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THE DISMISSAL OF PUBLIC-SCHOOL EDUCATORS ON THE GROUNDS OF SEXUAL ABUSE OF CHILDREN: AN APPRAISAL OF SECTION 188A OF THE LABOUR RELATIONS ACT 66 OF 1995

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Submitted in fulfilment of the requirements for the LLD degree

FACULTY OF LAW

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Supervisor: Prof BPS van Eck

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SUMMARY

This doctor of laws (LLD) thesis examines the effectiveness of section 188A of the Labour Relations Act 1995 in handling dismissal disputes of educators charged with child sexual abuse in public schools in South Africa. The thesis acknowledges the development of labour dispute jurisprudence in the country which was galvanised by the constitutional dispensation in 1994. On attaining independence from a past riddled with apartheid policies and oppression, South Africa took a new direction and set itself a goal to develop democratic systems and institutions, including those related to labour dispute resolution. The Constitution of the Republic of South Africa recognised rights such as that of employees not to be subjected to unfair labour practices and the right to form and participate in trade unions. This development was bolstered by the enactment of several statutes, including the Basic Conditions of Employment Act, the Employment Equity Act, and the Labour Relations Act. Within the architecture of the LRA, the legislature provided specialised institutions and processes termed the “one-stop shop” for resolving labour disputes effectively. This provision included the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Courts, supported by bargaining councils.

This thesis acknowledges the subtle prevalence of child sexual abuse in schools perpetrated by teachers as a besetting problem affecting children, parents, families and the community. There are international instruments applicable in South Africa that prohibit child sexual abuse against children such as the United Nations Convention on the Rights of the Child and the regional one called the African Charter on the Rights and Welfare of the Child as well as the domestic laws including the Constitution of the Republic of South Africa, 1996 which are explored in Chapter 2 of this thesis. These laws prohibit the sexual abuse and exploitation of children or anyone below the age of 18 years of age. The application of these laws has still not deterred errant educators from committing acts of child sexual abuse against children, which peaked during the global COVID-19 pandemic.

South Africa also has various statutes applicable within the school sector such as the Children’s Act, the Schools Act, the Educators Act, the South African Council for Educators Act, and the Electronic Transactions and Communications Act that are all designed to both protect children from child sexual abuse, uphold the rights to dignity and basic education, and at the same time protect teachers against unfair labour practices and unfair dismissal. Implementing these statutes has neither stopped educators from sexually abusing schoolchildren nor protected some accused educators against unfair labour practices and

unfair dismissals. As a result, the public-school sector decided to apply an innovative approach to dealing with child sexual abuse disputes against educators. This novel approach was inserted into the LRA as section 188A, termed a pre-dismissal arbitration, and renamed an inquiry by an arbitrator in 2014. For the sake of brevity, this thesis refers to section 188A of the Labour Relations Act 66 of 1995 simply as "section 188A". The idea behind section 188A was to reduce the number of forums which prevailed until then, where children would have to endure the ordeal of testifying several times. This is a "one-stop shop" for conducting disciplinary proceedings against teachers charged with child sexual abuse. This dispensation eliminates a disciplinary hearing and possible appeal and adopts an arbitration proceeding under the auspices of the CCMA or an accredited bargaining council. In the public-school sector, this responsibility was placed on the Education Labour Relations Council (ELRC) through Collective Agreement No. 3 of 2018 (the "ELRC Collective Agreement"). Whether this move was a panacea for resolving the problem of child sexual abuse perpetrated by educators in SA is the main problem and the golden thread of this thesis.

Though offering a promise of resolving the problem and presenting the public-school sector with many advances, this thesis ascertained that its reliance on section 188A is bedevilled by many problems that impede its success.

Apart from the problems already facing the public-school sector, such as acute fragmentation because multiple authorities exercise concurrent jurisdiction over the management of educator discipline, further challenges related to the application of innovation undermine its effectiveness.

The main advantages revealed by Chapter 6 of this thesis include reducing the multiplicity of forums that conduct disciplinary inquiries into teachers' misconduct as well as the related reductions in cost. From a psychosocial standpoint, using section 188A also reduces the chances of secondary trauma that schoolchildren may have to suffer by testifying in multiple forums and facing their possible sexual abuser.

At the same time, this thesis observes that the ELRC faces challenges such as the lack of appropriate venues with circuit television among other requirements and suitable for conducting arbitration proceedings. The ELRC relies on borrowed premises at the magistrates' courts throughout South Africa which lack security of tenure and predictability. The other challenge relates to litigants' using lawyers in the arbitration proceedings, turning them into pseudo-court proceedings often riddled with technicalities, costs in time and expenses, and multiple postponements. Some postponements are often counterproductive

because they lead to the disappearance of child witnesses as they graduate from the school system at the end of their secondary school period, whether in Grade 11 or 12. The processes depend on evidence which much of the time is derived from testimonies of victims and witnesses of child sexual abuse. The ELRC is also faced with the prospect of appointing sub-par commissioners to preside over cases, leading to new proceedings from the beginning under a different commissioner or to further court litigation.

Nor has the employer of educators helped the section 188 proceedings. Problematically, the employer has sometimes misclassified cases, with sexual assault being classified as assault and vice versa. The employer has also been reluctant to use the section 188A process although party to a collective agreement requiring all child sexual abuse cases against teachers in public schools to be processed according to section 188A. Several cases have been processed through internal hearings since the ELRC Collective Agreement consenting to the use of the section 188A process was signed on 25 September 2018.

This is an indictment of the legislative provision intended to safeguard the best interests of schoolchildren and the labour rights of teachers. Further problems critical to the process include the employer's failure to conduct proper investigations to ensure that cases are ripe for prosecution when they appear before the ELRC arbitrator, the failure to present closing arguments at such proceedings, the failure to prove cases, and the failure to secure witnesses.

The South African legislature has also exacerbated the problem by enacting parallel legislation providing for the employment of educators by the employer in terms of the Educators Act and then other educators employed by school governing bodies in terms of the Schools Act. The SGB educators are not covered by the ELRC Collective Agreement, so the ELRC lacks jurisdiction to preside over their cases when they commit child sexual abuse. This situation creates unnecessary confusion and disparities requiring a remedy to provide a single unified system for employing educators.

Despite the promise of ending multiple forums through the section 188A process, the presence of the South African Council for Educators adds another layer of complexity to the whole system, which negates its importance. Employers' decisions to dismiss educators for child sexual abuse are supposed to be reported to the regulator of teachers who may remove their licence to teach. The architecture of the South African Council for Educators Act requires the Council to note the report from the employer but not rely on it to charge a teacher for a breach of professional ethics. The Council for Educators must conduct its independent investigation,

hearings and appeals on these educators reported to them by the employer because of dismissal for child sexual abuse.

Section 15(2) of the Educators Act considers a teacher whose licence to teach has been withdrawn by the Council for Educators to have resigned, which has the effect of closing his access to the LRA dispute resolution processes. This step forces teachers to pursue civil litigation in the High Courts and Supreme Court of Appeal to insist upon their rights. The parallel educator disciplinary processes by the employer and the Council for Educators still pose the risk of subjecting children to multiple forums and attendant susceptibility to secondary trauma through multiple testimonies.

This thesis also conducts a comparative examination of the systems in Nigeria and England for dealing with educator dismissal disputes for child sexual abuse cases. This examination revealed several lessons which might be useful for successfully dealing with child sexual abuse in South Africa. Chiefly, both countries suffer the scourge of child sexual abuse by teachers but have a unified system for dealing with child sexual abuse cases and safeguarding the labour rights of teachers. England, in particular, took drastic measures to create a unified system by dissolving the General Teaching Council for England in 2012, as its commission of inquiry revealed that the GTCE created unnecessary problems of bureaucratic inefficiencies, duplication, and a financial burden on teachers through subscriptions to fund its existence. Now England has a united system and process for dealing with child sexual abuse cases against educators. Nigeria has a Teacher Registration Council of Nigeria with a diverse council running its affairs, unlike South Africa, whose council is dominated by teacher unions.

The South African position is problematic, because it is dominated by teacher unions constituting 18 members out of 30 council members whose vote is determined by the ELRC. This position places the risk of union goals dominating the agenda over professional regulatory goals, leading to polarisation. The teachers and students do not also help with the effectiveness of the section 188A process in child sexual abuse cases. Errant educators use bribes, invoking the African cultural practice of offering to pay damages when they have impregnated schoolchildren to evade prosecution. In worst-case scenarios, they bribe parents and guardians from poor backgrounds, who then withhold the consent of children to testify in proceedings against them. Some children both in England and South Africa also frame educators with false accusations or become untruthful in disciplinary proceedings, and potential child sexual abusers thus go unpunished and are retained in the school system.

This thesis concluded that the section 188A process in South Africa offers several benefits but is hampered by the negligence of the employer of educators in prosecuting cases and managing educators. The thesis also makes several recommendations for legislative reforms. For example, taking a cue from England, South Africa should abolish multiple authorities over educators. Moreover, prompt prosecution requires Parliament to exercise oversight over entities such as the employer of educators and the South African Council for Educators. These measures, among others set out in Chapter 8 of this thesis, require urgent attention to safeguard children's rights to protection from sexual abuse, protection of their dignity and their unqualified right to basic education, while also safeguarding teachers' rights.

TABLE OF ABBREVIATIONS

1959 Declaration	United Nations Declaration of the Rights of the Child (1959)
ACAS	Advisory, Conciliation and Arbitration Service
ACAS code	Advisory, Conciliation and Arbitration Service Code of Practice on Disciplinary and Grievance Procedures
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC / African Children's Charter	African Charter on the Rights and Welfare of the Child (1990)
ADR	Alternative dispute resolution
AU	African Union
BC	Bargaining council
BCEA	Basic Conditions of Employment Act 75 of 1997
BELA Act	Basic Education Laws Amendment Act 15 of 2011
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEO	Chief executive officer
CET Act	Continuing Education and Training Act 16 of 2006
Children's Act	Children's Act 38 of 2005
Collective Agreement / ELRC Collective Agreement	The Education Labour Relations Council Collective Agreement No. 3 of 2018
Constitution, 1996	The Constitution of the Republic of South Africa, 1996
COSATU	Congress of South African Trade Unions
COVID-19	Coronavirus disease 2019
CRA	Child's Rights Act, 2003 (Act No. 26 of 2003)
CRC	United Nations Convention on the Rights of the Child (1989)
CSA	Child sexual abuse
DBE	Department of Basic Education
DBS	Disclosure and Barring Service
DfE	Department for Education
DHET	Department of Higher Education and Training
Disciplinary Code and Procedures for Educators	Schedule 2 to the Employment of Educators Act 76 of 1998, "Disciplinary Code and Procedures for Educators"
DOE	Department of Education
DSD	Department of Social Development
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights; Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)
ECTA	Electronic Communication and Transactions Act 25 of 2002
Educators Act	Employment of Educators Act 76 of 1998
Educators Code of Professional Ethics	SACE Code of Professional Ethics for Educators
ELRC	Education Labour Relations Council
ELRC Constitution	Education Labour Relations Council Collective Agreement No. 1 of 2006

ELRC new constitution	Education Labour Relations Council Collective Agreement No. 6 of 2016
ET	Employment Tribunal
Explanatory Memorandum 2011	Explanatory Memorandum to the Education Act 2011 (Abolition of The GTCE Consequential Amendments and Revocations) Order 2012 No. 1153
Explanatory Memorandum LRAB 2010	Explanatory Memorandum Labour Relations Amendment Bill, 2010
EYTS	Early Years Teacher Status
FCTA	Federal Capital Territory Administration
FE	Further Education
FEDSAS	Federation of Governing Bodies of South African Schools
FET	Further Education and Training
FOSATU	Federation of South African Trade Unions
FTE	Full-Time Equivalent
GBV	Gender-based violence
GCSE	General Certificate of Secondary Education
Geneva Declaration / 1924 Declaration of the Rights of the Child	League of Nations Declaration of Geneva on Children's Rights (1924)
GPSSBC	General Public Service Sectoral Bargaining Council
GTCE	General Teaching Council for England
HC	High Court
HE	Higher Education
HOD	Head of Department
HOSPERSA	Health & Other Services Personnel Trade Union of South Africa
ICCPR	United Nations International Covenant on Civil and Political Rights (1966)
ICESCR	United Nations International Covenant on Economic and Social and Cultural Rights (1966)
ICRC	International Committee of the Red Cross
ICT	Information and Communication Technology
IIEP-UNESCO	International Institute for Educational Planning, in United Nations Educational, Scientific and Cultural Organisation
ILO	International Labour Organisation
ILO Convention 158 of 1958	Termination of Employment Convention, 1982 (No. 158)
IPO	Interim Prohibition Order
ITT	Independent task team
Labour Act, 2004	Labour Act Cap L1 LFN 2004
LEA	Local Education Authority
LRA	Labour Relations Act 66 of 1995
MCPD	Mandatory Continuing Professional Development
MEC	Member of the Executive Council
NAPTOSA	National Professional Teachers' Organisation of South Africa
NATU	National Teachers' Union
NEHAWU	National Education Health and Allied Workers Union
NEMIS	Nigeria Education Management Information System
NGO	Non-government organisation
NIA	National Intelligence Agencies

NIC	National Industrial Court
NJPT	*Nigerian Journal of Professional Teachers*
NPE	National Policy on Education
NSPCC	National Society for the Prevention of Cruelty to Children
OAU	Organisation of African Unity
Ofsted	Office for Standards in Education, Children's Services and Skills
OTT	Overseas Trained Teacher
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PAM	Personnel Administrative Measures
PCP	Professional Conduct Panel
PDE	Provincial Department of Education
PEDs	Provincial education departments
PEPUDA / Equality Act	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
PEU	Professional Educators' Union
PHSDSBC	Public Health and Social Development Sectoral Bargaining Council
PHWSBC	Public Health and Welfare Sectoral Bargaining Council
PMO	Programme Management Office
POPIA	Protection of Personal Information Act 4 of 2013
PRU	Pupil Referral Unit
PSA /	Public Service Act 103 of 1994 / Public Servants Association of South Africa
PSCBC	Public Service Co-ordinating Bargaining Council
QTS	Qualified Teacher Status
SACE	South African Council for Educators
SACE Act	South African Council for Educators Act 31 of 2000
SADTU	South African Democratic Teachers Union
SAHRC	SA Human Rights Commission
SAMWU	South African Municipal Workers' Union
SAOU	South African Teachers' Union
SAPS	South African Police Service
SASS	South African Secret Services
SCA	Supreme Court of Appeal
Schools Act	South African Schools Act 84 of 1996
SDR	Selected Dispute Resolution
Section 188A	Section 188A of the Labour Relations Act 66 of 1995
Sexual Offences Act	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
SGB	School Governing Body
SMT	Senior Management Team
SSSBC	Safety and Security Sectoral Bargaining Council
TCC	Teachers Code of Conduct
TDC	Teachers Disciplinary Committee
Teachers Disciplinary Regulations 2012	Teachers' Disciplinary (England) Regulations 2012
TIP	Teachers Investigation Panel
TMU	Teacher Misconduct Unit

TQU	Teaching Qualification Unit
TRA	Teaching Regulation Agency
TRCN	Teachers Registration Council of Nigeria
TRCN Act	Teacher Registration Council of Nigeria Act No. 31 of 1993, now the Teachers Registration Council of Nigeria Act, CAP T3, 2004
UBE	Universal Basic Education
UDHR	United Nations Declaration of Human Rights (1948)
UK	The United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations Children's Fund
US	United States
USA	The United States of America
VAPP Act	Violence Against Persons (Prohibition) Act, 2015
Z83 form / Z83 Application for Employment	The "Application for Employment" form used by job seekers to apply for government vacancies in South Africa.

PUBLICATIONS AND CONFERENCE CONTRIBUTIONS RELEVANT TO THESIS

Articles

Bushe B and Van Eck BPS "Challenges Regarding the Maintenance of Discipline and Effective Dispute Resolution within the Public-School Sector: A Case Thesis of the Grey College Matter" (ILERA Pretoria 2024)

Conference Contributions

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Bushe B and Van Eck BPS "Navigating the Complexity around Securing Parental Consent for Children to Testify in Child Sexual Abuse Misconduct Cases against Educators" (SAELA 28th Annual International Education Law Conference: 4 – 7 August 2024. Balalaika Protea Hotel. Sandton, South Africa)

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TABLE OF CONTENTS

DECLARATION ... **ii**
TURNITIN RECEIPT ... **iv**
SUMMARY ... **v**
TABLE OF ABBREVIATIONS ... **x**
PUBLICATIONS AND CONFERENCE CONTRIBUTIONS RELEVANT TO THESIS ... **xiv**
ACKNOWLEDGEMENTS ... **xv**
TABLE OF CONTENTS ... **xvi**
Chapter 1: General Introduction ... **1**
1.1 Background and Context ... 2
1.2 An Effective Educator Dismissal Dispute Resolution System ... 2
1.3 Problem Statement ... 7
1.3.1 Prevalence of Sexual Misconduct in Public Schools ... 7
1.3.2 Overview of Section 188A in Educator Dismissal ... 10
1.3.3 Just Cause and Due Process ... 12
1.3.3.1 Withdrawal of a Teaching Licence ... 13
1.3.4 Key Legislation ... 13
1.3.4.1 The Educators Act ... 15
1.3.4.2 The Schools Act ... 16
1.3.4.3 The LRA ... 16
1.3.4.4 The SACE Act ... 17
1.3.4.5 Other Legislation ... 17
1.3.4.6 The Protection of Personal Information Act ... 18
1.3.5 Role-players ... 19
1.3.6 The Status of Educator Dismissal Actions for Sexual Misconduct ... 20
1.4 Hypothesis and Delimitation of the Thesis ... 21
1.4.1 Hypothesis ... 21
1.4.2 Delimitation ... 22
1.5 Research Questions and Aims ... 23
1.6 Significance of the Thesis ... 24
1.7 Methodology ... 24
1.7.1 Overview of Sources ... 24
1.7.2 Combined Approaches to Legal Analysis ... 25
1.8 Rationale for Comparative Analysis ... 26
1.8.1 The Choice of Nigeria as a Comparator ... 26
1.8.2 The Choice of England as a Comparator ... 27
1.9 Brief Outline of the Thesis ... 28
Chapter 2: International Norms and Constitutional Perspective ... **31**
2.1 Introduction ... 32
2.2 Evolving Legal Perspectives on Safeguarding Children's Rights Globally and in Africa ... 33
2.2.1 The Transition from a Needs-Based Approach to a Rights-Based Approach to Childhood and Children's Rights ... 33
2.2.2 The League of Nations and the Recognition of the Rights of the Child ... 36
2.3 The United Nations Convention on the Rights of the Child ... 39

2.3.1 The Four Pillars and General Principles of the CRC 40
2.3.1.1 The Child's Right against Non-discrimination 40
2.3.1.2 The Right to Have Children's "Best Interests" Be "A Primary Consideration" 41
2.3.1.3 The Inherent Right to Life 41
2.3.1.4 The Right of a Child "Who Is Capable of Forming His or Her Own Views … to Express Those Views Freely in All Matters Affecting the Child" 42
2.4 The African Charter on the Rights and Welfare of the Child 44
2.4.1 Addressing Sexual Misconduct Issues Committed by Educators against Children 46
2.4.1.1 Protection of Children's Rights 47
2.4.1.2 Rights to a Safe Environment 47
2.4.1.3 Preventing Exploitation 47
2.4.1.4 Non-Discrimination 47
2.4.1.5 Reporting Mechanisms 48
2.4.1.6 Children's Best Interests 48
2.5 The Constitutional Perspective 49
2.5.1 Section 28 of the Constitution, 1996 51
2.5.1.1 The Fiduciary Duty and In Loco Parentis Principle for Educators 52
2.5.1.2 The Limitations of the Best Interests of the Child Doctrine 54
2.5.2 Section 29 of the Constitution, 1996 55
2.5.2.1 The Children's Unqualified Constitutional Right to a Basic Education in South Africa 55
2.5.2.2 Can the State be Compelled to Provide Basic Education for Individuals? 60
2.5.2.3 Adjudication of the Right to a Basic Education 60
2.5.3 Section 29 of the Constitution and Other Fundamental Rights for Children 61
2.5.3.1 The Right to Equality 62
2.5.3.2 Children's Right to Dignity 63
2.6 International Norms in Educator Labour Rights not to be Unfairly Dismissed 65
2.6.1 Analysis of Article 4 and its Requirement of a Valid Reason for Termination 67
2.6.2 Examination of Article 7 and the Worker's Right to Be Heard 67
2.6.3 The Right to a Reasonable Period of Notice or Compensation in Lieu Thereof 68
2.6.4 Procedure of Appeal Against Termination 69
2.7 The Educator's Constitutional Labour Rights 70
2.7.1 Section 23 of the Constitution, 1996 70
2.7.2 Unfair Labour Practices 71
2.8 Conclusion 73
Chapter 3: The LRA and the Section 188A Inquiry by Arbitrator in Handling Educator Dismissal Disputes Related to Sexual Misconduct 75
3.1 Introduction 75
3.2 Evolution from a Flexible to a Formalistic Approach to Employee Dismissal 76
3.3 Employee Dismissals under the LRA 79
3.3.1 The LRA Meaning of Dismissal 79
3.3.2 Permissible Grounds for Fair Dismissal 81
3.3.3 The Code of Good Practice: Dismissal 81
3.4 Examination of Just Cause and Due Process 82
3.4.1 The Requirements for Just Cause or Substantive Fairness 82

3.4.2 The Requirements for Due Process or Procedural Fairness 87
3.4.3 The Role of Suspension in the Disciplinary Process 89
3.5 Discussion of Section 188A of the LRA and Its Use in Disciplinary Inquiries 90
3.5.1 Processes under Section 188A 92
3.6 Conclusion 95
Chapter 4: A Critical Evaluation of the Legislation Regulating Educator Dismissals for Sexual Misconduct 97
4.1 Introduction 98
4.2 The Schools Act: Management of Educator Discipline and Addressing Sexual Misconduct in Public Schools 98
4.2.1 Governance and Professional Management of Public Schools 101
4.2.2 Role of the SGB in School Governance and the Discipline of Educators 101
4.2.3 Role and Functions of the Principal in Educator Dismissal Disputes 106
4.3 The Educators Act 110
4.3.1 The Educator in terms of the Educators Act 110
4.3.2 The Employer of Educators in terms of the Educators Act 112
4.3.3 Educator Dismissal Disputes under the Educators Act 113
4.3.3.1 Deemed Dismissals under the Educators Act 113
4.3.3.2 Withdrawal of the Teaching Licence under the Educators Act 115
4.4 Educator Dismissal for Serious Misconduct under the Educators Act 116
4.4.1 Sexual Misconduct Dismissals under the Educators Act 118
4.4.2 Processing Sexual Misconduct under Schedule 2 to the Educators Act 120
4.4.3 Educator Misconduct under the Educators Act and the LRA's Code of Good Practice 121
4.4.4 "Serious" and "Less Serious" Educator Misconduct and the Principal's Role 123
4.4.5 The Code of Conduct Procedure for Educator Dismissal Disputes 125
4.4.6 The ELRC Collective Agreement 127
4.5 The SACE Act and Its Regulatory Framework on Educators 128
4.5.1 Council for Educators Structures for Handling Sexual Misconduct Cases 129
4.5.2 The Disciplinary Committee's Mandate on the Code of Professional Ethics 130
4.5.3 The Code of Professional Ethics for Educators 130
4.5.4 Mandate to Investigate Allegations of Professional Misconduct 132
4.5.5 The Disciplinary Hearing under the SACE Act 132
4.5.6 Dispensing with Section 23 of the SACE Act 134
4.6 Register of Persons Unfit to Work with Children 135
4.7 The Role of the ECTA in Managing Sexual Misconduct Cases 136
4.8 Conclusion 137
Chapter 5: Analysis of Role-players Regulating Educator Sexual Misconduct 141
5.1 Introduction 142
5.2 The Fragmented Role of the Employer, the SGB, and the Principal 143
5.2.1 The *Scheepers-SGB* High Court Case: Analysis 144
5.2.2 The *SGB-Scheepers SCA* Case: Analysis 148
5.2.3 The *Leeto* Case Analysis and the Employer's Negligent Conduct 154
5.2.4 Analysis of the *CS-Swanepoel* Case and the Employer's Vicarious Liability 155
5.2.4.1 Background to the Case 155
5.2.4.2 The Clarity of the Relationship between the Employer and Educator 159
5.2.4.3 Fragmented Roles of the Council for Educators, SGB, and the Employer 161
5.2.4.4 Failure of the Employer to Manage Educator Discipline 161

5.2.4.5 Implications of Arbitrator and Presiding Officer Quality for Applying Laws .. 161

5.3 The Fragmented Role of the Employer, the SGB, and SACE 163

5.3.1 Analysis of the *Scheepers-SACE* Case 163
5.3.2 Background to the *Scheepers-SACE* High Court Case 164
5.3.3 Fragmentation Challenge in the *Scheepers-SACE* High Court Case 167

5.4 The *SACE-Scheepers* Supreme Court of Appeal Case 168
5.5 The *Council for Educators-Scheepers* Constitutional Court Case 168
5.6 Analysis of the *Robertson* Case and the Fragmented Public Schools System 169

5.6.1 Background to the *Robertson* Case 169
5.6.2 The Challenges of Forum Shopping in Educator Misconduct Cases 171
5.6.3 Deemed Resignation Jurisdiction in the *Robertson* Case 174

5.7 Unravelling the Complexities of the Fragmented Landscape of Oversight 175

5.7.1 Overlapping Authority over Public School Teachers 176
5.7.2 The Lack of Clarity on the Disciplinary Authority over Educators 177
5.7.3 Cooperative Governance and Meaningful Engagement 178

5.7.3.1 Democratisation of Education 178
5.7.3.2 Cooperative Governance 179
5.7.3.3 Meaningful Engagements 179

5.7.4 Employer Delay Contributes to Neglect of LRA Remedies 179
5.7.5 The Role of the Employer in Educator Sexual Misconduct Cases 180
5.7.6 Extended Traditional Relationship between the Educator and the Employer 181
5.7.7 Disparities in Treatment and Sanction of Educators 182

5.8 Conclusion 183

Chapter 6: Evaluation of the Application of Section 188A of the LRA and the Role of the ELRC in Educator Dismissal Disputes 185

6.1 Introduction 186
6.2 The Role of the ELRC in Educator Child Sexual Abuse Misconduct Disputes 186
6.3 Collective Agreement No. 3 of 2018 and Educator Sexual Misconduct Disputes 189

