

CHAPTER 19

SEXUAL VIOLENCE IN SCHOOLS

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TERMINOLOGY

- **'Abortion'** means the termination (ending) of a pregnancy. The pregnant person must be under 13 weeks pregnant to end the pregnancy without giving reasons.
- **'Consent'** means you agree to do something, and you understand what you are agreeing to do. When it comes to sexual acts, consent must be ongoing, meaning that it must be given continuously and for all conduct, and that it can be withdrawn at any time. Consent can be given through words or actions. It cannot be forced or given because you are threatened. In South African law, it is not possible for a child under the age of 12 to give their consent to any sexual act. Learners cannot consent to sexual acts with teachers or any school staff.
- **'Harassment'** is unwanted conduct of a physical, verbal or non-verbal nature that the perpetrator knows or ought to know causes harm or inspires the reasonable belief that harm may be caused.
- **'In loco parentis'** is a Latin term for 'in the position of parents'. In this chapter it describes the responsibility of schools and teachers for the welfare of children. Teachers are expected to step into the shoes of parents and care for children as if they are their parents.
- **'Penetration'** is the insertion of any body part or object into a person's genital organs, anus or mouth.
- **'Perpetrator'** is a person who commits an unlawful act, such as an act of violence.
- **'Rape'** is a term used in criminal law for any penetration without consent and all penetration of any person under the age of 12. This includes non-consensual penetration of a boy or man.
- **'Revictimisation' or 'retraumatisation'** refers to trauma experienced by victims of sexual violence because of a failure of the criminal justice system to protect them properly. This can occur, for example, through repeated postponements of a trial, or a failure to provide an intermediary through whom a victim can give evidence at trial.
- **'Sanction'** means official punishment imposed for breaking a law or rule.
- **'Sexual abuse'** includes rape, sexual assault and sexual harassment. The Children's Act 38 of 2005 defines 'sexual abuse' as including "sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted; encouraging, inducing or forcing a child to be used for the sexual gratification of another person; using a child in or deliberately exposing a child to sexual activities or pornography; procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial exploitation of a child". It is sexual abuse for a person to force you to see sexual movies or photographs, or for someone to call you sexual names, to touch you or make you touch them in a way that makes you uncomfortable.
- **'Sexual assault'** is a term used in criminal law for sexual abuse without penetration by a body part or object. It includes a person forcing you to touch their genital areas.
- **'Sexual violence'** is any sexual act or attempted sexual act using intimidation, threats, force, harassment or emotional abuse.
- **'Statutory rape'** is a term used in criminal law to describe the crime of sexual penetration of any person under the age of 16 by a person over the age of 18, or the penetration of a person who is under the age of 16 by a person aged 16 to 18 who is more than two years older than the younger person. See page 402 for more about the ages of consent.
- **'Survivor'** is a term adopted by a person to identify themselves as having overcome and survived an experience of sexual violence. As we discuss in this chapter, sexual violence is a crime of power where the perpetrator tries to take away the power that another person has over their own body. The term 'survivor' is used by some people to reclaim that power. However, other people feel that the term 'victim' is more appropriate to acknowledge that a harm has been done to them and that they have been subjected to violence through no fault of their own.
- **'Them' and 'they'** are used as pronouns that include people of all gender identities.
- **'Victim'** in this chapter refers to a person who has experienced sexual violence. Many people prefer to use the word 'survivor' because the term 'victim' can feel disempowering or as if a person is permanently damaged by sexual violence. No person who is sexually violated is 'damaged goods' but all are people who have been hurt in unacceptable ways. We use 'victim' as the identifier in this chapter for a person who has been hurt in this way, but it is up to each person to choose how they identify.
- **'Violence'** is behaviour that causes or may cause imminent harm to a person's safety or well-being, including through physical, emotional, verbal and psychological abuse, intimidation, harassment, stalking or damage to property.

OVERVIEW

This chapter will discuss sexual violence in schools, what it means for the rights of learners, and how to respond if you or someone you know has been a victim of sexual violence by a teacher or fellow learner. Please note that in this section we use the word 'teacher' to mean any person employed by the departments of education at a public school, including educators and non-teaching staff.

Readers should also consult the chapters on **gender and sexuality** and **the rights of pregnant learners** for a better understanding of the full range of rights that learners have over their bodies.

If you want to know the steps to take after you or someone you know has been subjected to sexual violence, please refer to the section starting on page 414 below. You may also want to use the handbook 'My teacher hurt me, what should I do?' which is available from SECTION27, the Centre for Applied Legal Studies and Lawyers against Abuse.

In a country with the most progressive of constitutions, which promises equality and dignity for all, the women and children of South Africa live in fear of violence every day.
- President Cyril Ramaphosa

INTRODUCTION

In June 2020, at the height of South Africa's response to the first wave of coronavirus infections, President Cyril Ramaphosa declared a 'second pandemic' of gender-based violence in South Africa that he characterised as "no less than a war being waged against the women and children of our country".

The effect of socio-economic hardship on the incidence of sexual violence is well documented. In South Africa, the most unequal country in Africa (in 2020), the already devastating endemic sexual violence in our society was even further aggravated by increased unemployment, poverty and disempowerment arising from the virus and the actions taken to try to contain it.

The link between poverty, substance abuse, unemployment and a failing education system on one hand and sexual violence on the other serves as an important reminder of the measures that need to be taken to cure our society of this plight. We will not be able to stop this kind of violence altogether without improving socio-economic conditions. However, we can help by holding perpetrators of violence to account.



Sexual violence is usually committed as a show of power by one person over another person where there is already an unequal power relationship between the perpetrator and the victim. It is therefore often committed by a person known to the victim in a personal space, such as home or school, and tends to affect some groups of people more than others.

Groups that are particularly vulnerable to sexual violence include women, children, poor people, people with disabilities and black people. This does not mean that white people, men or boys and rich people cannot be victims of sexual violence, but it does mean that special measures should be taken to protect and promote the rights of women, children, poor people, people with disabilities and black people, and in particular, poor black girls.

Some people still believe that sexual violence is committed because

something about the victim makes the perpetrator unable to control their sexual urges. For example, a girl wearing a short skirt or lipstick is sometimes seen as provoking sexual urges in men that make them rape or sexually assault the girl. This is problematic on many levels:

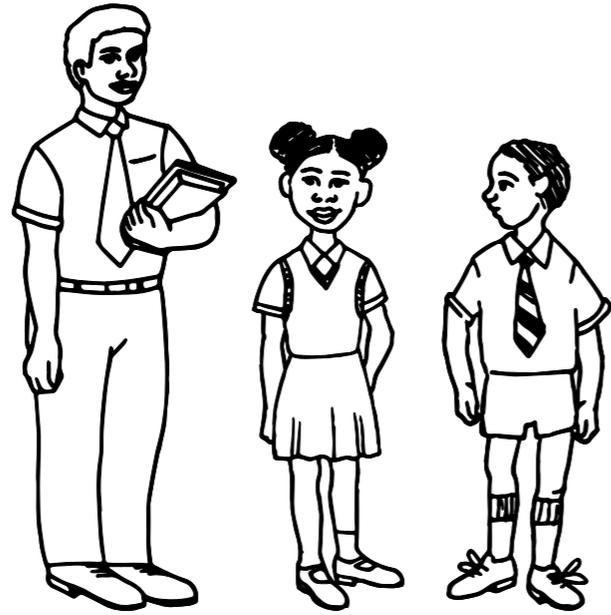
1. First, it implies that a victim is to blame for something they did not consent to, could not control, and which hurt them.
2. Second, it implies that men cannot control their actions if they feel sexually stimulated.
3. Third, it links sexual violence with sexual drive in a false way. It has been widely researched and agreed on that even though the violation is of a sexual nature, the crime is about the desire to exert power and not about sexual drive.

