conferencing, as is the training of convenors specifically to assist in the referral of students to conferences, as well as the utilisation of conferencing for a variety of school behavioural issues such as episodes of violence, vandalism, alcohol and drug abuse, disobedience and in other possible non-student school contexts including staff and school management disputation.¹⁷⁴⁴

It is not anticipated that any solid timeframe for the wholesale adoption of restorative practices in Australian schools can be put forward given the dissimilarity in philosophies, structures and practical difficulties evident in schools across the nation. However, it would be expected that those schools already utilising restorative practices would be able to expedite the process to some extent. Nonetheless, a timetable based upon the gaining of commitment to inclusion of restorative programs and methodologies into existing disciplinary programs and structures would help with the acceptance of new restorative dialogue, increased behavioural management options and improved statistics over a period of a year to a year and a half would be useful according to Morrison, Blood and Thorsborne.¹⁷⁴⁵

¹⁷⁴¹ Ibid 46.

¹⁷⁴² G McCluskey et al, 'Can Restorative Practices in Schools Make a Difference?' (2008) 60(4) *Educational Review* 412.

¹⁷⁴³ Ibid.

¹⁷⁴⁴ J Wearmouth, R McKinney and T Glynn, 'Restorative Justice: Two Examples From New Zealand Schools' (2007) 34(4) *British Journal of Special Education* 201–202.

¹⁷⁴⁵ Morrison, Blood and Thorsborne, above n 1688, 352.

The period of implementation of restorative practices into mainstream school use throughout the Australian jurisdiction is of significance in successful assimilation as it requires the commitment of school communities in a process that increases skill development, in conference convening for example, alignment of policy and procedure, and a more pronounced modification of dialogue and procedures over a two to three year duration.¹⁷⁴⁶ Best practice could likely be achieved over a four to five year span, which would see the preferred school community cultural change realised and behavioural change embedded in schools, and policy review and procedure practices in place.¹⁷⁴⁷ Shaw¹⁷⁴⁸ is mindful that a major threat to the establishment of sustainable examples of the preferred whole of school approach is time pressure, however, whilst Gonzalez¹⁷⁴⁹ recognises the benefit of the introduction in schools of stand-alone restorative justice coordinators in order to facilitate the introduction of sustainable program and procedure.

5.10 Incorporation of Restorative Justice Practice and Procedure into Australian School Discipline Management Structures

The widespread establishment and sustainability of a more formalised approach to restorative justice in Australian schools calls for the incorporation of the framework outlined above into existing discipline management policy regimes in each state or territory. This integration of the recommended regime into existing structures¹⁷⁵⁰ can be achieved in a similar fashion to the widespread assimilation of anti-bullying strategies and procedures¹⁷⁵¹ that has taken place in the domestic Australian education

¹⁷⁴⁶ Blood and Thorsborne, above n 1649, 15.

¹⁷⁴⁷ Morrison, Blood and Thorsborne, above n 1688, 352.

¹⁷⁴⁸ Shaw, above n 1492.

¹⁷⁴⁹ Gonzales, above n 1500, 305.

¹⁷⁵⁰ See Appendix 1 for an example of a rights-based restorative justice discipline management policy for use in Australian schools.

¹⁷⁵¹ See, eg, Education and Training, *Countering Bullying, Harassment and Violence in ACT Public Schools*, above n 1014; Education & Communities, *Bullying: Preventing and Responding to Student Bullying in Schools Policy*, above n 1031; Department of Education and Training, *Bullying, Harassment & Violence*, above n 992; Department of Education, Training and Employment, *The Code of School Behaviour*, above n 1007; Department of Education and Child Development, *Bullying, Harassment and Violence* (2014) Government of South Australia <<https://www.sa.gov.au/topics/education-skills-and-learning/health-wellbeing-and-special-needs/bullying-and-harassment/identifying-bullying-harassment-and-violence>>; Department of Education, *Staying Safe in Tasmanian Government Schools* (2015) Government of Tasmania <[290](https://www.education.tas.gov.au/documentcentre/Documents/Infosheet-</p></div><div data-bbox=)

environment. The integration of comprehensive restorative justice methodology and practice in Australian schools is also supported by the scaffolding provided by state and territory juvenile justice legislative frameworks that promote the use of diversion from traditional processes.¹⁷⁵² Education agencies have also provided support¹⁷⁵³ in the form of discipline management policy that has utilised a restorative justice approach. Essential human rights safeguards will underpin the use of this methodology and practice¹⁷⁵⁴ which will also benefit Australia's international human rights obligations.

This thesis recommends a whole of school, rights-based restorative justice approach to address juvenile school violence based upon the strategy introduced above in this chapter. To enable this, the hitherto underutilised Commonwealth *National Safe Schools Framework* provides a useful vehicle to inform and guide Australian schools in the provision and upkeep of safe school environments. Essentially, as recommended by both the United Nations Committee on the Rights of the Child and the Australian Human Rights Commission,¹⁷⁵⁵ Australia should increase efforts to maximise the effect of the *Framework*, as current school-based frameworks are inadequate in addressing school violence and bullying, for example. In guiding and informing state and territory policy and procedure, the *Framework* is beneficial in addressing the Australian school violence issue through the active promotion of safe and respectful school environments and by championing a whole of school approach to the problem.¹⁷⁵⁶

Health-Bullying.pdf>; Department of Education and Early Childhood Development, *Bully Prevention Policy* (2014) State Government of Victoria

<<http://www.education.vic.gov.au/about/programs/bullystoppers/Pages/prinprevent.aspx>>; Department of Education, *Behaviour Management in Western Australian Schools* (2008) Government of Western Australia <<http://www.det.wa.edu.au/policies/detcms/policy-planning-and-accountability/policies-framework/policies/behaviour-management-in-schools.en?cat-id=3457115>>.