6.3.1 The Signing of the ELRC Collective Agreement 192
6.3.2 Insights from the Opening Sections of the Collective Agreement 195
6.3.3 The Scope Clause 1 of the ELRC Collective Agreement 198
6.3.4 Definitions and Interpretation 199
6.3.5 The Referral of Disputes and the Appointment of Arbitrators 200
6.3.6 The Procedures Applicable to Inquiries and Arbitrations 203
6.3.7 The Outcome, Judgment or Arbitration Award 207
6.3.8 The Dispute Resolution Procedure in Clause 6 208

6.4 Application of Section 188A in Educators' Child Sexual Misconduct Cases 209
6.5 Analysis of the ELRC's Role in the Application of Section 188A of the LRA 210

6.5.1 The Successes of the ELRC 211
6.5.2 Problems Securing Appropriate Venues 212
6.5.3 The ELRC's Role in Safeguarding Teachers' Labour Rights 213
6.5.4 The Appointment of Competent Arbitrators 214
6.5.5 Section 188A Process Can Prove Expensive 215
6.5.6 Lawyers Turning Arbitrations into Complex Litigious Processes 216
6.5.7 Frivolous Postponements of Arbitration Hearings 217

6.6 The Role of the Employer in the Application of Section 188A of the LRA 218

6.6.1 Failure to Implement Section 188A of the LRA Consistently 218
6.6.2 Misclassification of Misconduct Cases 221

6.6.3 Failure to Secure Witnesses and Corroborative Evidence in Arbitration Hearings 221
6.6.4 Parental Refusal to Have Children Testify in Sexual Misconduct Proceedings .. 223
6.6.5 Employer's Failure to Submit Closing Arguments in ELRC Proceedings 224
6.6.6 Employer's Failure to Prove Charges in Sexual Misconduct Cases 225
6.6.7 Employer's Short-Termism in Managing Sexual Misconduct Cases 226
6.6.8 Employer's Failure to Consider Learners' Plight in Non-Sexual Abuse Cases ... 227
6.6.9 Employer's Failure to Process Cases Timeously 227
6.7 Other Role-players in the Application of Section 188A of the LRA 228
6.7.1 Lack of a Collaborative Approach between the ELRC and SACE 228
6.7.2 ELRC Arbitration Awards Not Binding on SACE 228
6.7.3 SACE Exposing Children to Testifying Multiple Times 230
6.7.4 SACE Acquitting Educators Found Guilty by the Employer 231
6.8 The Role of Educators in Sexual Misconduct Cases 232
6.9 Conclusion 233
Chapter 7: Comparative Analysis of Educator Discipline Systems 236
7.1 Introduction 236
7.2 Educator Dismissal Procedures in Nigeria 237
7.2.1 Introduction 237
7.2.2 Prevalence of Child Sexual Abuse by Teachers in Nigerian Public Schools 241
7.2.3 Key Legislation on Dismissal Disputes in Nigeria 243
7.2.3.1 The Child's Rights Act and the Violence Against Persons (Prohibition) Act 243
7.2.3.2 The Violence Against Persons (Prohibition) Act 245
7.2.3.3 The National Policy on Education 247
7.2.3.4 The Teachers Registration Council of Nigeria Act 249
7.2.3.5 Nigerian Law Regulating Teacher Dismissal for Sexual Misconduct 253
7.2.4 Role-players in Dismissing Teachers Charged with Child Sexual Abuse 256
7.2.4.1 The Teachers Registration Council of Nigeria 257
7.2.5 The Comparative Lessons for South Africa 259
7.3 Educator Dismissal Procedures in England 260
7.3.1 Introduction 260
7.4 Prevalence of Child Sexual Abuse by Teachers in UK State Schools 265
7.4.1 Key Legislation on Educator Dismissal Disputes in the UK 266
7.4.1.1 The Education Act 1944 and the Regulation of Education in the UK 266
7.4.2 The Role-players in Dismissing Teachers Charged with Child Sexual Abuse 268
7.4.2.1 The Role of Governing Bodies and the Local Authority 268
7.4.2.2 The Abolition of the General Teaching Council for England (GTCE) 270
7.4.2.3 Regulating Teacher Sexual Misconduct against Learners in England 271
7.4.3 The Teachers' Disciplinary (England) Regulations 2012 272
7.4.4 Balancing Children's Rights and Teachers' Labour Rights 277
7.4.5 Protection of Teachers' Labour Rights in England 278
7.5 The Comparative Lessons for South Africa 282
Chapter 8: Conclusion and Recommendations 286
8.1 Introduction 286
8.2 Conclusions regarding Question One 287
8.3 Conclusions regarding Question Two 298

8.4 Conclusions regarding Question Three 299
8.5 Conclusions regarding Question Four 301
8.6 Conclusions regarding Question Five 303
8.7 Overall Conclusions 304
8.7.1 Overall Conclusions on the First Hypothesis 305
8.7.2 Overall Conclusions on the Second Hypothesis 306
8.8 Recommendations 306
8.9 Suggestions for Future Studies 309
BIBLIOGRAPHY 311
ARTICLES 311
BOOKS AND CHAPTERS IN BOOKS 318
CASES 321
DISSERTATIONS AND THESES 330
PAPERS 331
STATUTES 333
INTERNET SOURCES 337
STRATEGIES, POLICIES AND REPORTS 361

Chapter 1: General Introduction

Page

1.1 Background and Context 2
1.2 An Effective Educator Dismissal Dispute Resolution System 2
1.3 Problem Statement 7
1.3.1 Prevalence of Sexual Misconduct in Public Schools 7
1.3.2 Overview of Section 188A in Educator Dismissal 10
1.3.3 Just Cause and Due Process 12
1.3.3.1 Withdrawal of a Teaching Licence 13
1.3.4 Key Legislation 13
1.3.4.1 The Educators Act 15
1.3.4.2 The Schools Act 16
1.3.4.3 The LRA 16
1.3.4.4 The SACE Act 17
1.3.4.5 Other Legislation 17
1.3.4.6 The Protection of Personal Information Act 18
1.3.5 Role-players 19
1.3.6 The Status of Educator Dismissal Actions for Sexual Misconduct 20
1.4 Hypothesis and Delimitation of the Thesis 21
1.4.1 Hypothesis 21
1.4.2 Delimitation 22
1.5 Research Questions and Aims 23
1.6 Significance of the Thesis 24
1.7 Methodology 24
1.7.1 Overview of Sources 24
1.7.2 Combined Approaches to Legal Analysis 25
1.8 Rationale for Comparative Analysis 26
1.8.1 The Choice of Nigeria as a Comparator 26
1.8.2 The Choice of England as a Comparator 27
1.9 Brief Outline of the Thesis 28

1.1 Background and Context

This thesis, entitled "The Dismissal of Public-School Educators on the Grounds of Sexual Abuse of Children: An Appraisal of Section 188A of the Labour Relations Act 66 of 1995", derives its rationale from a constellation of interrelated factors.[2] It duly acknowledges the necessity for an efficacious mechanism for resolving educator dismissal disputes within the public education sector. Furthermore, it underscores the pivotal role of just cause and due process in the disciplinary proceedings and the ultimate dismissal of educators facing charges of sexual misconduct against schoolchildren,[3] recognising this role as a legal requirement and a fundamental ethical cornerstone.

The thesis further comprehensively explores the intricate legislative framework governing employment[4] and regulation of educators,[5] dissecting the complex legal terrain marked by the concurrent oversight and jurisdiction exercised over educators by diverse laws and institutions. Finally, the thesis scrutinises the distinctive role played by section 188A of the Labour Relations Act (the "LRA"),[6] concentrating on its application to allegations of sexual misconduct levied against educators at South African public schools. The ensuing structure of this first chapter encompasses its foundational hypothesis, methodological approach, pivotal research inquiries, and a succinct preview of its subsequent content and progression. In this thesis, for practical reasons, the masculine form is used throughout and should be assumed to include the feminine form unless the context requires the feminine form.

1.2 An Effective Educator Dismissal Dispute Resolution System

The importance of an effective system for disciplining and dismissing educators charged with and being found guilty of sexual misconduct transcends legal and ethical boundaries.[7] It is a

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[2] The ELRC Collective Agreement No. 3 of 2018 ("the ELRC Collective Agreement"), signed by the parties to the Education Labour Relations Council ("the ELRC"), effected significant changes in the process for handling educator dismissals related to cases of sexual misconduct in South African schools. The ELRC is a statutory council established to promote peaceful labour relations and resolve disputes between public educators and their employers in South Africa. Sch 1 to the Labour Relations Act 66 of 1995 ("the LRA") defines the ELRC as the bargaining council established under s 6(1) of the Education Labour Relations Act 146 of 1993. The Collective Agreement transfers the responsibility for handling all such misconduct cases from the employers of educators to the bargaining council's arbitration processes.

[3] See s 188 of the LRA.

[4] South African Schools Act 84 of 1996 ("the Schools Act"); the LRA; the Employment of Educators Act 76 of 1998 ("the Educators Act").

[5] South African Council for Educators Act 31 of 2000 ("the SACE Act").

[6] The LRA.

[7] The legislative framework governing discipline management in the Public Service finds expression from s 195(1)(a) of the Constitution of the Republic of South Africa, Act No. 108 of 1996 ("the Constitution, 1996"): "A high standard of professional ethics must be promoted and maintained."

cornerstone of a just and responsible society that values the welfare of its citizens, particularly its future generations.[8] Such a disciplinary system safeguards the well-being of students,[9] maintains the integrity of the education system,[10] and upholds the principles of justice and ethical conduct. In any society, the education sector plays a pivotal role in shaping its citizens' future. Educators are entrusted with the responsibility of nurturing and educating the next generation, making their conduct and professionalism crucial.[11] On 9 April 2021, the then Minister of Basic Education, Ms Angie Motshekga, gazetted new regulations in terms of section 4 and 35 of the Employment of Educators Act (the "Educators Act") that determined educators' terms and conditions of employment as stated in the Regulations for Prevention of Re-Employment of Former Educators Discharged or Deemed Discharged for Misconduct or Deemed Resigned.[12] Promulgating this regulation demonstrated the dire need to address sexual misconduct by educators at public schools. Allegations of this misconduct directly threaten students' safety and psychological well-being and erode public trust in the education system.[13]

Dismissing employees, especially educators, charged with sexual misconduct constitutes a multi-layered challenge in labour relations. It is often likened to a form of "capital punishment"[14]

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[8] See Chapter 2 of the Bill of Rights and s 7 of the Constitution, 1996, which states: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

[9] S 28(2) of the Constitution, 1996 states: "A child's best interests are of paramount importance in every matter concerning the child."

[10] S 29(3) of the Constitution, 1996 provides for integrity within education establishments as follows: "(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that– *(a)* do not discriminate on the basis of race; *(b)* are registered with the state; and *(c)* maintain standards that are not inferior to standards at comparable public educational institutions."

[11] The National Policy Framework for Teacher Education and Development in South Africa ("the NPFTED 2007") was adopted by the Department of Education in Pretoria in 2006 and espouses several principles one of which, item 5, states: "It seeks to provide an overall strategy for the successful recruitment, retention, and professional development of teachers to meet the social and economic needs of the country. The objective of the policy is to achieve a community of competent teachers dedicated to providing education of high quality, with high levels of performance as well as ethical and professional standards of conduct." This policy pronouncement buttresses the need for "ethical and professional standards of conduct" for educators.

[12] See the Schedule to Regulations for Prevention of Re-Employment of Former Educators Discharged or Deemed Discharged for Misconduct or Deemed Resigned GN 331 in *GG* 44433 of 9-04-2021 ("the GN 331 in *GG* 44433 of 9-04-2021"). The main purpose of these new regulations is to prevent the reemployment of educators found guilty especially of sexual misconduct.

[13] The public has lost confidence in the teaching profession, and there is a clarion call to curb the sexual abuse of children in schools, among other serious offences. In terms of those regulations, educators dismissed for sexual misconduct and other serious offences under s 17(1) of the Educators Act are prevented from re-employment in the school sector in South Africa.

[14] See Landman (1995 *CLL*) 41 and Landman (1996 *CLL*) 51. See also Grogan *Workplace Law* (2017) 140, who asserts that "dismissal is considered the most serious disciplinary penalty that can be lawfully imposed by an employer." This thesis is aware of the new edition, Grogan *Workplace Law* (2020) 140, where it is asserted that "Disciplinary penalties in the workplace must be applied progressively, i.e., a lighter sanction should be applied in the case of a first offence, and graver sanctions—of which summary dismissal is the ultimate—reserved for repetitions or the most serious offences. In this

in this context, as it marks the gravest civil consequence of an employment relationship. At these moments of crisis, employees, including educators, are at their most vulnerable and in dire need of protection[15] as these allegations attract serious consequences for them.[16] This is especially true of accusations of sexual misconduct, which carry significant social, legal, and personal implications. In terms of the Regulations for Prevention of Re-Employment of Former Educators Discharged or Deemed Discharged for Misconduct or Deemed Resigned, educators found guilty of sexual misconduct may be entered into the National Child Protection Register referred to in section 111 of the Children's Act[17] and may not be employed in the teaching profession unless they have "a clearance certificate from the Registrar referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007".[18]

Reputation, livelihood, and even freedom are all at stake for educators accused of this misconduct. Beyond the legal and ethical dimensions, profound human consequences must also be considered.[19] The lives and careers of educators depend on the outcomes of disciplinary and dismissal processes, one of the more serious being indefinite removal from the teaching profession.[20] Ensuring a fair, just, effective system for dealing with such cases is a legal obligation[21] and a moral imperative affecting the lives of all parties involved, from the accused educators to the students and communities they serve.[22] In this context the significance of administering an efficient disciplinary and dismissal process for educators

paragraph, the various forms of sanction that may be imposed on employees by their employers are considered in order of their severity". The 2020 edition will be referenced where it provides new insights relevant to this thesis.

[15] See Landman (1995) *CLL* 41 and Landman (1996) *CLL*51.

[16] According to Van Niekerk and Smit (2019) 235, "while dismissal of an employee would rarely be of any consequence to the employer, the consequences for the employee are serious." This study is aware of the new version, Van Niekerk and Smit (2023), which will be cited in instances where it provides new insights and perspectives relevant to the discussions in this thesis."

[17] Children's Act 38 of 2005 ("the Children's Act").

[18] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("the Sexual Offences Act").

[19] According to McGregor et al (2017) 165, "misconduct is a 'fault' dismissal which implies that the employee is guilty of misbehaving which causes the dismissal". This thesis is aware of the new edition of McGregor et al (2020). However, due to the minimal differences in perspectives that apply to this thesis, the 2017 edition will be consistently referenced throughout. The 2020 edition will only be cited when it presents views that are new and essential to specific aspects of the discussion.

[20] In terms of item 4.4. of GN 331 in *GG* 44433 of 9-04-2021.

[21] S 17(2) of the Educators Act states: "(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."

[22] The NPFTED, 2007 espoused the need for educators to uphold "ethical and professional standards of conduct" in the teaching profession. This is also consistent with the provisions of s 17(2) of the Educators Act.

charged with sexual misconduct becomes evident.[23] The ramifications of these processes ripple through society, underscoring the imperative of getting them right.

In South Africa, the issue of employee dismissal is of immense significance. A poorly executed dismissal process can prove costly in time and financial resources[24] and may also harm labour relations and overall productivity.[25] Conversely, retaining employees who are operationally redundant, untrustworthy, or ineffectual undermines the organisation. Unfortunately, determining when an employee may be justifiably dismissed can often be complicated.[26] Numerous tribunals are poised to evaluate the fairness of dismissals; each tribunal is empowered to reinstate unfairly dismissed employees or order that they be compensated.

In addition, accessibility to these tribunals has been made easier for dismissed employees, regardless of the merits of their cases. In some instances, legislation or collective agreements compel employers to defend themselves without legal representation, even though employees may be assisted by seasoned union officials. Employers must therefore understand the intricacies of dismissing employees correctly from the outset. A misstep in the pre-dismissal process can seriously affect subsequent litigation or arbitration, exacting a heavy toll on the employer.

Allegations of sexual misconduct against educators often ignite a political[27] and media frenzy and trigger societal disgust.[28] Their gravity reverberates through the lives of learners, their families, and the broader community. Relentless media scrutiny underscores the urgency of effectively addressing sexual misconduct in the South African public education system.

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[23] In terms of sch 2 to the Educators Act, disciplinary processes against educators charged with misconduct must be efficient. Item 2(d) of sch 2 to the Educators Act states: "*(d)* a disciplinary code is necessary for the efficient delivery of service and the fair treatment of educators, and ensures that educators— (i) have a fair hearing in a formal or informal setting; (ii) are timeously informed of allegations of misconduct made against them; (iii) receive written reasons for any decision taken; and (iv) have the right to appeal against a finding or sanction contemplated in section 25(2)."

[24] See Grogan *Dismissal* (2017) 1.

[25] According to Grogan *Dismissal* (2017) 1, "a botched dismissal can prove costly, both in time and money, and may impact negatively on labour relations and production". See also Grogan *Dismissal* (2017) 128, who argues that "disciplinary action against individual employees may have even wider ramifications".

[26] See Grogan *Dismissal* (2017) 1, who asserts that "unfortunately, the answer to when an employee may safely be dismissed is far from simple". See also Grogan *Dismissal* (2022) 1 for the new perspective on the same statement that "dismissing employees without recursions may be far from simple". This thesis is aware of the 2022 version of Grogan's *Dismissal*. The 2017 edition will be the primary reference throughout, with the 2022 version cited when it presents perspectives that are new and particularly relevant to the thread of this thesis, with appropriate indication provided.

[27] See Van der Walt (2023).

[28] Macupe *The Mail and Guardian* (2021); SAHRC (2021); South African Government (2020); Pillay (2023); Sobuwa (2021); McCain (2023).

Consequently, individuals affected by sexual misconduct often seek civil remedies through the courts, further eroding trust in internal mechanisms. These cases highlight the need for a more integrated and streamlined system to ensure the fair and effective handling of such cases.

In many countries, specialist institutions,[29] such as labour courts,[30] tribunals, administrative boards,[31] or a combination of these forums, have been established to resolve labour disputes efficiently and affordably.[32] Establishing these specialist dispute resolution structures serves various purposes, such as providing expeditious, efficient, and cost-effective procedures and ensuring easily accessible, specialist, yet informal institutions.[33] The momentum towards reforming labour dispute resolution in South Africa began with the Wiehahn Commission, established by the South African government in 1979,[34] followed by the Explanatory Memorandum to the Draft Labour Relations Bill in 1995. The memorandum, produced by a Ministerial Task Team, identified deficiencies in the pre-existing dispute resolution processes and proposed establishing the Commission for Conciliation, Mediation, and Arbitration (the "CCMA") and labour courts to address these issues.[35] These recommendations aimed to create an effective and accessible system for labour dispute resolution. In contrast to the dispute resolution institutions and procedures established by the Labour Relations Act 28 of 1956, the overhaul ushered in by the 1995 LRA introduced fundamental and dramatic

[29] Hepple (1988) *CLP* 169; Le Roux (1987) *ILJ* 183; Jordaan and Davis (1987) *ILJ* 199 cited in Van Niekerk and Smit (2019) 479.
[30] See Van Niekerk and Smit (2019) 479, stating that "specialist labour courts operate in France (Conseil de Prud'hommes), Germany (Arbeitsgericht) and Sweden (Arbetsdomstolen)".
[31] Van Niekerk and Smit (2019) 479: "In the USA, the National Labour Relations Board performs a number of dispute resolution functions."
[32] Van Niekerk and Smit (2019) 479.
[33] The Complete Wiehahn Report (1882) para 1.4.22 discusses the reasons for establishing the Industrial Court; it was cited in Van Niekerk and Smit (2019) 479. See also the Explanatory Memorandum (1995) *ILJ* 278 cited in Van Niekerk and Smit (2019) 479: "This report was prepared by the Ministerial Task Team published in 1995 [and] provides reasons for the establishment of the CCMA and labour courts."
[34] In 1979, the South African government established the Wiehahn Commission of Inquiry in response to various issues, including the Soweto uprisings, which negatively impacted investments in the country. The Commission comprehensively investigated the existing labour legislation and recommended significant reforms, such as the partial liberalisation of trade unions and the granting of bargaining powers to all races, including black workers. The Commission's recommendations encompassed areas such as freedom of association, autonomy for unions in determining membership criteria, access to apprenticeships for individuals of all races, the establishment of a National Manpower Commission for continuous monitoring, and the restructuring of the Industrial Tribunal into an Industrial Court. Additionally, in 1979, the Federation of South African Trade Unions (FOSATU) was formed; it was later renamed the Congress of South African Trade Unions (COSATU) in 1985 and it advocated for multiracial and industrial unionism. These developments aimed to address the challenges and promote equality in the labour relations landscape of South Africa.
[35] See Van Niekerk and Smit (2019) 479. See also s 112 of the LRA.

changes.[36] These institutions were designed to provide easily accessible, specialist, informal procedures.

The central institution for labour dispute resolution under the LRA is the CCMA,[37] a "one-stop-shop" for resolving labour disputes.[38] In addition to bargaining and statutory councils and review courts, the Labour Court and the Labour Appeal Court [39] play crucial roles in resolving labour disputes. The Labour Court ranks on the level of a High Court,[40] and the Labour Appeal Court resembles the Supreme Court of Appeal in status.[41] This thesis evaluates the dismissal of public-school educators and section 188A of the LRA in particular against the backdrop of the mentioned dispute resolution institutions.

1.3 Problem Statement

Like all education systems, the South African one has its challenges. A pressing, morally reprehensible issue it faces is the alarming prevalence of sexual misconduct among educators. This pervasive problem tarnishes the image of the profession and severely threatens the safety, well-being, and future prospects of the nation's students.

1.3.1 Prevalence of Sexual Misconduct in Public Schools

Cases of educators sexually abusing learners have recently surged: 142 have been processed in the last five years, peaking at 77 cases reported during the COVID-19 pandemic (2019/2020),[42] then dropping slightly (37 cases reported in 2020/2021).[43] Yet these numbers starkly remind us of this continuing, pervasive scourge, worsened by the upsetting fact that 31 of these cases occurred outside the ELRC's jurisdiction.

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[36] The Explanatory Memorandum (1995) *ILJ* 283. See also Van Niekerk and Smit (2019) 479.
[37] See s 112 of the LRA, stating: "The Commission for Conciliation, Mediation and Arbitration is hereby established as a juristic person. [Commencement of s 112: 1 January 1996.]."
[38] See also Van Niekerk and Smit (2019) 479.
[39] The purpose of the LRA was, among other things, "to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act". See also Van Niekerk and Smit (2019) 479.
[40] See s 151(2) of the LRA substituted by s 55(1)(b) of Act 10 of 2013 "The Labour Court is a superior court that has authority inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a Division of the High Court of South Africa has in relation to the matters under its jurisdiction."
[41] See s 167(3) of the LRA as amended by s 18 of Act 127 of 1998 "The Labour Appeal Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction.
[42] ELRC Annual Report 2019/2020 (2020).
[43] ELRC Annual Report 2020/2021 (2021) 21.

If the review period is lengthened, it is noted that the annual reports by the South African Council for Educators (SACE) recorded a total of 583 cases of sexual misconduct by educators between 2014/2015 and 2020/2021: 94 cases in 2014/2015,[44] 97 in 2015/2016,[45] 99 in 2016/2017,[46] 78 in 2017/2018,[47] 93 in 2018/2019,[48] 122 in 2019/2020,[49] and 83 in 2020/2021.[50] This trend yields an annual average of 94 cases. These figures demand serious steps to resolve these disputes effectively.

Sexual misconduct within schools encompasses a range of behaviour, such as rape, attempted rape,[51] sexual assault,[52] texting learners and making unsavoury sexual remarks,[53] sharing explicit images,[54] arranging meetings outside school hours,[55] enticing learners with promises of money or treats,[56] engaging in sexually suggestive or inappropriate conversations,[57] as well as physically inappropriate touching.[58] Acts of sexual assault and rape

[44] SACE Annual Report 2014/2015 (2015) 21.
[45] SACE Annual Report 2015/2016 (2016) 30.
[46] SACE Annual Report 2016/2017 (2017).
[47] SACE Annual Report 2017/2018 (2018) 19.
[48] SACE Annual Report 2018/2019 (2019) 21.
[49] SACE Annual Report 2019/2020 (2020) 38.
[50] SACE Annual Report 2020/2021 (2021) 48.
[51] See *Mzikayifani David Shezi v Department of Education (Kwazulu Natal)* PSES 714-18/19KZN ("the *Shezi* case"). The *Shezi* case para 8(b) states: "b. A charge of attempted rape was laid against the Applicant, on the 22nd September 2016 at the Nkandla Police Station under Cas No.84/09/2016." See also *Superintendent General Free State Department of Education v Mr Moshe Moses Mofokeng* ELRC276-20/21FS ("the *Moshe Mofokeng* case") in which the educator was charged with and found guilty of attempted rape against a learner.
[52] See *Gauteng Dept of Education v Lucky Baloyi* ELRC392-21/22GP ("the *Baloyi* case") para 4: "It is alleged that on 06 April 2021 while on duty at Kgomotso Comprehensive High School, you sexually assaulted a Grade 10 learner, leaner A, in that you spanked her on the buttocks."
[53] See *Arnold Z Robertson v South African Council for Educators, Western Cape Department of Education, and Department of Basic Education* 15547/2013 ("the *Robertson* case")
[54] Pijoos (2023); SAPA (2013).
[55] *Satani v Department of Education, Western Cape and Others* (CA10/15) [2016] ZALAC 38 (13 June 2016; (2016) 37 ILJ 2298 (LAC) ("the *Satani-LAC* case") para 7. See also *Satani v Department of Education Western Cape and Others* (C447/2017) [2019] ZALCCT 5 (6 March 2019) ("the *Satani-LC* case").
[56] See *Van Wyk v Department of Education Western Cape* PSES508-16/17WC; *Gwe v HOD Department of Education Western Cape* PSES708-16/17WC.
[57] *Motshoane v Education Labour Relations Council and Others* (JR1808/13) [2018] ZALCJHB 98 (9 March 2018) ("the *Motshoane* case") para 3. Motshoane asked a girl child about her virginity.
[58] See *Department of Education: Free State v ELRC and Others* (JR2278/12, J2935/12) [2017] ZALCJHB 129 (20 April 2017) ("the *Leeto* case") para 13. See also *Diholo v Gauteng Department of Education and Others* (JR 1775/19) [2023] ZALCJHB 117 (2 May 2023) ("the *Diholo* case") para 5. See also *HK van Niekerk v The State* Case No A215/2007 TPD para 5.

or unlawful sexual intercourse with and against learners, students,[59] or other employees[60] have also regrettably been reported.[61] Furthermore, instances of educators engaging in sexual relationships with learners[62] are deplorable. These examples are by no means isolated incidents, as subsequent chapters of this thesis will elucidate. Research on this topic substantiates the existence of a pervasive culture of abuse within South African schools.

