

Forms of educator-on-learner sexual misconduct redefined

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The aim of this article is to redefine the forms of educator-on-learner sexual misconduct. The forms of educator-on-learner sexual misconduct are put into context by briefly indicating the independent yet interrelated roles and functions of the police, the employer of educators and the South African Council for Educators (SACE) when dealing with such misconduct. Although the employer deals with misconduct, more unified action by the police, the employer and SACE should be promoted if we want to rid our schools of sexual predators. It is argued that unified and thus more effective action against educators who are guilty of sexual misconduct could be ensured by bringing forms of educator-on-learner sexual misconduct in line with sexual offences. By redefining and classifying the forms of educator-on-learner sexual misconduct within the framework of sexual offences and relevant law, this article contributes towards closing the gap between various interpretations of sexual offences, forms of sexual misconduct and contraventions of ethical and professional standards.

1 INTRODUCTION



Cartoon 101114st – Could Rape be added to the three Rs (Reading wRiting aRithmetic) of basic skills in education in South Africa?

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South African educators have a legal duty to refrain from sexual misconduct, but a considerable number fail to fulfil this duty (RSA 1998 s 17(1)(b), (c); RSA 2000(a) s 23(1)(c); SACE Code items 3.5, 3.6, 3.8, 3.9; Collins 2003; Harbour 2010). Although it is impossible to determine accurately just how widespread the problem is, no one can deny that it is significant (Harbour 2010). Evidence of the significance of this problem can be found in the fact that during the 2009–2010 financial year,

12 sexual harassment cases were referred to the Education Labour Relations Council (ELRC) for arbitration (ELRC 2010). The South African Council for Educators (SACE) confirms that it usually receives five to ten educator-on-learner sexual misconduct complaints per month, but also mentions that there has been a notable increase in the number of such complaints (Eliseev & Nicolaidis 2010; Matlala 2011).

The fact that terminology has developed in South African and other African schools to

describe this practice indicates just how common educator-on-learner sexual misconduct has become. Expressions used include: “sexually transmitted grades”; “BF” or “bordel fatigue”, used by learners to refer to exhaustion as the result of multiple sexual activities with educators; “my chalk allowance”, used by educators to refer to learners they have sexual relations with; “man without zip”, used by female learners to refer to male educators who easily “falls in love” with school girls; “dating relationship” or “love relationship”, used by both educators and learners to describe what they regard as a “lawful love” relationship; and “proposing love”, used by learners to refer to educators who ask them for sexual favours (A lexicon of abuse 2009; Human Rights Watch 2002:chapter 5; IRIN Africa).

In Coetzee (2011b) it is argued that the Department of Education struggles to eliminate educator-on-learner sexual misconduct because the law and policies that define and regulate educator-on-learner sexual misconduct are inadequate. Currently, the following forms of educator-on-learner sexual misconduct are identified in the Employment of Educators Act 76 of 1998:

- Sexual assault.
- A sexual relationship between a learner and an educator from the same school.
- Any common law or statutory sexual offence.
- Educator conduct that is improper, disgraceful or unacceptable (while the educator is on duty) (RSA 1998, ss 17(1)(b), (c); 18(1)(dd)).
- In instances where an educator has a sexual relationship with a learner from another school, he or she could be charged with contravening section 18(1)(q) (RSA 1998).

In this article the author redefines and classifies forms of educator-on-learner sexual misconduct while considering the Children’s Act (as amended), the Criminal Law (Sexual Offences and Related Matters) Amendment Act, the Films and Publication Act (as amended), the Promotion of Equality and Prevention of Unfair Discrimination Act and the South African Council of Educators Act.¹

2 CONTEXTUALISATION

Although it is argued that forms of educator-on-learner sexual misconduct should be redefined

within the framework of sexual offences and other relevant law, it is also essential to identify these sexual offences and legal provisions pertaining to such offences; the forms educator-on-learner sexual misconduct could take; and the contraventions of the SACE Code of Professional Ethics (hereinafter SACE Code), so as to place the forms of educator-on-learner sexual misconduct into context. This is done by briefly indicating the independent yet interrelated roles and functions of the police, the employer and SACE when dealing with an educator who has sexually abused a learner. Each of these stakeholders has a unique role and function in dealing with educators who are allegedly engaging in sexual misconduct.² The police are responsible for handling the criminal investigation of a sexual offence which could result in the educator being prosecuted. The employer has to handle the investigation of the alleged misconduct because it affects the employment relationship. SACE is responsible for investigating possible transgressions of its ethical and professional standards.

SACE itself emphasises the need to distinguish between ethical matters regulated by SACE and employment-related matters regulated by the employer (SACE Complaints).³ Martin (2005:97-98) states that the educator participants in his study generally did not know of or understood the role and functions of SACE; they only knew that they had to be registered at SACE before they can teach in South Africa. He also states that these educators did not recognise the link between the various legal provisions on educator-on-learner sexual misconduct and the relevant provisions in this regard in the SACE Code.

