1 Introduction

“National basic education spokesperson Granville Whittle said that of the 75 teachers struck off last year six were found guilty of rape, 20 of having a sexual relationship with a pupil and 21 of sexual assault.”¹

This article was prompted by the very high incidence of educator-on-learner sexual misconduct.² It was very disturbing to find that the media regularly refer to court cases dealing with children that are sexually abused, and that in many of these instances the perpetrator is an educator.³

In 2010, the Minister of Basic Education, Angie Motshekga, admitted that sexual abuse is becoming a major problem in public schools.⁴ In actual fact, the problem of educator sexual misconduct is not a recent development. In 2002 already it was reported that a third of the South African girls raped were raped by educators.⁵ It seems that the Department of Education has not had much success in getting rid of sexual predators among its personnel. In this article the focus will be on educator-on-learner sexual misconduct.

South African educators have a legal duty to refrain from sexual misconduct.⁶ The question is why, with law and policy in place for regulating educator sexual misconduct, does the problem of educator sexual misconduct persist? The high incidence of educator sexual misconduct is especially

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² A Matlala “More Teachers Guilty of Lust: Reported Cases of Sex with School Girls on the Increase” (19-01-2011) Times Live <http://www.timeslive.co.za/local/article859002.ece/More-teachers-guilty-of-lust> (accessed 26-03-2012). In this article, “educator” refers to “any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological service, at any public school”. See s 1 of the Employment of Educators Act 76 of 1998.
baffling in the light of the serious consequences that educators found guilty of some forms of sexual misconduct may face – for example, dismissal and deregistration from the South African Council for Educators (“SACE”), never to teach again.  

The aim of this article is to identify and critically evaluate law and policy regulating educator-on-learner sexual misconduct. Various problems relating to such law and policy transpired. The first problem is the conceptual confusion resulting from the use of various umbrella concepts in law and policy for identifying the problem of educator-on-learner sexual misconduct. A second and related dilemma is that no clear distinction is made between sexual harassment as regulated by labour law on the one hand and general law on the other hand. Labour law and policy are merely adapted to the sphere of education and made applicable to non-employment relationships such as the educator-learner relationship. A third problem is that educator sexual misconduct is not clearly and sufficiently addressed as serious misconduct in education law and policy. A fourth problem is that sanctions for educator-on-learner sexual misconduct are not sufficient and not in line with the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Sexual Offences Amendment Act”), the Children’s Act 38 of 2005, and the Children’s Amendment Act 41 of 2007. This in turn results in educators found guilty of less serious forms of sexual misconduct facing more serious consequences than educators found guilty of more serious forms of sexual misconduct.

2 Conceptual confusion

There seems to be a tendency to use various umbrella concepts in education law, policy and public documents to describe sexual offences committed against learners in schools. This ambiguity hampers the implementation of law and policy and the prosecution of educator perpetrators. The choice of an umbrella concept may lead to emphasising, in the sphere of education, only those forms of sexual misconduct related directly to the chosen concept, at the expense of other more serious and criminal forms of sexual misconduct. Also, in South Africa various departments and professionals are involved in the protection of children against sexual offences. For these departments and professionals to clearly communicate with one another it is thus imperative to have a common understanding of which conduct will constitute a sexual

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7 S 17(1) (b)-(c) of the Employment of Educators Act; s 23(1)(c) of the South African Council of Educators Act; items 3.5, 3.6, 3.8, 3.9 of the SACE Code of Professional Ethics.
8 “Education law” refers to “those components of the Constitution, other statute law, the common law and case law that create an education system and regulate the multilateral interaction of individuals, groups, independent bodies and official authorities within that system”. (See LM Maree Die Onderwys onder ‘n Nuwe Grondwet (1995)).
9 The following departments and professionals are involved: the South African Police Services, the Department of Social Development, the Department of Labour, the Department of Health, the Department of Justice and Constitutional Development, and the National Prosecuting Authority. Department of Education Guidelines for the Prevention and Management of Sexual Violence and Harassment (2008) item 3.
offence, and of the elements of the various sexual offences. Clearly defined forms of sexual misconduct that correlate with sexual offences and sanctions that are in line with criminal law will promote prosecution, because learner victims will be better informed about the protection offered by the law, and about remedies available to them.