The Educators Act classifies any form of sexual misconduct by an educator as a grave ground for dismissal upon conviction.[63] The Act uses the imperative language "must be dismissed" when addressing these offences.[64] So the employer plays a direct role in these cases where dismissal is the likely sanction.[65] Although school principals possess discretionary powers, specific legal competencies and established misconduct procedures are required when principals are tasked with managing disciplinary actions within their schools.[66]

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[59] See *S v Marais*, Case No ASOC 122/2204 Regional court held at Kimberley ("the *Marais* case"). In the *Marais* case, a male teacher was accused of two accounts of indecent assault on a nineteen-year-old female learner. See also *S v Nonyane* (256/05) [2006] ZASCA 21; [2006] SCA 23 (RSA) (20 March 2006) ("the *Nonyane* case") para 2, stating: "The appellant, a teacher 39 years old at the time of the trial, was convicted by the regional magistrate at Itsoseng of raping an 11-year-old schoolgirl. The appellant was then committed for sentence to the High Court of Bophuthatswana in terms of the provisions of s 52(1) of the Criminal Law Amendment Act 105 of 1997." See *Gauteng Department of Education v SADTU obo Kgadi Elliot Mofokeng* ELRC1027-21/22GP ("the *Mofokeng* case") para 8 in which the complainant stated before the commissioner: "PM stated under oath that in 2019 she was fifteen (15) years old. She stated that on 23 August 2021, Mofokeng stopped his vehicle next to her and rolled down his window. He invited her to get inside the car. She got into the car and Mofokeng drove to his place. Whilst at his place, Mofokeng forced her legs open and raped her." This case also created a media frenzy: Motloung (10 May 2023).

[60] *J I Julius and Western Cape Education Department, Education Labour Relations Council* held in Cape Town PSES 148-06/07WC ("the *Julius-ELRC* case") 9.

[61] See *CS and Another v Swanepoel and Others* (19027/13) [2022] ZAWCHC 37 (17 March 2022); [2022] 2 All SA 810 (WCC); [2022] 7 BLLR 660 (WCC) ("the *CS-Swanepoel* case") para 1.

[62] See *Zwezwe v Department of Education, Kwazulu-Natal and Others* (D 97/2010) [2011] ZALCD 40 (18 October 2011) para 4.

[63] See s 17(1) of the Educators Act: "Serious misconduct. An educator 'must be dismissed' if he or she is found guilty of -
(a) theft, bribery, fraud or an act of corruption in regard to examinations or promotional reports;
(b) committing an act of sexual assault on a learner, student or other employee;
(c) having a sexual relationship with a learner of the school where he or she is employed;
(d) seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student or other employee;
(e) illegal possession of an intoxicating, illegal or stupefying substance; or
(f) causing a learner or a student to perform any of the acts contemplated in paragraphs (a) to (e)" (original bolding).

[64] See s 17(1) of the Educators Act.

[65] Du Toit et al (2023) 498 assert that "the common denominator of the various firms of dismissal is that all of them are ultimately caused by the employer. Dismissal, by definition is not initiated by the employee, nor is it 'something which merely happens. In essence, some overt action' by the employer is required to bring employment to an end. Once it has taken place, subsequent conduct of the employee – for example, an offer to resign – does not affect the dismissal, though it may be relevant to determining the remedy in the event of unfairness."

[66] See s 18 of the Education Laws Amendment Act 53 of 2000. See also SECTION27 (2017) 77 and Van Rooyen and Rossouw (2007) 15. The view is shared by Joubert and Prinsloo (2001) 184, who hold the view that "the employer delegates the power to maintain discipline in a public school to the principal

1.3.2 Overview of Section 188A in Educator Dismissal

Making a bold and strategic move in signing Collective Agreement No. 3 of 2018 (the ELRC Collective Agreement"), the employer relinquished its authority to discipline and dismiss educators charged with sexual misconduct to the ELRC.[67] This agreement seeks to give expression to section 188A of the LRA, essentially entailing an inquiry and hearing conducted by a CCMA or bargaining council arbitrator or dismissal arbitration. This significant shift in approach raises intriguing questions about whether this method effectively leads to fair dismissal in cases of sexual misconduct in schools. The ELRC's implementing section 188A of the LRA through this ELRC Collective Agreement marks a significant development in addressing dismissal disputes involving educators accused of sexual misconduct in South Africa's public-school system.[68]

Section 188A was initially introduced into the LRA in 2002 as a "pre-dismissal arbitration" process, a notable innovation in South African employment law.[69] Under this mechanism, the employer can seek the services of the CCMA or an accredited agency to appoint an arbitrator to conduct an arbitration hearing rather than follow the internal disciplinary process and appeals. This process is invoked either with the employee's consent or if such a provision is already stipulated in the employee's contract.[70] This innovation was intended to expedite the process of conducting disciplinary proceedings by skipping internal disciplinary hearings, thus saving time.

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of the school. This means that the principal had not only the task of managing a public school efficiently, but also the authority and responsibility to take appropriate action to ensure a school environment in which a culture of teaching and learning is maintained. Ultimately, the principal is the highest official in a school [and] is also accountable to the Head of the provincial department of education for everything that happens in the school." Item 3 of Annexure A.7 of the Personnel Administrative Measures (PAM) determines that the core duties and responsibilities of principals fall in seven categories, namely general or administrative duties, personnel management, academic performance of the school, teaching responsibilities, extra- and co-curricular duties, interaction with stakeholders and communication.

[67] See ELRC (2022) 21. The ELRC signed Collective Agreement, which provided for addressing critical issues that have bedevilled society – paedophilia and sexual misconduct by teachers. According to the ELRC (2022) 21: "The Council concluded a collective agreement in which all cases of sexual misconduct will be dealt with through s 118A (Inquiry by arbitrator) of the LRA. All matters pertaining to sexual misconduct are referred to the Council once the Department has concluded its investigation. The ELRC Collective Agreement was concluded in September 2018. The Council is continuously engaging with the Department of Justice and Constitutional Development to assist with the utilisation of the Courts for these special cases. The council is also fulfilling its mandate to report the educators who are found guilty of sexual misconduct to the Department of Social Development to include them in the Register of Sexual Offenders in terms of the Children's Act."

[68] See fn 1.

[69] Du Plessis and Fouche (2019) 413. See also McGregor et al (2017) 224 and Van Niekerk and Smit (2019) 490.

[70] See Du Plessis and Fouche (2019) 413.

However, this process faces certain challenges. Despite its intentions to expedite dispute resolution by minimising redundancy between internal and external hearings, the process's initial title of "pre-dismissal arbitration" has been contentious, prompting a name change to "inquiry by an arbitrator" in the 2014 amendments to the LRA. Nevertheless, its fundamental nature as an arbitration process, instead of an internal disciplinary hearing, remains unchanged.[71]

Arbitration is a system of dispute resolution in which an independent neutral third party, the arbitrator, is appointed by mutual agreement of the disputing parties.[72] He then follows quasi-judicial processes and acts as the decision-maker in the dispute.[73] After the parties make their presentations, he issues an arbitration award, generally final and binding.[74] In turn, the parties commit themselves to abiding by the arbitrator's decision, recognising it as final and binding.[75] The downside to arbitration is that the parties lose control of the outcome of the dispute resolution process; the advantage is that the dispute is resolved and the determination is final, binding, and enforceable.[76] According to Van Niekerk and Smit,[77] "there is therefore no right of appeal against the finding, but the finding may be taken on review to the Labour Court". According to the Explanatory Memorandum to the Labour Relations Amendment Bill, 2010,

> while this procedure in terms of which an arbitrator chairs an internal enquiry into allegations about an employee's conduct or capacity offers considerable potential savings to employers and employees by avoiding a duplication of internal enquiries and arbitration hearings, little use has been made of it.[78]

Given this scanty use, it is difficult to tell whether arbitration is a useful, efficacious process for dealing with the thorny issue of dismissing educators for sexual misconduct.

The ELRC, a specialised bargaining council for public education sector disputes, has witnessed a troubling surge in disputes filed against educators, particularly those involving

[71] According to Du Toit et al (2014) 167, "the inquiry is conducted in the same way as a CCMA arbitration, the commissioner has the same powers and the award is similarly final and binding [s 188(6) to (8)]".
[72] Wiese (2016) 7.
[73] Coetzee and Schreuder (2010) 470.
[74] Lötter and Mosime (1993) 2.
[75] Okharedia (2011) 2.
[76] Wiese (2016) 7.
[77] Van Niekerk and Smit (2019) 491.
[78] Item 12(a) of the Explanatory Memorandum Labour Relations Amendment Bill, 2010. See also McGregor et al (2017) 224, placing a rider to the benefit of s 188A process that "it avoids a repetition of processes, namely, an internal disciplinary hearing and a possible later challenge of the dismissal dispute in arbitration. It saves time and money".

sexual misconduct towards children.[79] This thesis focuses on dismissal disputes related to educators facing charges of sexual misconduct against children in South African public schools. Alarming statistics reveal that, over the past decade, rather than decreasing, reported cases of sexual misconduct filed with both the ELRC[80] and SACE have steadily risen.[81] The question is whether section 188A can be a panacea for processing sexual misconduct cases with respect to safeguarding the plight of children[82] and just cause and due process with respect to the educators involved.[83] The rise of sexual misconduct in South African schools is a pressing concern with far-reaching implications for all stakeholders in the education system.[84] This section of the discussion explores the extent of this problem and its profound consequences for students, educators, and the education system as a whole.

The timing of this thesis is particularly apt given the escalating number of such cases and the ensuing public outcry. The primary aim of the thesis is to scrutinise the existing mechanisms for handling educator dismissal disputes involving sexual misconduct in order to assess their effectiveness. By shedding light on these procedures and their outcomes, this research seeks to contribute to a more comprehensive understanding of the challenges and potential solutions associated with this critical issue. Notably, several cases have already gone before the courts, exemplifying the challenges of this process. A case in point is *Diholo*,[85] processed under section 188A. The issues that arose in *Diholo* are extensively explored in Chapter 2 of this thesis. Unfortunately, the court did not delve deeply into section 188A in *Diholo*.

1.3.3 Just Cause and Due Process

The dismissal of educators accused of sexual misconduct reflects an evolution from common-law practices[86] to equity-based and licensing approaches, as discussed in Chapter 3 of this thesis. Initially, common law allowed broad employer discretion with limited employee recourse, focusing only on contractual obligations.[87] The equity-based approach introduced through labour legislation,[88] however, prioritises fairness by mandating substantive and

[79] See para 1.3.1 above on the prevalence of sexual misconduct cases.
[80] See para 1.3.1.
[81] See para 1.3.1, according to SACE Annual Report 2019/2020 (2020) 38.
[82] See 110 of the Children's Act.
[83] See s 188 of the LRA.
[84] See the ELRC Collective Agreement.
[85] The *Diholo* case para 1.
[86] Grogan *Dismissal* (2017) 13. This is discussed below in para 1.3.3.1. See Van Niekerk and Smit (2019) 492.
[87] See Grogan *Dismissal* (2017) 11.
[88] Grogan *Dismissal* (2017) 3 observed that "the foundation of this jurisprudential exploration lies in the labour law of South Africa, particularly the Labour Relations Act 28 of 1956 [the "LRA 1956"] and its successor, the LRA. These acts established tribunals tasked with addressing equity-based dismissal

procedural due process, influenced by ILO standards.[89] A more recent approach indirectly involves licence withdrawal, emphasising regulatory oversight in upholding ethical standards in education. These approaches demonstrate a progression towards fairer dismissal processes for educators.

1.3.3.1 Withdrawal of a Teaching Licence

This thesis contends that the dismissal of educators charged with sexual misconduct is complicated by dual oversight: employer[90] and regulatory, primarily through SACE.[91] While SACE enforces ethical standards and may revoke teaching licences, its actions significantly impact employment, despite not constituting direct dismissals. For instance, in cases such as *Robertson*,[92] an educator's suspension by the employer is compounded by SACE's decision to remove the educator's licence, effectively barring him from returning to teaching.[93] This duality can lead to inconsistent sanctions for the same offence, creating disparities in the handling of dismissal disputes. The need for a more integrated approach is highlighted to ensure fair and effective resolution of such cases, which are discussed further in subsequent chapters of this thesis.

1.3.4 Key Legislation

Educator misconduct, particularly sexual misconduct, poses significant challenges in the South African education system. This thesis investigates the complexities of dismissal disputes involving educators charged with sexual misconduct. It explores the legal landscape,

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issues. A significant shift occurred in South African labour law with the introduction of the concept of 'unfair labour practices.' This innovation enabled labour tribunals to move beyond the confines of contract law and into the uncharted territory of fairness".

[89] See the ILO conventions, particularly the Termination of Employment Convention, 1982 (No. 158) ("the ILO Convention 158 of 1958"). Art 4 of the ILO Convention 158 of 1958 states: "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service." On the other hand, Art 7 of the ILO Convention 158 of 1958 states: "The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."

[90] Ss 3 and 17 of the Educators Act.

[91] Ss 5(c) and 14 of the SACE Act.

[92] See the *Robertson* case para 4. This case is thoroughly discussed in Chapter 5 of this thesis.

[93] S 5(c) of the SACE Act provides for the disciplinary processes and actions that may be taken against registered educators who violate the code of professional ethics. S 5(c)(iii)(cc) of the SACE Act states: "Subject to this Act and the National Education Policy Act, 1996 (Act No. 27 of 1996), the council may … *(cc)* remove from the register for a specified period or indefinitely, or subject to specific conditions, the name of, an educator found guilty of a breach of the code of professional ethics." A teacher removed from the register by SACE is not allowed to teach anywhere in South Africa. It is important to note that SACE is required to follow due process throughout this entire process.

due process considerations, and the delicate balance between protecting learners' well-being and educators' rights.

The South African education system operates within a comprehensive legal framework[94] aimed at ensuring the quality and professionalism of educators while safeguarding the rights of learners. At the heart of this framework lie several key pieces of legislation dictating the conduct, obligations, and rights of educators. Understanding these statutes is fundamental to comprehending the complexities of educator dismissal disputes, particularly those related to sexual misconduct.

The transformation of education in South Africa has witnessed profound changes, shaping the educational landscape through the implementation of various statutes. The South African Schools Act 84 of 1996 (the "Schools Act"), the LRA, the Employment of Educators Act 76 of 1998 (the "Educators Act") , and the South African Council for Educators Act (the "SACE Act"), among others, have been instrumental in regulating and advancing the education sector. These statutes aim to enhance the quality of education by addressing governance, management, and administrative issues, and they have been pivotal in addressing the challenges associated with public schooling's lower standards. Of significant concern within this complicated system is educator misconduct, a problem associated with declining educational standards, as evidenced by widespread public outcry.[95] To address this concern, the Education Laws Amendment Act specifies forms of educator misconduct[96] and the requisite procedures for handling these cases.[97]

However, a significant concern that still undermines these efforts is the increasing incidents of educator misconduct, which range from minor transgressions to severe misconduct, including sexual misconduct. The proliferation of these cases substantially threatens the intended goal of quality education and necessitates a comprehensive exploration of managing this misconduct.

[94] See the Constitution, 1996; the Schools Act; the Educators Act; the Children's Act; the LRA; and the SACE Act. These statutes are discussed briefly in para 1.2.2 and more thoroughly later in Chapters 3 to 9 of this thesis.
[95] Macupe *The Mail and Guardian* (2021); South African Government (2020); Pillay (2023); Sobuwa (2021).
[96] See the Education Laws Amendment Act 53 of 2000.
[97] S 10 of the Education Laws Amendment Act. See also ss 17 and 18 of the Educators Act.

1.3.4.1 The Educators Act

The Educators Act is a crucial piece of legislation in South Africa's education system, replacing the Educators' Employment Act[98] to establish a comprehensive framework for the employment, management, and conduct of educators.[99] This Act governs conditions of service, discipline, and dismissal, explicitly categorising sexual misconduct as a serious breach warranting dismissal.[100] It emphasises just cause and procedural fairness, ensuring educators have the opportunity to defend themselves while placing significant responsibility on Heads of Departments to investigate allegations and initiate disciplinary proceedings.[101]

However, the Act's definition of sexual misconduct is limited, focusing primarily on educator behaviour[102] within the employment context, which may overlook the broader implications for learners. This limitation was evident in *Robertson*, where inappropriate remarks to a student highlighted the narrow focus of the Act.[103] Furthermore, the Act fails to adequately address the diverse manifestations of sexual misconduct, such as cyber harassment, and does not impose penalties for educators who neglect to report instances of abuse, potentially undermining protections for learners.

While the Educators Act plays a vital role in regulating educator conduct, it requires critical review, particularly in its treatment of sexual misconduct cases. The Act's disciplinary procedures should align with the Code of Good Practice: Dismissal outlined in the LRA[104] to ensure effective handling of these cases. Subsequent chapters of this thesis will explore these shortcomings and discuss potential amendments to enhance the legal framework, as demonstrated in cases like *CS-Swanepoel* and *Leeto*, discussed in Chapter 5 of this thesis, where the failure to adequately address misconduct resulted in significant harm to learners.

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[98] See the Educators' Employment Act 138 of 1994.
[99] See s 37(1) of the Educators Act, regarding the repeal of Act promulgated under Proclamation 138 of 1994, and savings: "(1) Subject to the provisions of subsection (2), the Educators' Employment Act, 1994, is hereby repealed." Squelch (1999) 51 observed that the Employment Laws Amendment Bill 1999 proposed repealing Chapter 5 of the Educators Act to give it the status of a collective agreement. This was to bring it into line with the public service in which misconduct and incapacity are dealt with by means of collective agreements.
[100] See s 3 of the Educators Act.
[101] See s 17(1)(b) and (c) of the Educators Act.
[102] Ss 17 and 18 of the Educators Act.
[103] See para 1.3.3.1, where the withdrawal of the licence was mentioned as a form of indirect dismissal.
[104] See item 7 of the sch 8 of the LRA.

1.3.4.2 The Schools Act

The Schools Act is integral to South Africa's educational framework, establishing governance structures[105] and safeguarding learners' rights to a secure environment free from abuse, including educator misconduct.[106] However, it lacks explicit authority for disciplining educators, which can complicate the resolution of misconduct cases,[107] particularly in situations like the *Scheepers* cases,[108] discussed in Chapter 5 of this thesis. These cases highlight jurisdictional conflicts among the Heads of Departments, school governing bodies, and principals, raising questions about who has the authority to investigate and initiate disciplinary actions.[109] This ambiguity underscores the need for a critical analysis of the Schools Act to clarify roles and improve the handling of dismissal disputes involving educators for sexual misconduct, as discussed in subsequent chapters of this thesis.

1.3.4.3 The LRA

The LRA is crucial for managing labour disputes in the education sector, particularly concerning the dismissal of educators for sexual misconduct. It establishes a legal framework that outlines valid grounds for dismissal, with sexual misconduct classified under misconduct.[110] The recent amendment, Section 188A, enhances the efficiency of handling such cases through bargaining councils, promoting procedural fairness in investigations.[111] However, challenges remain, as delays by Heads of Departments can push cases into civil courts, exemplified by the *CS-Swanepoel* and *Leeto* cases.[112] This thesis argues for the necessity of efficient disciplinary procedures aligned with LRA principles to strengthen the

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[105] See s 1 "governing body", stating "**'governing body'** means a governing body contemplated in section 16(1)" (original bolding); s 16(1) states: "Subject to this Act, the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act."

[106] See s 16(3) of the Schools Act, which states: "Subject to this Act and any applicable provincial law, the professional management of a public school must be undertaken by the principal under the authority of the Head of Department."

[107] See ss 16(3), 20, and 21 of the Schools Act.

[108] *School Governing Body Grey College, Bloemfontein v Scheepers and Another* (506/19) [2020] ZASCA 82 (3 July 2020); [2020] 3 All SA 704 (SCA) ("the *SGB-Scheepers* case") discussed in Chapter 5.

[109] *South African Council for Educators v Deon Scheepers and Others* (CCT 127/22) [2023] ZACC 23 (12 July 2023); [2023] 10 BLLR 981 (CC); (2023) 44 ILJ 2191 (CC); 2024 (5) BCLR 663 (CC) ("the *Council for Educators v Scheepers CC* case").

[110] S 188 of the LRA.

[111] See s 188A of the LRA for a detailed provision of the inquiry by an arbitrator.

[112] This fragmentation within the system can have several adverse consequences. First, it leads to prolonged legal battles, often at significant cost to both parties involved. Secondly, it blurs the lines of jurisdiction and oversight, making it challenging to hold educators accountable for their actions effectively. Thirdly, it can undermine trust and confidence in the education system's ability to address educator misconduct promptly and fairly. This is discussed fully in Chapter 5 of this thesis.

management of educator misconduct, ensuring a protective environment for students, as discussed in subsequent chapters.

1.3.4.4 The SACE Act

The SACE Act significantly influences the dismissal of educators for sexual misconduct by establishing SACE as the regulatory authority overseeing ethical and professional standards within the teaching profession.[113] It mandates adherence to a Code of Professional Ethics, which explicitly prohibits sexual abuse.[114] SACE has the authority to investigate allegations and impose sanctions, including removal from the register of practising educators, as seen in *Robertson*[115] and *Monde Chris Satani*.[116] These cases exemplify the fragmentation that can arise when SACE's sanctions contradict those of the employer, highlighting the complexities in regulating educator conduct.[117] This thesis addresses these issues, particularly in relation to the interconnected roles of various legislative frameworks, in Chapters 4, 5, and 6.

1.3.4.5 Other Legislation

In addition to these statutes, several others significantly impact the education sector in South Africa. These include the Promotion of Administrative Justice Act ("the PAJA"), the Promotion of Access to Information Act ("the PAIA"), the Children's Act, and the Sexual Offences Act.

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[113] See s 5(a) of the SACE Act.
[114] See s 5(c)(i) of the SACE Act, which states: "Subject to this Act and the National Education Policy Act, 1996 (Act No. 27 of 1996), the council– … *(c)* with regard to professional ethics – (i) must compile. maintain and from time to time review a code of professional ethics for educators who are registered or provisionally registered with the council."
[115] In the *Robertson* case para 1, Arnold Robertson, the educator, was previously employed by the Western Cape Department of Education. On 20 August 2010, he received a final written warning and a two-month suspension without pay from the second respondent, in accordance with s 18(3)(d) and s 18(3)(f) of the Educators Act, for making sexually explicit remarks directly to a Grade 7 learner. After he had served his suspension, the Western Cape Department of Education reported his conduct to SACE, as required by s 26(2) of the SACE Act. Subsequently, SACE found Robertson guilty and removed his name from the register of educators. However, the High Court overturned SACE's decision, citing procedural irregularities and unfair treatment. As a result, the court ordered Robertson's reinstatement as an educator under certain conditions, including undergoing remediation and sexual therapy and submitting a report to SACE for registration on a three-month basis.
[116] *Satani v Department of Education Western Cape and Others* (C447/2017) [2019] ZALCCT 5 (6 March 2019) ("the *Satani-LC* case").
[117] Van Eck (2006) *Obiter* 20 warned against the erosion of Labour Court jurisdiction in employment disputes by reason of circumstances like the present ones where authorities such as the SGB sidestep legislation and a matter that should have followed the LRA process ends up in the civil courts.

Furthermore, the criminal justice system can also affect a teacher's ability to teach. The Children's Act[118] and the Sexual Offences Act[119] stipulate that teachers found guilty of sexual misconduct must be listed in a register of sexual offenders maintained by the Department of Justice and the Department of Social Development. Being on this register disqualifies individuals from working with children.[120] The Constitution of South Africa, 1996 also influences how inquiries into sexual misconduct by educators are handled in respect of human dignity.[121] Both the *Marais case* and the *Nonyane* case illustrate possible occurrences of educator sexual misconduct against learners, but the manner of processing the cases may lead to a discharge of the educator. On the other hand, sometimes the accused educator may genuinely have been innocent, but his dignity was impinged in violation of the constitutional right to dignity, and he could no longer teach. The accusations of sexual misconduct, such as rape, removed these teachers from the classroom. These cases are thoroughly analysed in Chapter 3 of this thesis to give them more perspective and demonstrate how they fit into the dismissal of public-school teachers after being accused or convicted of sexual misconduct.

1.3.4.6 The Protection of Personal Information Act

The Protection of Personal Information Act ("the POPIA")[122] is a crucial piece of legislation that has gained significance in the treatment of sensitive information, particularly in cases of sexual misconduct in the education sector. The POPIA gives expression to section 14 of the Constitution, 1996[123] which provides for the right to privacy. The POPIA places considerable importance on protecting individuals' personal information, ensuring that it is processed lawfully and transparently.[124] Though the POPIA offers critical safeguards for individuals' privacy, it also poses certain challenges when it comes to managing and sharing information related to educator misconduct. Balancing the imperative to protect the personal information of both the alleged victims and the accused educators while ensuring due process and transparency in dismissal procedures can be complex. Applying the POPIA in the context of educator dismissal procedures for sexual misconduct thus warrants careful consideration and

[118] In terms of s 120(c) of the Children's Act on finding persons unsuitable work with children: "(1) A finding that a person is unsuitable to work with children may be made by– … *(c)* any forum established or recognised by law in any disciplinary proceedings concerning the conduct of that person relating to a child".
[119] See the Sexual Offences Act 23 of 1957. See also the *Marais* case.
[120] GN 331 in *GG* 44433 of 9-04-2021.
[121] See s 10 of the Constitution, 1996, which recognises human dignity both as a human attribute and a fundamental right.
[122] Protection of Personal Information Act 4 of 2013.
[123] See s 14 of the Constitution, 1996.
[124] See s 18 of the POPIA.

may require adjustments to existing practices in order to appropriately balance data protection and the pursuit of justice.