¹⁷⁵² See 5.5 above for a discussion on the use of restorative justice programs and procedures within the Australian Juvenile Justice System, including conferencing.

¹⁷⁵³ See 5.6 above for a discussion on the use of restorative justice programs and procedures in Australian schools to date.

¹⁷⁵⁴ See 6.2 below for a discussion on the human rights implications of restorative justice in schools programs and procedures.

¹⁷⁵⁵ See 6.2 below for a discussion on the recommendations advanced for Australia internally by the Australian Human Rights Commission, as well as the recommendations advanced for Australia by the United Nations Committee on the Rights of the Child.

¹⁷⁵⁶ See 4.6 above for an outline of the guiding principles of the National Safe Schools Framework.

While the guiding principles and intent of the *Framework* is of merit, a far more robust and structured regime of measures is required to more appropriately address the school violence issue. Specifically, a more extensive restorative justice regime should be implemented, based upon the entry level, secondary/targeted and intensive or tertiary level intervention approach that utilises problem solving classroom circles, peer mediation and peer accountability panels culminating in an expansive conferencing approach. As recommended in this thesis, a model approach buttressed by the scaffolding provided by the *Framework* would address the school violence problem and contribute to safer school communities in a more robust and effective fashion with due regard for human rights, and importantly interrupt the journey to adult criminality often undertaken by at-risk violent students.

The incorporation of a model rights-based restorative justice approach to address school violence in Australia within the scope of the *Framework* will inform and guide state and territory discipline management policy in a similar vein to the wholesale adoption of anti-bullying policy across the Australian jurisdiction as outlined above. As discussed earlier,¹⁷⁵⁷ school-based restorative justice programs are already in place in several jurisdictions, albeit in a limited capacity. For example, in Western Australia, the current *Department of Education and Training, Behaviour Management in Schools* (2008) policy includes recommendations for the use of restorative processes when managing breach of school discipline.¹⁷⁵⁸ These can feasibly be adapted in concert with a revised *Framework* to incorporate the more comprehensive strategy developed in this thesis.

Moreover, the collaborative leadership demonstrated by the Commonwealth in initiating the *Framework* is buttressed¹⁷⁵⁹ by the provision of adequate funding to assist schools and communities in their efforts to reduce school violence, such as during the 2004–2005 period in which significant funding was provided to Australian schools to initiate

¹⁷⁵⁷ See 5.6 above for a discussion on the use of restorative justice programs and procedures in Australian schools to date.

¹⁷⁵⁸ Department of Education and Training WA, *Behaviour Management in Schools*, above n 110, 7.

¹⁷⁵⁹ See also 4.4 above for a discussion on the various Commonwealth statutes that are in place to provide financial assistance to state and territory education agencies.

safe schools programs that reflect the *Framework*.¹⁷⁶⁰ In particular, the *Australian Education Act 2013* (Cth) provides funding that is conditional on the implementation of national policy initiatives which can include the *Framework*¹⁷⁶¹ suitably adapted to include the implementation structure advanced in this thesis. Funding and resource allocation remain significant given the considerable impost that the introduction of appropriate programs and policies including training required for school staff and students places on state and territory education agencies when initiating and progressing appropriate rights-based restorative justice policy and procedure in Australian school settings.

5.11 Conclusion

This chapter of the thesis saw the introduction and canvassing of important concepts that play a pivotal part in the culmination of the study which will lead to recommendations for the wholesale introduction of rights-based, restorative justice-based behavioural management structures in Australian schools. Initially, the inexact notion of a rights-based approach was introduced which requires the expansion of laws, practices and procedures to uphold and address the violation of rights, which was then extended to a rights-based approach adapted for children and juveniles. The discussion then moved to the critical notion of restorative justice that was introduced in earlier chapters and included background discussion of the Australian experience of restorative justice within the confines of juvenile justice structures in the wider community. From this juncture, the discussion turned to the use of restorative justice practices in Australian schools where some useful experiences have been gained, before an important discussion on the wholesale adoption of uniform human rights-based restorative practices based upon a whole of school approach, and the introduction and upkeep of

¹⁷⁶⁰ Cross et al, above n 960. Note the National Safe Schools Grants Program of 2004–2005. See H McGrath, ‘Making Australian Schools Safer: A Summary Report of the Outcomes from the National Safe Schools Framework Best Practice Grants Programme (2004-2005)’ Australian Government Department of Education, Science and Training <<http://www.ncab.org.au/Assets/Files/MakingAustraliaSchoolsSafer.pdf>>, in which funding was provided to support the implementation of the National Safe Schools Framework. In this program a large number of Australian Schools received grants to initiate predominantly anti-bullying programs.

¹⁷⁶¹ *Australian Education Act 2013* (Cth) s 22(1).

sustainable and valuable behavioural management practices that will contribute toward reduction of the school violence problem.

A restorative framework for implementation was then introduced that highlighted the importance of notions of safe and restorative schools that focussed upon the needs of stakeholders like students, teaching and administrative staff, parents and members of the wider community in a three level approach. This methodology is grounded in the use of problem solving circles, peer mediation, peer accountability panels and conferencing which requires the commitment of stakeholders to address the question of school violence. Also needed is a shared vision for change in school communities, effective training and support and professional relationship development in an attempt to construct and maintain the preferred whole of school approach to the implementation of restorative justice practices that is cognisant of essential human rights obligations.

Chapter Six of the thesis will provide an overview of the study, a final discussion on the human rights implications of a restorative justice approach, shortcomings in Australia's performance in the upholding of human rights, and key findings, future perspectives and a concluding statement.

