

Law and policy regulating the management of learner-on-learner sexual misconduct in South African public schools

Susan Coetzee

Department of Educational Leadership and Management, University of South Africa

Email: coetza1@unisa.ac.za

The aim of this article is to identify and critically evaluate current law, policy and public documents that regulate learner-on-learner sexual misconduct. It was concluded that there is no education-specific law and policy that regulate learner-on-learner sexual misconduct in particular. The prominent document that is available in this regard is the *Guidelines for the prevention and management of sexual violence and harassment in public schools*. Besides not being enforceable law, this document is also interspersed with obscurities and in several respects in conflict with other law, policy and public documents. The implementation thereof is therefore hindered and the effective management of learner sexual misconduct impeded. It is recommended that learner sexual misconduct be addressed in education-specific and enforceable law. This can be done by either inserting a section in the South African Schools Act 84 of 1996 or by inserting a regulation in the *Regulations for safety measures at public schools*.

1 INTRODUCTION

Sexual misconduct by learners is alarmingly common in South African schools (Anderson & Ho-Foster 2008). South African children start with sexual experimentation and become sexual active at ever younger ages (Caelers 2005:11; Redpath 2003:17; Serrao 2008:9). Many of these sexual activities take place on the school grounds and even in the classrooms while educators are present in the class (Serrao 2008:9). Learner-on-learner sexual misconduct has a multidimensional nature, and multiple forms of learner sexual misconduct are prevalent in South African schools. These include (De Wet, Jacobs & Palm-Forster 2008:99, 101; Haffejee 2006; Human Rights Watch 2001:Ch. 5; Serrao 2008:9; Watson, Eduscript & Grey 2010:8):

- inappropriate, obscene and vulgar sexual innuendos, jokes and stories;
- sexual bribery such as coercing girls into performing oral sex;
- groping;
- fondling girls' breasts;
- touching or pinching another learner's buttocks;
- kissing girls without their consent;
- raising girls' skirts;
- putting hands under girls' skirts;
- pressing up against another learner's body;
- leering at or eyeing up another learner's body;
- showing pornography;
- flashing;
- circulating rumours of sexual conduct by another learner;

- fingering;
- spying on other learners who are undressing;
- standing under stairs and looking up under girls' skirts;
- rape and gang rape. Gang rape is also referred to as 'jackrolling' – the practice where boys have to show their 'male power' or earn their gang membership by forcefully abducting and gang-raping girls (Mlamleli, Mabelane, Napo, Sibya & Free 2000:263). There is also evidence of xenophobic sexual misconduct where lesbian, gay, bisexual and transgender learners are raped because it is believed that it will change their sexual orientation (De Wet *et al.* 2008:101, 106).

The focus of this article then is the law and policy regulating the management of learner-on-learner sexual misconduct in public schools.

Sexual misconduct is incompatible with a milieu conducive to teaching and learning. It is a barrier to learning and is ultimately an infringement on the victims' right to education (De Wet *et al.* 2008:98; Department of Education 2008:3; RSA 1999 preamble; South African Human Rights 2006:7; Veriava [S.a.]). Effective school management is identified as one of the most important factors contributing to safe schools (Department of Education and South African Police Service 2002 par. 1.3). It is thus essential that learner sexual misconduct be effectively managed so as to ensure a disciplined and purposeful environment favourable to teaching and learning. The management of learner sex offenders requires cooperation between various departments, institutions and professionals. This cooperation needs to take place within the existing legal framework.¹

There is a lack of education-specific law and policy² regulating the management of learner-on-learner sexual misconduct which hampers such cooperation. The aim of this article is to identify and critically evaluate current law, policy and public documents regulating the management of learner-on-learner sexual misconduct at school level and to make recommendations for change. The law, policy and public documents are discussed according to their relevance to the problematic conceptualisation of learner sexual misconduct, the preventative measures schools need to have in place to ensure effective management of learner-on-learner sexual misconduct, the physical or psychological signs of sexual abuse and of developmental indicators of sexual abuse, the internal procedures and processes to manage learner sexual misconduct, and the management of the alleged sexual offender.

