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THE LEGISLATIVE REGULATION OF SEXUAL MISCONDUCT BY EDUCATORS IN SOUTH AFRICAN PUBLIC SCHOOLS

SUMMARY

This article explores the impact of education legislation on the failure to adequately address sexual misconduct by educators toward learners in South African public schools. The *Employment of Educators Act* 76 of 1998 is the central piece of legislation regulating the employment of departmental educators. Secs. 17 and 18 of the *EEA* are analysed with reference to 48 arbitration awards issued by the Education Labour Relations Council. Three shortcomings are identified. First, the *EEA* describes the types of misconduct with which educators may be charged, but makes a distinction between "serious misconduct" listed in sec. 17 (which attracts mandatory dismissal) and "misconduct" in sec. 18 (where dismissal is discretionary). The only two types of sexual misconduct expressly listed in sec. 17 of the *EEA* are sexual assault and sexual relationships with learners. Relevant arbitration awards show that other types of sexual misconduct encountered in public schools are often as serious. Secondly, the failure to expressly mention more types of sexual misconduct in the *EEA* (for example, sexual harassment and sexual grooming) often results in charges against educators based on catch-all provisions in the *EEA* such as "improper conduct". This sanitises the seriousness and high incidence of certain types of sexual misconduct. In turn, it has two detrimental effects on the effective management of sexual misconduct. Educators who are guilty of the types of sexual misconduct omitted from the *EEA* are not always dismissed. It also prevents proper recording and recognition of the systemic nature of specific types of sexual misconduct. Thirdly, sec. 18(3) of the *EEA* provides for a range of sanctions (notably fines) between a final warning and dismissal, and for the imposition of a combination of sanctions short of dismissal. This results in educators not being dismissed, despite being guilty of serious sexual misconduct. The article argues for the express inclusion and description – in sec. 17 of the *EEA* – of a broader range of types of sexual misconduct often encountered in schools and for a change in approach to how sanction for misconduct is regulated by sec. 18(3) of the *EEA*. This will assist role players in correctly identifying the types of sexual misconduct involved, will lead to more consistent and appropriate charges against offenders, will result in more appropriate (and serious) sanctions imposed, and will provide clarity about the incidence of different types of educator sexual misconduct as the basis for further policy responses.

1. INTRODUCTION*

Basic education[1] takes place in schools, an environment where the expectation always is that the survival, safety, and development of learners, most of whom are children, are of paramount importance.[2] This is despite the clear power differential that exists between educators and learners in schools. In this context, any sexual misconduct[3] by educators directed at learners is serious[4] and should be dealt with effectively. Yet sexual misconduct by departmental educators[5] toward learners as children continues to beset South African schools.[6] The provincial Departments of Education (hereinafter, the 'department'), as the employer[7] of departmental educators, have been unable to adequately address and uproot sexual misconduct.[8]

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1 *An early draft of this article was presented at the Annual International Mercantile Law Conference, hosted by the University of the Free State from 2-4 November 2022. We are grateful for the helpful comments and recommendations by two anonymous peer reviewers. Basic education "means Grade R to Grade 12, as evidenced in the national curriculum statement". See sec. 1(a) of the *Basic Education Laws Amendment Bill*. GN 705 *Government Gazette* 2021:45601.

2 *Constitution of the Republic of South Africa*, 1996:sec. 28(2); *Children's Act* 38/2005:sec. 9.

3 The term 'sexual misconduct' is used to include all forms of misconduct of a sexual nature as also discussed further in the text. A detailed definition is proposed in the conclusion to this article.

4 Consider the remarks by Pithey *et al.* in the main text at fn. 157 in the context of sexual grooming. Further, learners are required to attend school, placing them in a mandatory setting which, as mentioned, includes a power differential between the learner and the educator. Apart from this, learners are impressionable and vulnerable in relation to the educator, who should act *in loco parentis.*

5 The focus of this article is on "departmental educators" (around 70 per cent of public school educators) who are described in sec. 1 of the *Employment of Educators Act* 76/1998 as persons who teach at a public school "*and* who [are] appointed in a post on any educator establishment under this Act". In terms of sec. 5(1)(b) of the *Employment of Educators Act* 76/1998, the educator establishment of the department consists of posts created by the Member of the Executive Council (hereinafter, MEC). These educators are, therefore, appointed by the department to the posts created by the MEC. The remaining 30 per cent of educators are appointed by the public school itself in terms of sec. 20(4) of the *South African Schools Act* 84/1996. Their employment is not regulated by the *Employment of Educators Act* 76/1998. See FEDSAS 2014:1, 4 and 9. Note that the FEDSAS study was based on a relatively small sample of schools.

6 Existing studies on the prevalence of sexual misconduct in schools include Breetzke *et al.* 2021:765-776; Ward *et al*. 2018:e460-e468; Coetzee 2013:37-48, Brock *et al.* "Sexual violence by educators in South Africa: Gaps in accountability", https://rebrand.ly/nlz0jbk (accessed on 27 February 2023).

7 *Employment of Educators Act* 76/1998:sec. 3(1).

8 From 2014 to 2019, there has been a steady increase in the identifiable number of disciplinary hearings involving sexual misconduct (for the reasons stated further in the article, it is not always possible to identify the incidence of sexual misconduct from the Annual Reports of the nine provincial Departments of Education). These reports show that the number of disciplinary hearings (involving sexual misconduct) rose from 63 in 2014/2015 to 151 in 2018/2019, with a slight decrease in 2019/2020 to 136.

There is an extensive body of literature on the issue of sexual violence against children,[9] sexual misconduct by educators,[10] and possible policy responses to sexual misconduct in schools. However, the article is limited in its focus and, it is submitted, takes a novel approach. It focuses on the employment dimension of sexual misconduct in schools. This is done with reference to the wording of secs. 17 and 18 of the *Employment of Educators Act* 76 of 1998 (hereinafter, the *EEA*), as well as the experience with the application of these sections, as evidenced by a survey of 48 arbitration awards issued by the Education Labour Relations Council (hereinafter, the 'ELRC')[11] in respect of four departments[12] between 2014 and 2019.[13]

Our hypothesis is that the current wording of the *EEA* creates fertile ground for the misrecognition of sexual misconduct in all its guises and leads to the formulation of inappropriate charges and the imposition of inadequate sanctions against offending educators. Ultimately, it results in a failure to properly recognise the incidence of different types of sexual misconduct in public schools[14] and, as such, impedes appropriate employment and policy responses. It should be emphasised that this article does not address what all these policy responses may be, other than to suggest an amendment to the wording of the *EEA* to provide a stronger basis for further policy responses.

In exploring this hypothesis, part 2 below provides an overview and analysis of the current regulation of sexual misconduct by departmental educators in terms of secs. 17 and 18 of the *EEA*. Part 3 considers these provisions in conjunction with their actual application through an analysis of arbitration awards issued under the auspices of the ELRC. Ultimately, it is argued that this experience illustrates a number of inadequacies in the *EEA,* which undermine the interests of learners and impede the task of all role players to address sexual misconduct in schools, namely that of school

9 See fn. 6.

10 See, for example, Beninger 2013:281-301.

11 The ELRC is the bargaining council exercising labour dispute resolution jurisdiction over the public education sector in South Africa.

12 The analysis is limited to the departments of four provinces, namely the Western Cape, the Free State, the Eastern Cape, and Limpopo. The total number of formal disciplinary hearings for misconduct between 2014 and 2019 were compared. Based on this, the nine provinces were divided into three statistical groups: provinces that were above the 75th percentile in terms of the number of formal disciplinary hearings for misconduct; provinces below the 25th percentile, and provinces closest to the average number of formal disciplinary hearings for all nine provinces. One province from each group was selected for analysis, including a province close to the average (Free State), the province with the highest (Western Cape) and the lowest (Eastern Cape) number of formal disciplinary hearings, as well as one further province (Limpopo) below the 25th percentile.

13 The arbitrations and statistics largely relate to the pre-pandemic period (up to and including 2019). Prolonged school closures during the pandemic and reduced contact between educators and learners may skew the data from 2020 onwards.

14 See fn. 6.

principals,[15] officials of the department,[16] and presiding officers of disciplinary hearings.[17] Based on these insights, part 4 concludes with recommendations and proposals for the amendment of the *EEA.*

2. THE CURRENT REGULATION OF SEXUAL MISCONDUCT IN SECS. 17 AND 18 OF THE *EEA*

Secs. 17 and 18 of the *EEA* contain the types of misconduct with which educators may be charged, as well as the possible sanctions that may be imposed.[18] At the outset, it may be said that these provisions, and the *EEA*, in general, show little express appreciation of the context of this employment relationship as one involving learners as children. In *Centre for Child Law and Others v South African Council for Educators and Others*,[19] the court identified the need to incorporate the best interests of the child as a guiding principle in the discipline of educators.[20] The proposed *Basic Education Laws Amendment Bill* (hereinafter, the '*BELA Bill*')[21] does show an awareness of the child's best interests and incorporates this principle in proposed amendments to education laws. Unfortunately, the proposed amendments to the *EEA*, including those dealing with the discipline of educators, do not once refer to the child's best interests.

The *EEA* distinguishes between "serious misconduct" (in sec. 17) and "misconduct" (in sec. 18). As far as sexual misconduct is concerned, the relevant provisions of sec. 17 provide that:

> (1) An educator *must* be dismissed if he or she is found guilty of—
>
> (b) committing an act of sexual assault on a learner, student or other employee;

15 The disciplinary code and procedure for departmental educators is contained in schedule 2 of the *Employment of Educators Act* 76/1998. Item 4(1) of Schedule 2 provides that the employer (Head of Department) must delegate the function to deal with "less serious" misconduct to the head of the institution (school principal) where the educator is employed. As such, the first role player involved in the discipline of educators is the school principal who has the authority to impose up to a final written warning (item 4(5) of Schedule 2) for "less serious" misconduct, or, in case of more serious misconduct, involves the department.