Chapter 6: Thesis Overview, Human Rights Implications, Key Findings, Recommendations and Conclusion

6.1 Thesis Overview

The intended purpose of this thesis was to conduct an investigation into the benefit of a rights-based approach grounded in restorative justice methodology and practices that will address the challenge of violence in Australian schools in a useful, practical and beneficial fashion while upholding and advancing essential human rights obligations.

Chapter 1 of the thesis identified the global problem of juvenile violence as well as the dearth of information available in relation to school violence. Salient risk factors were identified including individual characteristics such as low intelligence, behavioural issues, alcohol and drug use, as well as relational factors such as poor familial bonding, erratic or harsh parenting, low socio-economic status and societal issues including income inequality, weapons access, and the presence of gangs. Important issues introduced in the chapter included the escalation of juvenile toward adult violence, so often seen, as well as the unhelpful influence of mass media in the provision of both information and entertainment. The important notion of schools as settings where juvenile violence is both perpetrated and controlled along with the inevitable blurring of boundaries between schools and community that spawn difficulty in the management of juvenile violence was also introduced.

The contextual framework of the thesis was also advanced and is essentially one that is underpinned by a rights-based approach allowing the development of suitable juvenile school violence methodology for use in Australian schools grounded in human rights obligations principally derived from the pivotal *UNCRC* tenets of best interests and participation, along with associated international instruments. Chapter 1 also outlined research questions that centred on juvenile school violence in Australian schools, the nature and scope of domestic and international law in addressing juvenile violence, contemporary Australian education law and policy relevant to school violence and the

question of a rights-based approach to addressing the problem of juvenile school violence and how education policy can be informed by the thesis. The chapter also outlined the conceptual frameworks, methodology, and document analysis of the study and gave a chapter outline and structure. Importantly, the aim of the research was identified in the chapter, being the formulation of advantageous recommendations for school law, policy and guidelines that address school violence in Australian schools.

The relevance of the thesis was identified as contributing to an enhanced understanding of violent juvenile behaviour and the concomitant effect on society with a particular focus on criminal justice and education agencies as they have the most fundamental relationship with violent juveniles. An important contribution to the field of education law and practice in violent juvenile discipline management in Australian schools is also of relevance in the thesis. Insofar as significance of the thesis is concerned, by grounding the research in an Australian perspective it is suggested that an important contribution will be made to the existing body of knowledge concerning juvenile violence, which will go some way toward addressing the domestic research lacuna in the area.

Chapter 2 of the thesis identified germane definitional aspects of the thesis including the important notions of juvenile, violence and school violence which represent the central theme of the study. Manifold typologies of these areas were discussed which contributed toward linking research questions and aims including the question of legal maturity in light of the *doli incapax* provisions in Australian juvenile justice legislation, in addition to exploration of a useful definition of violence derived from numerous classifications whether physical, emotional, psychological or economic, amongst other exemplars. The discussion then focussed on the pivotal school violence delineation so important to the study which was extended by analysis of attendant risk factors that can contribute to acts of school violence. The chapter then focussed on patterns and trends of juvenile violence in Australia more broadly, prior to a focus on domestic school violence. Also discussed in the chapter were limitations in analysis of recorded juvenile criminal justice data in

addition to the perennial problem of underreporting and policing methods which add further difficulty.

The impact of juvenile violence on victims, communities and society more generally was then discussed, which was then extended to causes, risk and protective factors associated with juvenile violence. The overarching issue of school violence was then examined including the associated causal factors, prior to a discussion of school violence in the Australian domain which included commentary on fatal episodic domestic school violence incidents and the pervasive and damaging trend of internet and technology-based recording and publication of school violence not previously anticipated.

By providing an overview of the development of autonomous human rights for children and juveniles, Chapter 3 established an important platform for Chapter 4 of the thesis which in turn examined domestic and international obligations associated with human rights instruments in light of responses by institutions such as the juvenile justice and education agencies within Australia.

Chapter 3 of the thesis outlined the notion of human rights with particular focus on the transfer of such rights to children and juveniles and the emergence of delinquency as a social problem including the development of stand-alone systems to deal with the issue, such as the development of children's courts. An introduction was also provided to the important concept of restorative justice that would be the subject of much focus in subsequent chapters of the thesis. The chapter also provided the historical background to the emergence of the *UNCRC* and other international instruments associated with children and juveniles with a focus on the specific rights provided under the convention, in particular the best interests principle and the notion of participation. Following this, an overview was made of selected jurisprudence associated with children and juvenile human rights in both a domestic and international sense.

In light of the human rights instruments discussed in Chapter 3, the formal structures in place to deal with juvenile violence especially in school settings within the Australian jurisdiction were examined in Chapter 4 as a precursor to an extensive discussion later in the chapter on the incorporation or otherwise of essential rights safeguards found in important human rights instruments into domestic Australian legislative and policy regimes associated with children and juveniles. In particular, the juvenile justice and education law and policy structures including the Commonwealth initiated *National Safe Schools Framework*, which although worthwhile has had limited influence on domestic school responses to the school violence issue, were considered. Whilst inconsistency between state and territory responses to juvenile justice was identified, some consensus on other rights-based safeguards was also apparent. An overview of domestic education legislative and policy approaches to dealing with school-based child and juvenile violence was then undertaken prior to an overview of essential human rights-based canons including best interests and participation amongst others, along with staples such as natural justice, due process and procedural fairness. Encouragingly for the purposes of this thesis, a diversion from traditional punitive responses in the form of restorative justice practices was found to have some exposure in domestic Australian juvenile justice legislation and education policy.