It seems that the stakeholders themselves do not have a clear understanding of other stakeholders’ roles and functions in dealing with educators who are allegedly guilty of sexual misconduct. Asmal (2002) argues that when an educator is dismissed on the basis of sexual abuse of a learner, deregistration automatically results. The author contends that this view is not totally correct. Dismissal is not required for deregistration from SACE. It should be kept in mind that SACE is an autonomous, statutory body that is in control of the ethical and professional standards of the teaching profession; it is not responsible for employment matters (RSA 2000(a) s 2(c)). The name of an educator may be removed from the register only after he or she has been found

guilty by SACE of a breach of the SACE Code, and if the sanction of deregistration has been imposed as a result. Thus deregistration means that an educator loses his or her professional status and as a result may not be employed as an educator (RSA 2000(a) s 21(2)). Furthermore, before deregistration, the educator must be given a reasonable opportunity to make representations. Thus the decision of the Department of Education's disciplinary committee may not be used as is to deregister an educator (RSA 2000(a) s 23(1)(c), 23(3); SACE Registration criteria and procedures items 7.1.3, 7.2.).⁴

An educator's commission of sexual misconduct will constitute a breach of the SACE Code. Such an educator could be charged with the contravention of one or more of the following ethical and professional standards:

- To refrain from any form of abuse (physical or psychological)
- To refrain from improper physical contact with learners
- To refrain from any form of sexual harassment (physical or otherwise) of learners
- To refrain from any form of sexual relationship with learners at a school (SACE Code items 3.5, 3.6, 3.8, 3.9)

The author contends that educators also fail to see the link between forms of sexual misconduct, and criminal offences and other relevant law provisions. This is for example evident from the practice that a school acts as "mediator" and negotiates the "damages" to be paid, which creates the impression that the matter has been settled and the learner victim's options of redress are then exhausted (Asmal 2002; Coombe 2002:8). School officials should keep in mind that by doing this; they commit a sexual offence themselves.⁵ Educators should realise that one act of sexual misconduct could result in sanctions imposed by the courts, internal sanctions for sexual misconduct imposed by the employer and sanctions imposed by SACE. However, this requires unified action on the part of the police, the employer and SACE.

Currently the police, the employer of an educator and SACE have no *reciprocal* obligation to inform one another of a complaint of learner sexual abuse. There is evidence that educator perpetrators slip through the cracks

because incidents that are reported only to the police, the employer or SACE often do not result in the investigation of the incident because the party to which it has been reported simply opts not to investigate the complaint or to handle it internally (Gross 2009; Human Rights Watch 2002 chapter 5). It is suggested that it should be made obligatory for the police, the employer and SACE to inform one another when a learner lays a complaint relating to sexual abuse against an educator. Currently, in an attempt to strengthen the link between the employer of educators and SACE, SACE makes two lists available on their website. One list contains the names of educators who are accused of sexually abusing learners and the other the names of educators deregistered for the sexual abuse of learners. Although making these lists available can improve the link between SACE and the employer, the constitutionality of the first list could be questioned. Publishing this list serves no purpose; these educators have not been found guilty and have not been deregistered.

The lack of unified action by the stakeholders creates the false impression among educators that they could get off the hook by resigning if they are caught. This is not the case; they can still be held criminally liable and be deregistered from SACE. Once again, the need for unified action to rid our schools from sexual predators is emphasised.

Redefining and classifying the forms of educator-on-learner sexual misconduct within the framework of sexual offences and other relevant law will link sexual offences and forms of sexual misconduct and will enable the police, the employer and SACE to act as a unified front against educators who are guilty of sexual misconduct.

3 Redefining forms of educator-on-learner sexual misconduct

In the process of redefining forms of educator-on-learner sexual misconduct, the forms are classified either as misconduct or as serious misconduct. The suggested level of seriousness attached to a specific form of educator-on-learner sexual misconduct is determined by the level of seriousness attributed to the corresponding criminal sexual offence.

3.1 Rape

The first form of educator-on-learner sexual misconduct that has to be identified is rape.

Currently rape is not classified as a serious misconduct, but is covered by section 18(1)(dd) of the Employment of Educators Act, which provides that the commission of any common law or statutory offence (such as rape) constitutes misconduct. Section 18(5)(d) specifically identifies rape as one of the offences contemplated in section 18(1)(dd) by providing that an educator who is found guilty of rape *may be* dismissed. The seriousness of rape commands that it be identified as a specific form of educator-on-learner sexual misconduct and in particular as serious misconduct for which dismissal is obligatory.⁶ It seems illogical that an educator *must be dismissed* for having a sexual relationship with a learner at the school where he or she is employed and for sexual assault but not for rape, which is a far more serious offence (RSA 1998 ss 17(1), 18(5)(dd)). In fact, the courts have regarded the rape of young children as a very serious offence (*S v Chapman*; *S v Njikelane* at 4).