16 Where the misconduct is not considered "less serious", item 5 of Schedule 2 applies, and the principal involves the department (through the circuit manager) to conduct a disciplinary enquiry into the educator's alleged misconduct.

17 The department (employer) appoints the presiding officer in terms of item 7 of Schedule 2 to chair the disciplinary enquiry.

18 Despite the importance of these provisions in holding educators accountable for misconduct and the shortcomings identified in this article, there has been limited critical analysis and engagement with these provisions.

19 *Centre for Child Law and Others v South African Council for Educators and Others* [2022] ZAGPPHC 787 (13 October 2022).

20 *Centre for Child Law and Others v South African Council for Educators and Others*:par. 92.

21 GN 705 *Government Gazette* 2021:45601.

> (c) having a sexual relationship with a learner of the school where he or she is employed;
>
> (f) causing a learner or a student to perform any of the acts contemplated in paragraphs [(b) and (c)].
>
> (2) If it is alleged that an educator committed a serious misconduct contemplated in subsection (1), the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures provided for in Schedule 2 (own emphasis).

Sec. 17 of the EEA thus contains two specific types of sexual misconduct and mandates dismissal in case of transgression. In contrast, sec. 18 of the *EEA*, which contains a long list of rules under the heading "misconduct", does not contain the peremptory provision that educators must be dismissed if found guilty of the misconduct listed in that section. There is also no specific mention of any type of sexual misconduct in sec. 18(1). A close analysis of sec. 18(1) shows that the only provisions that may be construed to include misconduct of a sexual nature include instances where an educator:

> (k) unfairly discriminates against other persons on the basis of race, gender, disability, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, family responsibility, HIV status, political opinion or other grounds prohibited by the Constitution;
>
> (q) while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner;
>
> (dd) commits a common law or statutory offence.

The inclusion of unfair discrimination in this list of possibilities may, at least partially, be justified by the reality that sexual misconduct disproportionately affects female learners[22] and inherently discriminates against them based on their sex or gender.[23] Another provision that may be used in case of sexual misconduct is sec. 18(1)(*q*), which prohibits improper, disgraceful or

22 It is acknowledged that perpetrators and victims may be of the same sex or may involve sexual misconduct by a female educator toward a male learner. Even so, sexual misconduct continues to be based on the sex, gender, or sexual orientation of the learner victim. See, for example, item 5.1 of the *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace* in GNR 1890 *Government Gazette* 2022:46056 (hereinafter, the *Harassment Code*).

23 For example, in 29 of the arbitrations that involved sexual misconduct and are listed in fn. 42, 27 cases involved sexual misconduct toward female learners. See also Calitz & De Villiers 2020:72-107. Although not expressly included in the *Employment of Educators Act* 76/1998*,* sexual (and sexual orientation) harassment is also widely accepted as a form of unfair discrimination. See sec. 6(3) of the *Employment Equity Act* 55/1998; item 5 of the *Harassment Code*, and the discussion in part 3. It should be noted, however, that there is tension between the sometimes egregious manifestation of individual sexual misconduct and the use of the label of "unfair discrimination" to describe it for purposes of discipline. This arises from the fact that unfair discrimination (while it includes intentional and targeted discrimination) is, in principle, a faultless and systemic concept designed to also address discrimination arising from good intentions or unconscious bias.

unacceptable conduct by an educator. The discussion below shows that this catch-all provision is often used to charge educators with sexual misconduct when the facts do not meet the description of the two types of sexual misconduct included in sec. 17(1)(*b*) and (*c*). The danger of this approach is apparent – sexual misconduct is not regarded for what it is; its systemic and serious nature is not properly appreciated,[24] and inappropriate sanctions may be imposed. The more so where the section lumps together "improper", "unacceptable", and "disgraceful" conduct, with these words sending signals of different degrees of culpability.[25]

The third possibility in case of sexual misconduct is reliance on sec. 18(1)(*dd*), namely to show that the sexual misconduct constitutes a common law or statutory offence, which sec. 18(5) explains to include rape. However, two immediate issues arise in relation to the use of sec. 18(1)(*dd*). First, it presupposes knowledge of criminal law and the constituent elements of crimes and requires the application of criminal law principles to a disciplinary process and the misconduct in question.[26] It also creates uncertainty about the required standard of proof in the context of discipline.[27] Secondly, this provision reinforces a fundamental misconception, namely that misconduct is dependent on the existence of a crime.[28] Misconduct may constitute a crime (and *vice versa*), but the existence of one is not necessarily dependent on the existence of the other. Employers routinely declare non-criminal conduct to constitute misconduct in their workplaces. Despite cross-fertilisation between employment law and criminal law,[29] the general approach to misconduct

24 In 2008, a qualitative study of sexual harassment of learners in the Free State recommended legislative and policy interventions pertaining to this form of sexual misconduct. Sexual harassment is still not included in the *Employment of Educators Act* 76/1998 as a type of misconduct. See De Wet *et al.* 2008:111.

25 "Improper" means "not in accord with propriety, modesty, good manners, or good taste"; "unacceptable" means "not acceptable, not pleasing or welcome", and "disgraceful" means "bringing or involving disgrace" (disgrace meaning "to be a source of shame"). Use of the three words in that order, in light of the aforementioned definitions, shows an increasing degree of culpability, all contained within one ground of misconduct. See the Miriam Webster Dictionary, https://www.merriam-webster.com/dictionary/ (accessed on 27 February 2023).

26 Depending on the misconduct, criminal proceedings may well run parallel to the disciplinary process. The point, in this instance, is that the disciplinary process itself, as a result of the wording in secs. 17 and 18, imports terminology ordinarily used in criminal proceedings and, therefore, requires of presiding officers to have knowledge of such terms.

27 The standard of proof in a disciplinary matter corresponds with the standard in a civil matter, which is less strict than the beyond-reasonable-doubt standard in criminal matters. The employer is required to show that, on a balance of probabilities, the employee committed the misconduct in question. See Grogan 2022:174.

28 See, for example, *Moshela v CCMA* 2011 32 ILJ 2692 (LC):par. 36. Employers may pursue disciplinary action against an employee for alleged criminal conduct even where the employee is acquitted in criminal proceedings, since misconduct on the same facts may still be proven.

29 See, for example, the argument in parts 3 and 4 that the criminal definitions of different types of sexual conduct may usefully be adapted to the employment context, specifically as a basis for amendment of the *Employment of Educators Act* 76/1998.

in employment has long been based on the recognition of a conceptual distinction between these two branches of law.[30]

At present, the *EEA* only expressly prohibits the following types of sexual misconduct – "sexual assault", "sexual relationships" between educators and learners (and then only of the same school), and "rape" (as a type of "common law or statutory offence" envisioned in sec. 18(1)(*dd*)).[31] As evidenced by the facts of the arbitration awards discussed below, educators perpetrate sexual misconduct in many ways, ways not clearly provided for in the *EEA*,[32] but always in a context that makes it serious and that typically should justify dismissal.

As far as sanction is concerned, sec. 18(3)-(5) lists the sanctions that may be imposed against an educator guilty of any of the types of misconduct listed in sec. 18(1). The relevant parts of these three subsections read as follows:

> (3) If … a finding is made that the educator committed misconduct … the employer may … impose a sanction of —
>
> (a) counselling;
>
> (b) a verbal warning;
>
> (c) a written warning;
>
> (d) a final written warning;
>
> (e) a fine not exceeding one month's salary;
>
> (f) suspension without pay for a period not exceeding three months;
>
> (g) demotion;
>
> (h) a combination of the sanctions referred to in paragraphs (a) to (f); or
>
> (i) dismissal, if the nature or extent of the misconduct warrants dismissal.
>
> (4) Any sanction contemplated in subsection (3)(e), (f) or (g) may be suspended for a specified period on conditions determined by the employer.
>
> (5) An educator may be dismissed if he or she is found guilty of –
>
> (c) unfair discrimination, as contemplated in subsection (1)(k);
>
> (d) rape, as contemplated in subsection (1)(dd).

30 See, for example, *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration & others* 2006 27 ILJ 1644 (LC); *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson & others* 2009 30 ILJ 2513 (LC), where the Labour Court emphasised, albeit in a procedural fairness context, that the informal approach to discipline supported by the *Labour Relations Act* 1995 moves away from a criminal approach to discipline.

31 Sec. 18(5) explains that a common law or statutory offence includes rape.

32 Coetzee emphasises that sexual misconduct in schools can only be eradicated if legislation adequately regulates it. See Coetzee 2011:77. See also Coetzee 2012: 82-85.

These subsections raise problems. First, sec. 18(3) provides for a number of possible sanctions between a final written warning (which, as its name suggests, should be final) and dismissal. These include a fine, unpaid suspension, and demotion. In addition, the section allows for a combination of sanctions short of dismissal (such as a final warning and a fine). This creates the danger that educators are not dismissed for serious misconduct in circumstances where a final warning is not regarded as sufficient.