Chapter 5 culminated in recommendations for the wholesale adoption of a restorative justice approach to behavioural management in Australian schools framed in a juvenile rights-based approach that is cognisant of human rights obligations. Initially, the chapter outlined the important concepts of a rights-based approach and restorative justice which had been introduced earlier in the thesis. In order to provide context to the domestic use of restorative methodology and practices, an overview of the use of restorative justice in Australia within the confines of juvenile justice agencies, and more importantly school settings, was provided. Principally framed in a three stage approach, the recommended restorative justice strategy embodies the use of conferencing along with more preliminary methods including problem solving circles, peer mediation and accountability panels as well as a shared vision by schools, effective support and training and relationship development. An inclusive approach was advanced toward

achieving the goal of safe school environments which is conscious of essential human rights safeguards and goes some way toward addressing historical limitations and shortcomings in Australia's human rights performance.

As the thesis was underpinned by the upholding of essential human rights of juveniles, the implications of a uniform adoption of restorative justice methodology and practice in Australian schools aimed at the reduction of school violence will be the focus of the final discussion of the thesis. Key findings associated with a rights-based approach with particular focus on the two *UNCRC* tenets of the best interests of the child and participation identified earlier in the thesis, in addition to Australia's human rights shortfalls as espoused by the *UNCRC* along with other pertinent rights and school violence issues, will now be addressed.

6.2 Human Rights Implications For the Implementation of a Uniform Rights-based Restorative Justice Framework For Use in Australian Schools.

The use of sustainable restorative justice methodology and practice in Australian schools and the compatibility of such a regime in light of Australia's human rights obligations is particularly significant given *UNCRC* recommendations that Australia increases its efforts to implement methodologies and strategies to address school violence through the enactment of a federal framework complemented by state and territory legislation, in addition to the promotion of restorative school environments that are more conducive to achieving the goal of violence reduction. Further recommendations for a rights-based approach to address the issue of juvenile violence more broadly also complement *UNCRC* recommendations that focus on school settings.

6.2.1 Introduction

The wholesale adoption of a rights-based, restorative justice behavioural management regime in Australian schools is intended to address the school violence issue in addition to inculcating a restorative school environment that is both more tolerant of difference and respectful of difference in others. A discussion on the consistency or otherwise of such a regime in light of Australia's human rights obligations, with particular reference

to areas of concern that have been expressed by the international community in regard to the promotion of juvenile human rights in the Australian jurisdiction, would however be useful at this point. It is therefore the purpose of this final discussion in the thesis to marry the concepts and notions discussed in preceding chapters with the introduction of a rights-based, uniform behavioural management regime for use in Australian schools that is grounded in restorative justice methodology.

6.2.2 The Incorporation of Essential Rights-based Tenets in a Restorative Justice in Schools Framework

As discussed above,¹⁷⁶² essential rights-based approach tenets and their relationship to restorative justice methodology including the notions of accountability and transparency, universality and individual dignity, capacity development and empowerment, with a particular focus on participation and the best interests of the child, will be assessed with respect to the development of restorative practices for practical, sustainable use in schools and the fulfilment of rights and entitlements. The ability to address violation and denial of rights will also be addressed. This area is of importance given Australia's deficient performance in the implementation and promotion of child and juvenile rights found in international instruments, particularly the pivotal *UNCRC* since its ratification by Australia over two decades ago.¹⁷⁶³ Aligned with the recommendations of this thesis, the introduction of a child rights-based approach to juvenile violence was also supported by the Australian Human Rights Commission, which endorsed an integrated, cohesive, coordinated and interdisciplinary approach to address episodic juvenile violence, harassment and bullying,¹⁷⁶⁴ which logically would include school settings.

In response to the submission of the 4th periodic report by Australia in 2011, the United Nations Committee on the Rights of the Child was not without commendation for Australia's human rights activities in a number of areas as outlined in its most recent

¹⁷⁶² See 5.2 above for a discussion of the various children's rights-based tenets including transparency, universality, accountability, capacity development and empowerment.

¹⁷⁶³ See 3.5 above for a discussion on the gestation, introduction and ratification of the *UNCRC*.

¹⁷⁶⁴ Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child*, above n 671, [63].

report published in mid-2012.¹⁷⁶⁵ These included the introduction of Commonwealth legislation to establish a committee on Australian human rights legislation, the National Apology by then Prime Minister Rudd in 2009, rights of persons with a disability, the elimination of discrimination against women, protection of children in the family law system, early childhood education and closing the gap on indigenous disadvantage, amongst other important initiatives and developments.¹⁷⁶⁶

The satisfaction of essential rights-based tenets in a restorative justice approach to discipline management in Australian schools requires accountability and transparency between duty bearers and stakeholders. In this instance, the introduction and sustainable use of restorative practices such as classroom circles, peer mediation or accountability panels and conferencing can secure entitlements and obligations to respect, protect and fulfil rights through the appropriate discharge of legislative, administrative and judicial actions, as was introduced in Chapter 5,¹⁷⁶⁷ in order to respect, protect and fulfil the entitlements of children and juveniles.

Here, state parties including Australia are obligated under the *UNCRC* in particular but also the *ICCPR* and other important instruments to ensure those individual freedoms which can in turn be embraced under the mechanisms of school-based restorative practices. As an example, children and juveniles at Australian schools as rights holders are entitled to expect duty bearers in education agencies to uphold and protect their rights under *UNCRC* art 4 including the review of policy and the provision of adequate funding in educational services. It also extends to changing or amending laws such as would be the case with adoption of transparent, uniform restorative justice-oriented school behavioural management policy and procedure in Australian schools.

¹⁷⁶⁵ Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention*, 60th sess, UN Doc UNCRC/C/AUS/CO/4 (28 August 2012) [2]–[6].

¹⁷⁶⁶ *Ibid* [4]–[6]. Note also that the appointment of National Children’s Commissioner Megan Mitchell in February 2013 has also been seen as a positive development in the promotion of children and juvenile rights in Australia.

¹⁷⁶⁷ See 5.9 above for a discussion on an implementation framework for a rights-based restorative justice approach for use in Australian schools.