The statutes mentioned above become particularly relevant when the HOD has not expedited the discipline of educators in accordance with the Educators Act or the Schools Act. In such instances, teachers, as in the *Scheepers* case, have sought common-law remedies against the SGB and SACE by invoking their rights under the PAJA. This trend underscores the need for alignment between the Educators Act, the SACE Act, and other related legislation such as the Children's Act and the Sexual Offences Act. This alignment is crucial for appropriately prosecuting sexual offenders within schools, safeguarding children, and ensuring a balance between teachers' labour rights and due process. The existence of multiple legislative frameworks raises complex challenges in ensuring a coherent and effective approach to addressing educator misconduct while upholding students' rights and safety. This thesis will also consider other relevant legislative enactments, such as the Electronic Communication and Transactions Act ("the ECTA"),[125] to the extent that they are useful in dealing with disputes over educator sexual misconduct committed against children.

Understanding these legislative frameworks is crucial for navigating the complexities of educator dismissal disputes, particularly those involving allegations of sexual misconduct. This thesis investigates the intricacies of these statutes and their practical implications in addressing these disputes, thus ensuring the protection of both educators' rights and learners' well-being. It is also crucial to look at the role-players, who are ordinarily the enabling entities in the enforcement of the statutes discussed above.

1.3.5 Role-players

The dismissal of educators facing allegations of sexual misconduct in public schools adds another layer of complexity because of the overlapping oversight and jurisdiction of various statutes and institutions. This complex web encompasses the employer of educators, the regulator of educators, SACE,[126] SGBs,[127] and, to some extent, the ELRC,[128] as well as the criminal justice system and civil courts, all wielding influence over educator discipline and, ultimately, dismissals in schools. Legislative instruments such as the Schools Act, the Educators Act, the SACE Act, the LRA, and ILO conventions play pivotal roles in shaping how educator disciplinary matters, particularly dismissals, are conducted. These instruments are

[125] Electronic Communication and Transactions Act 25 of 2002 ("the ECTA").
[126] See ss 5(c) and 21 of the SACE Act.
[127] See s 16 of the Schools Act. See also ss 3 and 4 of the Educators Act.
[128] ELRC Collective Agreement No. 3 of 2018 (the "ELRC Collective Agreement").

fully discussed in Chapter 6 of this thesis, dealing with the Schools Act and stakeholders with oversight roles over the dismissal of educators for sexual misconduct, as well as in Chapter 7, dealing with the role of SACE.

The cases mentioned above, however, reveal a deep-seated challenge surrounding concurrent jurisdictions of the employer, the SGB, and SACE and now to some extent the ELRC that are pertinent to this thesis.

1.3.6 The Status of Educator Dismissal Actions for Sexual Misconduct

In South Africa, the status of educator dismissals for sexual misconduct does not seem to be relenting, as shown above.[129] As long as schools are open, cases arise year after year, quarter to quarter, month to month, and they are reported and prosecuted by both the employer and SACE, as stated in paragraph 1.1 above. This process makes sexual misconduct a serious problem in South African schools.

The employer of educators[130] has given its powers away to the ELRC to prosecute all sexual cases against educators.[131] The argument raised in adopting ELRC Collective Agreement is that it leads to speedy processing of sexual misconduct cases against educators and it reduces the likelihood of subjecting children to secondary trauma through multiple processes as would be the case with an internal hearing, which is usually followed by an appeal and then eventually the ELRC where the same child will be required to testify again.[132] This means that the cases are processed through arbitration from the outset as a one-stop process that replaces the Department's internal disciplinary hearing.[133] It follows that these cases can only be revised at the Labour Court should any party to the case be aggrieved: that party could not seek a review through the ELRC, as a commission cannot possibly review the rulings of another commissioner.

As discussed above, in several cases[134] that have gone before the courts the employer of educators has failed to manage the cases by upholding just cause and due process in conducting dismissal proceedings against educators. Even though the role of dealing with

[129] See para 1.3.1. above.
[130] See ss 3 and 4 of the Educators Act.
[131] See ELRC Collective Agreement.
[132] See official commentary from websites of some of the principals who signed the ELRC Collective Agreement: South African Government (2018); ELRC (2020).
[133] South African Government (2018).
[134] See the *Leeto* case; the *CS-Swanepoel* case; the *Scheepers* case.

sexual misconduct cases has been handed over to the ELRC through the ELRC Collective Agreement, read together with section 188A, the duty to dismiss remains that of the employer. All other processes, such as investigations, prosecutions, and related processes, remain the prerogative of the employer.

The question arises: does section 188A guarantee that the employer will perform its duty to ensure that just cause and due process are followed? That is not the duty of the arbitrator. This thesis argues that although section 188A may expedite cases and protect children from secondary trauma, the effective management of discipline and disciplinary process remains that of the employer, and cases can still fall through the cracks.

1.4 Hypothesis and Delimitation of the Thesis

1.4.1 Hypothesis

Based on the preceding discourse, the thesis posits two sets of multifaceted hypotheses:

Hypothesis 1: The incorporation of section 188A of the LRA by the ELRC constitutes a commendable initiative for expediting the resolution of sexual misconduct disputes within the public-school sector. The endemic prevalence of educator-related sexual misconduct against children in South African public schools profoundly challenges the credibility of the educational system. Moreover, subjecting child witnesses to a multitude of procedural stages, including internal disciplinary hearings and potential appeals, places an unwarranted burden of potential secondary trauma upon these witnesses. The use of a single process – section 188A arbitration proceedings – emerges as a viable mechanism to address pertinent issues promptly while safeguarding the welfare of children and upholding the labour rights of educators. The effectiveness of this system is pivotal to achieving these objectives.

Hypothesis 2: The application of section 188A of the LRA, as adopted by the ELRC, manifests certain inherent problems that warrant resolution. The thesis has identified various challenges that, if left unaddressed, may impede the successful implementation of the section 188A process in adjudicating cases of sexual misconduct involving educators and children. These challenges encompass, among other things, the issue of fragmentation stemming from concurrent jurisdiction exercised by multiple entities, including the employer and regulatory authorities, as well as the existing legislation on educator discipline and the procedural intricacies within section 188A. Furthermore, managing discipline within schools is a substantial challenge. Of particular concern in cases of sexual misconduct perpetrated by

educators against learners is the conduct of the employer during disciplinary proceedings, encompassing failures to present closing arguments, secure witnesses, and accurately classifying cases, among other pertinent matters. So, there is a pressing need to re-evaluate the current system for managing educator discipline.

1.4.2 Delimitation

Building upon the earlier remarks in this chapter and the hypotheses outlined above, it is imperative to emphasise the precise focus of this thesis:

- It is primarily concerned with the resolution of sexual misconduct cases involving educators and perpetrated against children within the South African public-school system, as governed by the ELRC Collective Agreement and the jurisdiction of the ELRC.

- The research does not encompass other forms of educator misconduct, sexual misconduct cases involving colleagues, staff, or clients, or issues related to educator employment and discipline outside the scope of child victims.

- Though acknowledging the broader legislative and regulatory framework, the thesis centres on the practical application of section 188A within the ELRC and its impact on the resolution of sexual misconduct cases, specifically against child victims.

- Furthermore, this thesis does not investigate wider aspects of education policy, curriculum matters, or the larger socio-cultural factors contributing to educator misconduct but maintains a dedicated focus on sexual misconduct cases involving children and the labour rights of educators as they undergo the disciplinary processes. As such, this thesis is structured around an examination of a three-pronged framework encompassing child protection, the labour rights of educators, and the disciplinary responsibilities of the employer.

- The thesis also focuses broadly on the use of section 188A and its relationship to the LRA dispute resolution processes.

- The thesis further examines SACE's concurrent jurisdiction as it relates to handling sexual misconduct cases only, not other forms of professional misconduct, under its legislation.

- Finally, the thesis conducts a comparative analysis of these issues as they are addressed in the educational contexts of Nigeria and England.

1.5 Research Questions and Aims

This thesis endeavours to answer the following questions:

- To what extent does the ELRC's use of section 188A effectively resolve cases of sexual misconduct against children in the public education sector?

- What insights and guidance can be derived from the ILO and scholarly discourse concerning the optimal approach to resolving labour disputes?

- What measures can be recommended to enhance the efficacy of section 188A in addressing educator dismissal disputes related to sexual misconduct in the public education sector?

- What lessons can be drawn from international comparative analyses regarding the efficient resolution of educator dismissal disputes arising from sexual misconduct against children in public (i.e. state) schools?

- What proposals and reforms could improve the effectiveness of resolving educator dismissal disputes involving sexual misconduct against children in public schools?

Ultimately, this thesis aims to evaluate and enhance the effectiveness of section 188A in addressing cases of sexual misconduct involving educators and children in South African public schools. By addressing the critical issues and challenges surrounding educator discipline and dismissal, the thesis seeks to promote fairness, due process, and ethical conduct, thus fostering a conducive environment for quality education while safeguarding the rights of all stakeholders involved. This research also aims to provide valuable insights for policymakers, educators, legal practitioners, and other relevant parties involved in the South African education system, offering recommendations for potential reforms and improvements.

1.6 Significance of the Thesis

The significance of this thesis extends beyond the boundaries of South Africa and has global implications. Sexual misconduct in the education sector is a pervasive issue, and addressing it is of paramount importance.

First, within the South African context, the thesis is significant because of the prevalence of sexual misconduct cases involving educators. These cases disrupt the education system and harm students physically, emotionally, and psychologically. A comprehensive analysis of dismissal procedures in the context of sexual misconduct is critical to ensuring the safety of South African learners and maintaining the integrity of the education sector.

Furthermore, South Africa's approach to handling sexual misconduct cases can serve as a model for other countries facing similar challenges. By identifying best practices and areas for improving South Africa's procedures, this thesis can contribute to international discussions on effective methods of addressing sexual misconduct in the education sector.

Globally, there is a growing recognition of the need to protect learners against educators' sexual abuse.[135] Enhancing dismissal procedures can deter potential perpetrators while providing a more efficient and just process for all parties involved. The findings of this thesis can inform policies and practices in various countries, potentially leading to safer educational environments worldwide.

1.7 Methodology

1.7.1 Overview of Sources

This thesis centres on evaluating and enhancing the effectiveness of section 188A in addressing cases of sexual misconduct involving educators and schoolchildren in South African public schools.

The primary method followed is analysing legal cases adjudicated in the labour dispute resolution forums such as the ELRC and the Labour Courts and any relevant documentation pertaining to educator disciplinary and dismissal processes for sexual misconduct against schoolchildren in South African public schools.

[135] Shakeshaft (2004) 6.

This detailed analysis aims to provide invaluable jurisprudential insights into the practical application and interpretation of the law in real-world scenarios of educator dismissal for sexual misconduct against schoolchildren in South African public schools.

1.7.2 Combined Approaches to Legal Analysis

This research follows a multifaceted approach combining doctrinal analysis,[136] legal comparative analysis,[137] and theory development[138] to comprehensively examine educator dismissal for sexual misconduct with minors.[139] Through a systematic evaluation of well-established legal principles, a comparative analysis of relevant legal systems, and an investigation of novel theoretical frameworks such as section 188A, this approach aims to deal with the intricate challenges associated with cases of sexual misconduct by educators involving schoolchildren at South African public schools. By amalgamating these diverse methodologies, the research seeks to enhance our comprehension and devise effective solutions in the pursuit of justice and child protection.[140] It ensures that legal principles are not only scrutinised but also translated into practical and meaningful actions within the context of

[136] Doctrinal analysis involves a systematic examination of legal texts and principles. Legal comparative analysis juxtaposes South Africa's dismissal procedures with those of other countries, such as Nigeria and the United Kingdom, to identify best practices and innovative approaches. See also Bhaghamma (2023) *IJGPR* 90 and Smith (1966) *MLR* 768.

[137] According to Weiss (2005) *CLLPJ* 177, "the perspective of studying a legal system from within is never sufficient. … Only the comparison with structures performing similar or even identical functions in other systems opens one's eyes to characteristic elements of one's own system. This discovery serves as stimulus for further reaching questions referring to the cultural, political, social, or economic reasons for the pattern established in one's own country." Theory development integrates legal, ethical, and sociological perspectives to advance theoretical frameworks for understanding and addressing sexual misconduct in education. This thesis argues that studying Nigeria, a fellow African country, and the UK, a developed country with a progressive legal system, will shed much-needed light on the present inquiry. Further, Weiss (2005) *CLLPJ* 177-178 observed that "the knowledge of the functioning of other legal systems provides a new perspective: the possibility to assess one's own system from outside and thereby put it into the context of other experiences made elsewhere".

[138] Consistent with one of the questions of this thesis pertaining to lessons that can be drawn from international comparisons, Weise believes that legal comparative thesis can be useful as "a tool for legal reform". In that regard, Weiss (2005) *CLLPJ* 178 observed that "the most interesting problem for academic research as well as for practical politics refers to the question whether and in what way comparative labour law can be used as a tool to legal reform and for the adaptation of the labour law system to new conditions". First, there is no doubt that comparison with other systems can significantly enrich the reformers' imagination of what could be done.

[139] This is consistent with one of the questions of this thesis. This thesis is interested in how the comparator countries deal with sexual misconduct against learners in public schools as well as the attendant labour disputes of educators arising from this misconduct.

[140] These legal sources and analyses collectively form the foundation for critiquing and improving the educator sexual misconduct dismissal labour dispute resolution system in South Africa's public education sector. They provide the contextual backdrop against which legislative gaps, challenges, and potential reforms are evaluated, ultimately contributing to the enhancement of this critical aspect of the education system.

child safeguarding and educator accountability, thus maintaining a delicate balance between safeguarding minors and upholding accused educators' labour rights.

1.8 Rationale for Comparative Analysis

Although primary data is not collected, a comparative analysis juxtaposes the South African educator dismissal system with those of England and Nigeria. This approach, based on existing literature and legal documentation, aims to identify key differences and similarities, providing broader contextual comprehension. The rationale for choosing the comparator countries is discussed below.

1.8.1 The Choice of Nigeria as a Comparator

Nigeria is chosen as a comparator in this thesis for several compelling reasons that underscore its significance. Both Nigeria[141] and South Africa[142] grapple with the grave issue of sexual misconduct in their educational institutions, making this shared challenge a rich ground for comparative analysis that can offer valuable insights to both nations.

First, then, these countries face common educational challenges, such as issues related to infrastructure, teacher quality, and curriculum development.[143] These shared challenges provide a context for understanding the specific issue of sexual misconduct among educators.

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[141] Nwauzi and Akolokwu (2015) *CJHR* 8. See also Jannamike (2020). According to Adebumiti (2021), "There are claims that sexual abuse is on the rise in Nigeria. And these abuses also commonly happen in schools. Interestingly, these claims are supported with statistics. The United Nations Children's Fund (UNICEF) in its report explained that one in four girls and one in 10 boys in Nigeria had experienced sexual violence before the age of 18. In addition, six out of 10 children in Nigeria experience emotional, physical or sexual abuse before the age of 18, with many experiencing physical violence. … Similarly, a survey by a non-governmental organisation, Positive Action for Treatment Access, indicated that over 31 per cent of girls in Nigeria reported that their first sexual encounter was rape or forced sex".

[142] See para 1.3.1 above for the prevalence of sexual misconduct against children by educators in South Africa.

[143] See Diala (2021) *IJLPF* 8. See also Ramose (2003) *SAJHE/SATHO* 141; Onyemachi (2010) *AIMDJE* 382. UNICEF (2922) 66 observed: "Available data indicates that millions of children in Nigeria are victims of violence in one or more forms each year. In 2016, one in six girls and one in five boys experienced emotional violence by a parent, caregiver or adult relative. It was estimated that 85 per cent of children aged 1–14 years were subjected to at least one form of violent discipline method (psychological aggression or physical punishment) by household members in the previous month (NBS and UNICEF, 2018). If the trend of violence against children continues unabated, about 60 per cent of children under the age of 18 years will experience some form of violence. Half of all children will experience physical violence. One in four girls and one in 10 boys will experience sexual violence." These views suggest that Nigeria faces challenges similar to those in South Africa.

Secondly, Nigeria and South Africa have diverse legal systems shaped by their unique histories and cultural backgrounds.[144] By examining how each legal framework addresses educator sexual misconduct, it is possible to discern the influence of cultural and historical factors on the effectiveness of these mechanisms.

Thirdly, these two nations have differing legislative approaches to addressing educator sexual misconduct. Comparing these legislative variations can illuminate the strengths and weaknesses of each system, potentially offering insights into areas for legislative reform.[145] Moreover, South Africa and Nigeria represent different regions within Africa. Studying how each country handles sexual misconduct cases can reveal regional variations in approaches[146] to this issue, which may lead to region-specific recommendations.

Furthermore, both nations' experiences of educator sexual misconduct resonate with global concerns about child protection and professional ethics. Lessons drawn from this comparative analysis can contribute to the global discourse on improving educator conduct and child safety in schools.[147]

1.8.2 The Choice of England as a Comparator

The selection of England as a comparator in this thesis brings valuable insights for several compelling reasons. First, it offers a distinct perspective on educator sexual misconduct in a developed, Western context,[148] providing a counterpoint to the South African experience. This contrast allows for comprehensively examining how different educational systems influence the prevalence and management of educator sexual misconduct.

Secondly, England and South Africa have unique legal frameworks governing teacher conduct and professional ethics. Comparing these frameworks reveals the impact of legal variations on preventing and resolving sexual misconduct cases, offering valuable lessons for both contexts.

Thirdly, historical factors, including colonial legacies, education policies, and societal norms, have shaped South Africa and England differently. Understanding how these historical backgrounds influence their approaches to sexual misconduct can provide critical insights into

[144] Diala (2021) *IJLPF* 3.
[145] See Bornu and Akani (2019) *JPLCI* 58.
[146] See Rossouw (2002) 76.
[147] See UNESCO (2017); Matthews (2011) *AJTE* 13. See also Shakeshaft (2004) 1.
[148] See Shakeshaft (2004) 1. See also Matthews (2011) *AJTE* 13.

the complex interplay of history and policy.[149] Moreover, cultural and social factors significantly shape attitudes toward misconduct and reporting. By comparing the cultural and social norms of South Africa and England, this thesis can illuminate how these factors impact reporting and handling sexual misconduct cases.

Furthermore, resource disparities between England's well-established educational infrastructure[150] and South Africa's resource-constrained educational system[151] are striking. Comparing how these disparities affect the management of misconduct cases is instructive for both contexts, highlighting potential resource-related challenges and solutions.

Finally, the relevance of England's approach to educator sexual misconduct aligns with global concerns about child protection, professional ethics, and safeguarding.[152] Lessons drawn from this comparative analysis extend beyond national borders and can inform international discussions on these critical issues.

1.9 Brief Outline of the Thesis

Chapter 1: General Introduction

This chapter introduces the topic of this doctoral thesis in law. It describes the background to the topic and states the research problem: educator sexual misconduct towards learners in South African public schools. It states the hypotheses and delimitation, the research questions and aims, and the significance and methodology. The rationale for a comparative analysis is provided, together with the two comparator legal systems. The structure of the thesis is briefly outlined.

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[149] See Grosset and Venter (1998) 270-277. See also Zatz and Rodriguez (2014) *LSI* 667 and Shakeshaft (2004) 1.

[150] The UNICEF Office of Research (2016) 4 observed that the UK is a rich country. This thesis contends that there may be challenges in the UK pertaining to educational infrastructure, but that they may not be as acute as those obtaining in South Africa. There is still something to compare with the South African situation, especially in regard to how the UK handles sexual misconduct against children.

[151] Amnesty International (2020) observed that "South Africa is failing too many of its young people when it comes to education. Although it has made significant progress since the end of apartheid in widening access this has not always translated into a quality education for all pupils. The system continues to be dogged by stark inequalities and chronic underperformance that have deep roots in the legacy of apartheid, but which are also not being effectively tackled by the current government. The result is many schools with crumbling infrastructure, overcrowded classrooms and poor educational outcomes". Engelbrecht (2020) *Prospects* 219 also observed: "The research findings indicate that although South African teachers in principle support the justification of inclusive education on social grounds, the lack of adequate human, technical, and infrastructural resources to facilitate implementation is a major contributing factor to the negative perceptions (within some school communities) of its educational and economic viability."

[152] See UNICEF (2021). See also Shakeshaft (2004) 1.

Chapter 2: International Norms and Constitutional Perspective

This chapter investigates international norms and treaties relevant to the right to education and equitable labour practices, examining their applicability within the South African context, particularly about protecting children against educators' sexual abuse. The thesis assesses the extent to which South Africa incorporates international norms and standards in shaping its own framework for addressing this misconduct. Insights and recommendations from the ILO and scholarly discourse are leveraged to identify best practices for resolving labour disputes, with a specific focus on cases of educator misconduct. Additionally, the chapter thoroughly explores South Africa's constitutional stance on the right to basic education, safeguarding against sexual abuse by educators, and the right to equitable labour practices, all significantly influenced by international norms.

Chapter 3: The LRA: Dispute Resolution and the Section 188A Inquiry by Arbitrator Process

This chapter comprehensively analyses the LRA, concentrating on dispute resolution processes, notably the distinctive section 188A process. The chapter explores how the LRA addresses employee dismissal dispute resolution and ensures the right to just cause and due process, particularly in sensitive contexts such as dismissing educators for sexual misconduct.

Chapter 4: Evaluation of the Legislation Regulating Educator Dismissals

This chapter considers the Educators Act, the Schools Act, and the SACE Act, exploring the rules and regulations governing educator behaviour. These statutes are scrutinised to ascertain their impact on the regulation of educators, especially those charged with sexual misconduct against children.

Chapter 5: Analysis of Role-players Regulating Educator Sexual Misconduct Disputes

This chapter comprehensively examines the Schools Act, delineating the functions of various stakeholders in the dismissal process, including the principal, the HOD, and the SGB. The chapter investigates the influence of these roles on educator dismissals, particularly those related to sexual misconduct against children. The chapter also considers recent amendments to the Basic Education Laws Amendment Act ("the BELA Act")[153] and their relevance to these

[153] Basic Education Laws Amendment Act 15 of 2011.

dismissals. In addition, the chapter critically analyses SACE's regulatory responsibilities. It addresses the impact of SACE's role on educator dismissals, especially concerning professional conduct. It also explores challenges related to concurrent jurisdiction and the concept of indirect dismissal in cases of educators facing charges of sexual misconduct against children.

Chapter 6: Evaluation of the Application of Section 188A and the Role of the ELRC in Educator Dismissal Disputes

This chapter assesses the application of section 188A, specifically examining its use in implementing the ELRC Collective Agreement to address disputes related to sexual misconduct. The chapter analyses the successes and challenges of administering section 188A in handling cases, drawing on critical themes emerging from the analysis of case law at the ELRC and the courts.

Chapter 7: A Comparative Analysis of Educator Discipline Systems

This chapter undertakes a comprehensive comparative analysis of educator discipline systems in South Africa, Nigeria, and England. It identifies differences and similarities in how these countries handle educator dismissals for sexual misconduct against children, drawing lessons and approaches that could enhance the resolution of these disputes in South African public schools.

Chapter 8: Conclusions and Recommendations

This chapter concludes the thesis by summarising key findings and offering actionable and pragmatic recommendations. Derived from research findings and comparative insights, it provides practical solutions to enhance the effectiveness of resolving educator dismissal disputes, particularly those related to sexual misconduct against children in South African public schools.

Having set the scene for this thesis, the discussion moves to international norms and constitutional perspectives on the right to basic education and fair labour practices.

Chapter 2: International Norms and Constitutional Perspective

Page

2.1 Introduction 32
2.2 Evolving Legal Perspectives on Safeguarding Children's Rights Globally and in Africa 33
2.2.1 The Transition from a Needs-Based Approach to a Rights-Based Approach to Childhood and Children's Rights 33
2.2.2 The League of Nations and the Recognition of the Rights of the Child 36
2.3 The United Nations Convention on the Rights of the Child 39
2.3.1 The Four Pillars and General Principles of the CRC 40
2.3.1.1 The Child's Right against Non-discrimination 40
2.3.1.2 The Right to Have Children's "Best Interests" Be "A Primary Consideration" 41
2.3.1.3 The Inherent Right to Life 41
2.3.1.4 The Right of a Child "Who Is Capable of Forming His or Her Own Views … to Express Those Views Freely in All Matters Affecting the Child" 42
2.4 The African Charter on the Rights and Welfare of the Child 44
2.4.1 Addressing Sexual Misconduct Issues Committed by Educators against Children 46
2.4.1.1 Protection of Children's Rights 47
2.4.1.2 Rights to a Safe Environment 47
2.4.1.3 Preventing Exploitation 47
2.4.1.4 Non-Discrimination 47
2.4.1.5 Reporting Mechanisms 48
2.4.1.6 Children's Best Interests 48
2.5 The Constitutional Perspective 49
2.5.1 Section 28 of the Constitution, 1996 51
2.5.1.1 The Fiduciary Duty and In Loco Parentis Principle for Educators 52
2.5.1.2 The Limitations of the Best Interests of the Child Doctrine 54
2.5.2 Section 29 of the Constitution, 1996 55
2.5.2.1 The Children's Unqualified Constitutional Right to a Basic Education in South Africa 55
2.5.2.2 Can the State be Compelled to Provide Basic Education for Individuals? 60
2.5.2.3 Adjudication of the Right to a Basic Education 60
2.5.3 Section 29 of the Constitution and Other Fundamental Rights for Children 61
2.5.3.1 The Right to Equality 62
2.5.3.2 Children's Right to Dignity 63
2.6 International Norms in Educator Labour Rights not to be Unfairly Dismissed 65
2.6.1 Analysis of Article 4 and its Requirement of a Valid Reason for Termination 67
2.6.2 Examination of Article 7 and the Worker's Right to Be Heard 67
2.6.3 The Right to a Reasonable Period of Notice or Compensation in Lieu Thereof 68
2.6.4 Procedure of Appeal Against Termination 69
2.7 The Educator's Constitutional Labour Rights 70
2.7.1 Section 23 of the Constitution, 1996 70
2.7.2 Unfair Labour Practices 71

2.8 Conclusion..... 73

2.1 Introduction

The preceding chapter introduced the multidimensional issue of educator dismissal for sexual misconduct against children in South Africa's public-school system. This issue was underscored by the prevalence of these sexual misconduct cases and their burden on the forums tasked with addressing this pressing concern. Notably, the introduction of section 188A of the Labour Relations Act 1995 (LRA) was a commendable step aimed at expediting dispute resolution and minimising the secondary trauma experienced by children. However, the chapter revealed that applying section 188A is fraught with several challenges hindering both child protection from sexual abuse by educators and the advancement of educators' labour rights.