It seems as if the Department of Education generally uses the phrase “sexual harassment and violence” as an umbrella concept. Sexual harassment within the sphere of employment is defined in item 4 of the Amended Code of Good Practice on the Handling of Sexual Harassment Cases (the “Amended Code of Good Practice”) only, as

“a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation”

and also

“unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account the following factors:

1. whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
2. whether the sexual conduct was unwelcome;
3. the nature and extent of the sexual conduct; and
4. the impact of the sexual conduct on the employee.”

Using sexual harassment as an umbrella concept for all forms of sexual misconduct in a school context is problematic, especially since sexual harassment is used for describing sexual misconduct committed by both educators and learners and in instances where the victims are either educators or learners. The applicability of this provision in cases of educator-on-learner sexual misconduct can be questioned. Learners do not fit into any of the listed perpetrator or victim categories. They are not owners, employers, managers, supervisors, employees or job applicants, nor suppliers or contractors.

13 Department of Labour Amended Code of Good Practice item 3.
14 Note that “sexual harassment” as such is defined in neither the Employment Equity Act 55 of 1998 nor the Promotion of Equality and Prevention of Unfair Discrimination Act 40 of 2000. See C Garbers “Sexual Harassment as Sex Discrimination: Different Approaches, Persistent Problems” (2002) 14 S A Merc LJ 371 392-393. In terms of s 203 of the Labour Relations Act 55 of 1996 and s 3 of the Employment Equity Act, the Code must be taken into account when applying or interpreting these Acts or any other employment law. Despite the fact that the Code is not binding law, the definition of “sexual harassment” is deemed the only “legal” definition of sexual harassment in South African law.
15 Department of Labour Amended Code of Good Practice items 2(3), 5.3.2.2 (numbered incorrectly as “5.2.3.2” in the Code).
16 Item 2(1).
question is asked whether learners could be regarded as clients or as “others having dealings with the business”?

Even if one argues that learners could fit into the category of clients or the category of “others having dealings with the business” such interpretation would not make sense in the light of the definition of sexual harassment itself as learners are not employees and do not have employment rights that can be violated.

Using “sexual harassment” as an umbrella concept results in a concept that originated in labour law being applied to the educator-learner relationship, which, although an unequal relationship, is not an employment relationship. In an attempt to overcome this problem, sexual harassment is simply very broadly defined by omitting the references to the employment relationship.

For example, the Department of Education took the definition of sexual harassment from the Code of Good Practice on the Handling of Sexual Harassment Cases published in 1998 – meant for the workplace – and adapted it for the education environment:

“Sexual harassment is
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. [iv omitted in definition]
v. It may include discrimination or offensive behaviour on the basis of the, gender or sexual orientation of a person.
vi. Sexual harassment is not limited to situations where an unequal power relationship exists between parties involved.

This definition creates confusion, since it severed sexual harassment from its intended application within labour relations to make it applicable to educator-on-learner sexual misconduct. It is indicated in the Amended Code of Good Practice itself that it is not applicable to sexual harassment outside the working environment and that where sexual harassment occurs outside the working environment regard should be given to the Promotion of Equality and Prevention of Unfair Discrimination Act 40 of 2000.

It should be noted that the Amended Code of Good Practice provides that where a non-employee (such as a learner) is the victim of sexual harassment by an employee (the educator), the non-employee may lodge a grievance with the employer of the harasser if the harassment has taken place in the workplace (school) or in the course of the employee’s employment.