Universality and the individual dignity of rights holders such as children and juveniles in schools is also an important notion in a restorative justice approach to behavioural management in Australian school settings in the sense that promotion of the individual worth of all students rather than simply as a class of rights holders is achievable instead of the promotion of generalist approaches common to traditional methods that are essentially target driven.¹⁷⁶⁸ The use of restorative methodology such as peer mediation and conferencing places value on the input of the individual student in the disciplinary process. Capacity development and empowerment is also an important feature of restorative justice in an Australian school discipline management regime as the methodology provides a welcome measure of empowerment to children and juveniles in school settings. It elevates student victims of school violence to participants rather than passive members of existing school disciplinary management processes, whilst promoting a human rights-based approach that is welcoming of juvenile rights. Two essential factors in the empowerment and capacity development potential of restorative practices in schools are the key elements of participation in the process of school discipline management and consideration of the best interests in all decisions affecting children and juveniles that are derived from school violence incidents.

Participation in a restorative justice process is fundamental to both its operation and success. Within the context of school environments, it represents a significant challenge in upholding the participatory rights of juveniles given the structures omnipresent in school systems that traditionally defer to predominantly hierarchical operating models. These are reliant on administrators and other management staff to regulate school policy and procedure while teachers largely are empowered to shape the classroom environment.¹⁷⁶⁹

The requirement for participation in restorative justice procedures and practice by all stakeholders, whether in classroom circles, peer mediation or conferencing in school settings, remains of importance as the communication of views, the search for answers

¹⁷⁶⁸ Monohan and Young, above n 516, 43.

¹⁷⁶⁹ L Johnny, 'UN Convention on the Rights of the Child: A Rationale for the Implementing Participatory Rights in Schools' (2005) 40 *Canadian Journal of Educational Administration and Policy* 2.

and dealing with the aftermath of the offence are central to the restorative model. The requirements of *UNCRC* art 12 and Beijing Rule 14 are also met by the participation of juveniles in decision-making in this sense, because the notion that children and juveniles have the right to have their views taken into account and have adults involve them in decision-making,¹⁷⁷⁰ is also endorsed by the Australian Human Rights Commission and satisfied in the restorative justice school disciplinary model. However, parental rights¹⁷⁷¹ are not actually subjugated by art 12 as participation by parents can be adjusted to account for maturation levels in the juvenile in question. Moreover, respect for the contribution of parental guidance and direction to the exercise of the rights of children and juveniles under *UNCRC* art 5 also is to be considered by state parties in the exercise of discipline management in schools. Further, Braithwaite suggests that there is an association between effective participative parenting and the restorative justice approach that highlights the notion of responsible social behaviour through discipline or the setting of limits, yet also encourages nurturing and affection by confrontation and disapproval of wrongdoing and increased support through recognition of the wrongdoer's value.¹⁷⁷²

Further, within the context of juvenile justice legislation and school behavioural policy across the Australian jurisdictions, the participation and consultation of students, teaching staff, parents, guardians and members of school communities once again aligns with the intent of restorative measures and practices, particularly conferencing, following incidents of school violence.¹⁷⁷³ This consultative and participative approach requires input and interaction from stakeholders and encourages positive interpersonal skills development, consultation and the encouragement of respectful relationships and the management of student behaviour in partnership with school community stakeholders, as well as student engagement.

¹⁷⁷⁰ See 3.6 above for a discussion of the right of children and juveniles to participate under international instruments.

¹⁷⁷¹ Australian Human Rights Commission, Submission to the Committee on the Rights of the Child, above n 671, [59]. See 4.3 above for a discussion of parental rights across Australian jurisdictions.

¹⁷⁷² V Braithwaite, 'Values and Restorative Justice in Schools' in H Strang and J Braithwaite (eds) *Restorative Justice: Philosophy to Practice* (Ashgate Publishing, 2000) 115–116.

¹⁷⁷³ See 4.7 above for a discussion on domestic juvenile justice legislation and school behavioural policy.

Additionally, in sharing power with students, adults may in fact contribute to the development of an enhanced sense of ownership in school environments by juveniles if they are provided with the opportunity to make decisions in relation to discipline management. They are also likely to have a greater inclination to accept and follow rules and procedures.¹⁷⁷⁴ The value of the participative process in the restorative process should not be undersold as by contributing to school policy and processes, juveniles are more inclined to become active, socially adjusted citizens capable of both making informed decisions and being responsible for the same, according to Varnham, Booth and Evers.¹⁷⁷⁵ The enhancement of life skills through exposure to restorative justice methodology in schools is of benefit to children and juveniles in traversing life challenges, as well as helping reduce juvenile violence and aggressive tendencies and improve educational achievement and future job prospects, principally in the areas of self-awareness, self-management, social awareness, relationship development and responsible decision-making.¹⁷⁷⁶

The inclusive participatory nature of a uniform restorative justice regime in Australian schools will also go some way toward addressing the United Nations Committee on the Rights of the Child concerns that there continue to be inadequate avenues for children and juveniles, particularly those aged 15 years or under, to express their views, as well as a dearth of mechanisms allowing meaningful participation and empowerment in school behavioural policy and decision-making in matters affecting them.¹⁷⁷⁷ As a consequence, restorative rather than existing punitive disciplinary management regimes in Australian schools will provide the medium for much greater participation and weighing of the views of children and juveniles, and will also satisfy the participatory goals of a rights-based approach and human rights more broadly in line with the requirements of human rights instruments, particularly those enshrined in the *UNCRC*.

¹⁷⁷⁴ Johnny, above n 1769, 6–7.

¹⁷⁷⁵ Varnham, Booth and Evers, above n 641.

¹⁷⁷⁶ World Health Organization, *Violence Prevention: The Evidence*, above n 25, 5, 29.

