

Victim rights and minimum standards for the management of learner victims of sexual misconduct in South African schools

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Current education-specific law and policy do not provide clear guidelines for schools when it comes to adopting policy for managing learner victims of sexual misconduct. It is contended that these policies should be formulated in a manner that will guarantee compliance with international and national victims' rights and minimum standards because that would ensure more effective management of learner sexual misconduct victims. If minimum standards are not upheld, victims' rights are not observed, victims are not effectively managed and secondary victimisation results. The aim of this article is therefore to identify and explain victims' rights and the minimum standards that must be complied with so as to ensure that these rights are observed. For that purpose, education-specific law and policy regulating the management of learner victims of sexual misconduct were benchmarked against international and national victims' rights such as fair and dignified treatment, offering and receiving information, protection, assistance, compensation and restitution and the underlying minimum standards for managing victims. This enabled me to formulate guidelines on learner victims' rights and minimum standards that schools should include in their policies for managing learner victims of sexual misconduct.

INTRODUCTION

Zapiro, the cartoonist, quoted a judge in a cartoon on child abuse as saying:

"The law says a multiple child rapist with a similar previous conviction should get LIFE! ... But hey, between us men, I'd say you acted out of VIRILITY and they were NAUGHTY GIRLS! ... So let's look at a much lighter sentence."

Child victims of sexual crimes are regularly marginalised and treated in a manner that results in secondary victimisation. It is a given that if the rights of a victim of a sexual crime are not observed and minimum standards for managing victims thus not adhered to, the victim will experience secondary victimisation.

Currently, learner victims are subjected to secondary victimisation when they report incidents of sexual misconduct at school. Learner victims who disclose are branded as "asking for it", blamed, ostracised, intimidated, threatened, retaliated against and made out to be liars by co-learners or educators (Hawkey 2009:1; Human Rights Watch 2002:chapter II; Schoolgirls suffer in silence 2010; Petrof 1994:1688-1690; SAPA 2009; Waterhouse 2008: 3, 4, 6). In *Govindsamy Kanniah v Department of Education Kwa-Zulu Natal*, for example, reference is made to a case where an educator refused to see a Grade 3 learner and her parents when they approached her to report that the learner had been sexually abused. Although the educator eventually listened to them and the case was reported, the charges were in the end withdrawn by the Department of Education because of the time delay. The allegations were

brought in 2002, but the educator was only charged in 2005 (ELRC 2009–2010:8-9, 13). In *Mxolisi Bobo v Department of Education Eastern Cape* the investigating officer indicated that his investigation had taken three months because the parents of the witnesses did not want him to talk to them and the children themselves hid when they saw him approaching them. The educator concerned was not suspended and remained at the school for more than a year after the sexual misconduct was reported because there was no labour relations officer at the district office to deal with the matter at that time (ELRC 2010:46-47).

Learner victims need to be managed in a manner that will minimise the impact of the sexual misconduct and prevent secondary victimisation. This can be done by observing their victim rights and by complying with minimum standards on services for victims. As early as 2002 the Department of Education and the Department of Safety and Security compiled the *Signposts for safe schools*, in which the need was emphasised for schools to include in their safety plans a "policy and process for dealing with learners who are victims of sexual abuse" (Department of Education & Department of Safety and Security 2002, item 1.3). A potential question is: What minimum standards do law and policy set that schools could use to guide them when adopting a policy for managing learner victims of sexual misconduct that would endorse victims' rights? It is this very question that I attempt to answer in this article.

The aim of this article is to identify and explain victims' rights and the minimum standards that must be complied with so as to ensure that these rights are observed. This will be done by benchmarking the education-specific law and policy that regulate the management of learner victims of sexual misconduct against international and national victims' rights and minimum standards. It is argued that internationally and nationally recognised victim rights such as fair and dignified treatment, offering and receiving information, protection, assistance, compensation and restitution and the underlying minimum standards for managing victims can be used to ensure more effective management of learner victims of sexual misconduct. If minimum standards are not upheld, victims' rights are not observed, which often results in secondary victimisation. It is contended that schools should therefore formulate their policies in a manner that will guarantee compliance with these minimum standards so as to ensure that learner victims are managed in a way that gives effect to their victim rights and prevents secondary victimisation.

First, however, the concepts "victim" and "secondary victimisation" need to be defined.