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19 Department of Education Sexual Violence and Harassment Guidelines 6 n 2.
21 Department of Labour Amended Code of Good Practice n 1 and n 2 state: “( 1 ) & (2) Where sexual harassment occurs outside of the working environment, regard should be had to the Promotion of Equality and Prevention of Unfair Discrimination Act. 4 of 2000.”
victim can thus lodge a complaint with the Head of Department (where the educator perpetrator is in the employ of the provincial department of education in a subsidised post) or with the principal (where the educator is appointed in terms of section 20(4) of the South African Schools Act 84 of 1996 in a nonsubsidised post). This provision seems to be superficial. Why would a non-employee use an internal remedy while he or she could bring criminal and/ or civil charges? It seems unlikely that a learner would lodge a grievance with, and would wish the matter to be resolved by, the Head of Department in instances where the perpetrator is the principal or another senior educator. It is contended that in instances where the perpetrator educator is in the employ of the school itself learner victims will be even more unwilling to lodge a grievance with the principal.

Another argument against the use of sexual harassment as an umbrella concept is that the definitions of sexual harassment and the *quid pro quo* and *victimisation* forms of sexual harassment and the objects of the Amended Code of Good Practice indicate the clear emphasis on labour law. This emphasis does not support the application of sexual harassment to instances where learners are either the victims or the perpetrators, as argued above.

Using sexual harassment as an umbrella concept also does not make sense if one considers the absence of sexual harassment as a criminal offence in the Sexual Offences Amendment Act, which is an Act aimed at “criminalising all forms of sexual abuse or exploitation”. Ultimately it is unfortunate that a concept that, as is, is riddled with difficulties, anomalies and reservations is used as an umbrella concept.

The Department of Education also uses the concept “sexual abuse” interchangeably with “sexual harassment”. For example, the Department indicated in its submission to the Task Group on Sexual Abuse in Schools

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22 S 20(4) of the South African Schools Act; s 3(4) of the Employment of Educators Act. In the instance where the school is the employer of an educator the learner will lodge the grievance with the principal as representative and professional manager of the school.


24 Department of Labour *Amended Code of Good Practice* items 5.3.2.1 and 5.3.2.2 (numbered incorrectly as “5.2.3.2” in the Code).

25 Items 1, 4, 5.3.2.1, 5.3.2.2 (numbered incorrectly as “5.2.3.2” in the Code).

26 S 2(b) of the Sexual Offences Amendment Act (emphasis added). It is not hereby suggested that sexual harassment be included in criminal law as an offence. Except that that will be confusing in the light of the fact that various criminal offences are forms of sexual harassment, it could also result in even fewer convictions. See M Reddi “Sexual Harassment in the Workplace: Do we need New Legislation?” *Acta Juridica* 109 116 for a more detailed explanation.


that schools fail to protect learners against sexual abuse because there is not a common understanding on the meaning of sexual harassment. In the same document the Department indicates that sexual harassment is a form of sexual abuse. Such a view is in line with the definition of “child sexual abuse” as “an umbrella term describing criminal and civil offences in which an adult engages in sexual activity with a minor or exploits a minor for the purpose of sexual gratification.”

However, in a leaflet published by the Department of Education and the Sexual Harassment Education Project (“SHEP”) a different approach is followed and sexual abuse is described as “a very serious type of sexual harassment.” In the same submission where the Department indicates its intention to work towards ensuring a common understanding of what sexual harassment entails, “sexual violence”, “sexual abuse” and “sexual harassment” are used interchangeably and as synonyms.

The problem with using sexual violence as an umbrella concept is that it excludes some nonviolent forms of sexual misconduct. Unfortunately, sexual violence is not defined in the Sexual Offences Amendment Act. From the definition in the Films and Publications Act 65 of 1996 it could be deduced that sexual violence will be sexual conduct that is “accompanied either by force or coercion, actual or threatened, or that induces fear or psychological trauma in a victim”. In the sphere of education, “sexual violence” is defined as “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. Intimate parts include the mouth, primary genital area, groin, inner thighs, buttocks, breasts, as well as clothing covering these areas.”