Sexual violence affects not only those who are physically hurt, but also people around them and those who feel that they are at risk of being hurt because they belong to a vulnerable group. This is known as 'secondary victimisation', and can affect a person's ability to participate properly in society. For example, a girl learner may be less likely to approach a male teacher after school for help with her schoolwork; even if she has never been sexually harmed and has never heard of the teacher harming anyone, she may be scared to be alone with an older man.

Direct and 'secondary' victims of sexual violence sometimes find that their physical and mental health is compromised, and that it is difficult for them to function properly in day-to-day life. If the person is of a schoolgoing age, then it may be difficult to participate and do well at school.

EVERYONE RESPONDS TO SEXUAL VIOLENCE DIFFERENTLY

- There is no right way for a victim of sexual violence to respond.
- Many people respond very emotionally, and may be hysterical, agitated and uncertain of the details of what happened to them. Other people may be quiet, serious and matter-of-fact, and remember very clearly what happened.
- Some people will want to tell everyone what happened, but others might prefer to tell no one for a long time.
- Perpetrators often make victims believe that they somehow provoked or 'asked for' a sexual act. This can make a victim feel guilty and ashamed, when in fact they have done nothing wrong. There is usually nothing that a victim of sexual violence could have done to stop the incident from happening, and any person assisting a victim of sexual violence should be careful not to suggest that there was.
- Victims may even feel sorry for the perpetrator, or suggest that they forgive them. This does not mean that they were not sexually harmed by the perpetrator.



SEXUAL VIOLENCE IN SCHOOLS

As we discussed above, sexual violence is usually committed by people with power against those without it, as a way of asserting that power.

The National Strategic Plan on Gender-based Violence and Femicide, 2020 (NSP) imagines schools as key role players in a restructured response to gender-based violence that recognises underlying socio-economic and cultural drivers and power dynamics. Programmes targeting schools are part of the NSP's initial 'Emergency Response Action Plan'. These programmes will be fundamental to changing societal norms and improving learner safety within schools; but appropriate and urgent measures must also be taken to protect learners from teachers implicated in

sexual violence, if learners are going to be safe and to feel safe in school. The latest available data from the South African Council for Educators (SACE) shows that in the majority of cases where teachers are found to have had sexual relationships with learners, those teachers are disciplined with written warnings or other minimal sanctions. Only the minority are dismissed.

It is very difficult to find reliable data on the number of learners affected by sexual violence in schools, because most victims of sexual violence do not report the violence to official bodies.



POLICY AND LEGISLATIVE FRAMEWORK

In this section we set out the specific laws and policies regulating sexual violence in schools. Some of this legislation applies only to cases where learners are sexually violated by teachers or principals. We will begin by setting out the laws that protect learners from all forms of sexual violence from teachers or other learners.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

The Constitution gives us an umbrella of rights to protect learners from sexual violence.

It says in Section 12 that each person has a right to bodily integrity and not to be treated in a cruel, inhuman or degrading fashion. This should be read with Section 10, which says that each person has the right to dignity. Any unwanted physical, sexual or emotional attention has the potential to infringe these constitutional rights.

The Constitution also gives special protection to children through a section particularly dedicated to the rights of children. It says that among other things, children have the right

“to be protected from maltreatment, neglect, abuse or degradation”. This gives special rights to children against abuse of any sort, and places a special duty on society to protect them.

Everyone has both the right to a basic education and the right to learn in a safe and secure environment. Sexual violence in schools not only interferes with a learner's ability to protect their rights to their body, it also usually affects a learner's ability to access their right to a basic education. This is because learners often feel uncomfortable and threatened at school, and/or are scared, traumatised and unable to focus on learning. Many learners drop out of school because of the trauma, especially if the perpetrator remains in school with the learner.

But what do these rights mean for each learner? The Constitution tells us that each person's individual rights must be respected and protected. This means that a person's dignity, bodily integrity and special rights as a child must not be interfered with. Section 7 goes further though, saying that rights must be actively 'promoted' and 'fulfilled'. This means that measures must be taken to ensure that people can enjoy the full extent of the rights that they are given. This may include active steps by the state or other people.

The Constitution also speaks about how rights bind the state and other people. It says in Section 8 that each branch of the state (government, the legislature and the courts) has a duty to ensure that rights are respected, protected,

INEQUALITY AND SEXUAL VIOLENCE

- Learners in poorly resourced schools are more likely to be victims of sexual violence.
- Learners feel most vulnerable when they go to the toilets at school, particularly schools with poor infrastructure where toilets are more likely to be far away from classrooms and less likely to have secure doors.
- Poor learners are more vulnerable to sexual advances by teachers because the teachers have status and money. Families of learners will sometimes negotiate payments to the family from the teacher who sexually abused the learner in exchange for not reporting the teacher.

THE AGES OF CONSENT

- Rape can be committed against a person of any age.
- A child under the age of 16 may consent to sex, but it will be considered 'statutory rape' if it is with a person over the age of 18. It is also statutory rape for a person between the ages of 16 and 18 to have consensual sex with a child under the age of 16 if there is more than two years' difference between their ages. This two-year rule applies only if the older child is 16 or 17 years old.
- For example: if two 15-year-olds have consensual sex, neither of them can be charged with statutory rape. If a 15-year-old and a 12-year-old have consensual sex, the 15-year-old cannot be charged with statutory rape. If a 17-year-old has consensual sex with a 14-year-old, the 17-year-old will have committed statutory rape.
- A child under the age of 12 cannot legally consent to sex. Even if a child under 12 indicates willingness to perform a sexual act, the law does not consider them old enough to make that decision. Sex with a child under 12 is always rape.
- The offences set out in the SACE Act and/or Employment of Educators Act and/or the Schools Act are about abuse or neglect of all learners, regardless of their age. Many learners in Grade 12 are over the age of 18 but are still protected by these Acts because they are learners, and because teachers assume the duties of parents when learners are in their care. The SACE Act is discussed on page 407 below.
- An offence in terms of the Children's Act can only be committed against a person who is under the age of 18. The Children's Act is discussed on page 404 below.

advanced and fulfilled. State institutions, such as public schools, are especially bound by this section to enforce the bill of rights. This means that schools and the departments of education have a duty to protect learners' rights to a basic education, and must actively protect learners from being hurt or violated. This includes properly punishing teachers who commit sexual offences, and appropriately disciplining learners.