Nugent JA has described it as a “humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim ...” in *S v Chapman* and in *S v Jansen* (at 378g-379a) it is described as “... an appalling and perverse abuse of male power”.⁷ Educators should keep in mind that the court regards the facts that a rape took place at school (a place where learners should be safe and protected), that the child was raped by a person in a position of trust in relation to the child and that a person has a duty to protect the child as aggravating factors during sentencing (*S v Njikelane* at 5; *Carolus v The State* at 36; *S v Nyambuza* at 3).

To understand what this form of misconduct entails, the criminal offence of rape should be studied. The Sexual Offences Amendment Act creates a statutory sexual offence of *rape*.

In terms of section 3:

Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape.⁸

Rape thus includes all acts of non-consensual sexual penetration of any genital organ or the anus. It covers not only rape where the perpetrator is a man and the victim a woman, but also male-on-male and women-on-male non-consensual sexual penetration. According to a study conducted in 5 162 classes in 1 191 South African schools nationwide “[m]ale schoolchildren in South Africa suffer high rates of sexual abuse, many of the assaults

perpetrated in school. By the age of 18, two in every five schoolboys reported being forced to have sex, mostly by female perpetrators” (Anderson & Ho-Foster). It is essential to emphasise that rape as a form of educator-on-learner sexual misconduct includes the rape of male learners.

The definition of *sexual penetration* includes any act which causes the penetration of the genital organs or anus of a person by another person’s genital organs or any other part of the body, or any part of the body of an animal (RSA 2007 s 1). Thus instances where the perpetrator uses an object (such as a tongue, finger, toe, part of an animal, bottle or stick) to penetrate the genital organ or the anus of another person constitute rape. Snyman (2008:357, 359-360, 362) says that even non-consensual penetration of a person’s mouth may in certain circumstances constitute rape. It will, for example, constitute rape when a male inserts his penis into the mouth of a female or the mouth of another male without consent, or where a female affects cunnilingus. To regard oral sex as sex without penetration is thus an erroneous belief.

An act of sexual penetration with a child under the age of 12 or a mentally disabled child will always constitute rape because children under the age of 12 and mentally disabled children are incapable of consent (RSA 2007 ss 3, 57). An act of sexual penetration with a child of 12 years and older but under the age of 16 (thus between 12 and 15 years of age) constitutes *statutory rape* notwithstanding the fact that the child has consented to the act (RSA 2007 s 15). Educators must be made aware that sexual relations with a learner below the age of 16 will always constitute rape. The so-called consenting love relationship excuse will be no defence.

Statutory rape will not apply in cases where the learner has consented and is 16 or older. However, this does not mean that an educator may have consensual sexual relations with a learner of 16 years or older. Although such relations will not constitute a criminal offence (rape or statutory rape), it will constitute misconduct in terms of the Employment of Educators Act and a contravention of the SACE Code.⁹ One factor that results in consent in law not being regarded as valid is the abuse of power of authority (Snyman 2008:365). Consent as defence will thus be regarded as invalid in instances where an educator abuses

his or her authority to impede the learner from indicating an unwillingness or resistance to the sexual act. If an educator compels two learners to have non-consensual sexual intercourse, he or she commits the offence of *compelled rape* (RSA 2007 s 4).

It is suggested that rape be classified as a form of serious educator-on-learner misconduct and that it be defined so as to include statutory rape and compelled rape. The sanction for a guilty verdict for rape, statutory rape and compelled rape should be compulsory dismissal, which is in line with the level of seriousness allocated to rape as a criminal offence.

3.2 Sexual assault

The second form of educator-on-learner sexual misconduct is *sexual assault*. Sexual assault is currently classified as a form of serious misconduct for which, if found guilty, an educator must be dismissed (RSA 1998 s 17(1)(b)).

The offence of sexual assault includes all forms of sexual violation without consent (including indecent assault) and also unlawfully and intentionally inspiring the belief that the other person will be sexually violated (RSA 2007 s 5).¹⁰ Sexual violation does not include any “act of sexual penetration” (RSA 2007 s 1). Educators who are committing sexual misconduct should be aware that “having sex without penetration” still constitutes sexual assault (*Mxolisi Seraphicus Swezwe v Department of Education KwaZulu-Natal* at 5, 23). In *Vuyo Gqirana v The State* (at 2) a man was found guilty of sexual assault after he had rubbed his penis between the buttocks of a fifteen-year-old boy without consent. In this case, Dambuza J emphasised that sexual assault often entails an abuse of power.