CONCEPTUAL ANALYSIS

A common understanding of who constitutes a victim and what secondary victimisation entails will promote more effective services to victims and the observance of the minimum standards of victim management by all stakeholders. It will also prevent secondary victimisation of learner victims. Since this article deals with child victims, it is necessary to start by defining that concept. "Child victim" is defined in the *Guidelines on justice in matters involving child victims and witnesses of crime* (UN 2005:art 9(a)) as any child (person under the age of 18 years) who is the victim of crime or witness to a crime regardless of his or her role in the offence or in the prosecution of the alleged offender(s).

This definition does not, however, explain the meaning of "victim" as such. It is thus still necessary to define the concept of "victim". One of the first attempts to promote a victim-centred, restorative justice approach to justice was undertaken by the Project Committee on Sentencing, which resulted in the publication of Issue Paper 7. In this Issue Paper "victim" is defined as: "the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who suffers

injuries as a result of the offence" (ZALC 1997a: 38). The promotion of a victim-centred, restorative justice approach to justice culminated in the Victim's Charter (Van der Merwe 2009:564).

"Victim" is unfortunately not defined in the Victims' Charter. Nevertheless, a working definition can be found in the Minimum standards on services for victims of crime for implementing the service charter for the victims of crime in South Africa (hereafter referred to as the Minimum standards) (DJCD 2004a:1), which is a document compiled to explain the rights of victims contained in the Victims' Charter. A victim of crime is defined as:

a person who has suffered harm, including physical or mental injury; emotional suffering; economic loss; or substantial impairment of his or her fundamental rights, through acts or omissions that are in violation of our criminal law. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim. A person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted, and regardless of the familial relationship between the perpetrator and the victim.

This definition also provides that the minimum standards governing services for victims are applicable to all victims and may not be applied in a discriminatory manner (DJCD 2004a:1). As the policy on victim rights developed, those who assist or intervene to assist the direct victim or the police and those who were financially and psychologically dependent on the victim (if the victim died) (family and friends) were also added as categories of victims (DJCD 2008a:27).

From these definitions we can conclude that a learner victim of a sexual crime will be a learner under the age of 18 years against whom a criminal, sexual offence was committed or a learner who witnessed or who was confided in with regard to a sexual offence being committed against another learner. The criminal offence need not actually have been committed – a mere threat of an offence is sufficient to classify the receiving person as a victim. However, for the purpose of this article the concept "victim" will be used as synonym for complainant and will refer to the learner against whom sexual misconduct was committed. Indirect victims or secondary victims are thus not included in the scope of this article.¹

Another concept that needs to be defined is "secondary victimisation". Secondary victimisation refers to:

the attitudes, processes, actions and omissions that may intentionally or unintentionally contribute to the revictimisation of a person who has experienced a

traumatic incident as a victim through failure to treat the victim with respect and dignity, disbelief of the person's account, unsympathetic treatment, blaming the victim and lack of (or insufficient) support services to assist the victim at interpersonal, institutional and broad social level (DJCD 2008a:27).

In this article "secondary victimisation" refers to instances where the management of the learner victim does not comply with the minimum standards for dealing with victims and where the victim is revictimised as a result. Minimum standards means standards below which service provision should not be offered and which should inform the content of all policy on management of victims (National Prosecuting Authority 2005:5). Adherence to minimum standards ensures that victim rights are maintained.

In the next section victim rights and minimum standards for managing learner victims of sexual misconduct are considered.

VICTIM RIGHTS AND MINIMUM STANDARDS FOR THE MANAGEMENT OF LEARNER VICTIMS OF SEXUAL MISCONDUCT

Victim rights emphasised in both international and national law are: fair and dignified treatment and respect for privacy, offering and receiving information, protection, assistance, compensation and restitution (DJCD 2004b:6-9; DJCD 2008a:3). There are six cross-cutting principles that underlie victims' rights and thus also the standards for managing child victims and witnesses of crime, namely: dignity, non-discrimination, best interest of the child, protection, harmonious development and the right to participation (UN 2005:art 8). These principles impinge on all victims' rights and minimum standards for the management of victims.

A thorough review of education-specific law and policy revealed that the rights of learner victims and the minimum standards for the management of learner victims are not expressly stated in education-specific law and policy. With the exception of the *Guidelines for the prevention and management of sexual violence and harassment in public schools* (hereafter referred to as *The guidelines*) (DoE 2008a) and *National strategy on screening, identification, assessment and support: School pack* (DoE 2008b) victims' rights and minimum standards for managing learner victims of sexual misconduct are mentioned in passing only. In most instances, their presence to be deduced from the text.