Section 8 also says that individual people and companies are bound by the Bill of Rights. This means for instance that any person who interferes with another person's bodily integrity, dignity or rights as a child has infringed that person's constitutional rights and must be held responsible for it, and that independent schools are also obliged to protect learners.

The Constitution recognises the unequal starting positions of bearers of rights, and states in Section 9 that each person has the right to equality. Sexual violence implicates the right to equality, because learners who are poor, black, female and/or living with disabilities are the most likely targets of sexual violence. You can read more about equality and what it means in Chapter 5.

CRIMINAL LAW

THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT, 2007

This Act criminalises certain sexual acts including any non-consensual sex, and sex with a person under the age of 16 by a person over the age of 18. It also gives a very broad definition of sex, which includes any physical penetration with a body part or object into the genital organs or anus of another person, and

insertion of a genital organ into another person's mouth. Non-consensual sexual acts that are not penetrative are still a statutory offence called sexual assault.

In Section 54(1), the Sexual Offences Act specifically criminalises the failure to report any sexual offence that a person knows or suspects has been committed against children. A person can be imprisoned for up to five years for this failure. This is important, because the first person a learner tells about being sexually assaulted or raped at school is often another teacher. If the teacher ignores the learner or tells them that they should pretend the sexual violence did not happen, Section 54(1) means that the teacher can be jailed or otherwise punished by a court.

The Sexual Offences Act sets out that sexual acts are not voluntary if they result from an abuse of power or authority, because a person is thereby 'inhibited' from indicating their willingness or unwillingness to participate in the sexual act. This means that when a learner has had sex with a teacher because the teacher threatened to fail them if they didn't, that teacher can be charged with the crime of rape.

The Sexual Offences Act sets out that an adult who commits a sexual act with a child under the age of 16 has committed the offence of statutory rape or statutory sexual assault, even if the child consents to the sexual act. A sexual act is defined very widely and can be interpreted as including anything from holding hands or kissing to penetration. Children between the ages of 12 and 15 cannot be criminally charged for engaging in consensual acts with one another. However, this was not the case when the Sexual Offences Act first came into effect in 2007.

THE CRIMINAL PROCEDURE ACT, 1977

The Criminal Procedure Act, 1977 sets out ways for children who are victims of sexual violence to be protected when they give evidence. For example, it says that non-verbal expressions such as gestures can be specifically considered as vocal evidence if the person gesturing is a child, and that an intermediary must be appointed to work with the child witness so that they are adequately prepared for trial and experience as little trauma as possible. The intermediary, who is usually a social worker, is a go-between for the magistrate, prosecutor, perpetrator and their legal representation.

If a person is convicted of a sexual offence against a child – including rape, statutory rape and sexual assault – section 41(1)(a) of the Sexual Offences Act says that the person may not be employed to work with a child in any circumstances.

Any person convicted of sexual offences against a child or a person who is mentally disabled will have their name recorded in the Sex Offenders Register. Ordinarily, an employer would be required to obtain a certificate from the Department of Justice and Correctional Services (DoJ & CD) to confirm that a potential employee's name does not appear on this register. The Sex Offenders Register appears to have only recently become operational. If an employer is unable to obtain these details from the department it is recommended that it obtains a police clearance certificate from the potential employee and asks the potential employee to depose to an affidavit confirming that they have never been convicted of a sexual offence against a child.

CASE STUDY

THE CASE OF JULES HIGH SCHOOL AND THE TEDDY BEAR CLINIC FOR ABUSED CHILDREN & ANOTHER V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT & ANOTHER

Before 2013, the Sexual Offences Act criminalised sexual conduct between two consenting children under the age of 16. This meant that children could be prosecuted for having consensual sex under the age of 16, but also could be prosecuted for holding hands, hugging and kissing. If convicted, those children could be placed on the national register for sex offenders described on page 389, and would be restricted from working with children or adopting children in the future.

This was brought into the spotlight in 2010, when three children aged 14 to 16 from Jules High School in Gauteng were charged with 'consensual sexual penetration'. The sexual act was filmed on a cell-phone camera and widely distributed on the internet. At the time, the National Prosecuting Authority ordered the children to attend counselling at the Teddy Bear Clinic for Abused Children as a condition for the charges to be dropped. The young girl who had been involved in the sexual act committed suicide in 2014. Her family said it was because she had never recovered from the shame she'd experienced after the incident.

At the same time as the Jules High School case, in 2010, the Teddy Bear Clinic asked the Pretoria High Court to declare those sections of the Sexual Offences Act that criminalised sexual acts between consenting children to be inconsistent with the Constitution and invalid. The Pretoria High Court ruled in 2013 that those sections were unconstitutional, and sent the matter to the Constitutional Court for confirmation.

The Constitutional Court found that the sections infringed children's rights in Sections 10 (the right to dignity), 14 (the right to privacy) and 28(2) (that a child's best interests are of paramount importance) of the Constitution. It noted that a level of sexual activity is normal and healthy

in adolescents, and that criminalising that activity was not only unfair on adolescents but also dangerous, because it would be difficult for them to make informed and healthy sexual decisions.

When a person alleges that they have been the subject of a sexual offence, a criminal case must be opened against the alleged perpetrator. The South African Police Service (SAPS) is required to investigate any alleged sexual offence through their Family Violence, Child Protection and Sexual Offences Unit. The Unit is specially trained to handle cases involving children who are victims of sexual offences.

The Service Charter for Victims of Crime in South Africa, which tells the SAPS how they should assist people who are victims of crime, says that victims of sexual offences must be interviewed about the crime in private, and that government must ensure that the victim has access to the social, health and counselling services and legal assistance that they need.

If the police turn away a person who reports an offence, fail to take a claim seriously, or do not make the necessary arrangements for the victim to be given medical assistance, then the officer involved is guilty of professional misconduct in terms of the National Police Instruction on Sexual Offences.

Once a victim of sexual violence has opened a case, he or she is known as the 'complainant'. Their role in the criminal case is to be a witness for the State against the person accused of the crime. The State prosecutes crimes because a crime is seen as being committed not only against an individual but also against the whole of society. A prosecutor appointed by the State will argue in court for the perpetrator to be convicted of the alleged crime. The person presiding over the court will be a magistrate or a judge.

THE CHILDREN'S ACT, 2005 AND THE CHILDREN'S AMENDMENT ACT, 2007

The Children's Act gives content to and supplements the special rights of children in the Constitution. It binds natural and juristic persons, such as schools or state institutions. The Children's Act says that every decision regarding children must be made in the "best interests of the child". This includes the injunction at section 7(1) (i) that children must be protected from physical or psychological harm caused by "subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence".

The Children's Act codifies the common law principal of 'in loco parentis', which refers to a person who steps into the shoes of a child's parents for a specific purpose. It means that a person acting in loco parentis, such as a teacher, has a responsibility to "(a) safeguard the child's health, well-being and development; and (b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards".

This partly explains why even a consensual romantic or sexual relationship between a learner over the age of 16 and a teacher is still unlawful. A teacher is supposed to be behaving like the learner's parent and certainly not entering into any sexual relationship with them. A teacher bears responsibility for a learner in the same way that a parent bears responsibility for a child. Also, there is an unequal power relationship between teacher and learner. This makes it difficult for a relationship to ever truly be consensual. For example, a consensual relationship

adversely affects a learner because a teacher has the power to determine whether a learner passes school, and can also influence other teachers at school.