This chapter moves the focus to international norms and treaties concerning the right to education and equitable labour practices. The norms and treaties considered are the League of Nations Declaration of Geneva on Children's Rights (1924) (the Geneva Declaration); the United Nations Declaration of Human Rights (1948) (1948 UDHR); the United Nations Declaration of the Rights of the Child in 1959 (1959 Declaration); and the United Nations Convention on the Rights of the Child (1989) ("the CRC"). The United Nations International Covenant on Civil and Political Rights (1966) (the 1966 ICCPR) and the United Nations International Covenant on Economic and Social and Cultural Rights (1966) (ICESCR) are mentioned where necessary. This chapter also explores the regional African Charter on the Rights and Welfare of the Child (1990) ("the African Children's Charter"), which speaks to the African child's rights to dignity, protection, and basic education.

The relevance of all these international instruments within the South African context, particularly in safeguarding children from sexual abuse by educators, is discussed. This chapter aims to assess the extent to which South Africa incorporates international norms and standards in shaping its framework for addressing educators' sexual misconduct against children while upholding the educator's labour rights not to be unfairly dismissed for sexual misconduct. To achieve this aim, this thesis draws upon insights and recommendations from the ILO and scholarly discourse to identify best practices for resolving labour disputes, with a specific emphasis on cases of educator sexual misconduct.

Furthermore, this chapter comprehensively explores South Africa's constitutional position on the right to basic education, the right to protection against sexual abuse by educators, and the educators' right to equitable labour practices in the resultant disputes. These constitutional aspects are significantly influenced by international norms, and the analysis in this thesis seeks to illuminate the intricate interplay between these elements in the South African context.

2.2 Evolving Legal Perspectives on Safeguarding Children's Rights Globally and in Africa

The issue of sexual misconduct against children, both in South Africa and around the world, particularly when perpetrated by educators, underscores a significant threat to children's dignity and fundamental rights. Protecting and safeguarding children's rights are paramount in this context. This thesis is grounded in the objective of finding a delicate balance between the right of schoolchildren to be protected from sexual abuse by teachers and the right of teachers to a fair dismissal when confronted with charges of sexual misconduct against schoolchildren. Historical exploration with an international focus is necessary to provide a comprehensive understanding of the evolving dynamics in handling these cases.

2.2.1 The Transition from a Needs-Based Approach to a Rights-Based Approach to Childhood and Children's Rights

The discourse on childhood and children's rights on the international stage has been transformed from a needs-based approach to a rights-based approach. Philippe Ariès's seminal work, *Centuries of Childhood*[1] and the more recent contribution by Hanita Kosher, Asher Ben-Arieh, and Yael Hendelsman in *Children's Rights and Social Work* provide crucial insights into the historical evolution of childhood.[2] First, Ariès's examination reveals the pre-16th century era when childhood lacked distinct recognition,[3] children being perceived as

[1] See Ariès (1962) 125. Ariès's argument regarding the "discovery" of childhood in the 17th century is predicated upon another much debated point: his assertion that "in medieval society the idea of childhood did not exist". This claim, which has been both enthusiastically adopted and categorically dismissed by scholars from various disciplines, is more nuanced than it sounds.
[2] See Kosher et al (2016) 9, who set out the history of the evolution of childhood, on the one hand, and the rights of the child, on the other: these may be traceable to three distinct periods: the pre-industrial period, the industrial period, and the period from the mid-20th century to the present.
[3] See Ariès (1962) 125. See also Heywood (2009) 19.

miniature adults.[4] Legally and socially, they were considered their parents' property,[5] devoid of individual status and rights.[6] The prevailing perspective allowed parents, primarily fathers, unrestricted power and control over children, endorsing practices such as widespread corporal punishment.[7]

Secondly, the industrial period in the 19th century marked a conceptual shift, recognising children as vulnerable and needing protection, leading to the child labour reform movement.[8] Previously seen as small adults, children became perceived as endangered by the adverse conditions of immigration, industrialisation, and urbanisation.[9] The emergence of child labour as a social issue marked a turning point in a growing awareness of the vulnerability of child labourers subjected to hazardous conditions.[10] The child labour reform movement gained momentum, challenging the exploitation of children in factories. This movement, advocating for children's protection and education rights, sparked a transformation in the perception of childhood.[11] Laws controlling child labour and introducing universal education recognised the

[4] See Hart (1991) *AP* 53. See also Kosher et al (2016) 9 and Heywood (2009) 11, who observed that "Ariès asserts that medieval civilisations failed to perceive a transitionary period between infancy and adulthood. His starting point, then, was a society which perceived young people to be small-scale adults".

[5] See Hart (1991) *AP* 53, who argues: "During the 16th, 17th, and 18th centuries, changes occurred in the nature of the property status accorded children. Children, first considered to be chattel, were valued for contributing to family work and supporting parents in their old age. In the early part of this period, young children continued to be ignored and were without individual identity to the extent that they were considered replaceable and interchangeable". Heywood (2009) 11 observed that "there was no idea of education, medieval people having forgotten the *paideia* of classical civilisation, and no sign of our contemporary obsessions with the physical, moral and sexual problems of childhood. The discovery of childhood would have to await the fifteenth, sixteenth and seventeenth centuries. Only then could it be recognised that children needed special treatment, 'a sort of quarantine', before they could join the world of adults".

[6] See Kosher et al (2016) 11, who hold the view that "gradually, children came to be considered as a special class, and parents were increasingly expected to maintain, educate, and protect them; schools were given some child-rearing responsibilities, and laws provided reprimand for difficult children". See also Hart (1991) *AP* 53.

[7] See Kosher et al (2016) 10. Many historians argue that during the early stages of modernisation, infant and child mortality rates were alarmingly high, causing emotional distancing of parents from their children. These historians claim that parents suppressed the ability to feel empathy for their children to avoid emotional attachment to a baby with a low chance of survival (Ariès (1960); DeMause (1974)). See also Hart (1991) AP 53. Children, viewed as expendable, faced neglect and abuse, and, in extreme cases, were sold as slaves. Child labour was widespread, and children had more responsibilities than rights.

[8] See Kosher et al (2016) 10.

[9] Kosher et al (2016) 10.

[10] Hart (1991) *AP* 53.

[11] See Kosher et al (2016) 10-11. The concept of the protection of children and education rights is important to this thesis in so far as it acknowledges that sexual abuse of children interferes with their ability to concentrate on education. Factory work was physically exhausting for children as young as 7 years old, who worked 16 hours a day in a damp, poorly ventilated workplace where corporal punishment was common. Foremen used harsh methods to keep exhausted children awake. In addition, working in a factory, unlike at the family farm or craft shop, exposed the children to large numbers of strangers who might molest and corrupt them (Alaimo and Klug (2002) 13-14). Further, "Laws controlling child labour and the introduction of universal education in the 19th century recognised

need to protect children and acknowledge their rights.[12] The state assumed responsibility for providing various services, ushering in an era of the expansion of children's rights.[13]

Thirdly, the subsequent era from the mid-20th century witnessed legislative developments addressing child welfare but also reinforced a perception of children as either passive and vulnerable or unruly and threatening.[14] Though society focused on protecting and providing for children, the emphasis on safeguarding resulted in a dependent childhood regulated by adult guardians.[15] The perception of children as resources for the future reinforced the concept of "saving children".[16] This idea continued to shape societal attitudes well into the 20th century, with a focus on children's physical survival and basic needs.[17]

Only in the latter half of the 20th century did the concrete formalisation of children's rights, particularly in international conventions, occur.[18] This formalisation created benefits and challenges, notably in the rights-based approach to child protection, with the United Nations playing a significant role. Despite debates about historical conceptions of childhood and children's rights, the formalisation of schooling and interactions with educators have introduced tangible benefits and challenges.

Critics challenge Ariès's influential work, *Centuries of Childhood*, objecting primarily to his assertion that the medieval concept of childhood did not exist.[19] Scholars, particularly medievalists, vehemently contest this claim, arguing for the existence of a distinct medieval understanding of childhood.[20] Ariès is criticised for adopting a "present-centred" approach, neglecting the nuanced historical context and overly idealising the medieval past while negatively portraying the present.[21] Critics question his reliance on aesthetic artefacts as historical evidence, arguing that his selective use overlooks naturalistic portrayals of childhood

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the need for children's protection and acknowledged that they had rights. As school gradually took the place of work, and regular schooling became compulsory (around 1900 in Europe), the attitudes toward the place and role of children also changed. Childhood could last longer and children could be seen as more dependent". This thesis observes and contends that the removal of children from factories into formal schools was a major achievement, but it also introduced children to new vulnerabilities, such as sexual harassment by teachers.

[12] See Kosher et al (2016) 11.
[13] See Kosher et al (2016) 12.
[14] See Kosher et al (2016) 12. See also Hart (1991) *AP* 53.
[15] See Kosher et al (2016) 12. See also Hart (1991) *AP* 53.
[16] See Kosher et al (2016) 12.
[17] See Kosher et al (2016) 12. This is why the period is regarded as a shift from a needs-based approach to a rights-based approach to childhood.
[18] See Kosher et al (2016) 12.
[19] See Wilson (1980) *HT* 133.
[20] See Wilson (1980) *HT* 133.
[21] See Wilson (1980) *HT* 133. See also Heywood (2009) 13.

in other medieval sources and may reflect more on artistic trends than historical realities.[22] While acknowledging Ariès's impact, these critiques prompt a reassessment of his conclusions within a broader historical framework.

Despite the critique directed at Ariès and alternative perspectives, the present thesis contends that the 20th century played a pivotal role in formalising children's rights to education, dignity, and protection through international conventions. The League of Nations and later the United Nations contributed significantly to codifying the childhood discourse and the rights-based approach to children's plight.[23] Though historical consensus on the conception of childhood remains elusive, the formalisation of the schooling environment, where learners engage with educators, has introduced distinct advantages and challenges for learners.[24] First, the discourse on children's rights precipitated the formalisation of these rights, manifested in treaties, conventions, and charters. Secondly, this formalisation introduced a rights-based approach, providing a justifiable basis for child protection within legal frameworks, including court adjudication. Thirdly, numerous rights materialised as tangible human rights, encompassing universal education and dignity, and safeguarding children from abuse and exploitation, including instances of a sexual nature.[25] This thesis scrutinises the formation of the League of Nations and investigates subsequent developments in international law, with specific emphasis on the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

2.2.2 The League of Nations and the Recognition of the Rights of the Child

In the aftermath of the First World War (1914-1918), children's rights expanded onto the international stage.[26] Eglantyne Jebb, founder of Save the Children International, played a leading role in this progression.[27] In 1924, she successfully advocated for the League of

[22] See Wilson (1980) *HT* 135, who argues that "Ariès relies upon printed and pictorial evidence: almost all the few manuscript sources used are taken from printed versions or from antiquarian compilations".
[23] Kosher et al (2016) 15.
[24] Kosher et al (2016) 15. See also Memzur (2008) *SAPR/PL* 1.
[25] See Memzur (2008) *SAPR/PL* 1.
[26] See Humanium (2023). See also Kosher et al (2016) 15.
[27] See Kosher et al (2016) 15, who observed that "in the aftermath of the First World War the protection-provision view of children's rights expanded into the international arena. In 1924, Eglantyne Jebb, founder of Save the Children International, persuaded the League of Nations to adopt the Declaration of Geneva on Children's Rights. This declaration is short, containing only 5 statements but these provide a concise list of what society 'owed the child' and established the notion that children should have certain types of 'rights'. They were not rights to 'do' or to 'act' independently as individuals. Instead they were rights to 'receive' in the form of things that should be done for the child". See also Humanium, which records: "After witnessing the horror of World War I, Eglantyne Jebb realised that children need special protection. In 1919, with the help of her sister, Dorothy Buxton, Jebb founded the Save the Children Fund in London to provide assistance to and protect children who have experienced war. In

Nations[28] to adopt the 1924 Declaration of the Rights of the Child, also known as the Geneva Declaration, which marked a significant milestone.[29] This declaration was adopted by the Fifth Assembly of the League of Nations and constituted the first international instrument explicitly recognising children's rights.[30] Non-governmental organisations, including the Children Fund and the International Council of Women, helped draft the Geneva Declaration, which had been integrated into the 1923 Charter of Save the Children International Union.[31] The introductory paragraph was added before its adoption by the Assembly of the League of Nations.[32] This succinct declaration established a fundamental shift by outlining what society "owed the child" and by laying the groundwork for the concept of children having specific "rights".[33] These rights, as articulated in the Declaration, were not framed as independent actions but as entitlements to "receive" certain provisions and protections. The following text is extracted from the records of the Fifth Assembly, League of Nations Official Journal, Special Supplement No. 23, page 179:[34]

1920, with the support of the International Committee of the Red Cross (ICRC), the Save the Children Fund was organised and structured around the International Save the Children Union. On 23 February 1923, the International Save the Children Union adopted the first version of the Declaration of the Rights of the Child during its fourth general assembly. The draft was later ratified during the fifth general assembly, on 28 February 1924. Jebb sent this document to the League of Nations, saying that she believed "we should claim certain Rights for the children and labour for their universal recognition". On 26 September 1924, the League of Nations adopted the declaration and titled it the Geneva Declaration. It was a historic day—the first … time [that] specific rights for children were recognised". See Humanium (2023).

[28] See Humanium (2023). Efforts to establish minimum standards for the protection of children commenced more than a decade before the formation of the League of Nations. In 1890, the First Conference on Workers' Protection in Berlin recommended a minimum age of 14 years for child miners. These issues found their place into the Covenant of the League of Nations, which bound its member states to "endeavour to secure and maintain fair and humane conditions of labour for men, women, and children" (Art. 23 (a)), and to "entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children" (Art. 23 (c)). See also UNICEF "Convention on the Rights of the Child" https://www.unicef.org/child-rights-convention/convention-text and Britannica, The Editors of Encyclopaedia "Members of the League of Nations" (*Encyclopedia Britannica*, 26 April 2024) https://www.britannica.com/topic/League-of-Nations/Members-of-the-League-of-Nations. It is of interest to this thesis to note that the Union of South Africa, as it then was, now the Republic of South Africa, was an Original Member of the League of Nations on 10 January 1920 and also endorsed the Geneva Declaration of the Rights of the Child.

[29] See Humanium (2023). See also Kosher et al (2016) 15 and League of Nations (1934).

[30] See League of Nations (1934). The League established several bodies and committees to address matters related to children's working conditions, trafficking, and stateless children. In 1924 the League incorporated the "Association internationale pour la protection de l'enfant," established in 1921 by 35 governments. However, being a declaration, it did not impose obligations on states. At this point, children were not yet considered rights-holders but rather recipients of the protection envisioned by the Declaration.

[31] See Humanium (2023). See also Office of the United Nations High Commissioner for Human Rights (2007) 3.

[32] The Office of the United Nations High Commissioner for Human Rights (2007) 3 confirmed that "in fact the Declaration was part of the 1923 Charter of Save the Children International Union, with the introductory paragraph being added before its adoption by the Assembly". See also Kosher et al (2016) 15 and Humanium (2023).

[33] See Humanium (2023).

[34] See Office of the United Nations High Commissioner for Human Rights (2007) 3. See also Humanium (2023).

> The Declaration of Geneva asserts that all nations owe the child the best they can offer. It is their duty to ensure the child's development, provide food, aid the sick and vulnerable, and protect against exploitation. Children should receive relief first in distress and be raised to serve society.[35]

The Second World War (1939-1945) prompted a renewed interest in children's well-being, culminating in the 1959 acceptance of the Declaration of the Rights of the Child by the General Assembly of the United Nations.[36] This declaration, still rooted in the provision-protection paradigm, asserted every child's right to a "happy childhood".[37] The language of this declaration reflected the prevailing view of children as "objects" in need of "services", omitting explicit support for children's individual rights to participation.[38] In 1948 the UN enacted the 1948 UDHR. which marked a major milestone in the child rights discourse, affirming children's right to special care and social protection set out in Article 25, which recognises the right to adequate living standards, including food, housing, and medical care, and ensuring equality for all children regardless of their birth status.[39] Article 26 highlights every child's right to free and compulsory elementary education for their full personal development in environments that foster respect, tolerance, and peace.[40] This is a significant milestone as it inspired South Africa's Constitutional commitment to prioritise children's right to social protection and basic education, discussed later.

In 1996, the UN further enacted the 1966 ICCPR, to safeguard children's rights under Article 14 by allowing court proceedings to be closed if the need arises for juvenile protection.[41]

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[35] See Humanium (2023), stating: "The fundamental needs of children were summarised in five points. The document discussed the well-being of children and recognised their right to development, assistance, relief and protection. However, although the document addressed certain fundamental rights, it was not legally binding. In 1934, the General Assembly of the League of Nations again approved the Geneva Declaration. The signatories promised to incorporate the principles of the document into their national laws, but they were not legally bound to do so. Nonetheless, the Geneva Declaration remains the first international Human Rights document in history to specifically address children's rights."

[36] See Office of the United Nations High Commissioner for Human Rights (2007) 4. See also Kosher et al (2016) 15. See also United Nations https://www.un.org/en/global-issues/children. In 1959 the 1959 Declaration further established fundamental principles for children's rights, shaping international law, national policies, and inspiring the later Convention on the Rights of the Child.

[37] See Kosher et al (2016) 15.

[38] See Kosher et al (2016) 15. See also Hart (1991) *AP* 53; Memzur (2008) *SAPR/PL* 1; Heywood (2009) 11.

[39] See Art 25(2) of the 1948 UDHR. See also the United Nations https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[40] See Art 26(3) of the 1948 UDHR. See also the United Nations https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[41] See art 14(1) of the 1966 ICCPR. See also Office of the High Commissioner for Human Rights https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

Article 18 addresses parents' liberty to provide religious and moral education,[42] and Article 23 provides the necessary protection for children during and after parents dissolve marriage.[43] In the same year, 1966, the 1966 ICESCR was enacted, setting out Article 10(1) which emphasises broad protection for families caring for children and Article 10(3) mandates special measures to prevent child exploitation and harmful employment.[44] The above enactments were instrumental to the development of the CRC which is discussed next.

2.3 The United Nations Convention on the Rights of the Child

The momentum for recognising children's rights reached a milestone in 1979 when the United Nations designated the International Year of the Child.[45] This celebration sparked the proposal for a new treaty on children's rights, eventually leading to the drafting and completion of the United Nations Convention on the Rights of the Child (CRC) in 1989.[46] The CRC, unanimously adopted by the UN General Assembly in November 1989, is the most comprehensive international convention, encompassing a broad spectrum of rights for children.[47] Notably, it emphasises children's involvement in decision-making processes that impact their lives.[48]

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[42] See art 18(4) of the 1966 ICCPR. See also Office of the High Commissioner for Human Rights https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

[43] See art 23(4) of the 1966 ICCPR. See also Office of the High Commissioner for Human Rights https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights. This argues that the provision for protection children during the dissolution of marriage of their parents is a commendable as it recognises their need for safeguards to realise their own potential.

[44]See art 10(1)(3) of the 1966 ICCPR. See also Office of the High Commissioner for Human Rights https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.This thesis observes that the period from 1948 onwards marked a significant development in international law, placing special focus on the recognition of children's rights to dignity, protection, education, and other fundamental rights. The laid the foundation for the adoption of the Convention on the Rights of the Child (CRC) and was instrumental to the advancements in South Africa's legal framework for children's rights decades later, following the end of apartheid.

[45] See Office of the United Nations High Commissioner for Human Rights (2007) 3. See also Kosher et al (2016) 15.

[46] See UNICEF "Convention on the Rights of the Child" https://www.unicef.org/child-rights-convention/convention-text. See also Kosher et al (2016) 15.

[47] Adopted in 1989 and entering into force in 1990, the CRC underscores the significance of acting in the best interests of the child. It addresses fundamental rights such as the right to life, identity, and familial relationships, emphasising the child's right to express opinions and to be safeguarded from abuse. The CRC focuses on the specific needs and rights of children. Signatory states are obliged to act in the best interests of the child. The CRC covers fundamental rights, including the right to life, a name and identity, and being raised by parents within a family or cultural group. The CRC also recognises the right to maintain relationships with both parents, even in cases of separation.

[48] See UNICEF "Convention on the Rights of the Child" https://www.unicef.org/child-rights-convention/convention-text. See also Kosher et al (2016) 15. The CRC categorically prohibits capital punishment for children and advocates against any form of cruel or degrading punishment. The influence of the CRC extends to the interpretation of the European Convention on Human Rights (ECHR), shaping global human rights discourse, though amid ongoing debates about universalistic approaches versus relativistic approaches. States must allow parents to exercise their parental responsibilities. Additionally, children have the right to express their opinions, which should be

The CRC constitutes a pivotal international human rights treaty, comprehensively delineating the rights of children across various domains.[49] It classifies a child as an individual under the age of eighteen, and nations ratifying the CRC are legally bound by its provisions.[50] The UN Committee on the Rights of the Child, consisting of 18 independent experts, oversees the implementation of the convention. States must regularly report to this committee on their progress in upholding child rights, and individuals can appeal to it if they perceive violations.[51] The principles of the CRC are stated below.

2.3.1 The Four Pillars and General Principles of the CRC

The CRC enshrines four general principles. Also known as "four pillars", these are formulated in Articles 2, 3, 6 and 12 of the CRC, and accord children the right against "non-discrimination", the right to have their "best interests" be "a primary consideration" in all actions concerning them, the "inherent right to life", and the right of a child "who is capable of forming his or her views … to express those views freely in all matters affecting the child".[52] These pillars are intended to help with the interpretation of the CRC as a whole and thus guide national programmes of implementation.

2.3.1.1 The Child's Right against Non-discrimination

In terms of Article 2 of the CRC, States parties must ensure that all children within their jurisdiction enjoy their rights. No child should suffer discrimination.[53] This article applies to every child, "irrespective of the child's parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or

considered and acted upon, and they should be protected from abuse or exploitation. The CRC requires the protection of children's privacy and stipulates that their lives should not be subject to excessive interference.

[49] See Office of the United Nations High Commissioner for Human Rights (2007) 301.

[50] See Office of the United Nations High Commissioner for Human Rights (2007) 301: "The following text is that approved by the General Assembly in its resolution 44/25 of 20 November 1989. For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier".

[51] See Memzur (2008) *SAPR/PL* 3. See also Kosher et al (2016) 15. The CRC strictly forbids capital punishment of children. The CRC also emphasises the obligation of all state parties to prohibit and eliminate all forms of cruel or degrading punishment, including corporal punishment of children.

[52] See Office of the High Commissioner for Human Rights https://www.ohchr.org/en/treaty-bodies/crc/background-convention. See also World Conference on Human Rights (1993).

[53] See Art 2(1) of the CRC.

other status".[54] The essential message is equality of opportunity.[55] Girls should be given the same opportunities as boys.[56] Refugee children, children of foreign origin, and children of indigenous or minority groups should have the same rights as all others.[57] Children with disabilities should be given the same opportunity to enjoy an adequate standard of living.

2.3.1.2 The Right to Have Children's "Best Interests" Be "A Primary Consideration"

Under Article 3(1) of the CRC, the best interests of children must be a primary consideration when state authorities make decisions affecting children.[58] This principle relates to decisions by courts of law, administrative authorities, legislative bodies, and both public and private social welfare institutions.[59] Of course, this is the CRC's fundamental message; implementing it is a major challenge.[60] The World Conference on Human Rights[61] has acknowledged the difficulty of implementing this provision of the CRC but has not provided either the reason for it or the best way to overcome the difficulty. This provision is found in the South African Constitution,1996, as discussed below. The challenge is that it is overbroad and unstraightforward and depends largely on the context in which it is applied.

2.3.1.3 The Inherent Right to Life

Article 6 of the CRC on the right to life includes formulations about the right to survival and to development, which should be ensured "to the maximum extent possible".[62] The term "development" in this context should be interpreted broadly, adding a qualitative dimension:

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[54] See Art 2(1) of the CRC.
[55] See Art 2(2) of the CRC requires: "Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."
[56] See Art 2(1) of the CRC. See also Leibig (2005) *NUJIHR* 3 and Memzur (2008) *SAPR/PL* 5.
[57] See Art 2(1) of the CRC. See also Bilyeu (1999) *IICLR* 485 and Memzur (2008) *SAPR/PL* 5.
[58] See Art 3(1) of the CRC. See also Office of the United Nations High Commissioner for Human Rights (2007) 335.
[59] See Office of the United Nations High Commissioner for Human Rights (2007) 335. See also World Conference on Human Rights (1993); Office of the United Nations High Commissioner for Human Rights https://www.ohchr.org/en/treaty-bodies/crc/background-convention.
[60] See Office of the United Nations High Commissioner for Human Rights https://www.ohchr.org/en/treaty-bodies/crc/background-convention. See also World Conference on Human Rights (1993).
[61] See World Conference on Human Rights (1993).
[62] See Art 6(1) and Art 6(2) of the CRC. See also World Conference on Human Rights (1993). This right has already been violated in South African public schools through negligence or mere disregard for children's right to life in instances where learners died in pit latrines. See also Govender (2023) and Fihlani (2018).

not only physical health is intended but also mental, emotional, cognitive, social, and cultural development.[63]

2.3.1.4 The Right of a Child "Who Is Capable of Forming His or Her Own Views … to Express Those Views Freely in All Matters Affecting the Child"

Article 12 of the CRC directs that children should be free to have opinions in all matters affecting them, and that those views should be given due weight "in accordance with the age and maturity of the child".[64] The underlying idea is that children have the right to be heard and to have their views taken seriously, including in any judicial or administrative proceedings affecting them.[65]

Scholars have, however, criticised the CRC for its shortcomings in various areas, notably in addressing sexual abuse,[66] safeguarding the girl child,[67] handling child soldiers,[68] combating child marriages,[69] and protecting children against harmful traditional practices.[70] The present thesis grapples with real cases involving educators accused of sexually abusing children, some to the extent of causing pregnancies.[71] A notable example is the *Mpumalanga*

[63] See Art 6(1) and Art 6(2) of the CRC. See also World Conference on Human Rights (1993).
[64] See Art 12(1) of the CRC. See also World Conference on Human Rights (1993).
[65] See World Conference on Human Rights (1993).
[66] See Levesque (1994) *BLR* 959, who observed, as regards the CRC's omitting the treatment of sexual abuse of children, that "this lack of attention to children's rights in the New World Order is particularly disturbing when one considers that the sexual maltreatment of children is a global problem that is increasing in scope yet essentially goes unnoticed". This omission is concerning for this thesis, which focuses on the protection of children from sexual abuse by educators in South African public schools. See also Memzur (2008) *SAPR/PL* 5.
[67] See Leibig (2005) *NUJIHR* 3. See also Memzur (2008) *SAPR/PL* 5.
[68] See Renteln (1999) *WLR* 191. See also Memzur (2008) *SAPR/PL* 5.
[69] See Askari (1998) ILSAJICL 123. See also Warner (2004) *AUJGSPL* 233 and Memzur (2008) *SAPR/PL* 5.
[70] See Bilyeu (1999) *IICLR* 485. See also Memzur (2008) *SAPR/PL* 5.
[71] See the case of *Superintendent General Free State Department of Education and Mr Tokelo Sedson Sethole* ELRC245-22/23FS para 31, in which it is stated: "Ms Jerminah stated that the employee even paid damages to the learner and asked them how he will be able to support the child if he loses his job". See also *Gauteng Dept of Education v S Rasekhula* ELRC 990-21/22GP para 12; *SADTU obo Nyiko B. Baloyi v Gauteng Department of Education* ELRC644-20/21EC para 12; and *SADTU obo MA Maraka and Department of Education Limpopo* PSES448 -11/12LP para 19, where it is stated: "Subsequently, the Maraka family paid R3 000-00 in damages to the learner's family". This practice represents a customary acknowledgement of guilt and an attempt to appease the parents of a sexually abused individual, often leading to the establishment of a customary marriage if the family accepts the damages. The payment for damages is typically coupled with a bride price, known as *lobola* in customary African circles. However, in the context of international norms, educators must recognise that the very idea of sexually violating a child is inherently unlawful. Moreover, resorting to paying damages as a justification for such abuse is fundamentally absurd. It constitutes an abuse of the fiduciary relationship of trust that educators are entrusted with, violating the duty to protect the child from sexual abuse. This conduct directly contradicts the principle of *in loco parentis*, as further discussed later in this chapter.