Notice should be taken of the fact that there is

no specific reference in the Constitution to victims' rights (Kgosimore 2000). Kgosimore (2000) contends that this is in line with the general view that in criminal cases the state acts as "victim surrogate" and victims are mere "pieces of evidence". As a result the offenders are also seen as "victims" that need protection from the state, and there is thus a tendency to view special measures for the protection of victims as unjustifiable limitations to the offender's right to a fair trial. However, in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009] (4) SA 222 (CC) (at 114) the Constitutional Court interpreted measures to provide child victims of sexual crimes protection, such as the use of intermediaries and closed-circuit television (CCTV), as "measures conducive to a fair trial" and not as limitations of the alleged offender's right to a fair trial (guaranteed in section 35(3) of the Constitution). This view is also supported by Bednarova (2011:11), who emphasises that these measures should be seen as supporting mechanisms that benefit criminal proceedings.

The minimum standards that need to be adhered to so as to ensure that victims' rights such as fair and dignified treatment, offering and receiving information, protection, assistance, compensation and restitution are observed, are discussed in the section below.

Right to fair and dignified treatment and respect for privacy

This victims' right include recognition of the child's rights to dignity and privacy, conformity with the best interest of the child principle, prompt and courteous response and redress, conscious attempts to minimise inconvenience, conducting interviews in the victim's language of choice and in private, respect for the victim's moral and mental integrity and improving the victim's self-esteem and confidence (DJCD 2004b:2; National Prosecuting Authority 2005:7; UN Economic and Social Council 1997:art 45; UN 1985:art 4).

Fair and dignified treatment of learner victims requires that children be seen as autonomous human beings in their own right and that the traditional objections brought against children's evidence be reconsidered. These traditional objections include: children's memories are unreliable; children are egocentric, highly suggestible, and do not understand the duty to tell the truth; children struggle to distinguish between fantasy and fact, and children easily make false

allegations with regard to sexual offences (*S v S* 1995 (1) SACR 50 (ZS) A, 54 at G-H). All interactions with the victim must be conducted in a child-sensitive manner. That means the child's right to protection (vulnerability) needs to be balanced against the child's individual needs and views (autonomy) (UN 2005:art (9)(d)).

To ensure that the child victim is treated with dignity and compassion, each victim needs to be treated as an individual. That means that his or her personal situation and immediate needs, age, gender, disability and level of maturity need to be considered (National Prosecuting Authority, 2005:7; UN, 2005:art 10, 11). An example of how the court interpreted this standard can be found in *S v S* (59 at F-H) where the judge stated that the girl victim's embarrassment was intensified when she had to give evidence before an exclusively male audience. The judge explained that that was the case because discussing sexual matters in the presence of the opposite sex is taboo in society, there was no female witness who could provide the victim with sympathetic support, the males could not understand the feelings of a female victim and that subconsciously the males would have represented her assailant to her.

Müller (2001:6)² emphasises that in order to ensure fair and dignified treatment of child victims, an inquisitorial rather than accusatorial approach should be followed. She comments that interviewing children is a highly specialised task and that it is essential that interviewers be trained in developmental psychology, language acquisition and communication with children. Great care must be taken not to make the focus of the investigation the victim's credibility and the degree of reliability of his or her allegation; instead, the focus must be on investigating the allegations (Cossins 2006–2007:302).

Anonymity promotes the child's right to privacy, and provides the child with control over who learns of the sexual misconduct and thus some degree of protection against secondary victimisation (Petrof 1994:1686, 1687). The compulsory reporting of child sexual abuse in terms of the Children's Act (RSA 2005:s 110(1)), the commission of a sexual offence against a child in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (RSA 2007:s 54(1)) and child pornography in terms of the Films and Publications Act (RSA 1996a:s 24B(2)) create unique problems (Petrof 1994:1678; Waterhouse 2008:20). There is an ambiguity because on the one hand the learner's

confidentiality and anonymity must be guaranteed, but on the other hand the educator is legally obliged to report the sexual offence. The learner's consent is not required to report the case and the result is that the child becomes involved in criminal proceedings without having had a say in the matter (Petrof 1994:1678; Van der Merwe, 2009:567). It is a requirement that only persons needed to assist the child be involved in the matter, and that the victim's name not be made known to the media (UN 2005:art 28).