'In loco parentis' also gives teachers a responsibility to protect learners from being hurt by each other.

The Children's Act defines abuse as "sexually abusing a child or allowing a child to be sexually abused" and places a duty both to report a sexual assault by a teacher and to report a rape of a minor. This means that a teacher who knows a colleague is sexually abusing a learner can be held criminally liable for sexual abuse, because their failure to report means that they are implicated in allowing it to happen. The teacher must report the offence to SAPS and to the provincial Department of Social Development (DSD).

The Children's Act establishes the National Child Protection Register (Child Protection Register). This is separate from the Sex Offenders Register. The Child Protection Register contains two lists: Part A, which includes details of children who have been abused and/or neglected, to assist with giving those children special protection and preventing their further abuse and neglect; and Part B, which includes the details of adults who have been found to be unsuitable to work with children. A finding that a person is unsuitable to work with children can be made by a court or other forum, including for example disciplinary proceedings instituted against a teacher, or proceedings by SACE. Any person who has been convicted of murder or rape of, or assault with the intent to do grievous bodily harm to, a child, or of possessing child pornography or of human trafficking, is automatically deemed unsuitable to work with children under



According to the Children's Act Section 110(1), any person who on reasonable grounds believes that a child is in need of care and protection may file such a report.

section 118 of the Children's Act; and their name should be entered into Part B of the Child Protection Register. A court may also order that a person must be listed on Part B of the Child Protection Register, at its discretion. Section 123(1) (b) of the Children's Act provides that the people listed in Part B are not allowed to work with or have any access to children.

The Child Protection Register is private, but allows people in designated child protection organisations, as well as members of the police who work on child protection, to access the register. All institutions working with children should check this list before employing anyone. This information can be obtained by writing to the Director General of the DSD on a confidential basis. The Director General is required to respond in writing within 21 working days to indicate whether the person's name appears on Part B of the Child Protection Register. Alternatively, the employer can complete Form 29, which can be obtained from the DSD and sent back to them with the request for details completed. Contact details for the DSD are provided at the end of this handbook in the 'List of Organisations'.

THE SOUTH AFRICAN SCHOOLS ACT, 1996

The Schools Act gives content to the state's constitutional obligation to create a secure environment for learning.

Section 8 of the Schools Act requires a code of conduct for learners to be drawn up by the School Governing Body (SGB) to regulate behaviour and relationships in schools. This code of conduct should clearly indicate what steps are to be taken against a learner who commits a serious offence at school, such as any act of sexual violence. This is a separate punishment from any criminal sanction that may be imposed on the learner.

INTERNATIONAL LAW

South Africa has ratified a number of international law conventions that inform the state's duty to keep learners safe at school. The state is bound by its international law obligations, and courts must consider these in interpreting the Bill of Rights. The most important of these, in the context of sexual violence, are the following:

- The United Nations Convention on the Rights of the Child says

that states must protect children from all forms of sexual abuse.

- As we have discussed above, one of the best ways we can decrease incidents of sexual violence is to empower and strengthen vulnerable groups towards creating a more equal society. The state is also bound by the Convention on the Elimination of All Forms of Discrimination Against Women, which says states must take appropriate measures to change the way that society views and treats men and women and their perceived roles, so that all practices based on the idea of inferiority of women are eliminated.
- The Declaration on the Elimination of Violence against Women, in article 4(d), sets out states' obligations to eliminate all forms of violence against women over time through state policies and interventions, including the duty to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons".

IT IS A CRIME:

- For any person to force you to have sex with them
- For any person to force you to have sex with someone else
- For any person to force you to touch their body with any part of your body, including your hands and mouth
- For any person to force you to touch your body in a sexual manner
- For a person over the age of 18 to force a person under the age of 18 to watch them touch themselves or someone else in a sexual manner.

LAWS APPLICABLE TO VIOLENCE PERPETRATED BY TEACHERS AGAINST LEARNERS

DUTIES OF TEACHERS IN PRIVATE SCHOOLS

The Educators Act does not apply to independent schools. The Independent Schools Association of Southern Africa has a standard code of conduct that private schools may use if they wish, but generally the schools have their own policies that do not have the same force as national legislation. This means that there is no standard way that teachers who commit sexual violence are dealt with in independent schools. However, teachers at independent schools are still bound by the South African Council for Educators Act, criminal laws, the Children's Act and the Constitution. All of the obligations created in these laws still apply to independent schools, and teachers in independent schools must still be criminally charged if they have committed a sexual offence. Independent schools must still check whether a person's name appears on Part B of the Child Protection Register before employing them.

THE EMPLOYMENT OF EDUCATORS ACT, 1998

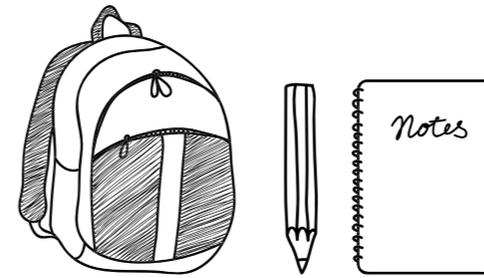
The Employment of Educators Act, 1998 ('the Educators Act') is a law developed to regulate the relationship between departments of education and the teachers they employ.

The Educators Act sets out disciplinary procedures to follow when a teacher in a public school commits an offence. Offences are separated into 'misconduct' and 'serious misconduct'.

If an allegation is made that a teacher in a public school has committed misconduct or serious misconduct, the head of the relevant provincial department of education or school principal should give written notice to the teacher of a disciplinary hearing. The hearing must be held no earlier than five days after delivery of the written notice and no later than ten days after.

If it is found in a disciplinary proceeding that a teacher has committed general misconduct, the employer can choose what sanction to impose, ranging from compulsory counselling to suspension and demotion. The employer, at their discretion, may dismiss a teacher who conducts themselves in an "improper, disgraceful or unacceptable manner", "displays disrespect towards others in the workplace" or "intimidates or victimises fellow employees, learners or students" (see Section 18(1) of the Educators Act). It should be noted that it is also general misconduct to commit a common law or statutory offence, including a breach of obligations in the Children's Act.

If it is necessary for a learner to give evidence against a teacher at a disciplinary hearing, and it is likely that giving evidence will be traumatic for



the learner, the presiding officer of the disciplinary hearing should appoint an intermediary through whom a learner can give evidence, in order to make the learner more comfortable with the process. The school should also consider engaging a social worker to counsel the child through the process, including sitting with them and the intermediary in the disciplinary proceedings.

If it is found in a disciplinary proceeding, after an investigation into the conduct, that a teacher has committed serious misconduct, the employer has no discretion as to what sanction to impose: the teacher must be dismissed. Serious misconduct includes sexual assault committed on a learner, student or other employee, having a sexual relationship with a learner of the school where the teacher is employed, and causing a learner or student to do either of these things (see Section 17(1) of the Educators Act).