2 CONCEPTUALISING LEARNER SEXUAL MISCONDUCT

The conceptualisation of learner sexual misconduct is problematic, since various umbrella concepts and phrases such as *sexual abuse*, *sexual harassment*, *sexual violence* and the phrase *sexual harassment and violence* are interchangeably used in policy and public documents to describe the sexual offences committed by learners (Department of Education 2008; RSA 2002 reg. 2; Department of Education and South African Police Service 2002 par. 1.3; Watson *et al.* 2010:14). Sometimes these concepts are used synonymously; at other times sexual harassment is described as a form of sexual abuse; and then again at other times sexual abuse is said to be “a very serious type of sexual harassment” (Department of Education and South African Police Service 2002 par. 3.3; Department of Education 2002; Kumalo, Adatio & Clacherty 2005:2; Mangena 2002; Watson *et al.* 2010:6). This ambiguity does not take cognizance of the multi-dimensional nature of learner sexual misconduct and thus impedes the management of learner sexual misconduct by hampering the implementation of law and policy and the disciplinary action against learner sexual offenders. Ultimately, the Education Department prefers “sexual harassment and violence” as an umbrella phrase (Department of Education 2008:3; Watson *et al.* 2010:14).³

The author contends that the use of sexual harassment as an umbrella concept is problematic because it results in the emphasis

being placed on only those sexual offences directly related to sexual harassment at the expense of other, more serious, criminal sexual offences that also constitute sexual misconduct. Adding *sexual violence* to the phrase does not solve the problem, because not all sexual offences that do not constitute sexual harassment would necessarily constitute sexual violence. Furthermore, the concept *sexual harassment*, which originated and is defined in Labour Law, is applied in a totally different sphere and to non-employment relationships.⁴ The concept is shaped to fit the education milieu and in particular learner-on-learner sexual misconduct by omitting parts of the Labour Law definition as found in the *Amended code of good practice on the handling of sexual harassment cases* to rid it from its Labour Law perspective (RSA 2005a item 4). *Sexual harassment* is then defined in *The Guidelines for the prevention and management of sexual violence and harassment in public schools* (hereafter *The Guidelines*) (Department of Education 2008:6) as:

- i Unwanted conduct of a sexual nature.
- ii Sexual attention constitutes sexual harassment if:
 - a) The behaviour is persisted (although a single incident of harassment may constitute sexual harassment).
 - b) The recipient has made it clear that the behaviour is considered offensive, and or
 - c) The perpetrator knew or should have known that the behaviour is regarded as unacceptable.
- iii Sexual harassment may include unwelcome physical, verbal or non-verbal conduct.
- iv (sic! Numbering in guidelines incorrect)
- v It may include discrimination or offensive unwelcome physical, verbal or non-verbal conduct.
- vi Sexual harassment is not limited to situations where an unequal power relationship exists between parties involved.
- vii Sexual harassment can be committed by and against a male or female person.

The definition of *sexual violence* in education-specific law and policy is also problematic because not all the actions identified as constituting sexual violence are necessarily of a violent nature. *Sexual violence* is defined as (Department of Education 2008:5):

... any sexual act or attempted sexual act using intimidation, threats or physical force. In schools this may include sexual harassment, assault, forced sex or rape, sexual abuse and sexualised touching of another's intimate parts or forcing any person to touch any person's intimate parts. Intimate parts include the mouth, primary genital area, groin, inner thighs, buttocks, breasts, as well as clothing covering these areas

As an umbrella concept, *sexual abuse* is a better choice than *sexual harassment*. However, it is contended that specific legal definitions must be preferred to umbrella concepts (Padayachee 1993:324; Levett 1991:13). Unfortunately, it seems that the use of an umbrella concept in the school milieu may be unavoidable. It is suggested that *learner sexual misconduct* be preferred and that criminal sexual offences be used as guidelines to determine the content of learner sexual misconduct. That would promote a common understanding of all involved in handling sexual offences committed by children.⁵

The first step in managing learner-on-learner sexual misconduct is to ensure that preventative measures are in place.

3 PREVENTATIVE MEASURES AT SCHOOL LEVEL

Although there is no education-specific law and policy prescribing specific preventative measures for learner sexual misconduct, guidelines can be deduced from the *Regulations for safety measures at public schools*, *The Guidelines* and from various other public documents.

Learners should be protected against sexual misconduct during any school activity; in other words, during “any educational, cultural, sporting or social activity of the school within or outside the premises” (RSA 2001 reg. 1). This protection is extended to protect the learner from behaviour that can constitute “sexual violence or sexual harassment” (as defined in *The Guidelines*) that takes place within a dating relationship (Department of Education 2008:6).

The authors of *The Guidelines* recommend valuable preventative measures. They firstly recommend that schools’ codes of conduct spell out very clearly what would constitute transgressions of sexual harassment and sexual violence (Department of Education 2008:4). In the light of the problems surrounding the use of the umbrella phrase *sexual harassment and violence*, it is suggested that sexual misconduct be included in codes of conduct as a specific form of misconduct (Haffejee 2006). The forms of learner-on-learner sexual misconduct included in codes of conduct should be defined in line with legislation defining sexual offences, such as the Sexual Offences Amendment Act, the Films and Publications Act, the Children’s Act 38 of 2005 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.⁶ Paragraph 10.2 of the *National policy on*

HIV/AIDS for learners and educators in public schools, and students and educators in Further Education and Training Institutions provides that codes of conduct should include provisions regarding the unacceptability of behaviour that may create a risk of HIV transmission (RSA 1999). Logically, such behaviour includes sexual conduct. The problem is that learners engage in sexual activities that they regard as ‘safe’, such as oral sex, not believing that they can contract HIV by engaging in it (Caelers 2005:11).