Minimum standards that would ensure the fair and dignified treatment of learner victims are included in *The guidelines*. This document provides that the parents of learner victims be informed, the confidentiality of victims be observed, the privacy of victims be protected, victims be treated fairly, the matter be dealt with within a reasonable time and impartiality be observed (DoE 2008a:5, 9, 18). The requirement that schools' codes of conduct must guarantee and promote learners' rights gives, as in the case of the Constitution, recognition to victims' right to fair and dignified treatment and the right to have their privacy respected in an indirect manner (RSA 1998:items 4.1, 4.2, 4.3, 4.6). However it would appear that in practice the management of learner victims does not comply with these minimum standards. In the study by Phasha (2008:315) learners identified a tendency for educators in whom they confided to disclose to other people without their permission. The learners indicated that they would have liked the educators to disclose only to people who would be involved in helping them (Phasha 2008:316).

Right to assistance

The first minimum standard of victim assistance is that the assistance should be emphatic, person-centred, based on restorative justice and aimed at victim empowerment, social reintegration and physical and psychological recovery of the victim (Department of Social Development [s.a]:3, 28; Müller & Van der Merwe 2006:647; UN Economic and Social Council 1997:art 46). This means on the one hand that protection must be provided (UN Economic and Social Council 1997:art 46), but on the other hand that the person providing the assistance should refrain from any action that would result in secondary victimisation (Bednarova 2011:6-7). These support efforts need to be coordinated so that the victim is not subjected to excessive interventions (UN 2005:art 23).

The second minimum standard of victim assistance is that practical aid should be provided. This includes ensuring access to social, health, counselling and legal services; helping the victim to preserve evidence, to contact friends or family, to report the matter to the police and to arrange absence; ensuring the victim's safety; and arranging a place where the victim feels safe to give evidence (DJCD 2004b:3; DJCD 2004a:13-14; Council of Europe 2007:art 14(3)).

The third minimum standard of victim assistance is adequate advocacy (see the right to receive information below) (Department of Social Development [s.a.]:28; DJCD 2004a:13-14; Van der Merwe 2009:564).

The fourth minimum standard of child victim assistance is that the assistance should be child-sensitive. It should be kept in mind that the needs of child victims of sexual offences differ from those of victims of crime in general. Support provided should take into account the extent and nature of the trauma, children's vulnerability, social pressure of adults against the child victim and social support for the perpetrator (Waterhouse 2008:1, 5). It is essential to ensure the safety of the victim, show respect for the victim, build trust, and assist the victim to restore a sense of control over his or her body and environment and over actions taken on his or her behalf (Herman 1992, cited in Waterhouse 2008:6).

The right of learner victims of sexual misconduct to assistance is dealt with in several education-specific policy documents such as *The guidelines* (DoE 2008a:3, 8, 11, 17-18), *Speak out: A handbook for learners on how to prevent sexual abuse in public schools* (hereafter referred to as *Speak out*) (Watson, Eduscript & Grey 2010:18), and *Signposts for safe schools* (Department of Education & Department of Safety and Security 2002:item 1.3). Nayler (2002) emphasises how important it is that the principles of victim support and minimising secondary victimisation be applied in schools and recommends that there be at least one person at a school or in the district who is specially trained and equipped to deal with sexual abuse cases. Labuschagne (1988:26, cited in Louw 2000:27) warns that an educator should be careful not to make the "special bond" that exists between himself or herself and the child after the child has confided in him or her conspicuous by giving too much attention to the child, by failing to punish the learner when needed or by calling the child to the side to talk about the matter in a

conspiratorial manner.

If the school is not in the position to offer counselling, the learner should be referred to one of the local resource centres³ providing counselling (DoE 2008a:11). It is required that schools have school-based support teams consisting of representatives from the school management team, educators, representative council for learners and the school governing body. These teams are responsible for ensuring that cases of sexual misconduct are reported, that victims receive counselling and that a register of all local resource centres that can help victims is compiled (DoE 2008a:17, 18).

The *National strategy on screening, identification, assessment and support: School pack* also provides for individual support plans (DoE 2008b:3). Individual support plans are plans designed for learners who need additional support, such as victims of sexual misconduct.⁴ These plans should be developed by educators in consultation with the parents and the institution-level support team (DoE 2008b:3).

Learner victims of sexual misconduct are not always assisted in a manner that empowers them and minimises secondary victimisation. In a study on helping learners overcome sexual abuse conducted in eight schools, Phasha (2008:319-320) found that the slow response and lack of cooperation from the department, social workers and the parents hinder educators in providing effective assistance. Phasha (2008:313) found that educators provided moral support (which they defined as helping to distinguish between right and wrong and assuring the child of his or her worth), while learners emphasised the need for both academic and emotional support (which they defined as support that would help them heal). Some of the educators indicated that they are required first to contact the department in writing, and that if the department's interview panel concludes that the child is telling the truth, the parents can be contacted. It is thus evident that an accusatorial approach, which is not in line with the victim's right to assistance, is followed by the department's investigators (Phasha 2008:319-320).