Secondly, sec. 18(1) does not include or define any type of sexual misconduct other than rape (inserted in a roundabout way by a later amendment to the *EEA* as one of the sec. 18(1)(*dd*) offences, for which an employee may be dismissed in terms of sec. 18(5)(*d*).[33] One obvious deficiency of the *EEA* is that the mention of rape in sec. 18(5) does not align with sec. 17. It simply defies belief that sec. 17(1)(*b*) and (*c*) require educators to be dismissed for sexual assault or sexual relationships with learners, but in the case of rape, dismissal is stated to be discretionary. More fundamentally, this shows little appreciation for the many different guises of sexual misconduct[34] and their seriousness, all well recognised in other areas of law.[35]

The third fundamental difficulty with the sec. 18 sanction provisions relates to the apparent impact of sec. 18(5), which states that educators *may* be dismissed for unfair discrimination and for perpetrating rape (as an offence contemplated by sec. 18(1)(*dd*)). Sec. 18(5) does not provide clarity but rather creates confusion through what it does not say. Does the express statement that educators may be dismissed for unfair discrimination and rape mean that they may not be dismissed for other types of misconduct or offences in sec. 18(1)? This clearly cannot be the case (in light of sec. 18(3) quoted earlier), but the impression is created and uncertainty remains.

In summary, apart from apparent deficiencies and uncertainties relating to how the *EEA* describes the different types of sexual misconduct, there are

33 It has also been argued that rape should be included in the *Employment of Educators Act* 76/1998 as serious misconduct under sec.17. See Coetzee 2011:55.

34 See part 3.

35 As mentioned, discipline should not be approached from a criminal perspective. However, where criminal law has formulated detailed definitions of sexual offences and these offences are committed in an employment context, the definitions may be helpful in the absence of any guidance in the *Employment of Educators Act* 76/1998. A particularly important example in the education context is rape, which is routinely charged as sexual assault in terms of sec. 17(1)(b) (possibly, to attract dismissal) – see 3.1. Phelps & Omar (2019) explain that the constituent elements of sexual assault are sexual violation, unlawfulness, the absence of consent, and intention. Sexual violation specifically excludes penetration. This means that, from a criminal law perspective, rape falls outside the scope of sexual assault. The lack of the *Employment of Educators Act* 76/1998 to keep abreast of developments such as these is further discussed in part 3.3, also in the context of the *Children's Act* and the fact that sexual harassment is well recognised in labour law. See Smythe & Pithy 2019:5-6. See also secs. 1(1), 3, and 5 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32/2007 (hereinafter, the *Sexual Offences Act*).

also apparent deficiencies in how the *EEA* regulates sanctions for misconduct. The analysis of arbitration awards in part 3 below reveals the practical impact of these deficiencies and uncertainties.

3. THE EXPERIENCE WITH SEXUAL MISCONDUCT IN SOUTH AFRICAN PUBLIC SCHOOLS

This part of the article considers the experience with sexual misconduct by educators primarily[36] through a qualitative analysis of relevant ELRC arbitration awards. This analysis focuses on the two aspects of discipline regulated by secs. 17 and 18 of the *EEA*, namely transgression of a rule,[37] and the appropriateness of sanction. In particular, the focus is on charges brought against educators in terms of sec. 17(1)(*b*) and (*c*) as well as sec. 18(1)(*q*) and (*dd*) of the *EEA*.[38] Of course, in many cases, referral to the ELRC was based on unfair dismissal, which creates the impression that sexual misconduct is adequately addressed. However, it should be borne in mind that analysing arbitration awards in unfair dismissal disputes is, in a sense, a self-fulfilling prophecy. Not all disciplinary enquiries end in dismissal or are referred to arbitration.[39] Further, not all the awards reviewed concerned unfair dismissal,[40] while some awards, even in case of dismissal, tell stories of inappropriate responses by the employer.

While the sample of awards considered may seem small, it is submitted that the analysis does assist in identifying a number of concerning possibilities, if not trends. First, the awards show that, in some cases, the employer relied on the provisions of sec. 17, which simultaneously illustrates the limited nature of those provisions. Secondly, in the vast majority of arbitrations concerning sexual misconduct, the employer also relied on sec. 18 (especially sec. 18(1)

36 Where appropriate, reference is also made to relevant statistics gathered from the annual reports in respect of the four departments and period under review.

37 Which depends on the existence and content of a rule and evidence of its breach.

38 Despite the possible use of sec. 18(1)(k) (unfair discrimination), no unfair dismissal disputes were referred to the ELRC for arbitration based on charges in terms of sec. 18(1)(k) in the period under review.

39 In the four departments analysed, and over the same period of time, there were 141 directly identifiable disciplinary enquiries for sexual misconduct and only 29 arbitrations. One possible reason for the lower number of arbitrations is that educators received a sanction short of dismissal and did not dispute the outcome of the disciplinary enquiry.

40 *Aba v Department of Education Eastern Cape* PSES643-17/18EC (hereinafter, *Aba*) and *Satani v HOD Department of Education Western Cape* PSES232-13/14WC (hereinafter, *Satani*) were unfair labour practice disputes where the educators challenged the fairness of disciplinary action short of dismissal. In *Aba*, the department was unable to secure its witnesses and submitted that transcribing the record of the disciplinary hearing would cost more than the relief sought. In the absence of evidence to prove the substantive fairness of the disciplinary action (a final written warning and R5 000 fine), the arbitrator found that the employer had committed an unfair labour practice and the sanction was set aside. The disciplinary action in *Satani*, which resulted in a final written warning and R6 000 fine, was found to be fair.

(*q*)). This was either as an alternative charge to the main sec. 17 charge, or as a separate independent charge where the facts did not support a sec. 17 charge (again illustrating the limited nature of sec. 17). Thirdly, and closely related to the first two points, it becomes apparent that the *EEA* simply has not kept pace with developments in other spheres of the law and recognition in those spheres of the existence of a range of different types of sexual misconduct and the seriousness of those types of conduct. Lastly, sec. 18(1)(*q*) is often used as the basis of a charge against educators, also for non-sexual matters, but its use (also to address sexual misconduct) does not easily result in dismissal, even in cases of apparently egregious sexual misconduct. Each one of these concerns is considered below.

3.1 The use of sec. 17 of the *EEA* to address sexual misconduct by educators

Three subsections of sec. 17 of the *EEA* describe sexual misconduct by educators that results in mandatory dismissal. These are "sexual assault" (on learners and "other employees"), "having a sexual relationship with a learner" (but only if the learner attends the school where the educator is employed), or "causing a learner" to perform these acts. An analysis of 29 arbitration awards[41] shows that reliance is placed on sec. 17 (especially sexual assault) to effect dismissal of the educator in question.[42] At the same time, the awards

41 There are reservations as to whether the published awards are the total number of awards issued by the ELRC. This analysis contains all the awards pertaining to sexual misconduct that were published on the ELRC website.

42 The awards are: *Aba*; *Department of Education Western Cape v Abels* PSES947-18/19 WC; *Adams v Department of Education Western Cape* PSES501-19/20WC (hereinafter, *Adams*); *Arendse v Department of Education Western Cape* PSES860-16/17WC (hereinafter, *Arendse*); *SAOU obo Aronse v Department of Education Western Cape* PSES740-18/19 WC (hereinafter, *Aronse*); *Baloyi v Department of Education Limpopo* PSES12-18/19 (hereinafter, *Baloyi*); *Bless v Department of Education Free State* PSES356-13/14 (hereinafter, *Bless*); *Chirwa v Department of Education Western Cape* PSES643-15/16FS (hereinafter, *Chirwa*); *Gwe v HOD Department of Education Western Cape* PSES708-16/17W (hereinafter, *Gwe*); *Isaacs v Department of Education Western Cape* PSES 24-15/16 WC (hereinafter, *Isaacs*); *SAOU obo Joseph v Department of Education Western Cape* PSES716-18/19WC (hereinafter, *Joseph*); *SADTU obo Kenosi v Department of Education Limpopo* PSES416 – 13/14L (hereinafter, *Kenosi*); *SADTU obo Klaasen v Department of Education Western Cape* PSES861-17/18 WC (hereinafter, *Klaasen*); *Kleinbooi v Department of Education Eastern Cape* PSES250-13/14EC (hereinafter, *Kleinbooi*); *Kleinbooi v Department of Education Eastern Cape* PSES300-16/17 EC (hereinafter, *Kleinbooi II*); *SADTU obo Kodisang v Department of Education Free State* PSES173-17/18FS (hereinafter, *Kodisang*); *Kodisang v Department of Education Free State* PSES173-17/18FS (hereinafter, *Kodisang II*); *NAPTOSA obo Kruger v HOD Western Cape Education Department* PSES781-16/17WC (hereinafter, *Kruger*); *NAPTOSA obo Larney v Department of Education Western Cape* PSES-800-16/17WC (hereinafter, *Larney*); *Western Cape Department of Education v Le Grange* PSES231-15/16 (hereinafter, *Le Grange*); *Mara v Department of Education Limpopo* PSES71-13/14LP (hereinafter, *Mara*); *Moyo v Western Cape Education Department* PSES811-18/19WC (hereinafter, *Moyo*); *SADTU obo Nevthavhok v Department*

show not only the variety of types of serious sexual misconduct engaged in by educators, but also that sec. 17 is limited in its ambit.