As is evident from the above definition, sexual violence is viewed in the sphere of education to include rape, sexual assault (previously “indecent

30 Department of Education Sexual Abuse in Schools.
(a) sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted;
(b) encouraging, inducing or forcing a child to be used for the sexual gratification of another person;
(c) using a child in or deliberately exposing a child to sexual activities or pornography; or
(d) procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child.
32 Kumalo et al Stopping Sexual Harassment 2 (emphasis added).
34 S 1 of the Films and Publications Act (inserted by s 1q) of Films and Publications Amendment Act 3 of 2009). See s 1 for the definitions of “explicit sexual conduct” (inserted by s 1(h) of Films and Publications Amendment Act 3 of 2009) and “sexual conduct” (inserted by s 1(f) of the Films and Publications Amendment Act 18 of 2004).
35 Department of Education Sexual Violence and Harassment Guidelines 5.
assault”) and sexual harassment.\textsuperscript{36} It is evident that here rape and sexual harassment are presented as two separate forms of sexual misconduct. This approach is also followed in an article dealing with sexual harassment in schools where the author uses sexual harassment as an umbrella concept to cover all forms of sexual misconduct but also distinguishes between rape and sexual harassment.\textsuperscript{37}

It seems that sexual abuse would have been the better choice as an umbrella concept. Although I agree with Padayachee that specific legal definitions must be preferred to umbrella concepts,\textsuperscript{38} it seems that the use of an umbrella concept in the school milieu may be unavoidable. It is suggested that educator sexual misconduct be preferred as an umbrella concept in the Employment of Educators Act 76 of 1998. In the next section I deliberate on educator-on-learner sexual misconduct as defined in current legislation.

3 Defining educator-on-learner sexual misconduct

Although section 17(1)(b) and (c) of the Employment of Educators Act states that sexual assault and having a sexual relationship with a learner from the school where an educator teaches constitute serious misconduct for which an educator must be dismissed, it does not provide for other forms of sexual misconduct.

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. It can be deduced that any common law or statutory offence of a sexual nature by an educator will thus constitute sexual misconduct. However, the problem is that dismissal is not the obligatory sanction for misconduct committed in terms of section 18(1)(dd). Although this section is broadly defined and could cover all offences (including offences of a sexual nature) it results in sexual misconduct be indicated as “misconduct”, rather than “serious misconduct”. In fact, section 18(5)(d) specifically identifies rape as one of the offences contemplated in section 18(1)(dd). Section 18(5)(d) provides that an educator found guilty of rape may be dismissed. The fact that only rape warrants dismissal and that the dismissal is discretionary is not in line with section 17(1)(c) and (d) of the Employment of Educators Act. It is also in conflict with section 41(1)(a) of the Sexual Offences Amendment Act, which provides that a person who has been convicted of a sexual offence against a child may not “be employed to work with a child in any circumstances”. Additionally, it contradicts the Children’s Act, which provides that a person found guilty of murder, attempted murder, rape, indecent assault or assault with regard to a child must be found unsuitable to work with children and such person’s name must be included in Part B of the National Child Protection


\textsuperscript{37} Prinsloo (2006) SAJE 305-306.

A person whose name is included in Part B of the register may not work with, or have access to, children at a school.\(^\text{39}\)

It seems that educators committing educator-on-learner sexual misconduct are also charged with contravening section 18(1)(q) of the Employment of Educators Act. In terms of section 18(1)(q) it constitutes misconduct if an educator “while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner”. Section 18(1)(q) of the Employment of Educators Act is used to prosecute educators who “displayed pictures of naked men and/or women and made remarks of a sexual nature to one or more of the learners”, had “a sexual relationship with a learner”, or “proposed love to … a learner at the school where you are employed as an educator”.\(^\text{40}\)

Currently the Employment of Educators Act does not make provision for “failure to report the commission of a sexual offence” as a form of educator-on-learner sexual misconduct. There is a need for including “failure to report the commission of a sexual offence” as a form of educator-on-learner sexual misconduct because educators are legally obliged to do so in terms of both the Children’s Amendment Act as well as the Sexual Offences Amendment Act.