The requirement that schools should provide for defining and including information on sexual transgressions in their codes of conduct is also in line with the *Guidelines for governing bodies*. This document requires that the codes of conduct “set a standard of moral behaviour for learners” and “contain a set of moral values, norms and principles” (RSA 1998 par. 1.9). Unfortunately, in our schools setting a standard of moral behaviour is compromised by educators who themselves commit acts of sexual misconduct and the general tendency to downplay instances of sexual assault such as persistent and unwanted kissing, fondling and touching, as mere ‘flirtation’ (Human Rights Watch 2001).⁷ It is suggested that an item be inserted in *The Guidelines* requiring educators to include information on sexual misconduct in classroom rules. The explanations should be couched in a language that learners will understand. It may be advisable to add the terminology commonly used by learners next to the acts that constitute sexual misconduct and to link the forms of sexual misconduct to corresponding sexual offences.

The booklet of the Centre for the Study of Violence and Reconciliation (CSV) on how to develop a school safety policy suggests that schools address sexual misconduct in their safety policies and safety plans (Vienings, Commys & Geyer [S.a]). Unfortunately, *The Guidelines* does not contain a similar provision. This is a problem since the above-mentioned booklet is not necessarily available and familiar to all schools. However, the Education Department’s booklet *Signposts for safe schools*, which deals with all safety matters, contains a similar provision (Department of Education and South African Police Service 2002 par. 1.3). Principals may find the following public documents informative when developing school safety plans:

- Part 2 of the booklet compiled by the Department of Education and UNICEF

- entitled *Implementation guidelines: Safe and caring child-friendly schools in South Africa*;
- the above-mentioned booklet of the CSVR; and
- Stopping sexual harassment at school* (Department of Education and UNICEF 2008; Vienings *et al.* [S.a]; Kumalo *et al.* 2005).

School safety plans should be drawn up after an assessment has been made of all incidents of crime and violence, including sexual crimes and incidents of sexual offences, committed during school activities (Department of Education and UNICEF 2008:44; Roper [S.a]:74; Vienings *et al.* [S.a]:7). Assessment should be done to determine whether:

- the school's code of conduct sufficiently addresses sexual misconduct;
- the governing body's disciplinary committee is effective;
- there is a reliable recording and reporting system in place;
- awareness campaigns are planned and implemented;
- a support team is in place to provide victims and alleged offenders with support and counselling;
- the school has posted a list of people and organisations that could provide support and advice to victims and alleged offenders in places where learners have easy access to the list; and
- the school's safety policy is in place and known to all stakeholders (Department of Education and UNICEF 2008:44; Vienings *et al.* [S.a]:5).

The safety plans could include strategies to

- make unsafe places safe;
- improve or amend educator supervision to minimise the opportunity for learners to commit sexual misconduct;
- make learners aware of the offences that would constitute sexual misconduct; and
- promote human rights and moral values (Department of Education and UNICEF 2008:19; Vienings *et al.*).

4 IDENTIFYING VICTIMS OF SEXUAL ABUSE

Unfortunately prevention is not always effective and learner-on-learner sexual misconduct occurs in many schools. It is therefore essential that educators are able to identify victims of sexual abuse and to know how to respond when such a learner is identified.

The Guidelines mentions the Education Department's undertaking to provide ongoing training sessions to educators, members of the governing body and all other persons covered by the guidelines (Department of Education 2008:4). The *Signposts for safe schools* document mentions that one of the aspects or topics to be covered during such training is how to identify a learner who is being sexually abused or subjected to any form of sexual misconduct. The booklet commendably contains a list of physical or psychological signs of sexual abuse and of developmental indicators of sexual abuse that are in line with the regulations of the Children's Act and various other documents (Department of Education and South African Police Service 2002 par. 3.4; RSA 2005b reg. 35).⁸

(a.) **Physical or psychological signs of sexual abuse** could include a change in behaviour of a learner; pain; unusual itching of genitals or anal area; difficulty in sitting or walking; regular urinary infections; recurrent mouth sores; demonstration of or interest in or knowledge about sex unsuited to the learner's age; sexually acting out, masturbation; withdrawal; poor hygiene or compulsive washing; a tendency to be secretive; loss of self-esteem; poor peer relationships; acting out; aggressiveness and irritability; mood swings, fear of undressing in the presence of others or wearing layers of clothing; tearfulness; fear of a particular person; suicidal behaviour; self-mutilation; obsessive behaviour; and active or passive bullying (RSA 2005b reg. 35).