The awards make it clear that sexual misconduct in schools takes many forms, ranging from rape[43] to what may be described as sexual assault (including sexual violation),[44] sexual relationships,[45] sexual grooming,[46] sexual harassment,[47] exposing children to pornography,[48] and other instances of unacceptable sexual behaviour.[49] Furthermore, many (if not all) of these instances of sexual misconduct constitute serious misconduct, mindful of the school setting, the interests of children, and the power differential between educator and learner. Yet not all these instances of sexual misconduct fall within the ambit of sec. 17(1)(*b*) or (*c*) (and, consequently, the *EEA* does not view them as "serious").[50] In only 6 of the 29 cases, reliance was placed on sec. 17 alone – one case concerned sexual relationships with learners,[51] one, touching,[52] and four, the rape of a learner.[53] This already shows that the distinction between secs. 17 and 18 is artificial. For example, rape has to be charged as sexual assault in terms of sec. 17 to ensure the mandatory dismissal of the educator.[54]

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of Education Limpopo PSES11-15/16LP (hereinafter, *Nevthavhok*); *Satani*; *Van Wyk v Department of Education Western Cape* PSES508-16/17WC (hereinafter, *Van Wyk*); *Vika v Buffalo City TVET College* ELRC74-16/17E (hereinafter, *Vika*); *Witbooi v Department of Education Eastern Cape* PSES227-14/15 EC (hereinafter, *Witbooi*); *Xolani v Department of Higher Education* PSES160-19/20LP (hereinafter, *Xolani*) and *SALIPSWU obo Zaula v Department of Education Western Cape* PSES224-16/17 WC (hereinafter, *Zaula*).

43 For example, the case of *Nevthavhok* involved the rape of an eight-year-old learner.

44 For example, the educator in *Van Wyk* lured the learner to his residence to give her money and then proceeded to kiss her.

45 For example, the educator in *Chirwa* had a sexual relationship with a Grade 11 learner.

46 For example, in the case of *Satani*, the educator asked the learner if she had a boyfriend, asked for her cell phone number, and requested to meet.

47 For example, in the case of *Gwe*, the educator requested the learner to kiss and have sex with him and promised the learner R50 if he remained silent.

48 For example, in *Zaula*, the educator sent the learner pornographic images via text message.

49 All of these terms are discussed further in part 3.3.

50 For example, see the facts of *Gwe* in fn. 47 where the educator was not charged with serious misconduct in terms of sec. 17 but was charged with "improper conduct" in terms of sec. 18(1)(q).

51 For example, *Kenosi.*

52 In the case of *Klaasen*, the male educator performed unwarranted body searches on female learners, touching their breasts and thighs.

53 *Kleinbooi, Kodisang, Kodisang II* and *Nevthavhok.* It should be noted that *Kodisang* and *Kodisang II* involved the same incident of rape by the same educator.

54 Consider the earlier remarks in fn. 35 regarding the definition of sexual assault, which excludes penetration, an element required for conduct to be considered rape for purposes of the *Sexual Offences Act*. Further, sec. 18(5) expressly lists rape as misconduct falling within sec. 18(1)(dd) but none of the cases discussed above included a sec.18(1)(dd) charge.

In most instances, sec. 18 is used in conjunction with sec. 17 – either as an alternative charge or as an additional, independent charge relating to instances of behaviour that formed part of a series of events, yet did not, or was not considered to fall under sec. 17.[55] This use of sec. 18 is discussed in part 3.2 below.

Lastly, in some instances of serious sexual misconduct (which should routinely attract dismissal), there is no reliance on sec. 17 at all. This is either because of the limited wording of sec. 17, or because of poor decision-making by relevant role players. [56] *Isaacs*, for example, concerned an educator who had sex with a learner.[57] Despite this, the main charge was based on sec. 18(1)(*f*) of the *EEA* for unjustifiably prejudicing the administration, discipline or efficiency of the school "because [the educator] had sex with a Grade 12 learner at the school".[58] In the alternative (on the same facts), he was charged for improper conduct in terms of sec. 18(1)(*q*).[59] The department offered no explanation as to the reason for not charging this educator for misconduct, which clearly falls within the ambit of sec. 17(1)(*c*) (a sexual relationship with a learner of the school).[60] *Isaacs* also raises questions about the ambit of sec. 17, in general, and sec. 17(1)(*c*), in particular. What is meant by a "relationship" and when is it or does it become "sexual"?[61] Does a relationship require continuous interaction? Does a "relationship" have to be consensual and should consent be a consideration (mindful of the power differential in the "relationship" and that the consent involves a child in a school setting)? What conduct is covered by the word "sexual" – does it, for example, require sexual intercourse?

In practice, sec. 17(1)(*b*) has been limited to instances of physical contact.[62] In a broader sense, this raises fundamental questions about the differentiation between misconduct that attracts mandatory dismissal (in sec. 17) and misconduct that attracts discretionary dismissal (in sec. 18). It may already be said that sec. 17 shows scant appreciation for the fact that all sexual misconduct by educators directed at learners (mostly children) in a school setting – manifested in practice through a wide array of different types of misconduct – is always serious.[63]

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55 For example, in *Moyo*, the educator faced seven main charges in terms of sec.17 for sexually assaulting learners by touching their breasts. Two further main charges were for improper conduct in terms of sec. 18(1)(q) for requesting to meet with learners after school, asking for their cell phone numbers, calling a learner "my beautiful" and "my girlfriend".

56 See the cases of *Aba, Gwe, Isaacs, Kruger*, and *Satani.*

57 *Isaacs:*par. 3.

58 *Isaacs*:par. 3.

59 *Isaacs*:par. 3.

60 *Isaacs*:par. 11.

61 For example, would communication via an online social media platform over several months, culminating in the educator eliciting explicit pictures from a thirteen-year-old learner be considered a sexual relationship? See *Davids v Department of Education Western Cape* ELRC767-21/22WC.

62 See, for example, *Zaula* discussed in part 3.2.

63 See fn. 6.

It should be mentioned that a proposed amendment to sec. 17 will broaden the scope of the provision. The *BELA Bill* proposes to insert a new sec. 17(1)(*g*) into the *EEA*. This subsection reads that an educator must be dismissed if he or she is found guilty of ''committing any other act which, in any other law that applies to the educator in so far as his or her employment is concerned, is classified as serious misconduct''. The subsection is not clear about what this "other law" is to which it refers, a law which ostensibly relates to employment and which classifies misconduct as serious or otherwise. In general labour law terms, the *Dismissal Code* in schedule 8 to the *Labour Relations Act* 66 of 1995 identifies serious types of misconduct[64] that may attract dismissal. None of these is sexual in nature. Furthermore, the Dismissal Code does not mandate dismissal in the way sec. 17 of the *EEA* does. Our Labour Courts have recognised that employers may formulate context-specific zero-tolerance rules (akin to mandatory dismissal), but that the employer has to clearly identify and motivate the rule.[65]

In light of these remarks, it seems unavoidable that sec. 17 of the *EEA* should at least be amended to provide a more comprehensive list of types of misconduct – specifically different types of sexual misconduct – regarded by their nature and the school setting as serious and which mandate dismissal.[66] The answer does not lie in the vague, proposed sec. 17(1)(*g*). An alternative option would be to expand the list of prohibited types of misconduct in sec. 18(1) of the *EEA*. However, as the further discussion shows, the inclusion of specific types of sexual misconduct in sec. 18 runs the risk of trivialising the conduct and may result in inappropriate sanctions.

3.2 Reliance on sec. 18(1)(*q*) in case of both general and sexual misconduct

The survey of ELRC arbitration awards also illustrates the prevalent use of sec. 18 charges in case of sexual misconduct by educators, especially the use of sec. 18(1)(*q*). Sec. 18(1)(*q*) prohibits an educator "while on duty, [to] conduct … himself or herself in an improper, disgraceful or unacceptable manner" (hereinafter, "improper conduct"). This is not surprising, given the broad wording of this provision, that it is relied on to address a variety of behaviours and also plays a residual role (as an alternative charge) in case of the presence of other types of defined and serious misconduct.[67]

64 For example, gross dishonesty, wilful damage to property of the employer or endangering the safety of others, physical assault, and gross insubordination.

65 See, for example, *SGB Cape Octorex (PTY) Ltd v Metal and Engineering Industries Bargaining Council and Others* 2023 44 ILJ 179 (LAC).

66 See part 3.3. Questions may be raised about the constitutionality of sec. 17 and about the types of misconduct included. However, in light of the seriousness of sexual misconduct in a school setting, it is submitted that the section should be used to the greatest extent possible.

67 For example, sexual assault provided for in sec. 17(1)(b) of the *Employment of Educators Act* 76/1998.

If one reflects on the use of sec. 18(1)(*q*), in general, statistics show that, during the period under review and at disciplinary hearings conducted by the four departments, improper conduct was the second most common type of misconduct with which educators were charged (it featured in 459 of the 3 717 disciplinary hearings).[68] It also featured in a number of arbitrations across the four departments.[69] From an analysis of arbitration awards, it becomes clear that this section is primarily used to address two categories of behaviour. First, unprofessional behaviour by the educator, which mostly does not involve learners or sexual misconduct.[70] Secondly, conduct directed at learners, which consists of and results in the verbal, physical or emotional abuse of learners (which may or may not be of a sexual nature).[71] In this regard, it is already noteworthy that the *EEA* does not include "abuse" (or, for that matter, sexual abuse) as a type of misconduct in sec. 17 or sec. 18, despite the fact that the *Children's Act* contains a description of the type of behaviour considered abuse against children,[72] which the majority of learners are. According to the *Children's Act*, abuse includes "sexually abusing a child or allowing a child to be sexually abused".[73]

In Tables 1 and 2 below, the arbitration awards, which included charges in terms of sec. 18(1)(*q*), are grouped into these two categories – unprofessional behaviour (Table 1) and the abuse of learners (Table 2).[74] The nature of the misconduct in each matter is briefly mentioned. Of the 53 charges brought against educators for improper conduct that featured in 31 of the arbitrations reviewed,[75] 18 charges related to the unprofessional behaviour[76] of educators (which, for the most part, did not involve learners or sexual misconduct), whereas 35 charges related to the abuse of learners.[77] The abuse of learners

68 The most common type of misconduct with which educators were charged is assault, as described in secs. 17(1)(*d*) and 18(1)(*r*) of the *Employment of Educators Act* 76/1998. Assault featured in 1 699 disciplinary hearings in the four departments analysed and, nationally, assault featured in 2 826 disciplinary hearings. The data is drawn from the annual reports issued by the respective provincial departments.