Teachers have the right to appeal any finding or sanction, and the sanction may be suspended pending finalisation of an appeal. This means that a teacher may continue teaching at a school despite being found guilty of

a dismissible offence of sexual violence. If an appeal is not concluded within 45 days, the Labour Relations Act, 1995 says that the teacher, or a union on behalf of the teacher, may refer the dismissal to the Education Labour Relations Council for dispute resolution.

THE SOUTH AFRICAN COUNCIL FOR EDUCATORS ACT, 2000

The South African Council for Educators Act (SACE Act) requires SACE to compile a Code of Professional Ethics (Code of Ethics) for all teachers. A teacher may not be employed unless they are registered with SACE. The SACE Act sets out at Section 23(1) that a teacher may be removed from the SACE register of teachers if the Code of Ethics is breached. Any form of sexual misconduct is a breach of the Code of Ethics. This includes any form of sexual abuse, improper physical contact, sexual harassment and any consensual sexual relationship with a learner.

The SACE register should ensure that no teacher found guilty of a sexual offence in school can be employed by any other school.

RELEVANT ITEMS IN THE SACE CODE OF ETHICS

- 3.1: Teachers must respect the dignity and constitutional rights of learners.
- 3.5: Teachers must not humiliate or physically or psychologically abuse a learner.
- 3.6: Teachers must not have improper physical contact with learners.
- 3.7: Teachers must promote gender equality.
- 3.8: Teachers must not sexually harass learners in any form.
- 3.9: Teachers must take reasonable steps to ensure the safety of learners.
- 3.12: Teachers must not abuse their position of power.
- 7.2: Teachers must enhance the dignity and status of the teaching profession and not bring the profession into disrepute.



PROTOCOL FOR THE MANAGEMENT AND REPORTING OF SEXUAL ABUSE AND HARASSMENT IN SCHOOLS

Because of the high rates of sexual abuse and harassment perpetrated against learners and school staff in South Africa, the Department of Basic Education (DBE), after talking to stakeholders, put in place the 'Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools in 2019' ('the Sexual Abuse and Harassment Protocol').

The Sexual Abuse and Harassment Protocol recognises that acts of abuse and harassment targeting learners deprive them of their fundamental right to equality and dignity, education and access to a safe and healthy environment, as provided for in the Bill of Rights enshrined in the Constitution. Sexual violence at school affects the learning environment and carries long-term negative mental health and sexual health consequences for the victim.

The Sexual Abuse and Harassment Protocol provides a guide for the management and reporting of sexual abuse, ensuring an appropriate and timely

response to cases of sexual abuse and harassment perpetrated against learners and school staff. It responds to the need for a standard response to allegations by learners and school staff of incidents of sexual abuse and harassment, whether they are perpetrated by learners, teachers or by other persons, and covers anyone employed at a South African school.

The Sexual Abuse and Harassment Protocol explicitly provides for incidents of sexual abuse that may happen on or off school premises, during or out of school. In particular, it acknowledges that:

sexual abuse and/or harassment may occur on or off the school premises, during the school

term or during school holidays. The response to these incidents should be the same as it would be if the incident occurred at school and during school hours. Learners may disclose allegations of sexual abuse and/or harassment that have occurred in the past. Time elapsed between the incident occurring and disclosure is irrelevant. Disclosure of historical incidents whilst at school or not, should be responded to immediately. Appropriate actions and support processes, as outlined in this protocol, must still be undertaken in all such cases of reported sexual abuse and/or harassment.

The Sexual Abuse and Harassment Protocol sets out in detail roles and responsibilities for various actors.

ROLES AND RESPONSIBILITIES

NATIONAL DEPARTMENT OF BASIC EDUCATION

The DBE is tasked with:

- Ensuring that sexual abuse and/or harassment is reported and managed according to the Sexual Abuse and Harassment Protocol in all schools
- Receiving quarterly reports from SACE on disciplinary proceedings against teachers who have been deregistered as a result of being found guilty of sexual offences against children
- Receiving quarterly reports from the provincial education departments on teachers who have been found guilty of misconduct as prescribed by the Sexual Abuse and Harassment Protocol.

PROVINCIAL EDUCATION DEPARTMENTS

The provincial departments of education are tasked with:

- Helping district officials to understand the Sexual Abuse and Harassment Protocol so that they can implement it.
- Collaborating with the provincial departments of health in implementing, in accordance with the National Adolescent and Youth Health Policy 2017, school-based interventions, such as 24-hour post-abuse treatment for learners and school staff, including post-exposure prophylaxis for rape victims
- Imposing sanctions against teachers and other school staff guilty of sexual abuse or harassment based on the severity of the violations as provided for in Sections 17 and 18 of the Educators Act and as per the sanctions provided in the SACE Disciplinary Code and Procedures for Educators (Paragraphs 4 and 6) and Section 16a of the Public Service Act of 1994

- Collecting quarterly reports from districts on sexual abuse and harassment cases in schools, and collating and reporting the district reports to the national DBE on a quarterly basis.

DISTRICT OFFICES

The district offices of the departments of education are tasked with:

- Providing an annual district circular to all schools to inform educators, principals and SGBs of their obligation to act against sexual abuse and harassment, as well as clearly spelling out the sanctions that may be imposed against educators and other school staff who violate the prohibition in accordance with the SACE Code of Ethics and the Employment of Educators Act as well as against learners in accordance with the School Code of Conduct and the Protocol
- Facilitating campaigns raising awareness of sexual abuse and harassment and the importance of reporting
- Addressing grievances of family members who believe a school's management of an incident of sexual abuse or harassment has been unjust or inappropriate
- Recording all cases of sexual abuse and harassment and reporting on a quarterly basis to the relevant provincial education department
- Upon receipt of a reported incident involving an SGB employee, the responsible district must check and ensure the SGB followed the protocol of checking prospective employees against the Child Protection Register and Sex Offenders Register, and that teachers employed by the SGB are registered with SACE.

The District-Based Support Team (DBST) is tasked with:

- Reviewing the action plan of the educator and School-Based Support Teams (SBSTs)
- Rating the level of support needed

- and whether the support required by the victim is being provided.
- Putting further action plans together for the victim based on the information available.

Part of the DBST's mandate is to provide district psychosocial services. These services are set up to support and provide guidance to schools with regard to the procedures, protocols and processes involved in an alleged case of child abuse. They remind the principal or school of the various steps which need to be taken, ensuring that the legal requirements and consequences of each step are carefully considered.

The district psychosocial services must:

- Ensure that the matter is reported to all relevant institutions such as the Police, SACE and the DSD.
- Discuss with the school the need to support the learner, the alleged perpetrator (if a learner) and other affected persons.
- Determine if counselling support is appropriate or necessary. Counselling would be to assist those involved with trauma and stress, and would not be part of the investigation.
- Counsel the principal and teachers about the need for confidentiality, and discuss who else needs to be informed. This is to guard against rumour-mongering among staff and learners.
- Support the school, teachers and parent by clarifying processes and procedures that follow reporting
- Discuss with the school the possible symptoms and behaviours of victims of abuse
- Maintain a district register of reported cases and ensure that a district register of all reported cases and copies of Form 22 (used for the reporting of abuse) are available at district offices. Such records must be kept in a confidential restricted file. For more information on a Form 22, see Chapter 20 of this Handbook.