(b.) **Developmental indicators of sexual abuse** are poor school performance, a constant need for reassurance (clinging), regression, withdrawal, stuttering, reluctance to partake in group activities, clumsiness and lack of coordination or orientation (RSA 2005b reg. 35).

Educators should remember that the presence of one or more of these signs or indicators does not necessarily mean that the learner is being sexually abused. It is thus necessary for the educator to observe the learner for a few days or even a few weeks before drawing a conclusion (Sun Park, Kenny, Sanger & Abrahams-Fayker 2009:4; Naylor 2005:19).

An educator suspecting that a learner is being sexually abused has to record the learner's behaviour over a reasonable period of time and keep a record of behavioural changes, changes in the learner's relationships, and changes in the learner's dealings with other learners and educators. *The Signposts for safe schools*

further suggests that the educator should have a confidential interview with the learner's best friend (Department of Education and South African Police Service 2002 par. 3.4). However, the author contends that this should rather be avoided due to the likelihood of such a learner 'innocently' confiding in another learner or even discussing the matter with friends. Educators could also, if they have good relationships with the particular learners, talk to the learners themselves. Should the learner confide in the educator, the recommended procedures for managing allegations of sexual misconduct should be followed.

5 MANAGING ALLEGATIONS OF SEXUAL MISCONDUCT

As previously stated, there is no education-specific law and policy regulating the management of learner-on-learner sexual misconduct. Although guidance for principals, educators and governing bodies can be found in *The Guidelines*, it is not enforceable law and is very difficult to interpret since there are numerous instances of ambiguity and indistinctiveness that in turn impede the implementation thereof and ultimately the management of learner-on-learner sexual misconduct.

5.1 Reporting the incident

The Guidelines states that the learner victim should ask the offender to stop and "in cases where a victim does not feel able to do so, the incident should still be followed up if reported" (Department of Education 2008:8). A similar provision is included in the booklet entitled *Speak out: A handbook for learners on how to prevent sexual abuse in public schools*. It states: "Ask the person to STOP! If you cannot, or if he/she continues to harass or abuse you, it's time for action" (Watson *et al.* 2010:20). Since the request or the absence of such a request will not affect the reporting process at all, the purpose of these provisions is not clear. It is thus suggested that this provision rather be omitted from both documents.

The Guidelines further provides that if the person to whom such report is made is not a designated educator, s/he should inform "the designated officer or principal" and not personally start with the investigation. If the educator is capable of counselling the learner, such counselling should be provided; otherwise the victim should be referred to a counsellor at, for example, Childline (Department of Education 2008:8). Once again *The Guidelines* is ambiguous. Reference is made to "a designated

educator", "*a designated official*" and "*the designated officer or principal*" (my emphasis) (Department of Education 2008:8). The phrase "*a designated educator*" [my emphasis] implies that more than one person could be responsible for handling sexual misconduct cases in a school, while "*the designated officer or principal*" [my emphasis] implies that only one person will be responsible. Later reference is once again made to "*the designated official*", which could be "*an adult member*" of the SMT, the school-based support team, or the school governing body (Department of Education 2008:9). It is not clear whether it is in the HoD's or the principal's discretion to designate this task. It also does not make sense that *The Guidelines* distinguishes between the School Management Team (SMT), the school-based support team and the school governing body. The school-based support team comprises representatives from the SMT, the school governing body, the Representative Council of Learners and the educators (Department of Education 2008:17). Furthermore, this provision creates uncertainty as to what should happen if the offence is reported to a designated educator, especially in the light of the fact that the principal is supposed to lead the investigation.

The Guidelines provides that the SMT or school governing body must inform the victim before the investigation of the right to request that one of the investigators be of the same sex than the victim (Department of Education 2008: Annexure A). The question arises as to why the exercise of these rights depends on the learners having to request it. Furthermore, by being indecisive and not identifying either the SMT or the School Governing Body as being responsible for informing the learner a problem with regard to accountability arise.

Victims should be informed of what needs to be done, which role players will be involved, and that they should not drink or eat, wash their mouths, shower or take any medicine before being examined by a doctor. This is especially important in instances where the learner was raped or forced to perform oral sex (Department of Education 2008:11).