69 In the 31 arbitration awards analysed for part 3.2 of this article, there were 53 charges of improper conduct. This is because multiple charges may be brought against an educator in one disciplinary hearing (also in the alternative), usually based on separate incidents of misconduct or different types of misconduct over a period of time. See Tables 1 and 2 for details on the charges.

70 See Table 1.

71 See Table 2.

72 *Children's Act*:sec. 1. In the conclusion to this article, the definition of abuse in the *Children's Act* is used as the basis for a proposed legislative amendment.

73 *Children's Act* 38/2005:sec. 1.

74 Other sources applicable to the employment of educators were considered in the compilation of Table 1. The term "unprofessional behaviour" (as also used in the text) was used along the lines of the requirements of the South African Council for Educators "Code of Professional Ethics", https://www.sace.org.za/pages/the-code-of-professional-ethics (accessed on 27 February 2023).

75 These charges are listed in Tables 1 and 2.

76 See Table 1.

77 See Table 2.

(Table 2) includes physical abuse (such as assault), verbal abuse (such as inappropriate language when speaking to learners) and emotional abuse (such as promising a learner money in exchange for sexual favours). It is noteworthy that most instances of the abuse of learners reflect misconduct of a sexual nature.

Table 1: Unprofessional behaviour by an educator as a type of improper conduct in terms of sec. 18(1)(*q*) of the *EEA*[78]

Unprofessional behaviour by an educator as a type of improper conduct in terms of sec. 18(1)(*q*) of the *EEA*		**Number of charges**
1	Stormed into another teacher's classroom[79]	1
2	Acted without instruction/approval of supervisor[80]	1
3	Disrespectful behaviour: Shouting at colleagues[81]	2
4	Displayed racially offensive images[82]	1
5	Displayed old South African flag[83]	1
6	Communicated contradicting information to a learner about disciplinary case[84]	1
7	Disgraceful and unacceptable language towards colleagues[85]	5
8	Confiscated test papers while learners were writing[86]	1
9	Insulted principal[87]	1
10	Refused to meet with new tourism educator[88]	1

78 The information in Table 1 is drawn from ELRC arbitration awards between 2014 and 2019. The awards are separately referenced in the table according to the misconduct.

79 *Kleinbooi*.

80 *NAPTOSA obo Mehlo v HOD of the Eastern Cape Department of Education* PSES658-16/17EC (hereinafter, *Mehlo*).

81 *SADTU obo Pakade v Department of Education Eastern Cape* PSES187-14/15EC (hereinafter, *Pakade*); See also *SADTU obo Goedeman v Department of Education Western Cape* PSES585-13/14WC (hereinafter, *Goedeman*).

82 *SADTU obo Mackay v Department of Education Free State* PSES615-14/15 FS (hereinafter, *Mackay*).

83 *Mackay*.

84 *Mackay*.

85 *Witbooi v Department of Education Eastern Cape* PSES227-14/15 EC (hereinafter, *Witbooi*); *Kruger* and *Goedeman*.

86 *Sekute v Department of Education Free State* PSES456-12/13 (hereinafter, *Sekute*).

87 *Smango v Department of Education Free State* PSES219-13/14 (hereinafter, *Smango*).

88 *Maphoto v Department of Education Limpopo* PSES549-15/16 LP (hereinafter, *Maphoto*).

Unprofessional behaviour by an educator as a type of improper conduct in terms of sec. 18(1)(*q*) of the *EEA*		**Number of charges**
11	Locked principal in classroom[89]	1
12	Slammed door in principal's face[90]	1
13	Improper conduct (unspecified)[91]	1
	Total	18

Table 2: The abuse of learners as a type of improper conduct in terms of sec. 18(1)(*q*) of the *EEA*[92]

The abuse of learners as a type of improper conduct in terms of sec. 18(1)(*q*) of the *EEA*		**Number of charges**
1	Sexual harassment[93]	8
2	Sexual assault[94]	2
3	Assaulted/attempted to assault learner (and parent)[95]	1
4	Sexual relationship with learner[96]	2
5	Kissed a learner, touched a learner inappropriately[97]	6
6	Hugged, touched a learner's buttocks[98]	1
7	Promised money in return for sex[99]	1
8	Called a learner a prostitute[100]	1
9	Asked for a learner's cell phone number, requesting to meet[101]	2

89 *SADTU obo Macanda v HOD Western Cape Education Department* PSES506-16/17WC (hereinafter, *Macanda*).
90 *Heynes v Department of Education Western Cape* PSES326-14 WC (hereinafter, *Heynes*).
91 *SADTU obo Mfeka v West Coast FET College* ELRC 036-13/14 WC (hereinafter, *Mfeka*).
92 The information in Table 2 is drawn from ELRC arbitration awards between 2014 and 2019. The awards are separately referenced in the table according to the misconduct.
93 *Aba*; *Mara*; *Zaula*; *Adams*, and *Moyo*.
94 *Moyo* and *Joseph*.
95 *Kleinbooi*.
96 *Chirwa* and *Isaacs*.
97 *Joseph*, *Larney*; *Arendse*; *Van Wyk*, and *Bless*.
98 *Gwe*.
99 *Gwe*.
100 *Kruger*.
101 *Satani and Moyo.*

The abuse of learners as a type of improper conduct in terms of sec. 18(1)(*q*) of the *EEA*		**Number of charges**
10	Showed an 18 age-rated movie to Grade 8 learners[102]	1
11	Abusive language towards a learner (and parent in one instance)[103]	4
12	Peeped under girls' skirts[104]	1
13	Made utterances of a sexual nature towards a learner[105]	1
14	Touched a female learner's chest/breasts[106]	4
	Total	35

An analysis of these two tables and the awards on which they are based reveals at least two insights. First, as mentioned, there is widespread reliance on sec. 18(1)(*q*) to address both sexual and non-sexual misconduct as well as misconduct relating to both colleagues and learners. The danger of this approach is immediately apparent – it creates the conceptual impression that one deals with instances of misconduct that qualitatively are equal in their nature and gravity. It is difficult to accept, to use two examples from Tables 1 and 2, that an educator storming into another educator's classroom (misconduct involving two adults)[107] is viewed and described the same as, for example, an educator sexually harassing a learner (where there is a clear power differential and the one party is particularly vulnerable as a child).[108] This is on top of the fundamental difficulty, pointed out earlier, that sec. 18(1)(*q*), in its wording, already lumps together conduct that is "improper, disgraceful or unacceptable", with these words having very different meanings.[109] In short, the use of sec. 18(1)(*q*) not only hides the presence of sexual misconduct, but also dilutes the inherently serious nature of sexual misconduct involving learners. One may reasonably expect that this could be a reason why educators are not always dismissed for sexual misconduct.[110]

Secondly, and closely related to the first point, sec. 18(1)(*q*) is used either as an alternative charge to a "more serious" charge in terms of sec. 17 (for which an educator must be dismissed), or as the foundation of an independent charge.[111] Furthermore, where sec. 18(1)(*q*) is used as the basis for a main charge, this often is in addition to what is viewed as more serious charges

102 *Le Grange*.
103 *Le Grange*; *Kleinbooi*, and *Steenkamp v Western Cape Department of Education* PSES730-15/16 WC (hereinafter, *Steenkamp*).
104 *Le Grange*.
105 *Aronse.*
106 *Moyo.*
107 *Kleinbooi*.
108 For example, *Adams*.
109 See fn. 25.
110 See part 3.4.
111 See, for example, *Gwe*.

in terms of sec. 17.[112] An arbitration that stands out in this regard is *Zaula.* In this case, the employee was charged in terms of sec. 17(1)(*b*) with the sexual assault of a learner, in that he "forcefully hugged the learner in his office and/or touched her buttocks and/or kissed her on her cheeks".[113] In the alternative to this charge, the applicant was charged with sexual harassment in terms of sec. 18(1)(*q*) of the *EEA*.[114] The applicant faced two further main charges. He was charged with improper conduct (sec. 18(1)(*q*)) for making an inappropriate utterance of a sexual nature towards the same learner, by asking her why she is not responding to his (sexual) requests.[115] The last charge was also for improper conduct in that the applicant, on another occasion, made a comment of a sexual nature towards the learner and sent her pornographic images.[116] *Zaula* shows that sec. 18(1)(*q*) is used as a catch-all provision in case of sexual misconduct where the misconduct does not meet the wording of sec. 17(1). It is clear that all three incidents in *Zaula* constituted misconduct of a sexual nature and were serious, but only the incident where there had been physical contact was charged in terms of sec. 17(1)(*b*), with that section requiring "assault". When the sexual misconduct is of a verbal, non-verbal or emotional nature, educators are charged with improper conduct in terms of sec. 18(1)(*q*). This, however, creates the risk that the gravity of the misconduct is not appreciated.[117]

As *Satani*[118] makes clear, non-physical conduct may be very serious and may, for example, amount to the sexual grooming of young children.[119] In *Satani*, the educator asked a Grade 6 learner for her cell phone number, requested to meet and talk to her, suggested to meet in a forest or bush, and asked her if she has a boyfriend.[120] The sanction that was imposed on the educator was a final written warning and a fine of R6 000. This clearly illustrates how serious misconduct, which should warrant dismissal, may be sanitised by using the amorphous terminology such as "improper conduct" of sec. 18(1)(*q*) of the *EEA*.[121] At least, in *Satani*, the arbitrator[122] ultimately appreciated the seriousness of the "improper conduct" in this matter, stating that:

112 See, for example, *Bless* where the charge for improper conduct was alternative to a sexual assault charge in terms of sec. 17(1)(*b*).
113 *Zaula*:par. 8.
114 *Zaula*:par. 8.
115 *Zaula*:par. 8.
116 *Zaula*:par. 8.
117 Coetzee (2015:2108-2139) emphasises the seriousness of exposing children to pornography (including child pornography) through its harmful effect on children and in light of its severity from a criminal perspective.
118 *Satani* PSES232-13/14WC
119 See also Chaka *et al.* (2018:87-104), where the authors find that the verbal and non-verbal sexual messages to adolescent learners by educators leave learners feeling vulnerable.
120 *Satani*:par. 12.
121 The incidence of sexual grooming in schools is increasing, and includes in-person, online or a combination of in-person and online contact between the educator and the learner, leading to the sexual exploitation of the learner. See Coetzee 2023:2-3, 6.
122 It should be noted that the educator disputed the outcome of the disciplinary enquiry and referred the matter for arbitration. Had the educator accepted the

> If any criticism can be levelled at the sanction that was imposed, then it would be that it might have been too light. What [the] applicant has done in essence amounts to grooming,[123] which is generally one of the first steps taken by an adult when he or she wants to sexually abuse a particular child.[124]

Whichever way sec. 18(1)(*q*) is used – as a main or alternative charge – one can expect the result to be the same, namely a pivot towards a lesser sanction. Where sec. 18(1)(*q*) is used as an alternative charge to a sec. 17 charge, it sends out a clear message that the transgression of sec. 18 – used as no more than a "back-up" – is less serious than the transgression of sec. 17. Where sec. 18(1)(*q*) is used as the main charge, it sends out the same message, but for slightly different reasons. In this case, sec. 18 may be used in addition to sec. 17 charges, which already juxtaposes, in the words of the *EEA*, "serious misconduct" and "misconduct". Where sec. 17 is not used at all, use of sec. 18(1)(*q*) on its own to address sexual misconduct sends a message that sexual misconduct is not to be distinguished from "unprofessional" conduct, not particularly unique, and not particularly serious. Again, one can expect sanctions short of dismissal to be imposed, even for very serious misconduct.[125]

3.3 Parallel developments concerning different types of misconduct

It is also evident from the analysis of awards and the tables above that the *EEA* failed to recognise sexual misconduct by educators in its many different manifestations, which are recognised and described in other areas of the law. It bears repetition that the only types of sexual misconduct expressly mentioned in the *EEA* are "sexual assault", having a "sexual relationship with a learner" (in sec. 17) and, in a roundabout way, "rape" (in sec. 18(5)). Perhaps the most obvious example of this failure is the *Act*'s lack of recognition of sexual harassment, which is a widely recognised type of sexual misconduct[126] and generally defined as any unwanted conduct of a sexual nature[127] – physical, verbal or non-verbal. For workplaces in general, the concept is defined and regulated by the *Harassment Code*[128] issued in terms of sec. 54(1)(*b*) of the *Employment Equity Act* 55 of 1998 (hereinafter, the '*Equity Act*'). In addition, the strict approach to sexual harassment taken by the Labour Appeal Court (even between adults and even in case of non-physical conduct) confirms

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outcome, the matter would not have ended in arbitration, meaning that the seriousness of the sexual misconduct would not have been appreciated.

123 Sexual grooming is an offence in terms of sec. 18 of the *Sexual Offences Act*.

124 *Satani:*par. 104.

125 Dismissal of educators for sexual misconduct is considered in part 3.4.

126 Recently confirmed by the comprehensive *Harassment Code*. See fn. 22.

127 For example, item 5.2.5 of the *Harassment Code* explains that it includes strip searching; sexual attention, including messages or proposals of a sexual nature; innuendos, hints, comments with sexual overtones, and whistling of a sexual nature.

128 GNR 1890 *Government Gazette* 2022:46056.

its seriousness.[129] It deserves to be recognised and viewed as such in the basic education sector, where victims are usually children. The question is not whether the *EEA*'s existing provisions are broad enough to include sexual harassment, but rather why this established concept is not expressly mentioned, and its seriousness emphasised through inclusion in sec. 17 of the *Act*.[130]

Included in the 29 awards relating to sexual misconduct are eight awards where charges were brought in terms of sec. 18(1)(*q*) (for improper conduct) based on the sexual harassment of a learner or, in *Aba*'s case, a colleague.[131] In *Vika*,[132] *Mara*,[133] *Moyo*,[134] *Zaula*,[135] and *Adams*,[136] the sexual misconduct involved learners (children), but the educators were charged with improper conduct (despite the facts showing and/or the charges referencing sexual harassment).[137] In *Gwe,*[138] *Satani*,[139] and *Kruger*,[140] the educators were charged with improper conduct in terms of sec. 18(1)(*q*) of the *EEA*, but the charges did not expressly state that the improper conduct was for the sexual harassment of learners. For example, in *Gwe*, the educator requested a Grade 7 learner to kiss him, told the learner that he loved him, requested him to have sex, and promised to give him R50 if he does not tell anyone.[141] The arbitrator defined the misconduct as sexual harassment, stating that it is misconduct of a serious nature that justifies dismissal.[142] In *Kruger*, the educator had a history of assault[143] and made sexist and derogatory remarks toward a number of learners, including calling a Grade 8 learner a prostitute,[144] conduct that could clearly constitute sexual harassment. If sexual misconduct – specifically

129 See *Campbell Scientific Africa (Pty) Ltd v Simmers & Others* 2016 37 ILJ 116 (LAC):paras. 19-20, 27, 33.

130 The *Employment of Educators Act* 76/1998 is not only an instrument to be implemented by the employer or presiding officers at disciplinary inquiries. It is the code of conduct for educators, contained in legislation, and a mechanism against which educators, parents, and other role players may measure the expected conduct of educators. This is especially important in light of some educators' poor understanding of the concept. See *Vika:*par. 73.

131 See *Aba*; *Vika*; *Mara*; *Zaula*; *Adams*; *Moyo*; *Gwe*, and *Satani*. Note that, in *Satani*, the charge did not expressly state that the educator conducted himself in an improper manner by sexually harassing the learner. However, it is clear from the context that the "improper conduct" in this matter amounts to sexual misconduct.

132 *Vika*:par. 10.

133 *Mara*:par. 11.

134 *Moyo*:par. 8.

135 *Zaula*:par. 8.

136 *Adams*:par. 7.

137 See the summary of misconduct in Table 2.

138 *Gwe*:par. 9.

139 *Satani:*par. 12.

140 *Kruger*:par. 8.

141 *Gwe*:par. 9.

142 *Gwe*:paras. 121, 126.

143 He had received a final warning for assault in 2014 and again in 2015. The misconduct, for which he was dismissed in 2016, also included assault. See *Kruger*:par. 79.

144 *Kruger:*paras. 8, 16, 20.

sexual harassment – remains such a fundamental challenge in public schools, the least the *EEA* can do is to call it by its name and to recognise its severity. This will have a clear deterrent effect and is not dependent on the eventual insights of the severity of sexual harassment by an arbitrator, as was the case in *Gwe*. Furthermore, accurate statistics is the first step to successfully address systemic challenges. If the *EEA* includes sexual harassment as a type of misconduct and record-keeping about its prevalence is required, it may go a long way to address it properly into the future. At present, depending on its nature, sexual harassment could possibly constitute sexual assault for purposes of sec. 17(1)(*b*) of the *EEA*[145] or be manifested by a relationship envisaged by sec. 17(1)(*c*). If, however, the conduct falls outside the scope of these two sections (which, in many cases, it will), the need to describe it as "improper conduct" (in terms of sec. 18(1)(*q*)) sends out an immediate message that it is of lesser importance.

Sexual harassment is not the only type of sexual misconduct that has attracted a label and a definition (in addition to sexual assault, sexual relationships, and rape mentioned in the *EEA*). Mindful of the earlier remarks about the need to keep criminal law and employment law separate, criminal legislation defines, for example, rape,[146] sexual violation,[147] statutory rape[148] and statutory sexual assault,[149] sexual exploitation[150] or grooming of children,[151] the display of pornography to children,[152] as well as exposure ("flashing") to children[153] (with "child" in general defined to mean a person under the age of eighteen years).[154] Reference has also been made to the concept of "abuse", including "sexual abuse", in the *Children's Act*.[155] While some of the criminal law definitions of these different types of conduct are detailed and perhaps too cumbersome for direct transplantation into the employment context, these definitions may be used to fashion relatively simple, yet appropriate rules for the employment context. For example, the current – and very detailed – criminal definition of sexual grooming makes it clear that its essence consists of any conduct designed to facilitate or promote sexual conduct by a learner.[156] Pithey *et al.* state the following about sexual grooming:

145 As evidenced by the first charge in *Zaula*. See Zaula:par. 8.
146 *Sexual Offences Act*:sec 3.
147 *Sexual Offences Act*:sec. 1(1).
148 *Sexual Offences Act*:sec. 15.
149 *Sexual Offences Act*:sec 16.
150 *Sexual Offences Act*:sec 17.
151 *Sexual Offences Act*:sec 18.
152 *Sexual Offences Act*:sec. 19.
153 *Sexual Offences Act*:secs. 21-22.
154 *Sexual Offences Act*:sec. 1(1).
155 See the main text at fn. 73.
156 *Sexual Offences Act*:sec 18. This is achieved through psychological manipulation to gain the trust of the victim. See Collings 2020:4.