CIRCUIT MANAGER

The Circuit Manager must ensure that principals report incidents of sexual abuse and harassment, and facilitate engagement with parents or guardians and family when necessary. Where sexual abuse or harassment is reported to the Circuit Manager by the principal, the Circuit Manager will contact the District Director and District Office of the DSD. The Circuit Office is also required to keep records of all reported cases of sexual abuse and to liaise with the District Office in supporting principals or School Management Team (SMT) members in reporting serious cases to SAPS.

SCHOOLS

Within the school community, various groups or individuals have responsibilities in dealing with sexual abuse and harassment cases.

THE SCHOOL-BASED SUPPORT TEAMS (SBSTS)

The Protocol requires schools to establish a SBST in order to respond to cases of sexual violence. The SBST is also responsible for formulating a support plan when an incident is reported to them. The SBST is required to:

- Identify the range of support required, e.g. counselling services, court preparation, referral for removal to place of safety, legal representation, medical assistance, admission to rehabilitative programmes, and tracking of follow-up appointments
- Consult with district psychosocial services and other relevant experts for guidance with specific support programmes
- Assist the affected learners by communicating with support providers and other government departments

- Ensure the implementation of the support plan, and monitor and review the support plan.

THE PRINCIPAL

A principal of a school is required to:

- Ensure the SMT is aware of their duty of care to all learners in loco parentis, including the alleged victim, alleged perpetrator (if they are a learner) and any other learner who may have been indirectly affected by sexual abuse or harassment
- Report any incident or suspicion of sexual abuse and harassment within 24 hours to the police, DSD, relevant provincial department of education or SACE.
- Refer the victim immediately for psychosocial support if deemed appropriate by the principal
- Ensure school staff and learners are familiar with the Sexual Abuse and Harassment Protocol and make staff aware of their duty to report any incident or suspicion of sexual abuse or harassment affecting a learner, teacher or school staff
- In consultation with the SGB, revise, evaluate, implement and monitor the School Code of Conduct to ensure consistency with the Sexual Abuse and Harassment Protocol, and with Section 8(3) of the South African Schools Act.

SCHOOL GOVERNING BODIES (SGBS)

The SGB must ensure that:

- Prior to appointment, everyone employed at their school is screened. This includes SGB appointees, volunteers and individuals who

work indirectly with children, such as administrative, security and maintenance staff. The SGB must check whether applicants are listed on the Child Protection Register or the Sex Offenders Register. It must ensure that prospective teachers are registered with SACE. After someone is appointed, the SGB must check employees against these registers every second year

- The School Safety Committee (SSC) is familiar with the Sexual Abuse and Harassment Protocol and that the School Safety Policy, School Safety Plan, Emergency Plan, and Code of Conduct for learners are aligned with the Sexual Abuse and Harassment Protocol
- In consultation with the principal, the SGB must revise, implement and monitor the School Code of Conduct to ensure consistency with the Sexual Abuse and Harassment Protocol
- Parents and guardians have access to the Sexual Abuse and Harassment Protocol and are aware of their rights and responsibilities. It must make sure that parents and guardians know what to do when there is an incident of sexual violence.

THE SCHOOL MANAGEMENT TEAMS (SMTS)

The SMT is tasked with the following:

- All members of the SMT must be familiar with the contents of the Sexual Abuse and Harassment Protocol.
- Where a Representative Council for Learners (RCL) is in place, members must be familiarised with the content of the Sexual Abuse and Harassment Protocol.
- A member of the SMT must assist a person affected by sexual abuse and/

or harassment by referring them, if required, to the appropriate institutions that offer support, and provide ongoing monitoring and additional academic support

- A member of the SMT continues to support the persons involved in the following ways:
 - Managing the alleged offender in consultation with the circuit manager and/or the district DSD if necessary.
 - Regularly communicating with the parents and guardians where learners are involved, and providing them with the contact details of stakeholders involved in the process
 - Continuing to consult with the necessary authorities, including: the District Office of the relevant department of education, SAPS, the district DSD and SACE.

TEACHERS

Teachers are required to:

- Provide a safe and private space for learners to disclose the details of incidents, and to keep confidential any information shared with them
- Report any incident or suspected incident of sexual abuse and harassment to the principal or to a member of the SMT if the principal is the alleged offender
- Observe any changes in a learner's behaviour following a report and inform the principal (or member of the SMT) if necessary; and
- Ensure that the guidelines and procedures for the reporting of sexual offences are covered

within predetermined lessons and refresh learners' awareness of these procedures periodically.

REPORTING GUIDELINES

The Sexual Abuse and Harassment Protocol sets out in detail guidelines for the procedure to be followed once a case has been reported. While a learner, a parent or anyone else can report an incident verbally or in writing or both, the Principal or SGB or whoever the report is made to must provide a written report to the circuit manager. The person to whom a report is made is not allowed to question or to verify the truthfulness of the allegations when they are reported. Their job is just to listen and note the allegations and report them. The report must be done with care, sensitivity and confidentiality. This will ensure that the learner victims are protected from additional and unnecessary emotional trauma.

The person to whom the incident was reported (principal, grade head, member of the School Management Team, teacher or circuit manager) must then follow the reporting procedures. This includes informing the School-Based Support Team and reporting to the circuit manager, the DSD, the school's governing body and the Police.

DISCIPLINARY PROCEDURES FOR FAILURE TO ADHERE TO THE PROTOCOL

Anyone – including teachers, principals, SGB and SMT members, and other school staff – who does not adhere to the Sexual Abuse and Harassment Protocol can have disciplinary action taken against them.

WHAT ABOUT IF THE PERPETRATOR IS ANOTHER LEARNER?

The Children's Act tells us that teachers are required to protect learners against the perpetration of sexual offences by anyone, including other teachers, private individuals and other learners. Teachers will be held liable for a failure to take appropriate action, as the case of Hyde Park High demonstrates:

In 2015, a 15-year-old learner, CF, at Hyde Park alerted her teacher to harassment by an older learner, BK, at the school; but the teacher did not provide adequate support or protection to the learner. BK then sexually assaulted and attempted to rape CF. CF told teachers and the principal at the school, but they did not inform the police, a child protection organisation or the DSD. CF got legal assistance from the Centre for Applied Legal Studies and brought the matter to the attention of the Gauteng Department of Education (GDoE), instituted a civil case against the school and teachers, and instituted criminal proceedings. BK was convicted of attempted rape. The principal was found guilty of misconduct and was fined one month's salary by the GDoE. The civil case is ongoing.

THE PROBLEM WITH ALL THESE LAWS

As you can see, there are many different laws that regulate different parts of sexual violence in schools. The Sexual Abuse and Harassment Protocol is meant to consolidate the different laws into an easy-to-understand guide for all school stakeholders.

Despite the Sexual Abuse and Harassment Protocol, there are still serious problems with coordination between the different systems put in place to protect learners and punish abusive teachers.