¹⁷⁷⁷ Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/4, above n 1765, [33].

Participative contribution in the democratic processes that resolve school-based conflict and safety issues, such as class circles, peer mediation and conferencing, is of obvious benefit and promotes the *UNCRC* art 12 premise of meaningful participation by children and juveniles in matters affecting them, whilst also promoting citizenship and democracy within school settings¹⁷⁷⁸ and the development of more politically minded citizens¹⁷⁷⁹ through the medium of restorative practices.

The best interests principle¹⁷⁸⁰ espoused by *UNCRC* art 3 is to be afforded preferential but not sole or absolute status in all actions undertaken by private or public social welfare institutions, courts, legislative bodies or administrative authorities that impact upon children or juveniles. In the opinion of the United Nations Committee on the Rights of the Child, the best interests principle in Australia is inadequately publicised, integrated and applied in legislative, administrative and judicial policy and proceedings and projects, while state parties are to be actively encouraged to provide guidance in the form of appropriate procedures and criteria to determine the criteria to be used in an individual assessment of the best interests of children and juveniles in all areas including judicial and administrative areas.¹⁷⁸¹

Mindful of these issues and the indistinct nature of the best interests principle, the use of restorative methodology and practices in Australian schools has much to offer. The *UNCRC* itself, argue Blagg and Wilkie,¹⁷⁸² can provide some measure of additional guidance such as in the area of freedom from all forms of violence under the auspices of *UNCRC* art 19, which would presumably include physical chastisement using traditional punitive behavioural management approaches employed by schools, in addition to *UNCRC* art 37, which prohibits cruel or harmful punishment and degrading treatment. Moreover, the United Nations Committee on the Rights of the Child was also critical of

¹⁷⁷⁸ Varnham, Booth and Evers, above n 641.

¹⁷⁷⁹ Johnny, above n 1769, 13.

¹⁷⁸⁰ See 3.5 above for a discussion of the best interests principle and 5.3.4 above for further explanation of the principle within the confines of a rights-based approach.

¹⁷⁸¹ Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/4, above n 1765, [32].

¹⁷⁸² Blagg and Wilkie, above n 657.

Australia's continued use of corporal punishment¹⁷⁸³ which remains a difficult issue. The lawfulness or otherwise of this disciplinary measure is contentious because of continued use in some Australian schools in certain circumstances under the auspices of 'reasonable chastisement.' The United Nations Committee on Rights of the Child also made specific mention of a dearth of systemic and recurrent evaluation of existing measures that address the school violence issue, and recommended that Australia act to prohibit corporal punishment and instead promote positive, alternative methods of discipline for children and juveniles in schools which are respectful of human rights.¹⁷⁸⁴ The use of restorative methodologies and practices in schools has obvious application in this sense and also goes some way toward the promotion of the best interests of children and juveniles.

The United Nations Committee on the Rights of the Child was also vocal on the need for Australia to enact a federal framework to reduce violence and to monitor anti-violence measures in schools. This is reflected by similar and complementary legislation at state and territory level¹⁷⁸⁵ that again has implications for the introduction of the uniform restorative justice methodologies and practices proposed in this thesis in both the critical areas of punishment for school violence incidents and the promotion of restorative, inclusive, less violent school environments, which remain first order priorities for schools engaged with the approach. More instructive is the United Nations Committee on the Rights of the Child view that Australia redoubles its efforts to address the prevention of school violence in the form of bullying, principally through the introduction of educational and socio-pedagogical methodology for teaching staff with parental input. This has implications for those entrusted with the care and development of children and juveniles, including in the provision of safe and healthy environments and protection from violence, with the best interests principle prominent throughout the Australian jurisdiction in the parental responsibility legislative framework.¹⁷⁸⁶

¹⁷⁸³ See 4.11.5 above for a discussion on the use of corporal punishment in Australian schools.

¹⁷⁸⁴ Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/4, above n 1765, [44].

¹⁷⁸⁵ Ibid [47].

¹⁷⁸⁶ See 4.10 above for a discussion of parental rights across Australian jurisdictions.

Further, under *UNCRC* art 29, which promotes the goals of education, students are to be particularly respectful of parental rights. This also aligns with restorative methodologies and increased capacity for teaching staff to address and investigate episodes of school violence including bullying. The United Nations Committee on the Rights of the Child did welcome measures introduced in the *National Safe Schools Framework*,¹⁷⁸⁷ which was endorsed by the Australian Human Rights Commission in its submission to the United Nations in late 2011. The Australian Human Rights Commission was also of the opinion that the Commonwealth government should support school communities in implementing the *National Safe Schools Framework* through the evaluation and monitoring of its impact, and also endorsed the integration of human rights education in Australian school curricula.¹⁷⁸⁸

More broadly, the United Nations Committee on the Rights of the Child also encouraged state parties to develop comprehensive strategies to prevent and address all forms of violence against children and juveniles including reporting results to the United Nations Secretary General in its next periodic report, and went further in recommending the introduction of explicit national legal bans on all forms of violence in all settings.¹⁷⁸⁹ Once again, uniform restorative justice methodologies and practices in school settings can be advantageous in both violence reduction through both less punitive punishment for behavioural infractions and also through cultural change that promotes a less violent school environment.

The promotion and nurturing of the best interests principle in uniform restorative justice methodology for use in Australian schools will also be allied to juvenile justice and school behavioural policy. The principle is well subscribed in state and territory juvenile justice legislation and is present without being prolific in state and territory school policy and procedure. Pleasingly, the intent if not the principle itself is largely

¹⁷⁸⁷ Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/4, above n 1765, [78]. See also 4.6 above for a summary of the provisions of the National Safe Schools Framework.

¹⁷⁸⁸ Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child*, above n 671, [68], [145]–[148].