Right to protection

Because child victims are subject to misconceptions and prejudices on the part of society (Waterhouse 2008:31), their vulnerability owing to their age and size is exacerbated. The Victims' Charter (DJCD 2004b:3) provides that victims have the right "to be free from

intimidation, harassment, fear, tampering, bribery, corruption and abuse". The following minimum standards must be adhered to so as to ensure victims their right to protection:

- If a victim reports that he or she has been threatened, the complaint must be taken seriously and be investigated.
- The victim's right to request that his or her personal information not be made available to the accused must be respected. It is, however, not clear what is meant by "personal information". It is suggested that this refers to any information that will allow the alleged perpetrator to locate the victim.
- The victim's possessions handed over into evidence must be kept safe.
- The victim's anonymity must be guaranteed.
- Protective measures should be available to the child victim under the age of 18 years. In terms of the Criminal Procedure Act (RSA 1977:s 170A) a child victim can testify in private, outside the court environment and the presence of the accused, if he or she would otherwise be exposed to undue mental stress or suffering. The victim is then placed in a separate room linked to the court via CCTV. The victim cannot hear or see the proceedings, but is questioned through an intermediary and gives evidence via CCTV (DJCD 2004a:13; RSA 1977:s 158; Van der Merwe 2009:265). Education-specific policy also makes provision for giving evidence via an intermediary. An intermediary may be appointed in instances of learner-on-learner sexual misconduct where a witness under the age of 18 years will be exposed to undue stress or suffering if he or she testifies at disciplinary proceedings (RSA 1996b:s 8(7)).⁵ If an intermediary is appointed, the examination, cross-examination and re-examination may only be done through the intermediary, and the intermediary may explain the meaning of any question to the witness (RSA 1996b:s 8(8)). If an intermediary is appointed, the governing body may direct that the witness give evidence at any place which is informally arranged so as to put the witness at ease; that the witness will not be able to see or hear any person whose presence may upset the witness; and that the governing body and any other person whose presence is necessary at the proceedings will be able to hear, through electronic or other devices, both the witness and the intermediary (RSA, 1996b:s 8(9)). It is unfortunate that these requirements

are made dependent on the discretion of the governing body. It is contended that the choice should rather be left to the victim so as also to give recognition to the victim's right to offer information.

Part of the right to protection is the right of victims of sexual offences to "post-exposure prophylaxis" (PEP). If a victim was exposed to the risk of being infected with HIV as a result of a sexual offence and has laid a charge with the police or has reported the matter to a designated health establishment, he or she may receive PEP at a designated public health establishment at the state's expense. The victim should receive free medical advice before the PEP is administered (RSA 2007:s (28)).

The victim (or any interested party acting on behalf of the victim) may within 90 days after the commission of the alleged sexual offence apply that the alleged offender be tested for HIV and that the results be disclosed to the victim or the person acting on behalf of the victim. If the application is brought by a person acting on behalf of the learner victim, such application may not be made without the consent of the victim unless he or she is under the age of 14 years (RSA 2007:s 30). The objectives of the test are to reduce secondary victimisation and to inform the victim of the alleged offender's HIV status so that he or she can make informed medical, lifestyle and other personal decisions and use the test results as evidence in civil proceedings (RSA 2007:s 34). Results must be kept confidential and may only be communicated to persons identified in section 37 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Should the victim for example make the results available to the media, he or she will be guilty of contravening section 37 (RSA 2007:s 38(1)(b)). Opinion is divided as to whether the compulsory testing of alleged sexual offenders is reasonable and justifiable in terms of the limitation clause.⁶

Right to offer information

For a victim's right to offer information to be realised, the victim must be allowed the opportunity to make a contribution and that contribution should not only be heard but should also be considered (DJCD 2004b:2; UN 1985:art 6(b)). In order to do that, four minimum standards must be adhered to. First, victims should be enabled to freely express themselves on what has occurred, on concerns relating to their involvement in the investigation process, on

their concerns regarding their safety in relation to the accused, on the manner in which they would like to offer testimony, and on their feelings and views concerning the outcome of the case (UN 2005:art 21). The National Implementation Plan (DJCD [s.a.]:19) requires that all departments responsible for the implementation of the Victims' Charter should implement administrative measures to facilitate easy communication with the victims. This will include making an interpreter available if necessary (DJCD 2004a:13). Educators to whom a child reports and the persons investigating an allegation of sexual misconduct should keep in mind that children tend to report the abuse in a fragmented manner, and that the first time the child reports the abuse he or she may not be making a full disclosure. If a child subsequently adds or omits some details and inconsistencies become evident, this should not be taken as proof that the child is lying (ZALC 1997b, para 5.2).