An example of this is in the Sekwati Primary School rape case.

In 2015, a 12-year-old learner, BM, was raped at gunpoint by a gardener on the school premises. BM only disclosed the rape four days after it had occurred. Upon being told of the rape, the mother immediately reported the rape to the principal, the SGB, the District Office of the relevant department of education and SAPS.

In this case, all of the systems in place to protect learners failed. The conduct of the various role players demonstrated a serious lack of knowledge on how to respond to these cases:

- The principal refused to take any steps against the gardener, and informed BM's mother that she must take whatever action she deemed necessary.

- The SGB did not respond to the complaint raised against the gardener.
- The District Office undertook to investigate. The mother had to follow up multiple times. Ultimately, the District Office stated that because the gardener was employed by the SGB, only the SGB could take disciplinary steps against him.
- SAPS stated that, because the learner had bathed and a number of days had passed between the rape and reporting it, a case could not be opened, as there was no evidence of the rape. The SAPS officer opted to accompany the learner and her mother to the gardener, facilitated an apology, and warned the gardener not to rape any more learners.

In 2016, the gardener sexually assaulted BM's younger sister, KBM. KBM was nine years old and at the same school. Again, the mother reported the sexual assault to the principal, who took no action.



After receiving threats from the gardener, the mother obtained a protection order against him. The gardener twice violated the order by threatening the learner and attempting to burn down the family's home. Both these violations were reported to SAPS. However, the gardener remains on the school premises with access to primary school learners.

Furthermore, no proper counselling services have been provided to BM and her family, despite repeated requests to the DSD.

This example demonstrates the ineffectiveness of the system put in place to protect and support victims of sexual violence. There remains a huge difference between what is required on paper and the lived experiences of victims.

A further complication is that principals are not required to report to the department of education and SACE at the same time as they report to the police. This means that three different processes may all start at different times and that SACE may not even hear about an incident at all.

As you will have seen from earlier in the chapter, there are also two separate registers for sex offenders. One is established through Chapter 6 of the Sexual Offences Act and the other through Chapter 7, Part 2 of the Children's Act.

- The Sex Offenders Register, established through the Sexual Offences Act, sets out people who have been convicted of a sexual offence against a child or person with a mental disability.

The purpose of this register is to prevent those convicted of such an offence from being employed to work with children in the future.

- The Child Protection Register, established through the Children's Act, also sets out in Part B of this register the names of people unsuitable to work with children. This includes a much broader range of people who cannot work with children but appears to apply to fewer institutions than the Sex Offenders Register. This may cause situations where names appear on one list only, and where certain employers need to consult both lists, and others only need to consult the Sex Offenders Register.

While the above discrepancies are very serious, the most serious problem perhaps is that principals, teachers and others often fail to follow the procedures designed for assisting learners who have been exposed to sexual violence in any form. Even if these systems exist, it is then hard for learners to trust that they will be supported and protected. This in turn makes it even less likely that learners will report the staff member or learner who hurt them.

However, in the case of CS and Another v Swanepoel and Other, the Cape Town High Court reaffirmed that teachers have a duty to protect children from sexual assault and molestation. The case arose after the plaintiff, then aged 12, was sexually assaulted by her teacher

(defendant) at her school premises. After an initial disciplinary hearing whereby the presiding officer found that the case against the defendant had not been proved on a balance of probabilities, the plaintiff's mother instituted an action of damages against the defendant, the Western Cape MEC for Education, and the school. The judgment, delivered on 17 March 2022, found that the WCED failed to discharge its duty to protect the plaintiff, as the WCED had failed to vet the teacher before employing him, leading to the department negligently overlooking the fact that the teacher had previously been found guilty of indecent assault against a minor. The WCED was therefore found jointly and severally liable with the teacher for damages.

These kind of systemic issues can only be properly fixed with better alignment between the South African Council for Educators, the DBE and the criminal justice system, but it helps for learners to know their rights and to know the process that should be followed after sexual violence is committed.

A learner usually doesn't need legal representation to follow these steps, but they are much more likely to be able to follow each step properly if they have help from an adult they trust.

We set out the steps below and list organisations that can be contacted for further assistance, legal or otherwise, at the end of this chapter as well as in the 'List of Organisations' at the end of the handbook.

HOW PRINCIPALS CAN HELP

The more time the different processes take, the more the learner will be re-traumatised by what has happened to them. Principals can help by reporting to the DBE, SACE and the police as soon as they find out about the sexual violence. They can use the mechanisms described in this chapter to suspend the teacher for the course of the investigation and assist the learner to move schools if necessary. Teachers and principals should also speak regularly to learners about their rights over their bodies, and the remedies if those rights are violated. Principals can ensure that sexual education in their school is given in an open and honest manner.

USEFUL READING

We rely heavily in this section on an illustrated handbook compiled by the Centre for Applied Legal Studies, Lawyers against Abuse, and SECTION27, titled 'My teacher hurt me, what should I do?' The handbook is illustrated and very accessible for learners, and available in isiZulu, Sepedi, English, Xitsonga and Braille. You can access a copy through SECTION27, whose contact details are listed at the end of this book.

WHAT IF YOU FIND OUT THAT YOU ARE PREGNANT?

- Speak to your trusted person about your options. If you decide to keep the baby, there are people and organisations that can support you and help you to finish your studies
- If you feel that you cannot or do not want to keep the baby, speak to the nurse or doctor about adoption or abortion
- If you are less than 12 weeks pregnant, you automatically have the right to an abortion
- If you are more than 12 weeks pregnant but the pregnancy came about because you were raped, you still have the right to an abortion up to 20 weeks
- You do not need your parents' consent to have an abortion, but it is a good idea to discuss your options first with a counsellor or an adult you trust.

WHAT TO DO IF YOU ARE (OR YOU KNOW A LEARNER WHO IS) A VICTIM OF SEXUAL VIOLENCE IN A SCHOOL

1. ASK SOMEONE FOR HELP

If you have been harassed, sexually assaulted or raped, try to find a reliable person who you can be honest with to help you through the process.

2. IF YOU HAVE BEEN RAPED OR SEXUALLY ASSAULTED

A. KEEP THE EVIDENCE

If you have been raped or sexually assaulted, you should try not to change your clothes, bath or shower before you have been to the hospital. Take a change of clothes with you to the hospital if you can. Whatever you do, do not put your clothes into a plastic bag, because the plastic can ruin the evidence. The evidence is very important in prosecuting the person who hurt you, especially when there is no one who witnessed what happened.

B. GO TO THE HOSPITAL

If you have been physically hurt by sexual violence in any way, you should go to a hospital as soon as you can. A doctor should give you all of the medical care you need to make sure you heal quickly. If you have been raped, you should do everything you can to get to a hospital within 72 hours (three days). If you go within three days, a doctor can give you the morning-after pill to prevent possible pregnancy, and post-exposure prophylaxis (PEP) medication to prevent you from being infected with HIV. You do not need your parents' permission to receive this medication. The sooner you can get to the doctor, the better. Even if you can't get to a hospital within 72 hours, you should try to get there as soon as you can for a doctor to do a full examination and give you any medication you may need.