It seems that kissing without consent may also constitute sexual assault since the contact between the “mouth of one person” and “the mouth of another person” constitutes a sexual violation, and sexual assault includes “all forms of sexual violation” (RSA 2007 s 1). If an educator commits an act of sexual violation with a child of 12 years and older but under the age of 16 (thus between 12 and 15 years of age), it will constitute *statutory sexual assault* notwithstanding the fact that the child has consented to the act (RSA 2007 s 16). If an educator compels a learner to commit an act of sexual violation with another learner without the consent of either learner, he or she commits

the offence of *compelled sexual assault* (RSA 2007 s 6).

It is suggested that sexual assault as a form of educator-on-learner sexual misconduct be extended to make provision for statutory sexual assault and compelled sexual assault. These should be classified as forms of serious misconduct and the sanction for a guilty verdict should be compulsory dismissal, in line with the level of seriousness allocated to assault as a criminal offence.

3.3 Sexual exploitation of learners

Sexual exploitation of learners should be identified as a form of educator-on-learner sexual misconduct. Once again, valuable guidelines with regard to the content of this suggested form of sexual misconduct can be deducted from sexual offences relating to sexual exploitation.

The Sexual Offences Amendment Act creates various offences relating to sexual exploitation (RSA 2007 ss 11, 17). Sections 17(1) and 11 provides for similar offences of unlawfully and intentionally *engaging* the services of a child or a person older than 18 years for financial or other reward, favour or compensation to the child or person older than 18 or a third person for the purposes of engaging in a sexual act or by committing a sexual act with the child or person older than 18 years. “Engaging” includes either an express request or a request tacitly implied by the person’s conduct. Where section 17(1) requires that the act had to take place “with or without” the consent of the child, section 11 does not contain a similar requirement. Thus even though a 17-year-old learner can consent, such consent will be regarded as invalid for the purposes of this offence because the learner is still “a child” in terms of section 1(1) of the Sexual Offences Amendment Act (Snyman 2008:396). An educator who pays the school fees of an adult learner in exchange for sexual relations with the learner or an educator who promises an adult learner (18 years and older) a pass mark if the learner has sexual relations with him or her, commits the offence of engaging sexual services of persons 18 years and older. Examples of sexual exploitation of learners that currently occur in schools are exchanging sex for *inter alia* food, pass marks, examination papers, school fees and money; in some instances, female learners who arrive late at school are forced to have sex with educators

before they are allowed to enter the locked school grounds (SAPA 2006).

Other offences related to the sexual exploitation of children includes *being involved* in the sexual exploitation of a child, *furthering* the sexual exploitation of a child, *benefiting from* the sexual exploitation of a child and *living from* the earnings of the sexual exploitation of a child (RSA 2007 ss 17(2), (3), (4), (5), (6)). Parents who accept compensation from the educator perpetrator in exchange for withdrawing or not reporting the case, and parents who knowingly allow an educator to have sexual relations with their child in exchange for some form of benefit, can be charged with the offence of *being involved in the sexual exploitation of a child* and the offence of *furthering the sexual exploitation of a child*. Songololo (2000:7) calls these practices the prostitution of school-going children by their families.

It is suggested that sexual exploitation be included as a form of educator-on-learner sexual misconduct and that its definition include being involved in the sexual exploitation of a learner, furthering the sexual exploitation of a learner, benefiting from the sexual exploitation of a learner and living from the earnings of the sexual exploitation of a learner. It is suggested that the form of misconduct be defined as *sexual exploitation of a learner* to include learners older than 18 years of age. Educators should be made aware that they could be charged with the sexual exploitation of learners in addition to any other sexual offence they might be charged with. For example, an educator who sexually exploits a learner under the age of 18 years by giving him or her a pass mark in exchange for sex could not only be charged with sexual exploitation of a child, but also with statutory rape.

3.4 Sexual grooming of children

Sexual grooming has to be included as a form of educator-on-learner sexual misconduct. Its definition should include promoting the sexual grooming of a child.

Grooming is defined as “[p]reparing a child for sexual abuse and exploitation” (ECPAT 2007:4). It is a gradual process of getting a child ready to engage in sexual relations by breaking down inhibitions over a period of time – setting the stage for sexual exploitation, so to speak (Centre for Applied Legal Studies & Tshwaranang Legal Advocacy Centre:11). It is

contended that sexual abuse of the child could be prevented if the process could be interrupted. However, this is not a simple matter, because grooming behaviours are not uniform and can take physical, psychological, material and emotional forms, or a combination of these (Snyman 2008:556). The ultimate aims are to lower the child’s sexual inhibitions and to desensitise the child to and normalise adult-child sexual relations (Kreston 2009:42). Furthermore, sex offenders usually does not only groom the child, but also the child’s parents and/or friends (Weber).