5.2 Protecting confidentiality

The Education Department requires that "[a]ll alleged sexual violence and harassment should be treated as far as possible with confidentiality" (Department of Education 2008:5). To comply with this, educators have to respect learners' right to privacy and protect both the victim and alleged offender by not publicising the

matter (RSA 1996a s 14; RSA 1998 par. 4.3; Commonwealth Secretariat 2002:10; South African Law Commission 1997 Ch. 2). Naylor (2005) mentions that victims can request that their identities be protected and be kept secret within the school. However, the author contends that educators *always* have a duty to protect learners' privacy and to avoid making alleged sexual offences public, and not only when requested to do so. Failing to do so is in fact a criminal offence. Section 335A of the Criminal Procedure Act 51 of 1977 (as amended by Act 32 of 2007) states:

(1) No person shall, with regard to any offence referred to in section 153 (3) (a) and (b), as from the date on which the offence in question was committed or allegedly committed, until the prohibition in terms of section 154 (2) (b) of the publication of information relating to the charge in question commences, publish any information which might reveal the identity of the person towards or in connection with whom the offence was committed or allegedly committed, except with the authorization of a magistrate granted on application in chambers, with due regard to the wishes of the person towards or in connection with whom the offence was committed.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment if the person whose identity has been revealed is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

All sexual offences contemplated in section 1 of the Sexual Offences Amendment Act, as well as furthering the commission of a sexual act, are included under section 153 (a) and (b).

5.3 Obligation to report

The educator must inform the learner that he or she (the educator) is legally obliged to report the matter. It is suggested that an educator should rather inform the learner of this when he or she approaches the learner or when the learner approaches him or her and the educator becomes aware of the nature of what the learner wants to disclose, and not only after the learner has confided in the educator (Department of Education and South African Police Service 2002 par. 3.4). The duty to report only applies to sexual offences committed against children, i.e. persons under the age of eighteen years (RSA 2005c s 1; RSA 2007 s 1).

Principals are also obliged to report sexual violence and Level 4 sexual misconduct to the police (within 72 hours of 'occurrence') and to social workers (Department of Education

2008:14). The *Guidelines for governing bodies* requires that *all criminal offences* be reported to the police. With the Sexual Offences Amendment Act providing for a considerable number of sexual offences, the duty to report in terms of the *Guidelines for governing bodies* is more extensive than under *The Guidelines*. Although principals must report the matter to the Education Department's district office, they need not wait for a response from the district office before reporting the matter to the police and the Department of Social Development (Department of Education 2008:10; Department of Education and South African Police Service 2002 par. 3.5). The Children's Act requires that an educator who has reasonable grounds to conclude that a child has been sexually abused must report that conclusion to a designated protection organisation, the provincial Department of Social Development or a police official (RSA 2005c s 110(1)). This provision requires that educators should report more offences than only those offences that constitute sexual violence as required by *The Guidelines*.

An educator who fails to report the commission of a sexual offence against a child to the police commits a statutory offence in terms of Section 54(1) of the Sexual Offences Amendment Act. The Prevention of Family Violence Act 133 of 1993 provides that any person who attends to, advises or instructs a child must immediately report reasonably suspected ill treatment (including sexual abuse) of which the probable cause was deliberate to a police official, a commissioner of child welfare or a social worker. Furthermore, 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 (RSA 2005c). Therefore, educators who are aware of a learner being sexually abused by another learner and do not report it can be held criminally liable for sexual abuse, because the failure to report indirectly means that they *allowed* the learner to be molested or assaulted (Coetzee 2011a:246). Such educators can also be charged with the offence of failing to comply with Section 110(1) of the Children's Act (RSA 2005c). It is evident from the above provisions that all educators, and not only those to whom sexual offences are reported, have the duty to report.

5.4 Informing the parents

After the matter is brought to the attention of the designated official, such official should

inform the parents or guardians of the offender as well as the victim in writing of the charge (Department of Education 2008:10). This is a laudable provision since it ensures that learners' right to information as contained in Section 32 of the Constitution is upheld. Once again it is suggested that the principal be the person required to inform the parents or guardians of the offender and victim. This will be in line with the guideline mentioned later in *The Guidelines* on due process in cases that may lead to suspension or expulsion as well as the *Guidelines for governing bodies* (RSA 1998 par. 13.2; Department of Education 2008:12). The SMT or adult members of the school governing body must then appoint a two-person investigating team to investigate the allegation without delay. The investigating team must inform the victim and the offender of the outcome within seven days. A report must be filed and a copy forwarded to the district office (Department of Education 2008:9).