It is also important to have the doctor inspect wounds that have been inflicted on you for collecting evidence if you decide to take action against the perpetrator. The doctor may ask some uncomfortable questions, and will need to examine your vagina or anus. You should be honest with the doctor and the doctor should make you feel comfortable. The doctor cannot perform any tests or examine you in any way without your explicit permission.

The doctor should be able to get a J88 form from the hospital, which is a form that records the evidence they have collected. If they don't have the form, they still need to examine you and give you whatever medical attention and medication you need.

C. GO TO THE POLICE

Many people in South Africa do not trust the police and do not trust that the police will assist them. A survey from 2015 showed that 83% of South Africans believe that the police are corrupt. This is particularly difficult when dealing with personal crimes such as sexual violence. Victims feel uncomfortable even speaking to people that they know and trust about sexual violence, and usually feel very uncomfortable reporting cases to the police. Take your trusted person with you to

speak to the police if you can. If you would feel more comfortable speaking with a female police officer, you have the right to do so. The police should take you to a separate room so that you can tell them what happened privately, but your person can stay with you while you speak to the police.

You can attend any police station that you choose. The police must open a docket and take your statement. Your statement should include everything you remember about the person who abused you and the events leading up to the abuse. The police will help you to write down your statement and must read it back to you. You must be completely happy with the contents of your statement before you sign it. If there is something that you are not completely sure about, you can ask the police to remove it or change it.

You should ask the police officer assisting you for the following information:

- The CAS number for your case
- A copy of the statement you made
- The phone number of the police station
- The name and phone number of the police officer in charge of investigating your case. You may only be able to get this the next day.

D. GOING TO COURT

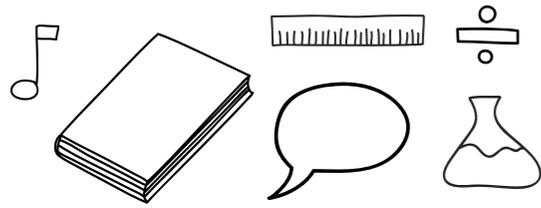
If a learner has opened a criminal case with the police, the police will investigate the case and give all the information to a prosecutor. This can sometimes take a long time, and the learner has the right to call the investigating officer to get updates on their case in the course of the investigation.

A child should always give their evidence through an intermediary, in a separate room away from the court. Even if the learner is over 18, the prosecutor can motivate for an intermediary if the learner is too traumatised to give evidence in court.

3. GETTING A PROTECTION ORDER

If a learner is being harassed or abused by their teacher or another learner, they may apply for a protection order through the Protection from Harassment Act, 2011.

Remember that harassment is when a person persistently makes you feel uncomfortable when they know, or should know, that they are making you uncomfortable. Sexual harassment is when the attention the person is giving you is of a sexual nature, for example when a person makes jokes about your breasts or bottom. The Protection from Harassment Act gives the courts power to make orders saying a person has to stop harassing you. If the



person continues to harass you after the order has been made, you must notify the police and they will arrest that person.

Sometimes a learner will need stronger protection than offered in the Protection from Harassment Act. If a learner is sexually violated by their teacher, they can apply for a protection order through the Domestic Violence Act, 1998. Although this is usually only used for protection against family members, because of the 'in loco parentis' relationship between a teacher and learner it has been found to also apply to teachers. You can apply for a protection order through the Domestic Violence Act if you have been sexually abused, including emotional, verbal and psychological abuse, harassment or stalking.

A protection order through the Domestic Violence Act not only sets out what conduct a person harassing or abusing you should stop doing, but also limits where that person is allowed to go in relation to you. For example, it can say that a teacher is not allowed to come within a certain distance of your house. If you live with the person abusing you, it can even say that the person is not allowed into your shared house at all. The content will depend on what the court decides is appropriate and necessary in the circumstances.

In both types of protection orders, you will be given an interim order first. This means that the court will make an order saying that the person making you uncomfortable must stay away from you while the court considers whether to give you a permanent protection order. You must be sure to always keep copies of the interim and final order safe, and to take these documents with you to the police

station if the person continues to harass or abuse you or does anything they are not allowed to do in terms of the order.

You should not need a legal representative for this process. The clerk of the court must assist you with completing your application for a protection order. You can go to the nearest magistrate's court to your home and ask to speak to the clerk of the court.

4. REPORT TO THE DEPARTMENT OF EDUCATION

If the violence was perpetrated by a learner, the school should follow the steps set out in their code of conduct for disciplining the learner. They must contact the local police station to report a crime if the act is a criminal offence and if it has not been previously reported.

If the violence was perpetrated by a teacher, the teacher must also be disciplined by their employer, which is either the provincial department of education or the school governing body. As described above, this is separate from the SACE process and any criminal process already underway, but the relevant provincial department should also ensure that the police and SACE are aware of any process they are undertaking.

A person who has been abused by an ordinary teacher should report them to the school principal. If the principal is the perpetrator of the abuse or if the principal does not report the abuse to the provincial department soon, you or your family can write directly to the provincial department.

The provincial department must investigate the matter and may suspend the teacher while they are doing so.

For more information on this, please see the section on the Employment of Educators Act under 'Laws Applicable to Violence Perpetrated by Teachers against Learners' on page 406 above.

5. MOVING SCHOOLS

Once an incident of sexual violence has been reported to the provincial department of education, a motivation can be made to the department in question to move schools. This can help sometimes if a learner is finding it difficult to learn in the space where they were sexually violated. The learner or their parents should write to the provincial department requesting a transfer and setting out the reasons why they need to move schools. If the learner lives more than five kilometres away from the new school and doesn't have transport to get to the school, the new school principal must try to arrange transport for the learner by writing to the District Office of the provincial department of education.

6. GETTING COUNSELLING

As discussed above, sexual violence affects different people in different ways. It will often make people unable to concentrate, sleep, or function normally in the ways they used to. Any person who is sexually violated should try to get counselling. This is sometimes available through schools, but may otherwise be accessed through free counselling services such as Childline. The number for Childline is 08000 55 555. Counsellors will help you to deal with what happened to you, and must keep all the information you give them confidential.

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Constitution of the Republic of South Africa, 1996.

Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007.

Criminal Procedure Act 51 of 1977.

Department of Basic Education, 'Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools', 2019.

Department of Health 'National Adolescent and Youth Health Policy', 2017.

Department of Justice and Constitutional Development 'Service Charter for Victims of Crime in South Africa' 2004.

Domestic Violence Act 116 of 1998.

Employment of Educators Act 76 of 1998.

GBVF Steering Committee 'National Strategic Plan on Gender-Based Violence and Femicide', 2020.

Labour Relations Act 66 of 1995.

National Education Policy Act 27 of 1996.

Protection from Harassment Act 17 of 2011.

South African Council for Educators Act 31 of 2000.

South African Council for Educators, 'Code of Professional Ethics'.

South African Council for Educators (SACE), 'How to Lodge a Complaint'.

South African Schools Act 84 of 1996.

INTERNATIONAL AND REGIONAL INSTRUMENTS

Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1979.

Convention on the Rights of the Child (CRC), 1989.

FURTHER READING

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