Section 18 of the Sexual Offences Amendment Act contains the statutory offences of the *sexual grooming of children* and *promoting the sexual grooming of a child*. What is important here is that the grooming acts are committed with the intention to “facilitate”, to “be used in the commission of”, to “encourage, enable, instruct or persuade a third person” or to “arrange or facilitate a meeting or communication between a third party and the child” with the aim of committing a sexual act with the child (RSA 2007 s 18(1)). Forms of grooming can include showing a child, pornography,¹¹ buying him or her gifts and providing him or her with drugs or alcohol. In the school situation it could include giving a learner a pass mark, favouring a learner in the classroom, declaring love to a learner, or giving a learner rides to or from school. There is a difference between exchanging gifts, pass marks, alcohol or money for sexual favours by a learner (sexual exploitation) and softening a child up for sexual relations by giving him or her gifts (sexual grooming).

A principal or colleague who is aware of an educator who is sexually grooming a learner under the age of 18 years and who does not act, can be charged with promoting the sexual grooming of a child.

3.5 Child pornography

Although pornography and child pornography are not explicitly indicated as forms of educator-on-learner sexual misconduct, they are currently dealt with in terms of section 18(1)(q) or 18(1)(dd) of the Employment of Educators Act.¹² As in the case of rape, this results in child pornography as a form of educator-on-learner sexual misconduct only being regarded as misconduct and not serious misconduct. Since educators work with children and are supposed to protect the learners, it is contended that child

pornography be classified as a form of serious misconduct. In *De Reuck v DPP* (at 61) the court describes the harm done by child pornography as follow:

It strikes at the dignity of children, it is harmful to children who are used in its production, and it is potentially harmful because of the attitude to child sex that it fosters and the use to which it can be put in grooming children to engage in sexual conduct.

Pornography as a form of educator-on-learner sexual misconduct should be defined to include the following:

- Exposure or display of, or causing exposure or display of, child pornography or pornography to a learner, including mentally disabled learners. Three corresponding sexual offences are applicable in this instance. The first sexual offence is limited to exposing or displaying, or causing exposing or displaying, of child pornography or pornography to a child (RSA 2007 s 19). The second corresponding sexual offence is limited to exposing or displaying, or causing exposing or displaying, of child pornography or pornography to a person who is mentally disabled (RSA 2007 s 25). The third corresponding sexual offence is limited to exposing or displaying, or causing exposing or displaying, of child pornography to an adult (RSA 2007 s 10). However, in the light of the nature of the relationship between educators and learners, it is contended that this form of misconduct be made applicable to cover exposing or displaying, or causing exposing or displaying, of child pornography and pornography to a learner irrespective of his or her age (RSA 2007 ss 10, 18(2)(a)(ii), 19, 25). A differentiation could then be made with regard to the sanctions for exposing or displaying, or causing exposing or displaying, child pornography or pornography to a child and exposing or displaying or causing exposing or displaying of child pornography or pornography to a learner who is 18 years or older.
- The viewing of pornography or child pornography. The viewing of pornography or child pornography is harmful to children as it is a “reality beyond their readiness” (Watson & Lefever 2005:198 cited in Kreston 2009:42). Children are neither mentally nor emotionally ready for pornographic material. As Kreston (2009: 56) puts it: “Graphic sexual experiences are outside the normal psychosexual developmental realm of childhood”.
- Using children, including mentally disabled children, for or benefiting from child pornography or pornography (RSA 2007 ss 20, 26). Any person (not registered with the Film and Publication Board) who distributes or exhibits material with an X18-rating or which contains depictions, descriptions or scenes of explicit sexual conduct to a child is guilty of an offence (RSA 1996 s 24A). Child pornography is never a matter for classification because any film or publication that contains images, scenes or descriptions of child pornography is automatically a matter for criminal investigation and prosecution (RSA 2009(b) item 2). Child pornography in visual, audio and verbal form is illegal. The manner in which child pornography is created is also irrelevant. Since child pornography is not victim-based, it does not make a difference whether actual children or pictures or sketches have been used to create the pornography (RSA 1996 s 24B(1)(b)).
- The distribution or exhibition in public of a film, game or publication which is classified as “X18” or contains depictions, descriptions or scenes of explicit sexual conduct to a child.¹³
- The unlawful possession of child pornography (RSA 1996 s 24B(1)(a)). A child who is depicted in child pornography need not be present when such pictures are viewed to be violated. It thus makes sense that the possession of child pornography is also prohibited (RSA 1996 s 24B(1)(a); Van Zyl 2008:231). In a recent case, the argument was brought that the perpetrator had only possessed child pornography and did not produce or distribute it. Such arguments create the flawed idea that private possession and viewing of child pornography is a lesser offence. The state prosecutor emphasised that viewing child pornography contributes to child abuse and rape because it creates a market (Otto 2010). Child pornography also encourages sexual expression without responsibility and as a result, endangers the health of children (Chetty & Basson 2006).
- Creating, producing or assisting in the creation or production – or in any way knowingly assisting in or facilitating the

importation, procurement, obtaining or accessing – of child pornography (RSA 1996 s 24B(1)(b)).