Department of Education v Sboniso Gumede,[72] case where the accused educator sought to rely on the cultural practice of 'paying damages' as a remedy for his actions. This case underscores the CRC's inadequacies in addressing a crucial issue affecting children in South African public schools who fall victim to sexual predators. The cultural practice invoked is a worrying attempt to circumvent accountability for sexual abuse towards a child, emphasising the urgency of addressing such challenges in the current legal framework in South Africa.

These critiques underscore the CRC's challenges and limitations in effectively addressing complex issues related to children's rights, prompting ongoing discussions about the need for enhancements and adaptations to better address emerging challenges in the realm of child protection.[73] By October 2023, 196 countries, but not the United States of America,[74] had ratified the CRC. Additional optional protocols focus on children in armed conflicts, the sale of children, child prostitution, and child pornography, reflecting the CRC's enduring impact and adaptability to emerging challenges.[75]

This thesis argues that the CRC's impact has been unprecedented. Unique in its speed of adoption and universal ratification, the CRC is the only human rights treaty to amalgamate civil or political, economic, social, cultural, and humanitarian rights in a single instrument.[76] It affirms not only the child's right to protection from harm but also the right to a meaningful childhood, autonomous development, and a voice in matters concerning children.[77] Importantly, it asserts the child as a human being deserving of respect as a unique individual,

[72] See *Mpumalanga Department of Education v Sboniso Gumede* ELRC156-22/23MP para 18, where it is stated: "The employee apologised, stating that 'I do not know what I was doing' and offered to pay 'damages' which he refused stating that he did not send his under aged daughter to school to 'make money off her' but to be educated. He also told the employee that he fails to see how he 'did not know' what he was doing". These cases are fully discussed in subsequent chapters.
[73] See Todres (1998) *CHRLR* 159. See also Memzur (2008) *SAPR/PL* 5, who observes: "It is argued that 'although the UNCRC directs State Parties to abolish "traditional 17 practices prejudicial to the health of children"' it does not adequately address the cultural discrimination the female child encounters in daily life. Therefore, the operation of the UNCRC is limited as 'cultural abuses ... do not always implicate a health risk'".
[74] De Lench (2017) applauded Somalia for ratifying the CRC and remained concerned about why the USA had not done so. De Lench (2017) stated: "Last Sunday, as I was flying 30,000 feet above Jonesboro, Arkansas on my way back to Boston from Dallas, I read about a statement issued by UN Secretary-General Ban Ki-Moon praising the ratification by the Government of Somalia of the United Nations Convention on the Rights of the Child. Noting that 196 countries had ratified the Convention, making it the most widely-ratified human rights convention in history, the Secretary-General, Ban Ki-Moon, as he then was, went on to encourage the United States, as the only holdout, 'to join the global movement and help the world reach the objective of universal ratification'". See also Memzur (2008) *SAPR/PL* 3.
[75] See Memzur (2008) *SAPR/PL* 3.
[76] See De Lench (2017). See also Memzur (2008) *SAPR/PL* 3.
[77] See Office of the United Nations High Commissioner for Human Rights (2007) 335. See also World Conference on Human Rights (1993); Office of the United Nations High Commissioner for Human Rights https://www.ohchr.org/en/treaty-bodies/crc/background-convention.

with his or her own perspective and intentions, by both fellow human beings and the state, its institutions, and other organisations.[78] This chapter of the thesis explores the historical evolution and significance of these international treaties and conventions, emphasising their impact on shaping the discourse and practice of children's rights.

This thesis contends that implementing the CRC would constitute a significant stride in establishing norms and standards to uphold the rights of children, particularly within school environments where they may be vulnerable to educators' sexual misconduct. The impact of sexual misconduct extends beyond compromising the dignity of children: it encroaches upon their fundamental right to receive an unimpeded basic education. This thesis must also examine the regional norms governing educator conduct and child protection to offer a comprehensive understanding of the legal landscape surrounding such issues.

2.4 The African Charter on the Rights and Welfare of the Child

The African Children's Charter was adopted by the Organisation of African Unity (OAU) in 1990 and entered into force in 1999, coinciding with the OAU's transformation into the African Union (AU) in 2001.[79] Similar to the CRC, the African Children's Charter is a comprehensive instrument that outlines children's rights and establishes universal principles for their well-being. It encompasses civil, political, economic, social, and cultural rights.[80]

The Charter aims to address the unique challenges faced by children in Africa, such as economic and sexual exploitation, gender-based discrimination in education and healthcare access, and participation in armed conflicts.[81] It tackles issues such as migration, early child marriage, disparities between urban and rural areas, child-headed households, street children, and poverty. Unlike the CRC, the African Children's Charter defines a "child" as an individual

[78] See Office of the United Nations High Commissioner for Human Rights (2007) 335. See also World Conference on Human Rights (1993); Office of the United Nations High Commissioner for Human Rights https://www.ohchr.org/en/treaty-bodies/crc/background-convention.
[79] The Preamble to the African Children's Charter states that this Charter was "adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU Addis Ababa, Ethiopia - July 1990 Entered into force on 29 November, 1999".
[80] See Memzur (2008) *SAPR/PL* 3.
[81] The Preamble to the African Children's Charter states: "**NOTING WITH CONCERN** that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care" (original bolding).

under the age of 18 and recognises the child's special place in African society, emphasising protection and care for African children.[82]

Compared to the CRC, the African Children's Charter places greater emphasis on African cultural values and experiences in the context of children's rights.[83] The Charter explicitly states that it supersedes customs, traditions, and practices inconsistent with its provisions.[84] It addresses various specific African issues, including apartheid,[85] discrimination,[86] internally displaced and refugee children,[87] imprisoned expectant mothers and mothers of infants, and disabled children.[88] It also allows children to petition the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) about violations of their rights.[89]

However, the criticisms and shortcomings of the African Children's Charter include its failure to protect children from life imprisonment without the possibility of release which the CRC provides for,[90] and the lack of provisions for alternative measures such as community

[82] Art 2 of the African Children's' Charter provides as follows: "**Definition of A Child** For the purposes of this Charter, a child means every human being below the age of 18 years" (original bolding). According to Memzur (2008) *SAPR/PL* 16, "Art 1 of the CRC states that a child is any human being under 18, unless majority is 18 attained earlier under the law applicable to the child. This provision is ambiguous and weak, lacking specific protection within the African context in order to take into account child betrothals, child participation in armed conflict and child labour". This thesis holds the view that the CRC provision is too ambiguous and is subject to abuse in instances of child abuse because of cultural practices. This gap is addressed by the African Children's Charter, which is solid.
[83] Memzur (2008) *SAPR/PL* 16 observed that "the higher standards provided in the [African Children's Charter] represent a meaningful attempt to address specific continental challenges and impress an African fingerprint that takes into account the social, economic and cultural set up of our continent".
[84] Art 21(1) of the African Children's Charter provides for the elimination of "harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child". See also Art 21(1)(a)-(b) of the African Children's Charter, which enforces the elimination of "those customs and practices prejudicial to the health or life of the child" and "those customs and practices discriminatory to the child on the grounds of sex or other status"; and Art 21(2) of the African Children's Charter, which provides: "Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory". See Memzur (2008) *SAPR/PL* 16, who observed that "although this has its own benefits, it is commonplace to argue that, relatively, the ultimate test lies in the extent to which international and regional law guarantees are fleshed out at municipal level".
[85] See Art 26(1) of the African Children's Charter.
[86] See Art 26(2) of the African Children's Charter.
[87] See Art 23(4) of the African Children's Charter.
[88] See Art 30(d) of the African Children's Charter.
[89] See Art 16(2) of the African Children's Charter.
[90] See Art 37(a) of the CRC.

rehabilitation.[91] The Charter is unclear in some areas, such as "domestic discipline",[92] and does not cover rights such as the right to remain silent, protection from retroactive legislation, or compensation for miscarriages of justice.[93] The Charter also has no mechanism to ensure that states commit and allocate resources to realising children's rights.[94] These are critical issues that promote the realisation of children's dignity.

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC), formed in 2001, supervises the implementation of the African Children's Charter.[95] ACERWC members are elected by the AU and serve five-year terms.[96] The committee reviews country reports on implementing the Charter[97] and has the authority to investigate issues it covers.[98]

2.4.1 Addressing Sexual Misconduct Issues Committed by Educators against Children

The African Children's Charter plays a commendable role in addressing educator dismissal disputes for sexual misconduct against children by establishing a framework of rights and protections for children in Africa.[99] Though the Charter does not directly address educator dismissal issues, its provisions are relevant in the broader context of safeguarding children's well-being, including cases involving educator misconduct. This thesis argues that the Charter can assist in educator dismissal disputes for sexual misconduct against children in the following ways:

[91] Art 17(3) of the African Children's Charter states: "The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation." Unlike the CRC, the African Children's Charter does not specifically provide for community rehabilitation services. Art 23(3) of the CRC also states that assistance under Art 23(2) "shall be provided free of charge, whenever possible". It provides for access to rehabilitation services, health care services and education (as reiterated in Art 24(1)). See also Memzur (2008) *SAPR/PL* 10.
[92] Art 20(1)(c) of the African Children's Charter regarding parental responsibilities states that parents or other persons responsible for the child shall have the duty "to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child". Given the high degree of uncertainty around corporal punishment in the current world, the African Children's Charter missed an opportunity to provide certainty and remove imprecision on this topic at both the domestic and the school levels. See also Monama (2022).
[93] This is a missed opportunity to enable the realisation of the rights of the child to be protected from arbitrary litigation.
[94] See Arts 23(3) and 24(1) of the CRC.
[95] See Ch 2, Art 32 of the African Children's Charter.
[96] Art 34 of the African Children's Charter states that the "Committee shall be elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by the States Parties to the present Charter".
[97] See Art 32 of the African Children's Charter.
[98] See Art 32 of the African Children's Charter.
[99] See Arts 16(1) and 27 of the African Children's Charter.

2.4.1.1 Protection of Children's Rights

The African Children's Charter recognises and upholds the rights of children, ensuring that they are protected from harm, abuse, and exploitation.[100] This protection includes provisions that aim to protect children from all forms of economic exploitation and activities that may compromise their health, education, or overall development.

2.4.1.2 Rights to a Safe Environment

The Charter emphasises the child's right to a safe and supportive environment. [101] This principle can be invoked in cases of educator sexual misconduct, as it underscores the importance of children's safety and protection in educational settings.

2.4.1.3 Preventing Exploitation

The Charter explicitly prohibits all forms of exploitation and abuse of children, including sexual exploitation.[102] This provision can be relied on to support cases involving educators' sexual misconduct, as it stresses the need to prevent these abuses and hold the perpetrators accountable.

2.4.1.4 Non-Discrimination

The Charter promotes the principle of non-discrimination, ensuring that all children are treated equally and protected regardless of their background.[103] This principle can be applied to ensure that educator dismissal disputes are handled without bias or discrimination.

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[100] Art 16(1) of the African Children's Charter provides: "States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child". The most critical argument of this thesis is that sexual abuse disturbs a child's right to basic education.

[101] The right to a safe and supportive environment becomes important when it comes to providing a safe learning environment for children in public schools. At present, this provision is far from the reality.

[102] Art 27 of the African Children's Charter on sexual exploitation specifically provides: "States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent; **(a)** the inducement, coercion or encouragement of a child to engage in any sexual activity; **(b)** the use of children in prostitution or other sexual practices; **(c)** the use of children in pornographic activities, performances and materials" (original bolding). Sexual abuse is prevalent in South Africa, as already discussed in para 1.2.1 of Chapter 1 above. Such a provision in the African Children's Charter is an important step in calling on countries such as South Africa to do better in managing this scourge.

[103] See Art 26(2) of the African Children's Charter.

2.4.1.5 Reporting Mechanisms

The Charter allows children to raise concerns about infringements of their rights.[104] This power is essential in cases of educator sexual misconduct, as children can report incidents of abuse without fear and with the expectation of protection.

2.4.1.6 Children's Best Interests

The Charter emphasises acting in the best interests of the child.[105] This principle can be relied on in educator dismissal disputes to ensure that the decision-making process considers what is best for the child's welfare and safety.[106]

Though the Charter does not directly address educator dismissal procedures, it offers a rights-based framework that underpins protecting children from harm, exploitation, and abuse, which is pertinent to cases of sexual misconduct by educators. It provides a foundation for ensuring that children's rights are respected, their safety is preserved, and their best interests are prioritised while these disputes are resolved.

This thesis analyses the impact of the CRC and the African Children's Charter on member states, particularly in shaping legislation in countries such as South Africa. Although both these instruments have been commended for their influence, it is noteworthy that the African Children's Charter faced challenges in garnering swift support from African nations, taking nine years for 15 countries to ratify it and bring it into force.[107] Even after 17 years, the ratification rate remains a concern.[108] Gose highlighted the negative consequences of these

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[104] Art 16(2) of the African Children's Charter provides: "Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect."

[105] Art 4(1) of the African Children's Charter on the Best Interests of the Child provides: "**1.** In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration" (original bolding). Memzur (2008) *SAPR/PL* 18 observed that the African Children's Charter's "phrasing with a definite article 'the primary consideration' in the ACRWC, as opposed to 'a primary consideration' in the CRC, elevates its role in the advancement of children's rights".

[106] The decision to sign a collective agreement to give expression to s 188A of the LRA in South Africa is a commendable step. What remains is to ensure that the ELRC Collective Agreement is administered well to achieve efficaciousness and also for the employer to bolster the management of employee discipline among educators in public schools.

[107] See Memzur (2008) *SAPR/PL* 6. The failure to ratify and adopt the African Children's Charter is concerning, given that it is there to give expression to international norms that should govern the development of national frameworks on children's rights. See also Kaime (2009) 5.

[108] See Memzur (2008) *SAPR/PL* 6.

challenges, including misquotations,[109] confusion over drafting and adoption dates, and difficulties in obtaining the instrument and related ratification information.[110]

Regrettably, the African Children's Charter has not received the same scholarly attention as the CRC, leading to an information gap that extends to the general African populace.[111] Memzur raises the critical question of why African countries initially hesitated to embrace an instrument they considered theirs.[112] One plausible explanation is the lack of awareness among some African nations about the Charter's existence.[113] Furthermore, those acquainted with the Charter might have perceived limited normative value in ratifying it, given their existing commitment to the CRC.[114] Next, this thesis discusses the constitutional perspective on both the rights of the child to be protected from sexual abuse by educators and the labour rights of educators not to be unfairly dismissed for allegations of sexual misconduct.

2.5 The Constitutional Perspective

The advent of a new democratic era in South Africa in 1994 brought about profound implications not only for the nation as a whole but also for its legal system,[115] marking the affirmation and creation of a peaceful society that prioritises respect, dignity, tolerance, and non-violent solutions to problems. A pivotal transformation occurred with the adoption of the Constitution, 1996, a landmark event that fundamentally altered the trajectory of South Africa's

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[109] Gose (2002) 12 notes that, for example, during the whole ratification process in the South African Parliament, the Charter was referred to as the "*African Charter on the Rights and Welfare of the African Child*" (see Minutes and Proceedings of the National Assembly, Thursday, 18 November 1999).

[110] See Gose (2002) 12, who observed: "see for example the speech of the then South African Minister for Welfare and Population Development given on 18 November 1999, printed in the Minutes and Proceedings of the National Assembly, Thursday, 18 November 1999, who said: *"[…] The African Charter on the Rights and Welfare of the African Child was drafted in 1979. To date, 27 countries of the 53 OAU member states are signatories to the charter, while 16 countries have ratified it. The OAU will ratify the charter on 29 November 1999. […]*". This statement is typical of the confusion that exists; not only is the Charter again referred to under the wrong name, but also the drafting date of the Charter is incorrect. It was probably confused with the UN Convention on the Rights of the Child, which was initiated in 1979, the International Year of the Child, and came to its conclusion in 1989, when the UN General Assembly adopted the Convention". See also Memzur (2008) *SAPR/PL* 6.

[111] See also Memzur (2008) *SAPR/PL* 6. See also Gose (2002) 14, who observed: "Only very scarce literature can be found on the subject. Very few authors have written (brief) articles on the Charter in legal journals or contributions for books specialising in the field of children's rights. These authors, however, mainly concentrate on selected points of the Charter and its historical background. In fact, most of them wrote on the topic before the Charter came into force on 29 November 1999." The argument is that the lack of scholarly attention to the African Children's Charter has deprived it of the attention it needs to be implemented in broader African communities.

[112] Memzur (2008) *SAPR/PL* 6.

[113] See Memzur (2008) *SAPR/PL* 6. See also Gose (2002) 14.

[114] See Memzur (2008) *SAPR/PL* 6. See also Gose (2002) 14.

[115] First through the Interim South African Constitution 1993, Act 200 of 1993 ("the Interim Constitution"), which preceded the Constitution, 1996. See SECTION27 (2017) 14.

history.[116] The public interest law centre SECTION27 observed that "apartheid left South Africa with a deeply unequal and dysfunctional education system".[117] Of particular significance to this thesis is the constitutionalisation of children's rights, a development solidified by section 28 of the Bill of Rights in the Constitution, 1996.[118] This constitutional commitment to children's rights was further exemplified by placing children at the forefront of South Africa's constitutional democracy.[119] Subsequently, the legislature introduced extensive, well-coordinated legislation specifically addressing children's rights.[120] This legislative framework recognises children's entitlements and ensures their alignment with the values enshrined in the Constitution. It emphasises the central role that children play in South Africa's constitutional democracy and the enforcement of their rights.[121] It is imperative to emphasise that any laws or legislation about children's rights must align with the Constitution, 1996, embodying its values and ethos.[122]

The Constitution, 1996 underscores the significance of children's rights through two dedicated sections. Section 28 unequivocally declares that "[a] child's best interests are of paramount importance in every matter concerning the child".[123] And section 29 guarantees the right to a basic education.[124] This thesis comprehensively reviews these constitutional provisions and safeguards, emphasising their critical role in cases where the best interests of the child, especially the child's well-being and educational rights, are compromised by sexual abuse perpetrated by educators in South African public schools. Protection against this abuse is essential to realising the fundamental (unqualified) right to basic education for these vulnerable children.[125]

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[116] The Interim Constitution transformed South Africa from a parliamentary democracy to a constitutional democracy. This change constitutionalised all things South African.
[117] See SECTION27 (2017) 14. The dysfunctional nature of the apartheid education system underscored a need for robust transformation, especially giving regard to the plight of children.
[118] See Chapter 2 of the Constitution, 1996.
[119] See SECTION27 (2017) 34.
[120] See s 28 of the Constitution, 1996. See also the Children's Act 38 of 2005. See also SECTION27 (2017) 34.
[121] SECTION27 (2017) 34.
[122] See s 2 of Chapter 1 of the Constitution, 1996 pertaining to the "Supremacy of Constitution", which states: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". See also Constitutional Court of South Africa (2024). This means that any legislation that was to follow the enactment of the Constitution must align with it.
[123] See s 28(2) of the Constitution, 1996.
[124] See s 29(1)(a) of the Constitution, 1996. See also Mahlangu and Pitsoe (2011) *JETERAPS* 365 and Deacon (2015) *SAJE* 1.
[125] The analysis sheds light on the need for protection to ensure the realisation of the fundamental right to basic education for these vulnerable children.

2.5.1 Section 28 of the Constitution, 1996

Section 28 of the Constitution, 1996 is a cornerstone of children's constitutional protection, emphasising their entitlement to safeguards against abuse and neglect, with a paramount focus on the "best interests of the child".[126] This thesis underscores the temporal context of the Constitution, 1996 enacted nearly five years after the United Nations ratified the CRC[127] and four years before the African Children's Charter came into force.[128] The temporal alignment is noteworthy, particularly as section 28 of the Constitution, 1996 harmonises with both the CRC[129] and the African Children's Charter.[130] Specifically, section 28 of the Constitution, 1996 enshrines the principle that "[a] child's best interests are of paramount importance in every matter concerning the child".[131] This convergence in principles highlights the interconnectedness of South African constitutional provisions with international and regional frameworks for protecting and promoting children's rights. Further,

> according to section 233 of the Constitution, 1996 all legislation must be interpreted to be consistent with international law. Section 39(1) of the Constitution also requires courts to consider international law when interpreting the Bill of Rights.[132]

The parts of section 28 of the Constitution, 1996 on children that are relevant to this thesis are set out below. Every child has the right to a name, nationality, and family or alternative care, protection from abuse, and freedom from work that endangers their well-being. The child's best interests are paramount in all matters concerning the child, and 'child' refers to anyone under 18 years.[133]

This thesis finds relevance in subsections (1) and (2) of section 28, particularly for their implications for educator dismissal disputes involving sexual misconduct. Section 28

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[126] See s 28(2) of the Constitution, 1996.
[127] See UNICEF "Convention on the Rights of the Child" https://www.unicef.org/child-rights-convention/convention-text. See also Kosher et al (2016) 15.
[128] The Preamble to the African Children's Charter states that it was "adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU Addis Ababa, Ethiopia - July 1990 Entered into force on 29 November 1999".
[129] See Art 3(1) of the CRC. See also Office of the United Nations High Commissioner for Human Rights (2007) 335.
[130] See Art 4 of the African Children's Charter.
[131] See s 28(2) of the Constitution, 1996.
[132] See SECTION27 (2017) 19, observing that "international treaties (agreements signed by countries) are binding on South Africa when they have been signed and ratified. These treaties become binding law within South Africa when parliament passes legislation giving effect to these treaties. Courts are also required to consider international law when they are interpreting and applying South African law".
[133] See s 28(1), (2) and (3) of the Constitution, 1996.

recognises children as individuals under the age of 18,[134] asserting their right to a name and nationality from birth.[135] Section 28 of the Constitution, 1996 introduces a critical concept aligned with the "*in loco parentis*" doctrine by emphasising parental care within or outside family environments, particularly in school.[136]

2.5.1.1 The Fiduciary Duty and In Loco Parentis Principle for Educators

This thesis contends that the educator-child relationship is inherently imbalanced, characterised by a fiduciary duty of trust on the part of the educator. This fiduciary role, grounded in the educator's profession, requires a commitment to care, skill, and the protection of the child.[137] The child's entitlement to protection is reinforced by legal frameworks, including treaties,[138] conventions, and the Constitution, 1996.[139] Consequently, both the state and the employer bear a legal duty to safeguard children from educator-inflicted sexual abuse, necessitating enforcement, regulation, supervision, and disciplinary measures.[140]

Despite De Villiers' perspective that the educator-learner-employer relationship deviates from traditional norms, this thesis asserts the contrary.[141] The employer, bound by the employment contract, collective agreements, and legal obligations, owes a duty to oversee and manage educators.[142] Simultaneously, the educator, in the context of the *in loco parentis* doctrine,

[134] See s 28(3) of the Constitution, 1996.
[135] See s 28(1)(a) of the Constitution, 1996.
[136] See s 28(1)(b) of the Constitution, 1996.
[137] See s 28(1)(d) of the Constitution, 1996.
[138] See the CRC.
[139] See s 28(1)(d) of the Constitution, 1996.
[140] See s 3 of the Educators Act. See also s 16 of the Schools Act. These are discussed in subsequent chapters of this thesis.
[141] See De Villiers (2021) 476, who argues that "in giving meaning to the content of the right to basic education through legislation, two further considerations should be borne in mind, namely the rights of learners as children (children's rights) and the rights of educators as employees. On the one hand, this means a school is not a traditional workplace, but one where a triangular relationship exists between learner, educator and employer. On the other hand, educators as employees are, in principle, entitled to the full array of employee rights". In the realm of educator-employer relationships, educators possess a spectrum of rights; however, the right to self-supervise is beyond their purview. Instead, the employer holds the prerogative to oversee educators. Defined by the contract of employment, this relationship is inherently traditional, with distinctions lying in the specific conditions governing the contract's execution. The incorporation of children into this dynamic introduces unique considerations, compelling the enforcement of children's international, constitutional, and school rights, particularly protection from sexual abuse. This thesis contends that in instances where both the employer and the state fall short in effectively managing educators, they should bear accountability for the repercussions. This perspective seeks to navigate the intricate balance between educators' rights and the paramount duty to shield children from sexual misconduct within the educational setting.
[142] See Du Toit et al (2023) 526, asserting that the discretion to discipline employees lies primarily with the employer. The extent of the employer's discretion has already been considered in the context of defining workplace rule and standards. See also *Nampak Corrugated Wadeville v Khoza* (JA14/98) [1998] ZALAC 24 (12 November 1998); [1999] 2 BLLR 108 (LAC); (1999) 20 ILJ 578 (LAC) para 33, where the Labour Appeal Court held that the decision to dismiss or take disciplinary action is "largely

assumes a parental role. This dual perspective emphasises the intertwined responsibilities of the employer and the educator in ensuring the well-being and protection of the child in the educational environment.