5.5 Investigating the allegation

The Guidelines does not specify who should ultimately be held responsible for the investigations. On page 7 it is indicated that the institution manager should lead the investigations (in the absence of a designated official) and "hold ultimate accountability" (Department of Education 2008: section on complaints procedures).⁹ It is not clear how this relates to the provision that the SMT or adult members of the school governing body must appoint a two-person investigating team. Does it mean that the principal is an *ex officio* member of such team? (See Department of Education 2008:9). In whose discretion is it to make the decision whether the SMT or the school governing body should nominate the investigating team? To complicate matters further, *The Guidelines* states that "[t]he primary responsibility for investigating cases of sexual harassment and violence and managing disciplinary proceedings rests on the SMT" (Department of Education 2008:17). This is not in line with the South African Schools Act 84 of 1996, which allocates the responsibility for governance and school discipline to the governing body and declares the principal the representative of the Head of Department (HoD) and responsible for the professional management of the school (RSA 1996b ss 9, 16, 16A(1)(a)).

The Guidelines is also unclear about the role of the SMT or school governing body in the selection of the investigation team. The

question that arises is whether two members should be *nominated*, as indicated on page 9 of *The Guidelines*, or whether the task to investigate should be *delegated* to two members, as indicated on page 19. If the SMT or governing body is responsible to *nominate*, it is in the discretion of another person (probably the principal) to make the final decision; but if to *delegate*, it means that the task is assigned to two specific members and the principal has no discretion in the matter. This does not make sense if the principal is to be the person ultimately responsible. Matters become even more confusing when, on page 18, the same task is allocated to the principal who must "take immediate action to remedy the situation, e.g. delegate to the investigating team, receive progress report and give feedback about the progress to the victim" (Department of Education 2008:18). It is not stated what precisely it is that the principal is supposed to delegate to the investigation team.

It seems that the investigation has to take place before the principal decides on what action should be taken, since the principal should consider the team's report. Usually it is required that, if an allegation is made against a learner for which the learner can be suspended or expelled, the learner must be taken to the principal and it is then in the discretion of the principal to decide on the action to be taken (RSA 1998 par. 13). The Department of Education's booklet adds to this confusion by stating that "[t]eachers have a responsibility to investigate *all* learners' complaints of sexual harassment and/or sexual violence" [my emphasis] (Watson *et al* 2010:14). This is in conflict with *The Guidelines*, which provides that no attempt should be made to investigate sexual violence cases. Furthermore, in terms of *The Guidelines* sexual violence is a Level 4 offence for which suspension or expulsion is the recommended sanction and an investigation is required before a learner may be suspended or before the HoD can be approached to make a decision whether or not a learner should be expelled.¹⁰

The Guidelines is silent on how the investigating team should go about investigating the complaint. It is suggested that clear guidelines be set for such investigators.

5.6 Follow up after incident was reported to the police

The principal has the duty to follow up on cases. The principal has to ensure that the

learner obtain the following information after making a statement to the police: the Occurrence Book (OB) and Criminal Administration System (CAS) numbers of the case, a copy of his or her statement, the telephone number of the police, the name and serial number of the officer who took the statement, the name and serial number of the officer who is investigating the matter (when it becomes available), a letter from the police that could be used by the victim to have the alleged offender arrested by any officer, and the name and phone number of the criminal investigating commander (RSA 1996a s 32(1)(b); Commonwealth Secretariat 2002:10; Department of Education & South African Police Service 2002 par. 3.5; Watson *et al.* 2010:16). It is averred that the principal's duty to follow up will help to ensure that the police take the case seriously.

5.7 Medical examination

The *Guidelines* mentions that the learner victim must undergo a medical examination within 72 hours (Department of Education 2008:11). It is argued that although this is mentioned in *The Guidelines*, the medical examination is not the responsibility of the principal but that of the police since it is required that the principal *immediately* report the allegations to the police and that the case be then handed over to the police (Department of Education 2008:10). However, the directive in *Signposts for Safe Schools* that the medical examination must take priority over the victim's statement to the police may confuse principals as to what their responsibility in this regard is (Department of Education and South African Police Service 2002, par. 3.5). Given that in terms of section 335B of the Criminal Procedure Act 51 of 1977 (as amended by Act 32 of 2007) the police need either the consent of a minor's parent or custodian or, if the parent or custodian cannot consent, the consent of a magistrate before he or she can request a medical examination of the child victim, it is contended that principals do not have the statutory authority to request a medical examination. This[s1] author recommends that this issue should be addressed in more detail in education-specific law.

In this section, some aspects of the management of the victim(s) of learner sexual misconduct were addressed. The next section elaborates on the management of learner sexual offenders and in particular the disciplinary proceedings.

6 MANAGING THE ALLEGED SEXUAL OFFENDER

How the principal should manage the alleged sexual offender will be determined by the seriousness of the offence. The principal must, after an allegation of sexual misconduct is received, inform the parents or guardians of the offender, and in instances where either the offender or the victim is from a child-headed household, Social Services should also be informed (Department of Education 2008:12).