- Making available or distributing child pornography (RSA 1996 s 24B(1)(c)).
- Failing to report any suspicion or knowledge of the possession, production or procurement of child pornography constitutes an offence in terms of the Films and Publications Act (RSA 1996 s 24B(2)).

Women and Men Against Child Abuse (WMACA) recently accused the Department of Education of failing to take appropriate and prompt action against educators engage in sexual misconduct. It refers to the instance where an educator was only suspended two months after he had been caught and reported (to the police and the Department) by a colleague for using the school's facilities to copy child pornography (Jordan 2010). There is an obvious need for both educators and learners to be made aware that recording sexual acts and distributing the recordings constitute a criminal offence as well as misconduct.

Educators should take note of what constitutes child pornography and which actions would be regarded as sexual conduct.

Child pornography is defined as

- [A]ny image, however created, or any description of person, real or simulated, who is, or who is depicted, made to appear, look like, represented or described as being, under the age of 18 years –
- a) engaged in sexual conduct;
 - b) participating in, or assisting another person to participate in, sexual conduct; or
 - c) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation (RSA 1996 s 1).

Sexual conduct

includes – (i) male genitals in a state of arousal or stimulation; (ii) the undue display of genitals or of the anal region; (iii) masturbation; (iv) bestiality; (v) sexual intercourse, whether real or simulated, including anal sexual intercourse; (vi) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object; (vii) the penetration of a vagina or anus with any object; (viii) oral genital contact; (ix) oral anal contact (RSA 1996 s 1).

Children should be protected against premature exposure to sexual pleasures and moral decay.

3.6 Compelling or causing learners to witness a sexual offence, sexual act or self-masturbation

Compelling or causing a learner to witness a sexual offence, sexual act or self-masturbation should be recognised as a form of educator-on-learner sexual misconduct. These practices do occur in our schools. In 2009 a boy testified in the Pretoria Sexual Offences Court that an educator had put on a “dirty” DVD and then self-masturbated in front of him (Otto 2010).

The Sexual Offences Amendment Act (RSA 2007 ss 21(1), (2), (3)) provides that a person commits an offence if he or she unlawfully and intentionally compels or causes a child, without the child's consent, to be present or to watch while he or she commits a sexual offence, a sexual act or an act of self-masturbation. An educator who compels a learner who is older than 18 years to be present or to watch while he or she commits a sexual offence, a sexual act or an act of self-masturbation commits an offence in terms of section 8(1), (2) and (3) of the Sexual Offences Amendment Act.

3.7 Exposing or displaying, or causing the exposure or display of, genital organs, anus or female breasts to a learner

Another form of educator-on-learner sexual misconduct that should be included in the Employment of Educators Act is flashing. This includes exposing or displaying, or causing the exposure or display, of genital organs, anus or female breasts to children. In this instance the perpetrator commits the offence whether the child has consented or not (RSA 2007 s 22). For the purposes of this offence, the capacity to consent is thus of no relevance.

3.8 The legal duty to report sexual offences

Currently, failure to report a colleague who commits a sexual offence against a child does not constitute misconduct. It is suggested that failure to report that a sexual offence is being committed by an educator against a child should be identified as a form of educator-on-learner misconduct.

Educators are obliged to report sexual offences in terms of the Children's Act as well as the Sexual Offences Amendment Act.

The Children's Act (RSA 2005 s 110(1)) obliges educators who

... on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected must report that conclusion ... to a designated protection organisation, the provincial department of social development or a police official.

Educators should also note that in terms of section 1 of the Children's Act, sexual abuse includes sexual molesting or assaulting a child, or *allowing* a child to be molested or assaulted. Thus an educator who fails to report a colleague who is sexually molesting or assaulting a child indirectly allows the child to be molested or assaulted (Coetzee 2011a:246; RSA 2005 ss 1, 305(1)(c)). This section therefore places an indirect obligation on an educator to report colleagues who sexually molest or assault a child.

The obligation to report is dependent on the existence of "reasonable grounds". The Consolidated Regulations to the Children's Act (RSA 2010 s 35) contain guidelines for the assessment of risk factors to support a conclusion of abuse or neglect on reasonable grounds as contemplated in section 110(1).

Persons (educators included) who fail to report the commission of a sexual offence against children commit a statutory offence in terms of section 54(1) of the Sexual Offences Amendment Act. In this instance, educators are obliged to report the matter to the police. It is contended that an educator who has opted to report to a designated person other than a police official (in terms of section 110(1) of the Children's Act) will be exempted from the legal obligation to report in terms of section 54(1) of the Sexual Offences Amendment Act. In terms of section 110(1) of the Children's Act (RSA 2005), the obligation is then on the person to whom the educator reported the alleged offence.