According to section 110(1) of the Children’s Amendment Act an educator 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”.

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 is aware of a colleague sexually molesting or assaulting a child and who does not report the matter can be held criminally liable for sexual abuse because his or her failure to report indirectly means that he or she allowed the child to be molested or assaulted. 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 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. The obligation is then on the provincial department of social development or designated child-protection organisation.

\(^{39}\) S 120(4) of the Children’s Act. It is suggested that the Children’s Act be amended so as to replace the reference to the common law offence of indecent assault with the new and much broader statutory offence of sexual assault.

\(^{40}\) Ss 118, 123(1)(b).

\(^{41}\) Govindsamy Kanniah v Department of Education, Kwa-Zulu Natal ELRC 28-09-2010 case no PSES49-09/10KZN; Mxolisi Seraphicus Swezwe v Department of Education, Kwa-Zulu Natal ELRC 18-12-2009 case no PSES146-09/10KZN; Lawrence Maphume Chiloane v DBE-NW ELRC 17-08-2010 PSES467/09/10. Reports of these cases in ELRC Dispute resolution services: arbitration awards for sexual harassment cases (2009-2010) are available at <www.pmg.org.za/files/docs/101019arbitration_1.doc> (accessed 26-03-2012). It seems that in instances where the victim learner is from a school other than the school where the educator is employed the educator is charged with contravening s 18(1)(q) of the Employment of Educators Act. See Mxolisi Seraphicus Swezwe v Department of Education, Kwa-Zulu Natal ELRC 18-12-2009 case no PSES146-09/10KZN.
to which the educator has reported the matter and that has investigated the matter to report to the police.\textsuperscript{42}

It is maintained that current legislation dealing with educator-on-learner sexual misconduct is not sufficient to regulate consequences of, and discourage, such misconduct. It is proposed that the legislature should consider repealing section 17(1)(b), dealing with sexual assault, and 17(1)(c), dealing with having a sexual relationship with learners, of the Employment of Educators Act; and inserting a subsection dealing pertinently and more extensively with sexual misconduct, classifying it as serious misconduct, clearly defining it, and identifying the forms it could take.\textsuperscript{43}

Since sexual misconduct is harmful to the employer-employee relationship, the employer will take disciplinary action in terms of schedule 2 of the Employment of Educators Act.\textsuperscript{44} As indicated above, current law and policy regulating sanctions for educator sexual misconduct are not in line with the Sexual Offences Amendment Act and the Children’s Act.\textsuperscript{45} This matter should be corrected. This should also help to eliminate the view that sexual misconduct will affect only the educators’ employment situation and emphasise the fact that the various forms of sexual misconduct constitute criminal offences.

SACE, as the professional body for educators, will also take action against an educator accused of sexual misconduct against a learner. An educator’s commission of sexual misconduct will constitute a breach of the SACE Code of Professional Ethics because such educator fails to, \textit{inter alia},

\begin{itemize}
  \item refrain from any form of abuse (physical or psychological);
  \item refrain from improper physical contact with learners;
  \item refrain from any form of sexual harassment (physical or otherwise) of learners; or
  \item refrain from any form of sexual relationship with learners at a school.
\end{itemize}

The name of an educator who breaches the SACE Code of Professional Ethics \textit{may be} removed from the register.\textsuperscript{46} It seems that one instance where the discretion implied by the “may be” will be interpreted to favour dismissal is where an educator is dismissed on the basis of sexual abuse of a learner.\textsuperscript{47} Such interpretation is in line with section 41(1)(a) of the Sexual Offences Amendment Act and sections 118, 120(4) and 123(1)(b) of the Children’s Act. It is, however, suggested that this interpretation be formalised and the instances when dismissal and deregistration will be compulsory on a guilty verdict and sections to this effect be inserted in the Employment of Educators Act and the South African Council of Educators Act 31 of 2000. It is suggested that

\textsuperscript{42} S 110(8) of the Children’s Amendment Act.