Second, the victim should be allowed to participate in the proceedings (DJCD 2004b:2). According to Müller and Van der Merwe (2006:648-649), victims can participate in proceedings: as witnesses, by making impact statements or by receiving compensation. The Convention on the Rights of the Child guarantees all children's participation rights by requiring that in all matters affecting children, their views must be given due weight in accordance with their age and maturity (UN 1989, art 12). Section 10 of the Children's Act 38 of 2005 provides as follows:

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

There is, however, a tendency to regard children's evidence with scepticism and to expect the child victim, instead of the perpetrator, to convince everybody of his or her reliability and that he or she is telling the truth (Songca & Le Roux 2004:310). Kaime (2005: 231) warns that the traditional paternalistic child-adult relationship may hinder the realisation of children's participation rights. If the victim is not made part of the process, he or she can "perceive the process just as disempowering" as the sexual misconduct itself (Spies 2009:21).

Third, the victim should be allowed to make amendments to his or her statement (DJCD 2004a:8). Fourth, the right to offer information emphasises the recognition of the victims'

interests during sentencing and includes the right to make an impact statement (Van der Merwe 2009:265). An impact statement is defined as:

a statement which would "address the effects of the crime on the victim, in terms of the victim's perceptions and expressions of the emotional, physical or economic harm he or she sustained as a result of the crime" (Erez 1999, cited in Müller & Van der Merwe 2006:649).

However, the South African Law Commission (ZALC 1997b:para 5.10.3) warns that an important distinction must be made between taking victims' views into account and granting victims an actual role in decision-making. Taking views and opinions into account almost invariably means affording some weight to those views when it comes to making the relevant decisions. To many victims and their support groups such developments seem entirely natural and acceptable. On the other hand, the accused person's constitutional right to a fair trial calls for absolute fairness and objectivity in the guilt-finding and sentencing processes. The superimposition of victims' views would introduce an element of subjectivity which would not necessarily be compatible with these constitutional imperatives.

Right to receiving information

Victims need ongoing access to information (Waterhouse 2008:6), otherwise they will feel disempowered because they do not know what to expect. Minimum standards that need to be abided by so as to ensure the implementation of the right to information include (DJCD 2004b:3; DJCD 2004a:13-14; UN 2005:art (19); Van der Merwe 2009:564):

- informing the victim of his or her victim rights, such as to give evidence through an intermediary or CCTV or *in camera* and how to exercise those. Education-specific policy also recognised this standard. *The guidelines* (DoE 2008a:12, 16, 21) provides that learner victims have the right to be informed of the outcome of the investigation and the right to appeal. The *National strategy on screening, identification, assessment and support: School pack* recommends that learner victims be informed of their right to: report the case at any police station; be given the telephone numbers of the police station and the investigating officer(s); be given the case number so that he or she can keep track of the case; request counselling; be accompanied by a parent or a trusted person; receive a copy of the statement; be interviewed in a private

room; and be interviewed by a female police officer. It is contended that this last standard is based on the presumption that the victim will be female. This provision is discriminatory and should be rephrased (DoE 2008b: 16, 17, 20);

- that victims be given the opportunity to ask for explanations in their own language of anything that they do not understand;
- the victim must be informed of the relevant support services available and also how to access such services. Education-specific policy and *Speak out* (Watson *et al.* 2010:26-29) provide an extensive list of such support services and their contact details, which schools should keep readily available;
- the victim must be informed of his or her role in the case, what to expect, the date and place of the hearing, and of the processes and procedures. *The guidelines* (DoE 2008a:11) and *Speak out* (Watson *et al.* 2010:16, 20) also underwrite this minimum standard. Learner victims must be informed that if they are below the age of 18 years, educators are obliged to report the matter to the police (Watson *et al.* 2010:16, 20); the investigating team will have to be informed of the allegation (Watson *et al.* 2010:18); the parents of the victim and the parents of the alleged learner offender will be informed (Watson *et al.* 2010:18); and if the alleged offender is an educator, the matter will be reported to the district office, provincial Education Department and the South African Council of Educators, who will all investigate the matter. Victims should make sure that they obtain the names and contact information of the investigators so that they can keep track of the case (Watson *et al.* 2010:18);
- the victim must be informed of the protective measures that are available to him or her;
- the victim must be informed as to the status of the case, whether the case is being investigated, and whether the offender will be charged;
- the victim must be informed that he or she has access to any documents the law entitles the victim to have access to;
- the victim must be informed of the possibility of obtaining reparation through civil proceedings; and
- education-specific policy also provides that learner victims of sexual violence be given