According to the *Oxford English Dictionary* (*OED*), the term *in loco parentis* originated in the late 1500s and was first recorded in the writings of William Clerke in 1594.[143] The Latin phrase *in loco parentis* translates to "In the place or role of a parent; as a substitute for a parent", designating an individual who assumes parental responsibilities, akin to a foster-parent.[144] Oosthuizen and Van der Walt assert that the principle of *in loco parentis* is deeply ingrained in the legal history of education, especially influencing formal education processes in South Africa.[145] Rooted in the responsibility of the state to govern civil society within its jurisdiction, this concept positions teachers in a role comparable to that of parents. The 1995 United States Supreme Court decision in *Vernonia School Dist. 47J v Acton*[146] referred to the *in loco parentis* position of teachers, emphasising a custodial and tutelary relationship with students, permitting supervision and control.[147]

As the *in loco parentis* principle gained traction in South African law, it became firmly entrenched, drawing parallels between the duties of teachers and parents.[148] This thesis argues that although terms such as "caring" and "comparable" have been traditionally used in this context, the issue of protecting children from sexual abuse calls for a more definitive term

within the discretion of the employer", approved in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others* (598/05) [2006] ZASCA 175 (26 September 2006); 2007 (1) SA 576 (SCA) para 42. This will be fully discussed in the chapters that follow.

[143] See Oxford English Dictionary "In Loco Parentis" (2023).

[144] The concept of *in loco parentis* implies that educators stand in the position of parents when entrusted with the care of children in a school system. This legal principle not only signifies the responsibility of educators but also implies an obligation to protect children from harm, particularly sexual abuse. The analogy draws a clear parallel between the expectations of educators and parents, emphasising the shared duty to ensure the safety and well-being of children within the educational environment. This obligation extends to both potential perpetrators and people who may witness such misconduct, underlining the imperative to prevent and address instances of sexual abuse. See Legal Dictionary "In loco parentis" (2019).

[145] See Oosthuizen and Van der Walt (1998) *Koers* 89.

[146] See *Vernonia School Dist. 47J v Acton*, 515 U.S. 646 (1995), especially 654-655. See also Ehrensal (2023) and Oosthuizen and Van der Walt (1998) *Koers* 89.

[147] See Oosthuizen and Van der Walt (1998) *Koers* 89.

[148] See Oosthuizen and Van der Walt (1998) *Koers* 98, who reject the idea that the duties of the parent equate with those of the teacher. Oosthuizen and Van der Walt prefer the view that "the duties of teachers, viz. caring and disciplining, can at most only be comparable with those of parents, as the in loco parentis principle implies, and not equated with it". This view is prefaced by the assertion that it "is also untenable to equate the educative duties of teachers with those of parents. On the basis of the principle of sphere sovereignty, the structural differences between the family and the school as independent societal spheres have to be respected, and resultantly, their respective focus on the education of one and the same child". The arguments of Oosthuizen and Van der Walt seem to suggest that the structure and sovereignty of family and those of a school are too remote to equate.

– "equating". The assertion is that, in matters of sexual abuse, equating the duties of teachers with those of parents is more fitting, emphasising that, just as parents would not subject children to such harm, teachers should also be held to the same standard.[149] The *in loco parentis* principle is consistent with the doctrine of the best interests of the child, though in terms of South African law it has its own limits in application.

2.5.1.2 The Limitations of the Best Interests of the Child Doctrine

Kruger notes that the Constitutional Court has provided explicit guidance on interpreting section 28(2) of the Constitution, 1996 concerning the best interests of the child.[150] In the case of *S v M (Centre for Child Law as Amicus Curiae)*,[151] Sachs J emphasised that section 28(2) is not an absolute trump that automatically dominates other rights.[152] Sachs J highlighted that, like all rights in the Bill of Rights, the best interests of the child must consider their relationship to other rights, allowing for limitations based on specific circumstances.[153] Heaton argues for an individualised, contextualised evaluation of each child's position when applying the best interests criterion. This approach was echoed by Sachs J in *S v M (Centre for Child Law as Amicus Curiae)*. It emphasises a close examination of the real-life situation of the specific child involved.[154] When applied to the school sector, this approach underscores the need for great care to ensure that teachers protect, rather than violate, the best interests of children, particularly by avoiding sexual abuse. The employer's role in supervising educators to prevent such abuse is also highlighted as crucial in maintaining a safe educational environment.[155]

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[149] See the *CS-Swanepoel* case para 68, where the High Court held: "At common law it is well-established that educators and those who are in charge of schools have a duty to take such care of the children that have been entrusted to them in *loco parentis*, as a reasonably careful father or mother would of their own children". In the *CS-Swanepoel* case para 68, the court also cited several cases in which the *in loco parentis* doctrine had been widely endorsed: *Rusere v The Jesuit Fathers* 1970 (4) SA 537 (R) 539D as endorsed in *Broom and Another v Administrator, Natal* 1966 (3) SA 505 (D) 518F-519A; *Wynkwart NO v Minister of Education and Another* 2002 (6) SA 564 (C) 567I-568C; *Minister of Education v Wynkwart NO* 2004 (3) SA 577 (C) 580A; *Hawekwa Youth Camp and Another v Byrne* 2010 (6) SA 83 (SCA) para 25; *Gora v Kingswood College and Others* 2019 (4) SA 162 (ECG) para 7.

[150] See Kruger (2018) *PER/PELJ* 18.

[151] *S v M* (CCT 53/06) [2007] ZACC 18 (26 September 2007); 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC).

[152] *S v M* para 26. See Kruger (2018) *PER/PELJ* 18. See also s 28(2) of the Constitution, 1996.

[153] See Kruger (2018) *PER/PELJ* 18. Sachs J held: "[T]he fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited" (*S v M* para 26). According to Kruger, "this aligns with the court's earlier ruling in *Minister of Welfare and Population Development v Fitzpatrick* [2000 (3) SA 422 (CC) para 17] affirming that section 28(2) is a right itself, subject to limitations".

[154] See Heaton (2017) 1. See also Kruger (2018) *PER/PELJ* 18.

[155] This thesis argues that in the examination of the state's role as an employer of educators, the government, by virtue of this employment relationship, bears the responsibility for supervising teachers and maintaining a safe school environment. See also Du Toit et al (2023) 526.

This thesis contends that realising the right to basic education, a topic explored later, is inherently linked to protecting children's other rights outlined in section 28 of the Constitution, 1996. Section 28(d) specifically requires the government to safeguard children from maltreatment, neglect, abuse, or degradation.[156] Sexual abuse, as a violation of dignity, hinders the fulfilment of the right to basic education. The prohibition of inappropriate work or services for children, as outlined in section 28(f), further underscores the interconnectedness of various rights, with the violation of well-being impacting education and overall development.[157]

The argument extends to the idea that schools should serve as places of "appropriate alternative care" for children, especially when removed from their family environment, ensuring protection from maltreatment, neglect, abuse, or degradation.[158] This perspective aims to address instances where teachers, as government employees, have perpetrated sexual abuse, potentially signalling a failure of the state to provide constitutional protection to children. Section 29 of the Constitution, 1996, addressing the right to basic education, becomes a pivotal aspect for consideration in this broader context.

2.5.2 Section 29 of the Constitution, 1996

2.5.2.1 The Children's Unqualified Constitutional Right to a Basic Education in South Africa

This section of the thesis critically examines the constitutional right to basic education, as articulated in section 29 of the Constitution, 1996.[159] Section 29 enshrines the right to a basic education, applying to both adults and children.[160] At the same time, section 28 of the Constitution, 1996 emphasises the protection of children from work that may jeopardise their well-being, education, or overall development.[161] Section 29 of the Constitution, 1996 comprises a set of education rights, recognised as a "hybrid" right because of its socio-economic and civil/political components.[162] Section 29(1) of the Constitution, 1996 states:

> Everyone has the right-
> *(a)* to a basic education, including adult basic education; and

[156] See s 28(1)(f)(ii) of the Constitution, 1996.
[157] See s 28(1)(f) of the Constitution, 1996.
[158] See s 28(1)(b) of the Constitution, 1996.
[159] See s 29(1)(a) of the Constitution, 1996.
[160] See s 29 of the Constitution, 1996.
[161] See s 28(1)(f)(ii) of the Constitution, 1996, which states: "(1) Every child has the right- … not to be required or permitted to perform work or provide services that- … place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development."
[162] See s 29(1) of the Constitution, 1996.

> *(b)* to further education, which the state, through reasonable measures, must make progressively available and accessible.

SECTION27 notes that section 29(1) of the Constitution, 1996 differentiates between basic education[163] and further education.[164] The distinction lies in the wording of the two rights. The right to further education comes with a qualification, stating that the state must take reasonable measures to progressively make further education available and accessible.[165] By contrast, the right to basic education stands "unqualified". Understanding the context of "basic education" becomes crucial within this framework.[166]

This unqualified right to basic education places a significant emphasis on providing priority attention and budgetary allocations to ensure reasonable access to functional literacy. It covers aspects such as reading, writing, arithmetic, and a fundamental understanding of economics, culture, and politics.[167]

Though section 29(1) obliges the state to make education universally available and accessible, it does not explicitly define the content and quality of the education to be provided.[168] The Constitution, 1996 also states that everyone, not just children, has a right to basic education. Section 29(1) imposes a constitutional obligation on the state to make education available and accessible to everyone.[169] The right, extending up to functional literacy, reflects an unqualified right demanding priority attention and budgetary allocations from the state.[170] Despite the absence of explicit references to universally accepted education rights, the constitutional framework is presumed to encompass equal access to educational institutions, safeguarded

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[163] See s 29(1)(a) of the Constitution, 1996.
[164] See SECTION27 (2017) 22. See also s 29(1)(b) of the Constitution, 1996.
[165] See SECTION27 (2017) 22. See also s 29(1)(a) and (b) of the Constitution, 1996.
[166] See SECTION27 (2017) 22. See also s 29(1)(a) and (b) of the Constitution, 1996.
[167] See Taiwo (2011) 117, who argues that the right to basic education is "an unqualified right requiring the priority attention of the State, also in respect of budgetary allocations. This requires the State to provide sufficient schools, educators and support, and other incidental services in order to ensure reasonable access to basic education for everybody. The right refers to education up to a level of functional literacy, in other words, reading, writing, arithmetic, and an elementary knowledge or awareness of economics, culture and politics".
[168] See s 29(1) of the Constitution, 1996, which does not limit basic education to children but applies it to everyone, including adults. See also SECTION27 (2017) 34 and Chürr (2015) *PER/PELJ* 2408.
[169] See Chürr (2015) *PER/PELJ* 2413. The case of *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) clarifies that the right to basic education creates a positive obligation for the state to provide basic education for every person, not merely a negative right to avoid obstructing a person in pursuing their basic education. The pivotal question arising from s 29 is whether it guarantees merely a place for schooling or ensures an "adequate" education. The argument presented in this thesis posits that the right to a basic education compels the state to deliver sufficient resources, including schools, educators, support, and other ancillary services, to ensure reasonable access for all.
[170] See Chürr (2015) *PER/PELJ* 2413.

by section 9 of the Constitution, 1996, which specifically addresses equality.[171] Further, another important consideration in this thesis is whether equality extends to the management of educator discipline to ensure that children are not discriminated against through sexual abuse.

In the South African context, the interpretation of "adequate" education is crucial. It seeks to empower individuals to break the cycle of poverty, compete effectively in the labour market, understand democratic values, and actively participate in and protect the democratic system.[172] This interpretation is consistent with Malherbe's perspective on the meaning of "adequate" education which underscores a standard that empowers individuals to transcend the cycle of poverty, compete effectively in the labour market, understand and embrace democratic values, and enhance their dignity and self-worth.[173]

The adequacy-based approach is demonstrated in a series of court judgments. For example, in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*[174] (the *Western Cape Forum for Intellectual Disability* case), the High Court noted that a basic education for learners with severe intellectual disabilities may be very different from that provided to learners in mainstream schools. What is important is that the learner receives an education that "will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be".[175] In *Madzodzo and Others v Minister of Basic Education and Others*,[176] the High Court held that access to basic school furniture was required for children to receive a basic education. The court supported an adequacy-based understanding of the right to a basic education, explaining:[177]

> The state's obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources: schools, classrooms, teachers, teaching materials and appropriate facilities for learners.

[171] See Malherbe (2008) *TSAR* 274. See also Chürr (2015) *PER/PELJ* 2413.
[172] See Malherbe (2008) *TSAR* 274. See also Chürr (2015) *PER/PELJ* 2413.
[173] See Malherbe (2008) *TSAR* 274.
[174] *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC).
[175] See the *Western Cape Forum for Intellectual Disability* case para 25, quoting the High Court of Ireland in *O'Donoghue v Minister for Health* [1993] IEHC 2 (27 May 1993); [1996] 2 IR 20.
[176] *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).
[177] *Madzodzo and Others v Minister of Basic Education and Others* para 20.

This thesis explores the challenges associated with enforcing second-generation rights, particularly the right to basic education, and scrutinises whether the state can be held legally liable for providing adequate basic education for individuals.[178] The Department of Education's White Paper on Education and Training emphasised:[179]

> Basic education must be defined in terms of learning needs appropriate to the age and experience of the learner, whether child, youth or adult, men or women, workers, work seekers or self-employed. Basic education programmes should therefore be flexible, developmental, and targeted at the specific requirements of particular learning audiences or groups, and should provide access to a nationally recognised qualification or qualifications.

Of critical importance in the quotation above is the requirement that basic education should provide access to nationally recognised qualifications. The interpretation of "basic education" in section 29(1) of the Constitution, 1996 should consider what the state can afford, ensuring that basic education fulfils the "learning needs appropriate to the age and experience of the learner, whether child, youth, or adult".[180]

Scholars contend that the South African definition of basic education is too narrow.[181] This argument posits that learners who only complete Grade 9 lack the necessary knowledge, skills, and experience to navigate the outside world.[182] As a result, these learners may be unable to develop to their full potential, live and work with dignity, pride, and self-respect, and improve the quality and virtues of their lives.[183] There was also some uncertainty in the law about whether Grades 10, 11 and 12 were included in the definition of "basic education", because in the *Juma Musjid* case,[184] the Constitutional Court appeared to equate this with compulsory education, which ends at the age of 15 or at the end of Grade 9. This uncertainty was resolved in *Moko v Acting Principal, Malusi Secondary School and Others*.[185] The case involved a Grade 12 learner who was prevented by the school from writing a matriculation exam on the grounds that he had not attended extra lessons. The Constitutional Court found that this decision breached the learner's right to basic education. The court favoured the

[178] See Devenish (1999) 398. See also Chürr (2015) *PER/PELJ* 2411.
[179] See Department of Education, White Paper on Education and Training (1995) ch 7, para 14.
[180] See Department of Education, White Paper on Education and Training (1995) ch 7, para 14. See Chürr (2015) *PER/PELJ* 2411.
[181] See Chürr (2015) *PER/PELJ* 2411. See also Malherbe (2008) *TSAR* 274.
[182] See Chürr (2015) *PER/PELJ* 2411.
[183] See Chürr (2015) *PER/PELJ* 2411. See also Department of Education, White Paper on Education and Training (1995).
[184] *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law as Amici Curiae)* 2011 (8) BCLR 761 (CC) ("the *Juma Musjid* case").
[185] *Moko v Acting Principal, Malusi Secondary School and Others* 2021 (3) SA 323 (CC).

adequacy approach and quoted[186] *AB and Another v Pridwin Preparatory School and Others*,[187] where the Constitutional Court held that basic education is a flexible concept which must be defined to meet the appropriate learning needs of the learner and should also provide access to nationally recognised qualifications. In the *Moko* case, the Constitutional Court found that to exclude Grades 10 to 12 would be "an unduly narrow interpretation of the term that would fail to give effect to the transformative purpose and historical context of the right".[188]

It is submitted that basic education should encompass the entire schooling career of a learner, extending beyond age or the completion of a specific level of schooling to include both primary and secondary education. Basic education, therefore, should evolve with increasing educational standards and capacities in South Africa to meet the changing requirements of a dynamic society undergoing political and social transformation.[189] Basic education must provide learners with the foundation to succeed and flourish in society, including the minimal necessary learning equipment and tools of literacy and numeracy.

The South African school system grapples with a multitude of challenges, encompassing disparities in the school environment, compromised safety, insufficient funding for basic education, substandard infrastructure, a scarcity of qualified educators, and an incapacity to address diverse learning needs.[190] This thesis also highlights the pervasive issue of sexual abuse of children by educators, emphasising the urgent need for decisive measures to address this chronic challenge.[191] Despite diligent efforts to find solutions, success has been achieved only in some areas, while others remain unresolved. The next question is whether a court of law can compel the state to provide basic education for individuals.[192] After this question is addressed next, the following aspect will be explored: the last element of the relationship between section 29 of the Constitution and other fundamental rights.

[186] See *Moko v Acting Principal, Malusi Secondary School and Others* para 30.
[187] See *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC).
[188] See *Moko v Acting Principal of Malusi Secondary School and Others* para 32.
[189] See *Moko v Acting Principal of Malusi Secondary School and Others*. See also Chürr (2015) *PER/PELJ* 2411.
[190] See Chürr (2015) *PER/PELJ* 2406. See also Malherbe (2008) *TSAR* 274.
[191] See Chapter 1 para 1.3.1.
[192] See Chürr (2015) *PER/PELJ* 2411.

2.5.2.2 Can the State be Compelled to Provide Basic Education for Individuals?

Chürr[193] argued that section 7(2) of the Constitution, 1996 obliges the state to "respect, protect, promote and fulfil the rights in the Bill of Rights".[194] This obligation imposes a set of duties on the state, encompassing respect, protection, promotion, and fulfilment of the right to basic education. The case of *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*[195] clarifies the principle that the right to basic education creates a positive obligation for the state to provide basic education for every person, not merely a negative right to avoid obstructing a person's pursuit of basic education.[196] Essentially, the right to a basic education imposes both positive and negative obligations on the state. In terms of the positive obligation, the state must take effective steps to guarantee access to educational facilities and ensure that every child benefits from the right to education.[197] The negative obligation requires the state and its agencies not to hinder children's access to education.

To fulfil its constitutional obligations, the state has established a mainstream, inclusive school system that aims to be inclusive, efficient, and attentive to the quality of learning conditions and outcomes.[198] However, questions arise about whether the South African school system realises a child's rights to basic education, the inclusivity of the system, the potential exclusion of certain learners, and whether an inclusive system might infringe upon a child's rights to equality and dignity.[199]

2.5.2.3 Adjudication of the Right to a Basic Education

In dismissal disputes involving educators accused of sexual misconduct, the immediate realisability of a child's right to a basic education under section 29(1)(a) holds particular relevance. Unlike other socio-economic rights that require progressive realisation,[200] this right obligates the state to ensure an uninterrupted, safe educational environment. The Constitutional Court has emphasised this in *Governing Body of the Juma Musjid Primary*

[193] Chürr (2015) *PER/PELJ* 2411.
[194] See s 7(2) of the Constitution, 1996.
[195] *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC).
[196] *Ex parte Gauteng Provincial Legislature* para 9.
[197] *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM) para 20.
[198] See SECTION27 (2017) 26.
[199] See SECTION27 (2017) 26.
[200] See ss 26(1) and 27 of the Constitution, 1996.

School and Others v Essay NO and Others,[201] affirming the right as immediately realisable and limitable only by reasonable and justifiable law.[202] Thus, any misconduct by educators that undermines students' educational rights directly contravenes this fundamental right, mandating swift and effective adjudication.[203]

2.5.3 Section 29 of the Constitution and Other Fundamental Rights for Children

The right to a basic education is not an isolated entitlement but is intricately connected with various other rights, demonstrating their interdependence. Among these other rights, the right to mother tongue education and language rights is particularly relevant.[204] Section 29(2) of the Constitution affirms the right of everyone to receive education in their official language or languages of choice in public educational institutions where practical.[205] Additionally, section 30 recognises the right of individuals to use the language and participate in the cultural life of their choice, provided it aligns with the Bill of Rights.[206] Section 31 further safeguards the rights of individuals to belong to a cultural, religious, or linguistic community, ensuring their right to enjoy their culture, practise their religion, use their language, and establish cultural, religious, and linguistic associations.[207]

The right to basic education is intricately interlinked with other rights within the Bill of Rights, forming a cohesive framework of interconnected protections.[208] Violations of the right to basic education may consequently implicate other rights, and, conversely, breaches of other rights may impact the right to basic education. For instance, a hazardous road outside the school not only endangers the learners' right to basic education but also jeopardises their right to freedom and security of the person, exposing them to the risk of injury or harm. In the context of educator misconduct, a violation not only undermines the learners' dignity but also obstructs

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[201] See *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law as Amici Curiae)* 2011 (8) BCLR 761 (CC).
[202] See the *Juma Musjid* case para 37. The Constitutional Court held: "It is important, for the purpose of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'."
[203] See the *Juma Musjid* case para 37.
[204] See Chürr (2015) *PER/PELJ* 2417.
[205] See Chürr (2015) *PER/PELJ* 2417.
[206] See s 30 of the Constitution, 1996. See also Chürr (2015) *PER/PELJ* 2417.
[207] See s 31 of the Constitution, 1996. See also Chürr (2015) *PER/PELJ* 2417.
[208] See SECTION27 (2017) 34. See also Chürr (2015) *PER/PELJ* 2417.

their access to basic education. These are some of the rights interrelated with the right to basic education for children: Children's right to basic education is interconnected with rights to further education, learning in their chosen language, dignity, equality, a safe environment, and protection from abuse.[209]

Basic education facilities grant access to a broad spectrum of political, social, and economic rights. These include, among others:

> These rights encompass equality, dignity, further education, protection from harmful work, basic nutrition, health care, social security, just administrative action, personal freedom, and freedoms of religion, expression, and association.[210]

These rights are mutually dependent, emphasising the importance of interpreting the right to education within the context of the Bill of Rights.[211] The ethical standards for a democratic education system are established through the right to equality[212] and the right to human dignity,[213] affirming that every child, regardless of various characteristics, is equally entitled to learn under conditions that respect, protect, and promote their inherent human dignity.

2.5.3.1 The Right to Equality

Sections 9(1) and 9(2) of the Constitution, 1996 declare that everyone is equal before the law and has the right to equal protection and benefit of the law.[214] Equality encompasses the full and equal enjoyment of all rights and freedoms. Sections 9(3) and 9(4) further prohibit unfair discrimination against any person, emphasising the protection and preservation of the equal worth of individuals.[215]

The right to equality entails not merely equal treatment but, crucially, the right "to have one's equal worth with others respected, protected, promoted, and fulfilled".[216] The Promotion of Equality and Prevention of Unfair Discrimination Act ("the Equality Act" or "PEPUDA")[217]

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[209] See ss 29, 9, 10, 24 and 28 of the Constitution, 1996.
[210] See SECTION27 (2017) 34. See also Chürr (2015) *PER/PELJ* 2417 and see ss 28(1)(c), 32, 27, 33, 12, 15 and 16 of the Constitution, 1996.
[211] See SECTION27 (2017) 35. See also Chürr (2015) *PER/PELJ* 2417.
[212] See s 9 of the Constitution, 1996.
[213] See s 10 of the Constitution, 1996.
[214] See also SECTION27 (2017) 34 and Chürr (2015) *PER/PELJ* 2417.
[215] See s 9(3) and s 9(4) of the Constitution, 1996. See also SECTION27 (2017) 34 and Chürr (2015) *PER/PELJ* 2417.
[216] See s 9 of the Constitution, 1996. See also SECTION27 (2017) 34 and Chürr (2015) *PER/PELJ* 2417.
[217] See the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Its Preamble states that it intends: "To give effect to section 9 read with item 23 (1) of Schedule 6 to the Constitution

addresses the promotion and advancement of equality and outlines reactive measures available when the right to equality is violated.[218] The equality provision in the Constitution does not preclude the state from making classifications, provided that the criteria for such classifications are permissible and do not constitute unfair discrimination.[219]

The right to equality extends to education, ensuring that learners are shielded against discrimination based on various grounds. Equitable distribution of resources and supplies across all communities is essential, promoting fairness in proportion to each community's needs.[220]

2.5.3.2 Children's Right to Dignity

Section 10 of the Constitution, 1996 on human dignity states that everyone has inherent dignity and the right to have their dignity respected and protected.[221] Dignity is not only a constitutional right but also holds foundational value, illuminating and guiding other constitutional rights.[222] Recognised as the foundation of many other rights, the right to dignity emphasises the intrinsic worth of human beings.[223]

The right to dignity is pivotal to democracy and essential for progress and advancement.[224] Dignity promotes and respects individual autonomy, safeguards an individual's worth in society, and recognises that all human beings possess equal worth and value. This

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of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith". See also South African Government (2023) https://www.gov.za/documents/promotion-equality-and-prevention-unfair-discrimination-act.

[218] Chürr (2015) *PER/PELJ* 2417.

[219] See s 9 of the Constitution, 1996. See also SECTION27 (2017) 30 on limitation of rights and Chürr (2015) *PER/PELJ* 2417.

[220] See s 9 of the Constitution, 1996. See also SECTION27 (2017) 34 and Chürr (2015) *PER/PELJ* 2417.

[221] See also SECTION27 (2017) 35 and Chürr (2015) *PER/PELJ* 2417.

[222] See SECTION27 (2017) 35, observing that "human dignity is based on the idea that all humans have equal worth which should be respected and protected. However, human dignity is not only an underlying value, it is also a self-standing right. The right to human dignity protects all people from degrading, humiliating, exploitative or abusive treatment and conditions. The appalling conditions in which many learners are educated clearly violate their dignity. In *Komape v Minister of Basic Education* 1416/2015, which concerned the death of a five-year-old learner in a pit latrine at his school, the High Court acknowledged that the absence of safe and adequate toilets was a violation of human dignity". See also *Komape v Minister of Basic Education* 2020 (2) SA 347 (SCA). An example of abuse is *Mr. K.C Ratshilumela v Department of Education-Gauteng* PSES346-19/20GP (the "*Ratshilumela* case"), where an educator sexually abused a learner who was also an orphan, taking away her dignity.

[223] See s 10 of the Constitution, 1996. See also SECTION27 (2017) 35 and the *Ratshilumela* case para 26.