The management of the alleged offender who committed sexual misconduct is regulated by the Schools Act and the *Guidelines for governing bodies* and, as any other form of misconduct, has to be handled in terms of the school's code of conduct.

A hearing must be conducted and the outcome of the hearing must be communicated in writing to both the offender and the victim (Department of Education 2008:12). If such alleged offender is found guilty of sexual misconduct, various sanctions can be considered, depending on the seriousness of the offence. The following guidelines are given: Level 1 offences include making rude jokes and drawing or writing graffiti of a sexual nature. For Level 1 offences, the proposed sanctions include a verbal or written warning, supervised schoolwork that will contribute to helping the learner to internalise values and respect, improving the school environment, performing tasks that would assist the offended person(s), replacing the damaged property, and temporary suspension from some school activities (Department of Education 2008:13). The Department of Basic Education's¹¹ suggested sanctions differ slightly from these in that it only suggests verbal and not written warnings for Level 1 offences. It also identifies the scrubbing of toilets and the fixing of damaged property as possible sanctions (Watson *et al.* 2010:11). Where the school opted for supervised school work or improvement of the school environment, the parents must be informed timeously and measures must be taken to ensure the learner's safety and security (Department of Education 2008:13; RSA 1998 par. 10).

Level 2 offences include circulating offensive material, threatening assault and intimidating a fellow learner (Department of Education 2008:13). The booklet of the Department of Basic Education also indicates verbal threats and name calling as Level 2 offences (Watson *et al.* 2010:10). The sanctions proposed for

Level 2 offences are supervised schoolwork that will contribute to helping the learner to internalise values and respect, a verbal or written warning, or conflict resolution in a peer education group for a specified period (Department of Education 2008:13). The Department of Basic Education also suggests temporary suspension from some school activities for Level 2 offences (Watson *et al.* 2010:11). The author is of the opinion that essentially the same sanctions are proposed for both Level 1 and 2 offences.

Level 3 offences include distributing pornography at school, improper suggestions of a sexual nature, and sexual harassment. The proposed sanctions include a disciplinary hearing, detention with community work, detention, and work with the leadership of a peer education group for a specified period (Department of Education 2008:13). Once again, the Department of Basic Education adds temporary suspension from some school activities as a sanction for Level 3 offences (Watson *et al.* 2010:11).

Level 4 offences include persistent harassment despite previous corrective measures, public indecency, sexual assault and rape. The proposed sanction for these offences is expulsion (Department of Education 2008:14; Watson *et al.* 2010:11). Criminal offences such as sexual assault and rape "must be investigated by the police and referred to the Court if necessary" (RSA 1998 par. 14). It is disturbing that *The Guidelines* does not pertinently recommend suspension as a sanction for sexual offences but only implies it by permitting governing bodies to recommend to the HoD to accommodate the learner temporarily in another school or an alternative supervised location and to provide for suspension as a correctional measure (Department of Education 2008:12; RSA 1996b s 9(1C)).¹² The author maintains that it was an oversight and not the intention to omit suspension as a sanction from the list of recommended sanctions. The author accepts that this is the case, especially in the light of the fact that, if the offence is of sexual nature, the school should consider the effect the offender's presence will have on the teaching and learning environment of the victim. The right to education of offenders who are still of compulsory school-going age should be upheld.

In terms of the *Guidelines for governing bodies*, the learner has the right to a fair hearing, but may be suspended before a hearing takes place if his or her presence at school will

lead to disruption, injury to other learners or damage to property, or if his or her presence will prejudice disciplinary proceedings (e.g. where he or she is likely to tamper with evidence or intimidate witnesses) (*Juta's Education Law and Policy Handbook* 2010:2A-12A). The disciplinary proceedings must commence within seven days after the suspension (RSA 1996b s 9(1A)). Learners have a right to be accompanied by their parents or a person designated by the parents. If the governing body continues the proceedings without the parent(s) or their duly appointed representative, it must show good cause for such continuation (RSA 1996b s 9(6)). If expulsion is chosen as the sanction to be imposed, the learner could also be suspended for a maximum period of fourteen school days while awaiting a confirmation from the HoD (RSA 1996b s 9(1D)).

In addition to indicating the recommended sanctions for each respective level, *The Guidelines* also contains a general recommendation that the learner be sent for counselling or be ordered to write a letter of apology to the victim (Department of Education 2008:12). It is not clear for which level of sexual misconduct these sanctions will be appropriate, especially since the governing body does not have the authority to implement such sanctions but only to *recommend* them. It is contended that the aforementioned sanctions will probably be suitable for Level 1 offences; however, then it does not make sense that the governing body lacks power to implement these sanctions.