> The grooming process provides the tools for manipulation through the offering of gifts, fulfilling the child's basic need for attention, praise, affection and closeness, and reworking these needs into an inappropriate sexual relationship. This manipulation of the child is viewed as the first step on the path to sexual abuse, which is why it is criminalised in s[ec]. 18 of [the *Sexual Offences Act*].[157]

In the concluding part of this article, proposals are made for the possible amendment of secs. 17 and 18 of the *EEA* to accommodate these developments. In doing so, one also has to remain mindful of the myriad types of sexual misconduct that may occur in schools and build flexibility into the proposals.

In summary, and considering that educators work with children, a clear and effective basis for dealing with sexual misconduct is imperative. This starts with clarity about terminology. Most types of sexual misconduct – be it assault, abuse, violation, harassment, grooming or other forms – have been identified, named, and defined. In the school context, when a learner is the victim of educator misconduct, all of it is serious. It should be included as such in the *EEA*.

3.4 The relationship between the use of secs. 17(1) and 18(1)(*q*) and dismissal

There is no doubt that educators are dismissed for sexual misconduct. After all, dismissal was the trigger for many of the awards analysed in this article. However, as the earlier discussion showed, not all disciplinary enquiries end in dismissal, and not all the awards reviewed for this article concerned unfair dismissal. Furthermore, some awards, even where there had been a dismissal, reveal inappropriate employer responses during the process leading up to the eventual dismissal. For example, in *Zaula* and *Arendse*, the presiding officers of the disciplinary hearings against the educators for sexual misconduct imposed final warnings.[158] In *Zaula*, the educator was found guilty of sexually harassing a learner over a period of three years.[159] In *Arendse*, the educator was found guilty of improper conduct for kissing a learner in the neck.[160] In both matters, the department appealed to the Minister who overturned the presiding officer's decision and imposed summary dismissal.[161] Had the specific department accepted the outcome of the disciplinary hearing and not appealed the sanction imposed against the educator, the sanction would not have been dismissal.

It is concerning that not all sexual misconduct by an educator directed at a learner attracts dismissal at a disciplinary enquiry. The earlier discussion

157 Smythe & Pithy 2019:1-9. Collings conceptualises sexual grooming by explaining the steps taken by perpetrators to groom children and providing further examples of the type of conduct that amounts to sexual grooming. See Collings 2021:16-31.
158 *Zaula*:par. 8; *Arendse*:par. 14.
159 *Zaula*:par. 8.
160 *Arendse*:paras. 12, 37.
161 *Arendse*:par. 6.

pointed out why this concern exists and why one may expect this to happen if legislation is not amended. It is worth repeating that the *EEA* sends out a confusing and dated message about the seriousness of sexual misconduct in schools. It does so through a combination of the distinction between sec. 17 (mandatory dismissal) and sec. 18 (discretionary dismissal), the very limited and dated list of the types of sexual misconduct in sec. 17, and the absence of other, widely recognised types of sexual misconduct from both secs. 17 and 18. This is exacerbated by the "criminal" (or punitive) approach to sanction in sec. 18(3) through its inclusion of a range of sanctions between a final warning and dismissal and provision for a combination of sanctions short of dismissal, as well as the impression created by sec. 18(5) that dismissal, even for rape, is discretionary.

It should, however, be recognised that inclusion and description of more types of sexual misconduct in the *EEA* – especially if they are included in sec. 18 – is not necessarily the answer, especially if sec. 17 is merely allowed to exist in its current form (providing only for sexual assault and sexual relationships). This point may be illustrated with reference to the parallel experience with (non-sexual) assault in schools.

Sec. 17(1)(*d*) provides that serious assault "with the intention to cause grievous bodily harm" is one of the "serious" types of misconduct that mandates dismissal. At the same time, sec. 18(1)(*r*) provides that "assault or an attempt or threat to assault" is one of the general types of misconduct with which educators may be charged, but with dismissal discretionary. In practice, this has meant that educators have only been dismissed for assault (in the sec. 18 sense of the word) where they have repeatedly made themselves guilty of assault. This is borne out by a perusal of the facts of matters heard at the ELRC, which concerned the fairness of dismissal of educators for assault on learners. For example, in *SADTU obo Dempers v Department of Education Western Cape* (hereinafter, *Dempers*),[162] the educator was disciplined on two occasions for assault. First, he received a final written warning and a fine, and on the second occasion, he received a cautionary letter from the department since the parents no longer wanted to pursue the matter.[163] He was only dismissed for the third incident of assault where he punched a learner in the face (breaking his front teeth).[164] In *SAOU obo Gertenbach v Department of Education Western Cape* (hereinafter, *Gertenbach*),[165] the educator also had a history of assault, for which he had received the sanctions of an unpaid suspension, final written warning, and instruction to attend anger-management counselling.[166] He was only dismissed after repeating the misconduct.[167] Grievous assault, where the educator hit a learner's head against a school desk, hit the learner in the face, and kicked him against his leg, had to take

162 *SADTU obo Dempers v Department of Education Western Cape* (hereinafter, *Dempers*) PSES608-18/19WC.
163 *Dempers*:paras. 22, 30.
164 *Dempers*:par. 13.
165 *SAOU obo Gertenbach v Department of Education Western Cape* (hereinafter, *Gertenbach*) PSES967-18/19WC.
166 *Gertenbach*:par. 8.
167 *Gertenbach*:paras. 72-73.

place before the educator in *SAOU obo May v Department of Education Western Cape* (hereinafter, *May*)[168] was dismissed.[169] This was only after he had received fines on two previous occasions for assaulting learners.[170]

These assault cases are certainly not the only examples,[171] but highlight the danger of simply including more types of sexual misconduct in sec. 18 of the *EEA*. The underlying risk of educators not being dismissed for serious misconduct – as all sexual misconduct involving learners surely is – is, first, to be found in the *EEA's* continued distinction between "serious" misconduct in sec. 17 and "other" types of misconduct in sec. 18, the limited scope of sec. 17 and the inclusion in sec. 18 of (a combination of) sanctions between a final warning and dismissal. The answer would seem to be to broaden the scope of sec. 17 to include all types of sexual misconduct involving learners. If the inclusion of other types of sexual misconduct in sec. 18 is considered, this should be done subject to adaptation of the possible sanctions that section provides for.

4. CONCLUSION AND PROPOSALS FOR REFORM

This article focused on two aspects of discipline – transgression of a rule and the appropriateness of sanction – pertaining to sexual misconduct in South African public schools. An analysis of legislation and relevant arbitration awards makes it clear that sexual misconduct is not always adequately addressed, mainly due to the wording of the *EEA* itself. Three interrelated deficiencies in the *Act* were identified.

First, the *EEA*'s distinction between the two types of misconduct in secs. 17 and 18. The discussion showed that sexual misconduct manifests in many different ways in schools. Many (if not all) of the examples discussed in this article constitute serious misconduct, especially mindful of the school setting and power differential between educator and learner. Due to the limited types of sexual misconduct included in sec. 17, not all sexual misconduct is viewed as "serious" by the *EEA* or those responsible for its implementation. In addition, the *Act* has not kept pace with recognition, in other areas of law, of the existence of different types of sexual misconduct and the seriousness of those types of conduct. In light of this, sec. 17 of the *EEA* should be amended to provide a more comprehensive list of types of misconduct – specifically different types of sexual misconduct – regarded by their nature and context as serious.

Secondly, as a result of the limited types of sexual misconduct included in sec. 17 of the *EEA*, use of this section is often reserved for physical forms of sexual misconduct, which sends a message that other types of sexual

168 *SAOU obo May v Department of Education Western Cape* (hereinafter, *May*) PSES749-18/19WC.

169 *May*:par. 8.

170 *May*:par. 16.

171 Other examples include, *Mangena v Department of Education Limpopo* PSES364-14/15 LP; *Plaatjies v Department of Education Western Cape* PSES122 -17/18WC, and *SADTU obo Scholtz v Department of Education Western Cape* PSES779-15/16WC.

misconduct are less serious and/or less important. As a result of this deficiency, sexual misconduct is often charged in terms of catch-all provisions provided for in sec. 18, particularly sec. 18(1)(*q*). The wording of this section sends a message that sexual misconduct is not unique, not particularly serious, and not to be distinguished from "unprofessional" conduct. It also precludes departments from identifying systemic issues around sexual misconduct in public schools. When considering appropriate amendments to legislation, the danger of including different types of sexual misconduct in sec. 18 is illustrated by the experience of repeat offenders in case of assault. Merely including more types of sexual misconduct in sec. 18 may have the effect of trivialising the conduct and may result in inappropriate sanctions.

This brings us to the third deficiency, namely the approach to sanction for misconduct in sec. 18(3). The provision includes a range of sanctions between a final warning and dismissal (which may be combined). In addition, sec. 18(5) reinforces the impression that dismissal, even for rape, is discretionary. The danger is that this approach will result (as it has) in educators not being dismissed in cases involving serious sexual misconduct.[172] It is submitted that sec. 18(5) should be removed from the *Act*, as should the sanctions between a final written warning and dismissal in sec. 18(3). This is in line with the spirit of the disciplinary code and procedure for educators[173] – that discipline is corrective and not punitive. Where a final written warning will not correct an educator's misconduct seen in light of the risk to learners, dismissal should follow.

Finally, it is submitted that, at the very least, a new type of misconduct, simply titled "abuse", should be included in sec. 17 of the *EEA* and described along the lines of the provisions of the *Children's Act*, *Sexual Offences Act*, and *Harassment Code*. A suggested description could be as follows:

> "Abuse" in relation to a learner means any form of harm or ill-treatment inflicted on a learner, and includes –
>
> (a) assaulting a learner or inflicting any other form of deliberate harm on a learner;
>
> (b) sexually abusing a learner, or allowing a learner to be sexually abused, including:
>
> (i) rape;
>
> (ii) engaging in physical or non-physical sexual interaction[174] with a learner, including any act(s) of apparently consensual sexual violation or sexual penetration[175] with learners from any school;

172 For example, *Zaula* and *Arendse*.

173 Schedule 2 of the *Employment of Educators Act* 76/1998.

174 Removing "sexual relationships" from the proposed definition was deliberate, since it is completely inappropriate in a school setting and does not portray the severity of the misconduct involved.