\textsuperscript{43} See SA Coetzee “Forms of Educator-on-Learner Sexual Misconduct Redefined” (2011) 12 \textit{Child Abuse Research South Africa} 51 51-64 for a more detailed explanation.

\textsuperscript{44} See sch 2 items 4 and 5 of the Employment of Educators Act.

\textsuperscript{45} S 41(1)(a) of the Sexual Offences Amendment Act; ss 118, 120(4), 123(1)(b) of the Children’s Act.

\textsuperscript{46} S 23(1) of the South African Council for Educators Act.

4 The place of sexual harassment as a form of educator sexual misconduct

Where will sexual harassment then fit into the educator sexual misconduct picture? To answer this question it is necessary to distinguish between sexual harassment in the workplace and in employment relations, and sexual harassment in spheres other than employment. Forms of sexual harassment in the workplace are “quid pro quo” harassment, “victimisation” and “hostile environment” harassment, and are regulated by the Labour Relations Act 55 of 1996, the Employment Equity Act 55 of 1998 and the Amended Code of Good Practice. With the adoption of the Employment Equity Act, sexual harassment became a discrimination issue. Section 6(1) of the Employment Equity Act provides that no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice on the ground of, inter alia, sex. In section 6(3) it is stated that the harassment of an employee on the ground of, inter alia, sex is prohibited.

Basson confirms that sexual harassment constitutes misconduct. However, it is suggested that sexual harassment in the sphere of employment as a form of educator sexual misconduct should be made applicable only within the employment environment and employment relations. The inclusion of sexual harassment as a form of educator-on-learner sexual misconduct, as currently done in education law, is problematic. As argued above, labour laws cannot be applied to learners. A clear distinction must be made between forms of sexual harassment that will constitute educator sexual misconduct within the employment environment and forms of sexual harassment that will constitute forms of educator-on-learner sexual misconduct.

The Promotion of Equality and Prevention of Unfair Discrimination Act as “law of general application dealing with equality and discrimination in broader society” provides remedies to learner victims. In this Act sexual harassment is severed from its employment connection and labour-law origin and defined as a form of harassment in spheres other than employment and

48 S 41(1)(a) of the Sexual Offences Amendment Act, which provides that a person who has been convicted of a sexual offence against a child may not “be employed to work with a child in any circumstances”.
in situations where there is no employment relationship.\textsuperscript{53} The Act is not applicable to “any person to whom and to the extent to which the Employment Equity Act, 1998 [Act 55 of 1998], applies”.\textsuperscript{54}

In section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 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”.

The problem, however, is that sexual harassment then is limited to cases of unfair discrimination.

5 Conclusion

In this article, current law and policy regulating educator-on-learner sexual misconduct were identified and critically evaluated in order to determine why, despite the existence of such law and policy, educator-on-learner sexual misconduct persists. Several problems were identified.

Firstly, the interchangeable use of various umbrella concepts for identifying the problem of educator-on-learner sexual misconduct creates uncertainty and confusion. In particular, the use of sexual harassment as an umbrella concept bears out to be challenging. It is suggested that \textit{educator sexual misconduct} be preferred as an umbrella concept in the Employment of Educators Act. Legal certainty is needed to curb this social problem and to duly punish offenders.

The second problem relates to the use of sexual harassment as an umbrella concept. The adaptation of the Amended Code of Good Practice’s definition of sexual harassment to fit the sphere of education resulted in it being made applicable to non-employment relationships such as the educator-learner relationship, for which it was not intended. The Amended Code of Good Practice’s provision for non-employees, such as learners, provides only internal remedies and can be questioned on practical grounds. Sexual harassment can be applicable as a form of educator-on-learner sexual misconduct only in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act. A clear distinction must be made between forms of sexual harassment that will constitute educator sexual misconduct within the employment environment and forms of sexual harassment that will constitute forms of educator-on-learner sexual misconduct.