¹⁷⁸⁹ Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/4, above n 1765, [48].

maintained in domestic school legislation and procedure.¹⁷⁹⁰ The right to an education under *UNCRC* art 28¹⁷⁹¹ also has relevance here in terms of a rights-based approach to the best interests principle in that children are to benefit from education free of violence with schools obligated to review disciplinary policy to ensure that no physical or mental violence, neglect or abuse is apparent, and that the dignity of the child or juvenile is maintained.

Key findings and recommendations that have been derived from the thesis will now be discussed.

6.3 Key Findings

Throughout the course of this thesis a number of instructive themes have emerged that are of particular importance in the context of school violence in the Australian arena. Essentially, this thesis will conclude that the challenge of addressing juvenile violence in Australian schools is best approached from a legislative and policy position grounded in a rights-based restorative justice approach which recognises both the problematic nature of school-based violence and the notion that juveniles have independent human rights. Key findings that have emerged during the study will now be discussed.

6.3.1 Insufficiency of Accessible Data Relevant to Domestic Australian School Violence

A thorough understanding of the impact and extent of school violence in the Australian jurisdiction is compromised by a lack of reliable data and structural shortcomings which were discussed in Chapter 2 of the thesis, as the recording of violent incidents on or connected to school environments is typically embedded in juvenile crime and violence data that is difficult to access. There is no stand-alone school violence data available at present. As a result, media reports on incidents of school violence across the domestic Australian landscape were referred to as well as small scale reports and anecdotal

¹⁷⁹⁰ See 4.11 above for an overview of state and territory juvenile justice legislative and school policy provisions including the pivotal best interests principle.

¹⁷⁹¹ See 3.6 above for a discussion on the right to education under the *UNCRC*.

evidence, because these sources of information heavily influence public opinion and perceptions of the school violence problem.

6.3.2 Limited Influence of International Law Safeguards in the Domestic Australian Legal Landscape

The influence of supporting international law on the development of a rights-based approach to address juvenile school violence within Australia remains of concern. Essentially, the lack of direct incorporation of *UNCRC* safeguards into domestic law has compromised the influence of this pivotal international instrument which was outlined in Chapter 3 of the thesis. Ostensibly, the non-negotiable human rights standards of the *Convention* that are targeted at the specific stand-alone interests and needs of children and juveniles to date is of only peripheral force until such time as the *Convention* is incorporated into domestic law. However, some promise has emerged such as the inclusion of important *UNCRC* provisions including the best interests element which has been given focus in juvenile justice legislation and school discipline management policy. In addition, stand-alone human rights legislative provisions have been enacted in some domestic jurisdictions to date, whilst judicial activism has seen the interpretation of domestic legislation with deference to international obligations such as those found in the *UNCRC* and other instruments in deciphering statutory ambiguity, although not where there is apparent clarity in legislative provisions .

6.3.3 Inconsistency in Implementation of International Safeguards in Domestic Australian Education Law and Policy

Chapter 4 demonstrated that the influence of international legal safeguards in domestic juvenile justice and education law and policy is visible, although uneven in its impact across jurisdictions. As has been identified previously, the best interests and participation notions, which represent significant canons of the *UNCRC*, are visible across the domestic Australian jurisdictions in juvenile justice legislation and process, although exposure in education policy remains sporadic.

An overview of the Australian education law and policy highlighted an unclear application of the best interests and participation notions. Essentially, the intent of the best interests of the child is easier to isolate rather than the exhibition of the notion. Although this is comforting to some extent, it leaves room for improvement in wholesale domestic education law and policy. Similarly, participation has a limited focus in domestic education policy although the *National Safe Schools Framework*, which is referenced in some if not all jurisdictions, promotes the participation of stakeholders in promoting safe school environments. This includes parents, carers and wider community representatives in addition to students, teachers and other school personnel.

6.3.4 Although Ad Hoc in Practice to Date, Restorative Justice is a Legitimate Disciplinary Management Strategy in Australian Education Law and Policy

The use of restorative justice practices and methodology in the Australian domestic juvenile justice arena is both long standing and extensive in its execution, with all states and territories utilising the approach through the use of cautioning and family group conferencing which represent the bulk of domestic restorative interventions. Whilst not as extensive, the use of restorative methodologies and practices in school for disciplinary management also has some history. Australia is something of a vanguard in implementation, with pilot schemes and small scale introduction of the practices dating from the 1990s.

There are also useful examples of large scale restorative approaches in Australian schools that have approached disciplinary management through the promotion of sustainable wholesale school cultural change in an attempt to infuse a restorative nature into school environments. This can be applied not only in student discipline management but also in teaching, learning and curriculum development and staff disputation, for example. Despite these useful examples and initiatives to date, the use of restorative methodology and practice in school-based disciplinary management remains ad hoc and disparate, although research and analysis into the effectiveness of such an approach ought to continue. As such, the development of an Australian uniform

management approach underpinned by rights-based principles which are provided with legislative and policy support is to be encouraged.

Importantly, as was discussed in Chapter 4 of the thesis, important linkages between the use of restorative practice and methodologies in schools and more broadly in the juvenile justice arena can have an important effect on community safety and culture in approaching juvenile violence, such as in the crucial interruption of the schoolyard to jail yard journey so often traversed by juvenile offenders who initiate criminal careers through violence and other offending within the confines of school settings.

6.4 Recommendations

6.4.1 Quantitative Research into the Extent of Juvenile School Violence in the Australian Setting

The empirical measurement and impact of juvenile violence in Australian schools was not the purpose of this thesis although it is anticipated that a quantitative study of the levels and extent of school violence in the Australian arena may be the subject of a post-doctoral study.¹⁷⁹² It is anticipated that this will provide some guidance as to the actual extent of the problem that is not available at present due to a paucity of reliable and accessible data and structural barriers in available crime statistics, as was discussed in Chapter 2.¹⁷⁹³ This evidential data is clearly valuable in the development of useful law and policy in response to the problem of juvenile school violence in the Australian setting.