175 In this instance, sexual violation and sexual penetration are used as explained in sec. 1(1) of the *Sexual Offences Act* and the definitions for statutory rape (sec. 15) and statutory sexual assault (sec. 16) but is extended to include learners of any age.

(iii) sexually molesting or sexually assaulting a learner or allowing a learner to be sexually molested or assaulted;

(iv) sexually grooming a learner by engaging in any conduct, inclusive of encouragement, inducement or force, designed to facilitate or promote the participation of a learner in sexual conduct;

(v) using a learner in or deliberately exposing a learner to sexual activities or pornography;

(vi) causing a learner to witness sexual offences, sexual acts or self-masturbation, including exposure or display of genital organs to learners;

(vii) sexually harassing a learner through physical, verbal and/or or non-verbal conduct of a sexual nature;

(c) bullying or allowing a learner to be bullied;

(d) exposing or subjecting a learner to behaviour that may harm the learner psychologically or emotionally.

In sum, legislative clarity is required. The inclusion of these specific types of misconduct in sec. 17 of the *EEA* will go a long way to recognise the rights of learners as children and the seriousness of sexual misconduct in all its guises in schools and will assist in identifying systemic challenges pertaining to sexual misconduct in public schools.

BIBLIOGRAPHY

BENINGER C
2013. Combating sexual violence in schools in sub-Saharan Africa: Legal strategies under regional and international human rights law. *African Human Rights Law Journal* 13:281-301.

BREETZKE G, FABRIS-ROTELLI I, MODIBA J & EDELSTEIN I
2021. The proximity of sexual violence to schools: Evidence from a township in South Africa. *GeoJournal* 86:765-776. https://doi.org/10.1007/s10708-019-10093-3

BROCK R, BRUNDIGE E, FUSTENAU D, HOLTON-BSALDUA C, JAIN M, KRAEMER J, MAHONDE K, OSEI M & GAFFOOR N.
2014. Sexual violence by educators in South Africa: Gaps in accountability. *Centre for Applied Legal Studies of the University of the Witwatersrand, Cornell Law School's Avon Global Centre for Women and Justice and the International Human Rights Clinic.* https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Sexual%20Violence%20by%20Educators%20Size%20180270%20NEW.pdf (accessed on 27 February 2023).

CALITZ K & DE VILLIERS C
2020. Sexual abuse of pupils by teachers in South African schools: The vicarious liability of education authorities. *South African Law Journal* 137(1):72-107.

CHAKA J, BEYERS C & SWANEPOEL E
2018. Voicing adolescent learners' perceptions of sexual messages received from teachers in a rural school within the Free State province. *Journal of Educational Studies* 17(2):87-104.

COETZEE SA

2011. Forms of educator-on-learner sexual misconduct redefined. *Child Abuse Research: A South African Journal* 12(1):51-64.

2012. Law and policy regulating educator-on-learner sexual misconduct. *Stellenbosch Law Review* 23:76-87.

2013. Victim rights and minimum standards for the management of learner victims of sexual misconduct in South African schools. *Child Abuse Research: A South African Journal* 14(2):37-48.

2015. Educator sexual misconduct: Exposing or causing learners to be exposed to child pornography or pornography. *Potchefstroom Electronic Law Journal* 18(6):2108-2139. https://doi.org/10.4314/pelj.v18i6.03

2023. Sexual grooming of children in teaching as a trust profession in South Africa. *Potchefstroom Electronic Law Journal* 26:2-34. https://doi.org/10.17159/1727-3781/2023/v26i0a14192

COLLINGS SJ

2020. Defining and delimiting grooming in child sexual exploitation. *Child Abuse Research: A South African Journal* 21(1):1-9.

2021. Towards a conceptualisation of grooming in child sexual exploitation. *Child Abuse Research: A South African Journal* 22(1):16-31.

DEPARTMENT OF EDUCATION, EASTERN CAPE

2014/2015. *Annual Report.* Pretoria: Government Press.

2015/2016. *Annual Report.* Pretoria: Government Press.

2016/2017. *Annual Report.* Pretoria: Government Press.

2017/2018. *Annual Report.* Pretoria: Government Press.

2018/2019. *Annual Report.* Pretoria: Government Press.

2019/2020. *Annual Report.* Pretoria: Government Press.

DEPARTMENT OF EDUCATION, FREE STATE

2014/2015. *Annual Report.* Pretoria: Government Press.

2015/2016. *Annual Report.* Pretoria: Government Press.

2016/2017. *Annual Report.* Pretoria: Government Press.

2017/2018. *Annual Report.* Pretoria: Government Press.

2018/2019. *Annual Report.* Pretoria: Government Press.

2019/2020. *Annual Report.* Pretoria: Government Press.

DEPARTMENT OF EDUCATION, GAUTENG

2014/2015. *Annual Report.* Pretoria: Government Press.

2015/2016. *Annual Report.* Pretoria: Government Press.

2016/2017. *Annual Report.* Pretoria: Government Press.

2017/2018. *Annual Report.* Pretoria: Government Press.

2018/2019. *Annual Report.* Pretoria: Government Press.

2019/2020. *Annual Report.* Pretoria: Government Press.

DEPARTMENT OF EDUCATION, KWA-ZULU NATAL
2014/2015. *Annual Report*. Pretoria: Government Press.

2015/2016. *Annual Report.* Pretoria: Government Press.

2016/2017. *Annual Report.* Pretoria: Government Press.

2017/2018. *Annual Report.* Pretoria: Government Press.

2018/2019. *Annual Report.* Pretoria: Government Press.

2019/2020. *Annual Report.* Pretoria: Government Press.

DEPARTMENT OF EDUCATION, LIMPOPO
2014/2015. *Annual Report.* Pretoria: Government Press.

2015/2016. *Annual Report.* Pretoria: Government Press.

2016/2017. *Annual Report.* Pretoria: Government Press.

2017/2018. *Annual Report.* Pretoria: Government Press.

2018/2019. *Annual Report.* Pretoria: Government Press.

2019/2020. *Annual Report.* Pretoria. Government Press.

DEPARTMENT OF EDUCATION, MPUMALANGA
2014/2015. *Annual Report.* Pretoria: Government Press.

2015/2016. *Annual Report.* Pretoria: Government Press.

2016/2017. *Annual Report.* Pretoria: Government Press.

2017/2018. *Annual Report.* Pretoria: Government Press.

2018/2019. *Annual Report.* Pretoria: Government Press.

2019/2020. *Annual Report.* Pretoria: Government Press.

DEPARTMENT OF EDUCATION, NORTH WEST
2014/2015. *Annual Report.* Pretoria: Government Press.

2015/2016. *Annual Report.* Pretoria: Government Press.

2016/2017. *Annual Report.* Pretoria: Government Press.

2017/2018. *Annual Report.* Pretoria: Government Press.

2018/2019. *Annual Report.* Pretoria: Government Press.

2019/2020. *Annual Report.* Pretoria: Government Press.

DEPARTMENT OF EDUCATION, NORTHERN CAPE
2014/2015. *Annual Report.* Pretoria: Government Press.

2015/2016. *Annual Report.* Pretoria: Government Press.

2016/2017. *Annual Report.* Pretoria: Government Press.

2017/2018. *Annual Report.* Pretoria: Government Press.

2018/2019. *Annual Report.* Pretoria: Government Press.

2019/2020. *Annual Report.* Pretoria: Government Press.

DEPARTMENT OF EDUCATION, WESTERN CAPE
2014/2015. *Annual Report.* Pretoria: Government Press.

2015/2016. *Annual Report*. Pretoria: Government Press.

2016/2017. *Annual Report.* Pretoria: Government Press.

2017/2018. *Annual Report.* Pretoria: Government Press.

2018/2019. *Annual Report.* Pretoria: Government Press.

2019/2020. *Annual Report.* Pretoria: Government Press.

DE WET NC, JACOBS L & PALM-FORSTER TI
2008. Sexual harassment in Free State schools: An exploratory study. *Acta Criminologica* 21(1):97-122.

FEDERATION OF ASSOCIATIONS OF GOVERNING BODIES OF SOUTH AFRICAN SCHOOLS (FEDSAS)
2014. Environmental analysis research report. Copy on file with authors.

GROGAN J
2022. *Dismissal Law*. 4th edition. Cape Town: Juta.

MIRIAM WEBSTER DICTIONARY
2023. https://www.merriam-webster.com/dictionary/ (accessed on 27 February 2023).

SMYTHE D & PITHEY B (EDS.)
2019. Phelps K & Omar J. *Sexual offences commentary: Act 32 of 2007*. Cape Town: Juta.

2019. Pithey B, Muller K & Van Zyl N. *Sexual offences commentary: Act 32 of 2007*. Cape Town: Juta.

SOUTH AFRICAN COUNCIL FOR EDUCATORS
2020. Code of Professional Ethics. https://www.sace.org.za/pages/the-code-of-professional-ethics (accessed on 27 February 2023).

WARD CL, ARTZ L, LEOSCHUT L, KASSANJEE R & BURTON P
2018. Sexual violence against children in South Africa: A nationally representative cross-sectional study of prevalence and correlates. *Lancet Glob Health* 6:e460-e468. https://doi.org/10.1016/S2214-109X(18)30060-3