7 CONCLUSION

The author has identified and critically evaluated the law and policy regulating the management of learner-on-learner sexual misconduct. This evaluation of the current education-specific law and policy compels the conclusion that current education law is not sufficient to ensure effective management of learner sexual misconduct.

The interchangeable use of various concepts to identify the problem of learner-on-learner sexual misconduct creates uncertainty and confusion. It is suggested that the concept *learner sexual misconduct* be preferred and that schools include information on sexual misconduct as a specific type of misconduct in their codes of conduct. To promote a common understanding, the forms of sexual misconduct should be defined to be in line with legally defined sexual offences. Learner sexual

misconduct should be addressed in education-specific and enforceable legislation. This could be done by inserting a section on learner sexual misconduct in the South African Schools Act 84 of 1996 or in the *Regulations for safety measures at public schools*.

The evaluation of the *Regulations for safety measures at public schools*, *The Guidelines* and various other public documents has brought for several preventative measures to the fore. These include the recommendations that learner sexual misconduct be addressed in schools' codes of conduct, that the codes of conduct be used to set a standard of moral behaviour, and that learner sexual misconduct be addressed in schools' safety policies and plans after an assessment has been done. When learner-on-learner sexual misconduct does occur, educators should be able to identify the signs. *Regulation 261: Children's Act of 2005: General Regulations Regarding Children*, the *Regulations for safety measures at public schools* and *The Guidelines* all contain valuable information on how to identify a learner that has been sexually abused and how to respond in such instance.

The main document regulating the management of learner sexual misconduct is the

Guidelines for the prevention and management of sexual violence and harassment in public schools. This document is not legally enforceable and is riddled with ambiguities and provisions that are in conflict with other policy and public documents. These ambiguities, discrepancies and contradictions have generated considerable uncertainty as to who is/are *inter alia* responsible for some of the procedures in the management of learner-on-learner sexual misconduct. Examples of these procedures include the investigation of alleged sexual misconduct; the offences that are accepted as constituting learner sexual misconduct; and the recommended sanctions, especially in the light of the absence of suspension as a sanction in the list of sanctions.

The right to education is an empowering right which learner-on-learner sexual misconduct infringes upon. If the problems with the law and policy regulating the management of learner-on-learner sexual misconduct are not urgently addressed, they may not only have a detrimental effect on the victim but also exacerbate the problems of learner sexual misconduct and contribute to current barriers to ensuring the right to education for all.

Endnote

- ¹ See paragraph 3 in *The Guidelines* for a list of all departments involved. In the rest of the article only the page numbers are indicated, since not all the paragraphs in *The Guidelines* are numbered.
- ² Since the management of learner-on-learner sexual misconduct at school level will be regulated by education-specific law and policy, a distinction is made between such law and policy and general law and policy (e.g. criminal law and child law) in this article.
- ³ Also see Kumalo *et al* 2005:1-2; Moletsane 2004; Pandor 2008; Veriava [S.a].
- ⁴ This matter is argued in detail in Coetzee, SA. 2011. *Law and policy regulating educator-on-learner sexual misconduct*. Accepted for publication in *Stellenbosch Law Review* (23)1, 2012. See Basson, A. 2007. Sexual Harassment in the Workplace: An Overview of Developments in *Stellenbosch Law Review* 18(3):425-450 for a discussion of sexual harassment and the remedies available in South Africa to victims of sexual harassment.
- ⁵ See the recommendation at the end of section 3 of this article.
- ⁶ 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. In this article the Consolidated Children's Act as amended by the Children's Amendment Act 41 of 2007 and Child Justice Act 75 of 2008 updated to *Government Gazette* no 33076 of 1 April, 2010 was used. 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.
- ⁷ Also see BBC News 2002.
- ⁸ Also see Department of Education and South African Police Service (2002 par 3.4); Sun Park *et al* 2009:4; Naylor 2005.
- ⁹ It is accepted that "institutional manager" refers to the principal. See the South African Schools Act 84 of 1996 s 16, where it is indicated that the principal is the professional manager of the school under the authority of the Head of Department.
- ¹⁰ Reference is later made of the fact that suspension is not included in the list of recommended sanctions on pages 13 and 14 of *The Guidelines*.
- ¹¹ The Department of Basic Education is referenced as author with regard to law and policy adopted and public documents compiled after 2010. The Department of Basic Education was formed in 2010 when the former National Department of Education was split into two: the Department of Basic Education and the Department of Higher Education and Training.
- ¹² See the recommended sanctions listed on page 13 of *The Guidelines*. For a definition of school-going age, see the South African Schools Act 84 of 1996 s 3.

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