As has been mentioned, educators are obliged to report any suspicion or knowledge of the possession, production or procurement of child pornography, and failure to report constitutes an offence in terms of the Films and Publications Act (RSA 1996 s 24B(2)).

It is suggested that this form of sexual misconduct be made applicable not only to the failure to report the commission of a sexual offence against learners below the age of 18 years (children), but also to the commission of a sexual offence committed against any learner irrespective of his or her age.

3.9 Sexual harassment of learners

Sexual harassment as a form of educator-on-learner sexual harassment is a thorny issue. In current Education Law and policy, sexual harassment against learners is not clearly defined and the labour law offence is merely severed from its labour law origin and adapted to the educator-learner relationship.¹⁴ The employer has a legal duty to protect learners from sexual harassment and a learner can hold the employer (Department or school) vicariously liable under the law of delict in instances where a learner is sexually harassed at school (Klinck 2009:6-48). It is thus necessary to include sexual harassment as a form of educator-on-learner sexual misconduct.

It is contended that sexual harassment as a form of educator-on-learner sexual misconduct should rather be defined and given content in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act (discrimination law) and not in terms of the Amended Code of Good Practice on the Handling of Sexual Harassment Cases (labour law). This Act is a law of general application wherein sexual harassment is defined as a form of harassment in spheres other than employment and in situations where there is no employment relationship. It is thus applicable to the educator-learner relationship and provides remedies to learner victims (Zalesne 2002:156). Educators may not subject learners to harassment on the grounds of sex (RSA 2000(b) s 11).

Harassment is defined as

- unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to –
- a) sex, gender or sexual orientation; or
- b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.

4 CONCLUSION

The inadequacy of current law and policy on educator-on-learner sexual misconduct and the lack of cooperation between the police, the employer of educators and SACE in handling sexual abuse complaints of learners are identified as obstructing the effective handling of the matter. In an attempt to address these obstructions, the forms of educator-on-learner sexual misconduct have been redefined and

classified. Before these forms could be redefined and classified as either misconduct or serious misconduct, they had to be placed in context. This was done by distinguishing between the independent yet interrelated roles and functions of the various stakeholders, simultaneously emphasising the differences between sexual offences, the forms of educator-on-learner sexual misconduct, and the standards of ethical and professional conduct. To augment the link between the police, the employer of educators and SACE, and to advance unified action against educators who allegedly engage in sexual misconduct, it is suggested that a reciprocal duty be established for the police, the employer and SACE to inform the other parties when a sexual abuse complaint is received from a learner.

In this article the author has redefined and classified forms of educator-on-learner sexual misconduct, while considering the Children's Act (as amended), the Criminal Law (Sexual Offences and Related Matters) Amendment Act, the Films and Publication Act (as amended), the Promotion of Equality and Prevention of Unfair Discrimination Act and the South African Council of Educators Act. By redefining and classifying the forms of educator-on-learner sexual misconduct within the framework of sexual offences and other relevant law, the forms of educator-on-learner sexual misconduct are linked to corresponding sexual offences or other relevant law provisions. It is envisaged that this will contribute to creating a unified front against educators who engage in sexual misconduct.

Currently, rape is not identified as a specific form of serious misconduct; it is covered by a general provision in terms of which any common law or statutory offence constitutes misconduct. It is suggested that rape be identified as a specific form of serious misconduct and that its definition include statutory rape and compelled rape. The current classification of sexual assault as serious misconduct should be retained, but its definition should include statutory sexual assault and compelled statutory assault. Sexual exploitation of a learner should be indicated as a form of misconduct and its definition should include

being involved in the sexual exploitation of a learner, *furthering* the sexual exploitation of a learner, *benefiting from* the sexual exploitation of a learner and *living from* the earnings of the sexual exploitation of a learner.

A form of educator-on-learner sexual misconduct that is very common in schools but is not currently specifically identified, is the sexual grooming of children. It is suggested that this be identified as a specific form of educator-on-learner sexual misconduct and be defined to include *promoting* the sexual grooming of a child.

Pornography as a form of educator-on-learner sexual misconduct is currently not identified as a specific form of misconduct. It is insufficiently covered by the application of sections 18(1)(q) and 18(1)(dd) of the Employment of Educators Act. It is suggested that pornography be classified as serious misconduct and that its definition include child pornography and its various subforms.

It is further suggested that compelling or causing a learner to witness a sexual offence, sexual act or self-masturbation, as well as flashing, be recognised as forms of misconduct. The inclusion of the failure to report a sexual offence that is committed by an educator against a child as a form of educator-on-learner sexual misconduct will increase the responsibility of educators to protect learners against sexual abuse at school.