6.4.2 Due Deference to The Convention for The Rights of the Child and Other International Instruments

As was revealed in Chapter 3, despite Australia's status as an early adherent to the *UNCRC* and some promising developments such as in disability discrimination, direct and unequivocal incorporation into domestic law remains elusive. Despite this drawback in underpinning domestic law and policy with human rights safeguards, the main canons

¹⁷⁹² This post-doctoral research will potentially be funded through an Australian Research Council Linkage Grant. See, eg, <http://www.arc.gov.au/about_arc/default.htm>.

¹⁷⁹³ See 2.9 above for an overview of contemporary Australian school violence.

of the *UNCRC*, in particular the best interests and participation of children in matters affecting them, can yet have influence through better and more overt appropriation of the *UNCRC* provisions into general law and policy. A comprehensive, uniform, domestic rights-based school discipline management approach can incorporate essential *UNCRC* provisions and go some way to fulfilling international human rights obligations while offering a more sophisticated approach to address school violence in Australia.

6.4.3 Consistent, Repeatable and Sustainable Restorative Justice Methodology and Practice in Australian Schools

The use of restorative justice methodology and practices for the purposes of discipline management in Australian schools has been trialled and implemented to an extent for some time,¹⁷⁹⁴ although the practice remains ad hoc and disparate education agency policy is evident across the domestic jurisdictions. The lack of clarity and cohesion in the use of restorative methodology and practices in Australian schools is unfortunate yet equally provides some opportunity to ensure greater harmony through the uniform adoption of consistent, repeatable and sustainable policy and procedure that can have a favourable impact upon addressing school violence in Australian schools. While the use of restorative methodology and practices will continue to garner debate and argument, greater legislative and policy support is required in order to provide the best potential for success, including provision of adequate funding, professional development and community involvement.

6.4.4 Adoption of Model Uniform Law and Policy Restorative Justice Initiatives in Australian Schools Grounded in a Rights-based Approach

It is suggested in this thesis that the adoption of a rights-based restorative justice methodology framework for Australian schools, as discussed in Chapter 5,¹⁷⁹⁵ will help address the school violence issue whilst also making a contribution to the embedding of human rights safeguards into domestic school policy and practices. As was discussed in

¹⁷⁹⁴ See 5.6 above for an overview of the use to date of restorative justice methodology in Australian schools.

¹⁷⁹⁵ See 5.9 above for a discussion of a suitable framework for implementation of a restorative justice discipline management methodology in Australian schools.

Chapter 4, education remains a state and territory law and policymaking responsibility¹⁷⁹⁶ notwithstanding Commonwealth activism in this area. The adoption of a national uniform approach to implementation initiated by the Commonwealth and facilitated through the vehicle of the *National Safe Schools Framework* would be constructive and go some way towards reducing the incidence and severity of school violence through cultural change in school discipline management across Australia, through the establishment and maintenance of climates that promote dignity, safety and fairness and are inclusive of all members of school communities. Commonwealth activism in state and territory affairs also provides context to such an intervention¹⁷⁹⁷ in addressing violence in Australian schools.

This approach will also take advantage of efficiencies by state education agencies in the provision of discipline management law and policy and promote consistency throughout the Australian jurisdiction, combined with early intervention and prevention to mitigate the often witnessed passage by violent juveniles to adult criminality. This will benefit the wider Australian community.

6.5 Concluding Statement

A model uniform restorative justice-based legislative and policy regime that is cognisant of essential human rights safeguards will provide an apposite framework for the management of violence in Australian schools. Initiated by the Commonwealth and mirrored by states and territories, this approach will enhance the *National Safe Schools Framework* and provide a robust strategy to address juvenile violence in school settings with productive effect.

¹⁷⁹⁶ See 4.4 above for a discussion of the constitutional responsibility related to the provision of education services in Australia.

¹⁷⁹⁷ In order to harmonise work safety and health legislation throughout Australia in what is a state and territory lawmaking field, the Commonwealth Parliament enacted uniform model legislation in 2010 that could be mirrored by states and territories. Uniformity in work health and safety law throughout Australia under the new regime is not yet realised, however, as Western Australia and Victoria remain uncommitted.

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Appendix 1

Rights Based Restorative Justice School Violence Discipline Management Policy Model for use in Australian Schools

Strategy	Response Level	Participants	Approach	Outcome
Problem Solving Circles	Secondary & targeted	Students, teachers & invited participants	Targeted, proactive & flexible	Effective conflict resolution & open dialogue
Peer Mediation	Secondary & targeted	Disputants/3rd party mediators (selected students)	Targeted, negotiation based	Development of negotiated settlement & suitable options
Peer or Accountability Panels	Secondary & targeted	Panel members (School Resource Officers & selected students), victim and offender	Targeted, negotiation based	Development of individualised consensual case plan for offender to follow
Conferencing				
Proactive Classroom Conferences	Intensive tertiary	Students/teachers	Formalised/targeted	Relationship importance & teaching and learning
Reactive Classroom Conferences	Intensive tertiary	Single or small student groups and teachers	Formalised/targeted	Collective agreement satisfactory to all conference participants
Reactive Community Conferences	Intensive tertiary	Students, teachers, parent/s, siblings, family members, members of wider community	Formalised/targeted	Collective agreement satisfactory to all conference participants

Strategy	Response Level	Participants	Approach	Outcome
Family Group Conferences or Family Group Decision Making Conferences	Intensive tertiary	Student offender, victim, family members, trained professional assistants such as police, religious representatives social workers, counsellors	Formalised/targeted	Collective agreement satisfactory to all conference participants and formulation of written behavioural plan for student offender