guidance on how to preserve evidence (DoE 2008a:11; Department of Education & Department of Safety and Security 2002, item 3.4).

Right to compensation

The National Implementation Plan (DJCD [s.a.]:19) indicates that this standard will be implemented through public education. It would appear that schools are expected to educate learners concerning sections 297 and 300 of the Criminal Procedure Act 51 of 1977. Section 297 deals with the right to compensation for damage to property as a result of a crime, and section 300 with claiming compensation for injury suffered as a result of a crime. However, this does not mean that the current practice in schools to have the offender pay minimal compensation to the parents without the case being reported should be condoned. Such practice allows the offender to transgress again because he or she has not taken responsibility for his or her actions. The compensation should not be made outside the justice system (UN Economic and Social Council 1997:art 43).

Right to restitution

Reparation is required to ensure full redress for the victim, and his or her reintegration and recovery. Reparation may include the criminal court's order for restitution, the damages ordered to be paid by a civil court, and victim compensation paid by the state (UN 2005:art 35, 37). Spies (2009:16) emphasises that "abused children have a need to experience that the perpetrator has taken responsibility for the abuse" and to participate in the process. One way to ensure this is to follow a restorative justice approach because it promotes offender accountability and allows for victim participation.

Restorative justice is:

a form of criminal justice based on reparation. Actions are aimed at repairing the damage caused by the crime, either materially or at least symbolically. When someone wrongs another, he or she has an obligation to make things right. The goal of the process is to heal the wounds of every person affected by the crime. In this context reparation to the victim and community is regarded a duty or obligation on the offender (ZALC 1997a:par 1.2).

Applied in the school milieu, restorative justice can be defined as a disciplinary measure aimed at reparation, offender accountability, victim empowerment and victim participation. The offender thus needs to repair the damage caused by his or her transgression, not only to the victim but also to the school community.

Learner victims' right to restitution is also guaranteed in education-specific policy that recommends disciplinary measures such as the writing of a letter of apology by the offender to the victim, the performance of tasks by the offender that would assist the victim, or paying the victim compensation (RSA 1998:item 10.1; DoE 2008a:12). However, these measures are applicable only to minor offences, and again only in instances of learner-on-learner sexual misconduct.

GUIDELINES ON MINIMUM STANDARDS FOR LEARNER VICTIM MANAGEMENT

Learner victim rights and the minimum standards for managing learner victims are not specifically and adequately addressed in education-specific law and policy. The Department of Education should consider adopting national minimum standards for the management of learner victims. However, in the absence of such standards, it is essential that schools consider international and national victims' rights and minimum standards when adopting their policies for managing learner victims of sexual misconduct. In most instances where the management of victims is implemented, this occurs in the context of learner victims of learner-on-learner sexual misconduct only. It is thus essential that schools ensure that their policies for managing learner victims of sexual misconduct include learner victims of both learner-on-learner and educator-on-learner sexual misconduct.

Schools should take notice of who constitutes a victim and what secondary victimisation entails. Currently, "victim" and "secondary victimisation" are not defined in education-specific law and policy.

The right to fair and dignified treatment and respect for privacy requires first that the management of learner victims be child-sensitive. On the one hand, minimum standards need to be put in place that will give recognition to the vulnerability of the child by ensuring protection (eg prompt redress, confidentiality and anonymity). On the other hand, learner victims should be recognised as autonomous, right-bearing persons by giving them voice (eg through following an inquisitorial rather than an accusatorial approach when interviewing them) and ensuring participation. Second, this right requires that the learner victim be managed in a manner that takes into account the individual victim's situation. The minimum standards should ensure that the individual learner's self-esteem

and confidence be restored and his or her moral and mental integrity be respected. The individual victim's language, gender, age, immediate needs, disability and level of maturity should be considered and will affect the management of the victim. It is suggested that the problem with regard to the ambiguity between the legal obligation to report and the obligation to guarantee the victims' right to confidentiality and anonymity could be solved if the department were to adopt policy on victims' rights and minimum standards for managing learner victims of sexual misconduct. Advocacy of such policy will result in learners being informed of their rights as victims and what they can expect should they become victims of sexual misconduct.