Lastly, the need to include sexual harassment as a form of educator-on-learner sexual misconduct is stressed. It is emphasised that sexual harassment should, in this instance, not be defined in terms of Labour Law but in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act.

By redefining and classifying forms of educator-on-learner sexual misconduct within the framework of sexual offences and other relevant law, this article contributes to a common understanding of sexual transgressions against children, unified action against educators who are guilty of sexual misconduct and the emphasis on respective stakeholders' responsibility to take action. Hopefully this will result in the eradication of the "fourth r" (Rape) from our schools.

Endnotes

1 The Children's Act 38 of 2005 as amended by the Children's Amendment Act 41 of 2007 and the Child Justice Act 75 of 2008 (hereinafter Children's Act); the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter Sexual Offences Amendment Act); the Films and Publication Act 65 of 1996 as amended by the Films and Publications Amendment Act 18 of 2004 and the Films and Publications Amendment Act 3 of 2009 (hereinafter Films and Publications Act, RSA 2009(a)); the Promotion of Equality and

- Prevention of Unfair Discrimination Act 4 of 2000 as amended by the Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002, the Judicial Matters Second Amendment Act 55 of 2003, Judicial Matters Amendment Act 22 of 2005 and the Judicial Matters Amendment Act 66 of 2008.
- 2 The author is aware that the term “stakeholders” in the field of education is used to indicate other parties such as the parents, learners and the governing body. In this article “stakeholders” is used to refer to the police, the employer of educators and SACE.
 - 3 Educators may be appointed in a non-subsidised post in terms of section 20(4) of the South African Schools Act 84 of 1996. The employer will then be the school itself. See Employment of Educators Act (RSA 1998 s 3(4)).
 - 4 Note that the *Registration criteria and procedures* are not in line with the South African Council of Educators Act 31 of 2000. In terms of section 23(3) of the Act the requirement that an educator’s name may only be removed after the educator was given a reasonable opportunity to make representations to the Council is also applicable to educators who are accused of a breach of the SACE Code. However, this is not required by the *Registration criteria and procedures*. Since the Act prevails over the policy document, the requirement must be adhered to.
 - 5 Refer to the section on *The legal duty to report sexual offences* below.
 - 6 This is argued in more detail in Coetzee (2011b).
 - 7 Note, however, that rape of male learners by female educators is more common than commonly thought (see Anderson & Ho-Foster (2008)) and the definition of rape is no longer gender specific (see the definition of “rape” in the text above).
 - 8 Consent means “voluntary or uncoerced agreement”. See Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2001, section 1(2). Snyman explains that consent could only succeed as defence if it had been given “consciously and voluntarily, either expressly or tacitly, by a person who has the mental ability to understand what he or she is consenting to, and the consent must be based on true knowledge of the material facts relating to the intercourse” (Snyman 2008:364).
 - 9 It will constitute serious misconduct in terms of section 17(1)(c) in instances where both the educator and learner are from the same school. In instances where the learner is not from the same school as the educator, it will still constitute misconduct in terms of section 18(1)(q). See *Mxolisi Seraphicus Swezwe v Department of Education KwaZulu-Natal*; Coetzee (2011a:242). The educator could, depending on the circumstances, be charged with contravening one or more of the items of the SACE Code listed above in section 2.
 - 10 Sexual violation is defined to include “any act which causes direct or indirect contact between the genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or any object. This will include one’s hands”. See Carter (2010).
 - 11 See Kreston (2009:56) for a discussion of the role child pornography plays in grooming.
 - 12 In terms of section 18(1)(dd) of the Employment of Educators Act, it constitutes misconduct if an educator commits a common law or statutory offence. In terms of section 18(1)(q) of the Employment of Educators Act, it constitutes misconduct if an educator “while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner”.
 - 13 Films and Publications Act (RSA 1996 s 24A). “Publication” is defined as:
 - (a) any newspaper, book, periodical, pamphlet, poster or other printed matter;
 - (b) any writing or typescript which has in any manner been duplicated;
 - (c) any drawing, picture, illustration or painting;
 - (d) any print, photograph, engraving or lithograph;
 - (e) any record, magnetic tape, soundtrack, except a soundtrack associated with a film, or any other object in or on which sound has been recorded for reproduction;
 - (f) computer software which is not a film;
 - (g) the cover or packaging of a film; and
 - (h) any figure, carving, statue or model
 Also see Films and Publications Act (RSA 1996 s (1)(xv)).
 - 14 It is argued that the application of sexual harassment and the Code to non-employment situations is forced and does not provide sufficient recourse to learners. This matter is argued in detail in an unpublished article in Coetzee (2011). See Department of Education 2008:6. Note in particular note 2 where the Department acknowledges that the definition in the Code was adapted to fit the sphere of education.

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