The fact that educator-on-learner sexual misconduct is not clearly and sufficiently addressed in education law and policy was identified as a problem contributing to the struggle to rid our schools of educator sexual predators. It is evident that the Employment of Educators Act, in identifying only sexual assault and having a sexual relationship with a learner from a school where the


\textsuperscript{54} S 5(3) of the Promotion of Equality and Prevention of Unfair Discrimination Act.
An educator is employed as forms of educator-on-learner sexual misconduct, fails to cover the wide spectrum of sexual offences that could constitute forms of educator-on-learner sexual misconduct. Although all the other forms of sexual misconduct could be covered by the provision that the commission of any common law or statutory offence constitutes misconduct, such application is problematic, especially in the light that it does not require the dismissal of an educator found guilty of this form of misconduct. This in turn brings another problem to the fore, namely conflict between the sanctions provided for in the Employment of Educators Act and the legal prohibition that persons convicted of a sexual offence against children may not work with children because of being unsuitable do so.

It is imperative that educators be made aware of offences that constitute forms of educator-on-learner sexual misconduct. Current law and policy regulating educator-on-learner sexual misconduct should be amended so as to unambiguously define educator-on-learner sexual misconduct, classifying it as serious misconduct and identifying the forms it could take. In identifying the forms it could take consideration should be given to the Sexual Offences Amendment Act, the Children’s Act and the Children’s Amendment Act, the Films and Publications Act (as amended), the Promotion of Equality and Prevention of Unfair Discrimination Act, and the South African Council of Educators Act.

**SUMMARY**

For quite some time now, the Department of Education has been attempting to rid schools of educators who commit sexual misconduct against learners. The question is why, with law and policy in place for regulating educator sexual misconduct, does the problem persist? In an attempt to answer this question, the author identifies and critically evaluates current law and policy regulating educator-on-learner sexual misconduct. Various problems with current law and policy are pinpointed and investigated.

The first problem identified is the conceptual confusion resulting from the use of various umbrella concepts in law and policy for identifying the problem of educator-on-learner sexual misconduct. The choice of sexual harassment as an umbrella concept in particular is found to be awkward. The choice of sexual harassment as an umbrella concept is related to the second problem, namely that labour law and policy are merely adapted to the sphere of education and applied to non-employment relationships such as the educator-learner relationship. The third dilemma identified is that educator-on-learner sexual misconduct is not clearly and sufficiently addressed in current education law and policy. The fourth problem identified is that sanctions for educator-on-learner sexual misconduct are not in line with the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the Children’s Act 38 of 2005 and the Children’s Amendment Act 41 of 2007, resulting in educators found guilty of less serious forms of sexual misconduct facing more serious consequences than educators found guilty of more serious forms of sexual misconduct.
1 Introduction

Section 25(1) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) provides that no one may be deprived of property except in terms of law of general application and that no law may permit arbitrary deprivation of property. The subsection does not distinguish between substantive and procedural reasons for a deprivation being arbitrary. However, in First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance1 (“FNB”) the Constitutional Court concluded that “a deprivation of property is ‘arbitrary’ as meant in s 25 when the ‘law’ referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair”. The rest of the FNB decision proceeds to analyse how substantive non-arbitrariness, in the sense of sufficient reason for the deprivation, is to be established, without saying anything about the meaning of the phrase “or is procedurally unfair”. However, from the phrasing of the passage cited earlier it must be concluded that a deprivation could be arbitrary in terms of section 25(1) either because it was substantively arbitrary in the sense that there is insufficient reason for it, as set out in the decision, or because it was procedurally unfair. Although procedural unfairness is not defined or even discussed further in FNB, it therefore apparently constitutes an independent ground for finding that a deprivation of property is arbitrary.

Although the court did not expand in FNB on procedural unfairness as an independent ground for a finding that a deprivation is arbitrary, this point was picked up in later case law. In Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and

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1 2002 4 SA 768 (CC) para 100 (emphasis added).