The right to assistance is extensively covered in education-specific policy. However, there is still a need for specific minimum standards to be set in this regard. These standards should be aimed at the empowerment and social reintegration of the learner victim so as to prevent secondary victimisation. Minimum standards should thus be child-sensitive; be victim centred; provide for practical aid with regard to the reporting of the case and the physical and psychological recovery of the victim; and should ensure that the victim is sufficiently informed.

The right to protection is recognised in education-specific policy in that practical protective measures (such as an intermediary and CCTV) are provided for and confidentiality and anonymity to some extent guaranteed. Nevertheless, more specific measures to ensure minimum standards for protection when the learner victim is threatened are required. It is contended that at school level it would be sufficient just to inform the victim of his or her rights to PEP and to apply that the offender be tested for HIV.

The right to offer information can be observed only if the minimum standards are in place that will ensure the victim the opportunity to offer information, and for such information to be heard and to be considered. Schools should ensure that they put measures in place that are child-sensitive, that will provide learners with the opportunity to express themselves freely and to participate by making impact statements or amending their statements.

The right to receive information is well covered in education-specific policy. Once again it is suggested that all the guidelines be integrated and be formulated so as to indicate the minimum standards that must be met to

guarantee this right.

The right to compensation would probably not be as relevant at school as at court level. It could possibly come into play in instances where it was necessary to transfer the learner victim to another school as a result of victimisation: the offender could cover the expenses in that regard if found guilty. Where the offender is not able to cover the expenses, the state should do so. Clear policy is necessary to place this right in context and to discourage the interpretation of this right as legalising bribery.

The right to restitution is closely linked to restorative justice and schools should ensure the adoption of minimum standards that will ensure offender accountability. Currently education-specific policy provides for disciplinary measures aimed at restitution, but those are applicable only to learner-on-learner sexual misconduct. It is suggested that schools adopt minimum standards that will ensure restitution where the offenders are educators.

Endnotes:

- ¹ For further information on secondary victims, see Morrison, Z, Quadara, A & Boyd, C. 2007. "Ripple effects" of sexual assault ACSSA *Issues no 7*.
- ² Although she investigated the giving of evidence by children in court, the findings are equally applicable to situations in schools where an allegation of sexual misconduct is investigated.
- ³ See the *Guidelines for the prevention and management of sexual violence and harassment* for a list of resource centres and Thuthuzela Care Centres (eg One Stop Centres for Rape Survivors).
- ⁴ The *Education White Paper 6* lists psychosocial disturbances and particular life-experiences among its catalogue of factors that cause "different learning needs" (DoE 2001:9).
- ⁵ Although this right is afforded to "witnesses," it applies to victims because victims are also "witnesses" at the proceedings.
- ⁶ See: Anderson, B. 2006. A human rights approach to HIV testing: Voluntary, mandatory or routine? *ALQ*, September. Retrieved on December 01, 2011 from <http://www.icw.org/files/ALQ%20Sept%202006%20-testing%20-.pdf>; Madiba, TE, & Vawda, YA. 2010. Compulsory testing of alleged sexual offenders – implications for human rights and access to treatment. *SAJBL*, 3(1) June:28-32; McQuoid-Mason, D. 2009. Compulsory HIV testing of alleged sex offenders. *SAMJ*, 99(1). Retrieved on December 01, 2011 from <http://www.scielo.org.za/pdf/samj/v99n1/v99n1a09.pdf>; Roehrs, S. 2007. Positive or negative? Compulsory HIV testing of alleged sexual offenders. *SA Crime Quarterly*, 20 June:31-36.

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CONCLUSION

As is evident from the quotation at the beginning of this article, child victims are regularly subjected to secondary victimisation. Their experiences and trauma are downplayed and they are often regarded as not being "true" victims because they were "looking for it", "naughty" or "sexually active" in any case. It is also evident that male entitlement to sex is still strong in our courts and society. As was argued in this article, the management of learner victims in a manner that will prevent secondary victimisation is essential. This can only be done by upholding the international and national minimum standards for victim management and thereby observing victims' rights. Education-specific law and policy need to be amended so as to provide for the recognition of victims' rights and the minimum standards that need to be adhered to so as to ensure observance of such rights.

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