[224] See s 10 of the Constitution, 1996. See also SECTION27 (2017) 35 and Chürr (2015) *PER/PELJ* 2420.

extraordinary right, inherent in every person, is not earned and cannot be abandoned.[225] Equality and dignity are interconnected, especially when assessing whether discrimination on unstipulated grounds exists and whether it is unfair and justifiable.[226] Learners' rights to dignity in education necessitate creating a respectful and tolerant environment and avoiding practices and disciplinary policies that cause harm, mistreatment, or humiliation. Promoting self-confidence and self-expression is essential.[227]

The right to a basic education is woven into the fabric of various fundamental rights, underscoring the interconnectedness of these rights within the constitutional framework. This right goes beyond merely providing academic knowledge; it encompasses the right to a safe and supportive learning environment.[228] The right to equality and the right to dignity play pivotal roles in shaping a democratic system of education, ensuring that every learner is treated with respect and that their inherent worth is recognised and protected.[229] The Constitution, 1996 imposes an ethical responsibility on educational institutions to provide an environment that respects, protects, and promotes every learner's dignity. Sexual abuse by educators is a blatant violation of this right, as it not only jeopardises a child's physical and mental well-being but also obstructs their access to education.[230] Consider the words of the First President of democratic South Africa, Nelson Mandela:

> Our children are our greatest treasure. They are our future. Those who abuse them tear at the fabric of our society and weaken our nation.[231]

Schools must ensure that learners are protected from all forms of harm, including sexual exploitation, and that learners' dignity is upheld throughout their educational journey.

In addressing the relationship between section 29 of the Constitution, 1996 and the right of children not to be sexually abused by educators, it is crucial to acknowledge that education is not an isolated right but operates within the broader framework of human rights.[232] The Constitution, 1996 imposes a duty on the state and educational institutions to take proactive measures to prevent, address, and eradicate any form of sexual abuse within the educational

[225] See s 10 of the Constitution, 1996. See also Chürr (2015) *PER/PELJ* 2420.
[226] See s 10 of the Constitution, 1996. See also Chürr (2015) *PER/PELJ* 2420.
[227] See Chürr (2015) *PER/PELJ* 2420.
[228] See ss 9 and 10 of the Constitution, 1996. See also SECTION27 (2017) 34-35.
[229] See ss 9 and 10 of the Constitution, 1996. See also SECTION27 (2017) 35.
[230] See Chürr (2015) *PER/PELJ* 2420. See also SECTION27 (2017) 35.
[231] Mandela (22 November 1997). See also *Mr L J Davids v Department of Education – Western Cape* ELRC767-21/22WC para 70.
[232] See Chürr (2015) *PER/PELJ* 2420. See also SECTION27 (2017) 35.

context.[233] This duty is aligned with the broader principles of equality, dignity, and the best interests of the child, as articulated in various provisions of the Constitution, 1996 set out above.[234]

This thesis therefore argues that the right of children not to be sexually abused by educators is not a standalone right but is intricately connected to the right to education, equality, and dignity. In this context, dignity signifies the intrinsic worth of each person, and any violation of this right, especially through sexual abuse, is a severe affront to the principles enshrined in the Constitution, 1996. Safeguarding this right requires a comprehensive approach involving legal measures, policy frameworks, and a commitment to fostering a culture of respect, accountability, and zero tolerance for any form of abuse in educational institutions. Having established the constitutionalisation of the rights of children, especially the rights to basic education and the best interests of the child, it is also appropriate to consider the labour rights of educators not to be unfairly dismissed or subjected to unfair labour practice, starting with the international norms for a constitutional perspective.

2.6 International Norms in Educator Labour Rights not to be Unfairly Dismissed

The dismissal of workers has attracted considerable scholarly attention worldwide and in South Africa.[235] Scholarly writing on the labour rights of educators dismissed for sexual misconduct against learners is, however, scant. Yet the dismissal of all employees, including educators, is regulated by international norms and standards. The International Labour Organisation C158 - Termination of Employment Convention, 1982 (No. 158) (ILO Convention C158) provides standard-setting guidelines for terminating any worker's employment.[236] This section of the thesis critically examines the role of the ILO in the context of educator dismissal disputes, particularly those related to sexual misconduct.

The ILO was established in the aftermath of the First World War as part of the Peace Treaty of Versailles, which also established the League of Nations.[237] With a constitution aiming to establish fair competition between nations and promote social peace through equal working conditions, the ILO has grown to include 183 member countries worldwide.[238] The Union of

[233] See Chürr (2015) *PER/PELJ* 2420. See also SECTION27 (2017) 34.
[234] See ss 9 and 10 of the Constitution, 1996.
[235] See Smit and Van Eck (2010) *CILSA* 46. See also Newaj (2020) *PER/PELJ* 1; Workman-Davies (2020); and Vettori (2012) *PER/PELJ* 101.
[236] See Smit and Van Eck (2010) *CILSA* 46.
[237] See Van Niekerk and Smit (2019) 23.
[238] See International Labour Organization "History" (2024). See also Smit and Van Eck (2010) *CILSA* 46.

South Africa as it then was, now the Republic of South Africa,[239] and the United Kingdom were among the founding members who signed the Peace Treaty of Versailles in 1919.[240] Nigeria joined the ILO in 1960.[241] The United States of America, initially an ILO member in 1934, withdrew in 1977 and re-joined in 1980.[242] South Africa withdrew from the ILO in 1964 because of apartheid-related discussions but re-joined after its democratic elections in 1994.[243]

As an ILO member, South Africa is obliged to align its national laws with ratified ILO conventions. The LRA explicitly states its purpose to give effect to these ILO obligations.[244] And in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (the "*Sidumo* case"),[245] the Constitutional Court emphasised the requirement and imperative of administering an impartial adjudication of dismissal disputes, aligning with the ILO principles.[246]

The ILO Convention C158, adopted in 1982, outlines international labour standards, emphasising valid reasons for termination related to misconduct, incapacity, or operational requirements[247] as well as the fair procedure that must accompany such dismissal.[248] The convention excludes certain categories of workers from protection, such as fixed-term contract workers or those on probation.[249] Dismissal based on invalid grounds, including race or union membership, is deemed impermissible.[250] Articles 4, 7 and 11 of the convention are now discussed in succession.

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[239] See Van Niekerk and Smit (2019) 23.
[240] See International Labour Organization "History" (2024).
[241] International Labour Organization "Nigeria" (2024).
[242] See International Labour Organization "History" (2024). See also Beigbeder (1979) *IR* 223, who observed: "On 6 November 1977, the USA withdrew from the ILO, which it had joined in 1934, thus reducing the Organisation's membership to 134 Member States".
[243] See Gnot (2015): "In order to avoid being officially excluded, the Republic of South Africa withdrew from ILO of its own accord, notifying its departure on 11 March 1964. It re-joined the Organisation on 26 May 1994, three years after the official abrogation of the apartheid laws and ten days after the election of Nelson Mandela as President of the Republic."
[244] See s 1(b) of the LRA, stating that the purpose of the Act is partly "to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation".
[245] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) ("the *Sidumo* case").
[246] See the *Sidumo* case para 61. See also Smit and van Eck (2010) *CILSA* 48.
[247] See Art 5 of Convention C158. See also International Labour Organization "Convention C158" (2024) and Smit and Van Eck (2010) *CILSA* 48.
[248] See Art 7 of Convention C158.
[249] See Arts 7 and 8 of Convention C158. See also International Labour Organization "Convention C158" (2024).
[250] See Arts 7 and 8 of Convention C158.

2.6.1 Analysis of Article 4 and its Requirement of a Valid Reason for Termination

Employment termination, as stipulated in Article 4 of ILO Convention C158, must be founded on a valid reason. Convention C158 distinctly outlines permissible grounds for termination: misconduct, incapacity, or operational requirements.[251] A valid reason for dismissal is required, considering the severity of the behaviour. However, Article 4 does not specify the types of misconduct warranting termination, leaving room for diverse interpretations. Article 4 reads:

> The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

It is clear that this provision applies impartially to all categories of workers, educators included.[252] This thesis focuses on the dismissal of educators facing charges of sexual misconduct against children within the context of South African public schools. Examining these cases within the framework of international labour standards, as outlined by the ILO, adds a crucial dimension to understanding and evaluating these dismissal disputes.

The focus now shifts to Article 7 of Convention C158, which is also significant for the present inquiry. It addresses the procedural aspect of termination related to the worker's conduct or performance, emphasising the worker's right to defend himself against allegations before his employment is terminated.[253] This right becomes particularly relevant in the context of educators facing charges of sexual misconduct against children in South African public schools.

2.6.2 Examination of Article 7 and the Worker's Right to Be Heard

Article 7 of ILO Convention C158 prescribes procedures related to termination appeals, severance allowance, and income protection. The convention outlines standards of procedural fairness in cases of employment termination. It includes provisions related to the procedures

[251] See Art 4 of Convention C158.
[252] This provision of Convention C158 establishes a standard that necessitates a valid reason for termination, specifically connected with the capacity or conduct of the worker such as sexual misconduct by educators or based on the operational requirements of the undertaking, establishment, or service.
[253] See Art 7 of Convention C158.

to be followed before or during termination, the process of appealing termination decisions, and workers' entitlements upon termination.[254]

Convention C158 sets out the procedures to be followed before or during termination. Specifically, Article 7 states:[255]

> The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made unless the employer cannot reasonably be expected to provide this opportunity.

The Committee of Experts on the Application of Conventions and Recommendations ("CEACR") has emphasised that, beyond the literal interpretation of Article 7, which grants workers the right to be heard by the employer, the essence of this article is to ensure that any decision to terminate employment is preceded by dialogue and reflection between the parties involved.[256] Although the worker must be provided with an opportunity to defend himself, Convention C158 does not specify the form that this defence involves or that the presentation of allegations should take, thus providing flexibility in implementation. Crucially, though, the right to be heard must be provided before employment termination, regardless of whether the worker is entitled to procedures after termination, and even if the termination is considered pending procedures for appeal.[257]

2.6.3 The Right to a Reasonable Period of Notice or Compensation in Lieu Thereof

Convention C158 stipulates that notice periods in cases of capacity-related terminations should be of a "reasonable" duration. Article 11 states:

> A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.[258]

[254] See Art 7 of Convention C158.
[255] See Art 7 of Convention C158. See also International Labour Organization "Convention C158" (2024).
[256] See Art 7 of Convention C158. See also International Labour Organization "Convention C158" (2024).
[257] See Art 7 of Convention C158. See also International Labour Organization "Convention C158" (2024).
[258] See Art 11 of Convention C158. See also International Labour Organization "Convention C158" (2024).

The specific duration may be typically determined by the legislation of an ILO member state, potentially augmented by collective agreements, employment contracts, or established customs. Article 11 also allows for the possibility of extinguishing the notice requirement by offering compensation in lieu of notice.[259] This compensation is expected to correspond to the remuneration that the worker would have received during the notice period if it had been provided. It is important to note that the only exception to the obligation to provide notice (or compensation in lieu thereof) appears in cases of an employee's serious misconduct.[260] In the context of this thesis, sexual misconduct by educators provides a valid reason for terminating employment in accordance with the ILO provision. This thesis evaluates the adherence to these core principles in various foreign jurisdictions, shedding light on the effectiveness of international standards in safeguarding educators' labour rights during dismissal disputes. The right to appeal is discussed next.

2.6.4 Procedure of Appeal Against Termination

Whereas Article 7 of Convention C158 ensures a worker's right to defend himself against allegations before termination potentially at the workplace, Article 8 grants him the right to appeal to an impartial body. Article 8 states:

> A worker who believes their employment was unjustly terminated may appeal to an impartial body. This right may vary if termination was authorised by a competent authority. Failure to appeal within a reasonable time may be considered a waiver of the right to appeal.[261]

Article 8 delineates the worker's right to appeal against unjustifiable termination, stipulating that the appeal can be directed to an impartial body, including a court, labour tribunal, arbitration committee, or arbitrator.[262] However, Article 8 allows for variation in the application of this right when termination is authorised by a competent authority, subject to national law and practice.[263] What is important is that the article introduces a provision by which a worker

[259] See Art 11 of Convention C158. See also International Labour Organization "Convention C158" (2024).
[260] See Art 11 of Convention C158. See also International Labour Organization "Convention C158" (2024).
[261] See Art 8 of Convention C158. See also International Labour Organization "Convention C158" (2024).
[262] See Art 8(1) of Convention C158. See also International Labour Organization "Convention C158" (2024).
[263] See Art 8(2) of Convention C158. See also International Labour Organization "Convention C158" (2024). In this thesis, it may be that when a case is heard through the arbitration process under s 188A

may be deemed to have waived the right to appeal if the right is not exercised within a reasonable period after termination, thus emphasising the timely assertion of this entitlement.[264] Regrettably, the convention fails to define the duration constituting a "reasonable period" within which the employee's right to appeal can be waived. This obscurity introduces inherent problems, fostering conjecture and uncertainty and potentially resulting in disparate applications of Article 8.

Essentially, international standards, as reflected in Convention C158, focus on three main principles: a valid reason for dismissal, the right to defend oneself at the workplace, and the entitlement to lodge an appeal. The educator's constitutional labour rights are now considered.

2.7 The Educator's Constitutional Labour Rights

This chapter of the thesis investigates the delicate balance between protecting the rights of children, particularly safeguarding them from sexual abuse by educators, and ensuring the due consideration of the labour rights of educators facing inquiries into allegations of sexual misconduct against children. This thesis focuses on scrutinising the effectiveness of handling educator dismissal cases related to sexual misconduct within the public-school sector, emphasising the application of section 188A of the LRA.[265] A constitutional perspective is vital in understanding the labour rights of educators in this context.

2.7.1 Section 23 of the Constitution, 1996

In the exploration of the constitutional framework, section 23 of the Constitution, 1996 takes centre stage, addressing various labour rights which inherently encompass the rights of teachers. In section 23 of the Constitution, 1996 dealing with a number of labour rights (including teachers' rights), sections 23(1) and 23(2) state:

> (1) Everyone has the right to fair labour practices.
> (2) Every worker has the right —
> *(a)* to form and join a trade union;
> *(b)* to participate in the activities and programmes of a trade union; and
> *(c)* to strike.[266]

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of the LRA, the case is not appealable but may only be reviewed by a labour court in terms of either s 145 or s 158 of the LRA.

[264] See Art 8(3) of Convention C158. See also International Labour Organization "Convention C158" (2024).

[265] See s 188A of the LRA.

[266] The LRA, which gives expression to the Constitution, 1996, significantly affirms collective bargaining for the determination of wages and employment terms. The LRA confers enforceable rights on

The constitutional perspective on the labour rights of educators, particularly under section 23 of the South African Constitution, underscores the fundamental rights of everyone, including teachers, to fair labour practices, the freedom to form and join a trade union, the right to active participation in union activities, and the right to strike. This framework forms a critical backdrop for examining and ensuring the protection of educators' labour rights in the context of dismissal disputes, with a specific focus on cases involving alleged sexual misconduct in South African public schools. By examining the interplay between the constitutional safeguards for educators' labour rights and the need to address cases of sexual misconduct through statutory mechanisms such as section 188A of the LRA, this thesis aims to provide a comprehensive analysis of the legal landscape surrounding educator dismissal disputes in the South African public-school system.

2.7.2 Unfair Labour Practices

The principle of unfair labour practices has long-standing roots in South African labour law, having been introduced by the Wiehahn Commission in 1979.[267] Initially, this principle broadly covered practices that the Industrial Court considered unfair to an employee.[268] This concept gained constitutional status with the advent of democracy, aligning with the right to fair labour practices enshrined in section 23(1) of the Constitution.[269] The concept of fair labour practice suffers from imprecision in its meaning, especially because the Constitution, 1996 does not define fair labour practices. Notionally, the expression may be analysed as presupposing the issue of fairness and then labour practices. The Constitutional Court confirmed this approach in *National Education Health and Allied Workers Union v University of Cape Town and Others* ("the *NEHAWU* case") where it held:[270]

> Our Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.

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employees, notably the right not to be unfairly dismissed and the right not to be subjected to "unfair labour practices".

[267] Van Niekerk and Smit (2019) 43 observed that "the Wiehahn Commission first introduced the concept of the unfair labour practice into South African labour law in 1979".

[268] See Van Niekerk and Smit (2019) 43.

[269] See Van Niekerk and Smit (2019) 43.

[270] See *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) para 33.

According to Van Niekerk and Smit, the LRA, particularly under section 186, details specific unfair labour practices. It moves from the previous more open-ended definition to a closed list that explicitly outlines unfair acts or omissions by employers.[271] The term was initially classified as "residual unfair labour practices" but was later brought directly within the scope of the LRA in 2002, specified under section 186.[272]

Van Niekerk and Smit highlighted the evolution of the definition of "unfair labour practice", noting that amendments in 1982 aimed to enhance specificity but retained a broad scope.[273] Within this definition, various practices were identified, such as substantively unfair dismissals, procedural flaws in dismissals, non-renewal of fixed contracts, dismissal of strikers during a lawful strike, selective re-employment, discrimination, and victimisation for trade union activities.[274]

Although the South African Constitution does not explicitly mention unfair dismissals and the respective remedies, an inference can be drawn from section 23 of the Constitution, 1996, which guarantees the right not to be subjected to unfair labour practices, including unfair dismissals.[275] This inference implies that the right encompasses protection against unfair dismissals, highlighting the interconnectedness of various labour rights and creating a foundation for addressing and preventing unjust dismissals, particularly concerning educators facing allegations of sexual misconduct in public schools.[276] The resolution of unfair labour practice disputes, especially those involving unfair dismissals related to educators facing allegations of sexual misconduct towards children, has been a contentious and closely scrutinised issue for years.[277]

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[271] See Van Niekerk and Smit (2019) 43. The concept clearly suffers the challenge of imprecision such that much of its meaning has to be inferred in varied contexts.
[272] See s 186 of the LRA.
[273] See Van Niekerk and Smit (2019) 43, who observed that "the definitions were amended in 1982 to introduce a greater degree of specificity, but both definitions remained broad. Some of the practices that were held to fall within the definition of 'unfair labour practice' included: dismissals that were substantively unfair or had a procedural flaw; a failure to renew a fixed contract; the dismissal of strikers during a lawful strike; selective reemployment; discrimination, and victimisation for trade union activities". Initially, the definition of unfair labour practices was a "closed list", clearly listing practices falling within its scope. See also s 186(2)(a)-(d) of the LRA. S 186(2)(a)-(d) outlines specific practices, such as those related to promotion, demotion, probation, training, and provision of benefits.
[274] See Van Niekerk and Smit (2019) 43. The aspect of unfair dismissal as an unfair labour practice is the interest of the present thesis.
[275] See Van Niekerk and Smit (2019) 43.
[276] See Van Niekerk and Smit (2019) 43.
[277] See the discussion of the dismissal of educators in para 1.3.3.1 of Chapter 1 of this thesis, pertaining to the withdrawal of the licence to teach.

Realising these rights has been contested, especially the right to strike. Unions acknowledge in no uncertain terms that exercising their right to strike has also invited unintended consequences such as destruction and burning down of schools.[278] Deacon contends that exercising the right to strike within schools results in irreparable harm to the unqualified right of children to basic education. Although strikers are entitled to strike under section 23 of the Constitution, 1996, the act of striking within school premises violates the unqualified right of children to basic education. Deacon suggests that strikers should exercise their right to strike outside the school environment in order to uphold both their own rights and the unqualified right of children to basic education under section 23 of the Constitution, 1996.[279] This recommendation does not diminish the rights of teachers to fair labour practices, better conditions of service, the right to better governance of schools and also, crucial to this study, the right not to be unfairly dismissed because of allegations of sexual misconduct against learners.

This insight emphasises the need to strike a balance between the rights of educators and those of employers. It is essential to appreciate that the concept of unfair labour practices applies to both employers and employees.

2.8 Conclusion

After examining the evolution and role of international norms and standards, particularly concerning childhood and children's rights, along with the rights of educators in South Africa to be free from unfair labour practices, it is possible to draw several conclusions providing answers to the second and fourth research questions of this thesis, which were:

- What insights and guidance can be derived from the ILO and scholarly discourse concerning the optimal approach to resolving labour disputes?

- What lessons can be drawn from international comparative analyses regarding the efficient resolution of educator dismissal disputes arising from sexual misconduct against children in public schools?

[278] See Gous (2018).
[279] See Deacon (2015) *SAJE* 2. Deacon recommends that strikers should conduct their strikes at the offices of the employer, directing their initiative towards the target without compromising the unqualified right of children to basic education within the school premises.

The shift from a needs-based approach to a rights-based approach to the concept of childhood development is crucial for establishing children's right to protection from sexual abuse by educators. This thesis emphasises the importance of balancing the rights of children against the labour rights of educators, emphasising the right to a fair hearing and protection against unfair dismissal.

Furthermore, the introduction of the CRC and the African Children's Charter formalises the concept of childhood, transitioning to a best interests' approach. This shift underscores children's rights to dignity, an unequivocal right to basic education, and protection from all forms of abuse, including sexual abuse by educators. Member states are obliged to ensure the realisation of these rights.

The Constitution, 1996 aligns with international norms by incorporating section 28 on the best interests of the child and section 29(1) on the unqualified right to basic education. The remaining task is to translate these rights into actionable steps by the state and its actors.

The ILO contributes to safeguarding termination of employment through conventions and regulations. Its Convention 158 outlines crucial standards for fair dismissal, including the necessity of a valid reason and the right to be heard for procedural fairness.

The Constitution. 1996 establishes the right to fair labour practices, initially conceptual, but legislatively redefined to encompass the right not to be unfairly dismissed. This chapter of the thesis has stressed the need to carefully consider and balance the realisation of children's rights to be free from sexual abuse by educators with the educators' rights not to be unfairly dismissed or to be subjected to unfair labour practices.

The discussion now moves to the LRA and its section 188A inquiry by an arbitrator in handling educator dismissal disputes related to sexual misconduct.

Chapter 3: The LRA and the Section 188A Inquiry by Arbitrator in Handling Educator Dismissal Disputes Related to Sexual Misconduct

Page

3.1 Introduction 75
3.2 Evolution from a Flexible to a Formalistic Approach to Employee Dismissal 76
3.3 Employee Dismissals under the LRA 79
3.3.1 The LRA Meaning of Dismissal 79
3.3.2 Permissible Grounds for Fair Dismissal 81
3.3.3 The Code of Good Practice: Dismissal 81
3.4 Examination of Just Cause and Due Process 82
3.4.1 The Requirements for Just Cause or Substantive Fairness 82
3.4.2 The Requirements for Due Process or Procedural Fairness 87
3.4.3 The Role of Suspension in the Disciplinary Process 89
3.5 Discussion of Section 188A of the LRA and Its Use in Disciplinary Inquiries 90
3.5.1 Processes under Section 188A 92
3.6 Conclusion 95

3.1 Introduction

The previous chapter established a foundation for this thesis by examining international norms, constitutional perspectives, and the rights of children and educators in the context of sexual misconduct in South Africa's public education sector. This chapter shifts focus to the Labour Relations Act (LRA), particularly its mechanisms for resolving disputes related to unfair dismissal, emphasising section 188A's unique inquiry by an arbitrator process.

This section of the discussion analyses how the LRA addresses employee dismissal disputes, with a specific focus on upholding just cause and due process in cases involving educator misconduct. It aims to evaluate the effectiveness of section 188A, especially as applied by the Employment Labour Relations Council (ELRC) in handling sexual misconduct cases. The historical development of section 188A, including concepts such as "deemed dismissals" from

the Educators Act and key cases such as *MSC Depots*[1] and *Mchuba*,[2] will be explored to elucidate important principles and limitations.

The chapter also addresses challenges such as forum avoidance and limited jurisdiction, suggesting potential legislative reforms to enhance the authority of LRA processes. Moreover, it underscores the importance of stakeholder awareness regarding LRA procedures and the critical role of the Labour Courts in protecting educators' rights. This exploration tracks the shift from flexible to more formal approaches in educator dismissals, particularly following the procedural changes instituted after 25 September 2018. Ultimately, this chapter aims to provide a comprehensive understanding of the complexities surrounding educator dismissal disputes, especially those related to allegations of sexual misconduct, setting the stage for further analysis.

3.2 Evolution from a Flexible to a Formalistic Approach to Employee Dismissal

This section examines the evolution of employee dismissal legislation in South Africa, highlighting the transition from a flexible approach to a formalistic one with the introduction of the LRA.[3] Prior to the Wiehahn Commission and the establishment of the Industrial Court, common law principles governed unfair dismissal, necessitating procedural fairness.[4] The Industrial Court, established following the Wiehahn Commission in 1978, began developing jurisprudence on fair and unfair dismissal from 1980 onwards, advocating structured, court-like procedures.[5] The enactment of the LRA in 1995 marked a significant shift, introducing more informal pre-dismissal procedures and establishing key bodies such as the CCMA, bargaining councils, and labour courts to adjudicate unfair dismissal claims.[6]

Historically, South African labour law has reflected the nation's socio-political evolution, moving from an environment characterised by racial discrimination to one that emphasises employee rights.[7] The 1924 Industrial Conciliation Act primarily protected skilled white

[1] *South African Transport and Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others* (D 449/2011) [2012] ZALCD 10 (16 July 2012); (2013) 34 ILJ 706 (LC).
[2] *Mchuba v Passenger Rail Agency of South Africa* (J392/14) [2016] ZALCJHB 73 (2 March 2016); [2016] 6 BLLR 612 (LC); (2016) 37 (ILJ) 1923 (LC).
[3] See the Black Labour Relations Regulation Act 48 of 1953. See also McGregor et al (2017) 4 and Grogan *Dismissal* 5.
[4] See Van Niekerk and Smit (2023) 13.
[5] See Chapter 1 para 1.1. See also Smit and Van Eck (2010) CILSA 61 and Van Niekerk and Smit (2023) 13 and 46.
[6] See Van Niekerk and Smit (2023) 46.
[7] See the Black Labour Relations Regulation Act 48 of 1953. Rooted in racial tensions, industrial conflict emerged with the discovery of valuable resources such as diamonds and gold. The Industrial

workers, but the Wiehahn Commission recommended principles of "unfair labour practice" and led to the creation of the Industrial Court.[8] This development laid the groundwork for a more equitable system, where fairness and procedural integrity began to take precedence over unchecked employer authority.[9]

The global trend towards protection against unfair dismissal influenced South African law, leading to an emphasis on "just cause" for dismissal.[10] Specialised courts were established to interpret these laws, typically favouring reinstatement as the primary remedy.[11] The shift towards employee protection represents a significant transformation in labour relations, aiming to foster a respectful and humane workplace free from unjust treatment.

While initially flexible, the approach to employee dismissal became more formalistic with cases such as *Mahlangu v CIM Deltak* and *Gallant v CIM Deltak* in 1987,[12] which outlined specific procedural requirements. These included notifying educators of the charges against them, ensuring timely hearings, and allowing for representation and witness testimony. Such safeguards underscore a commitment to procedural fairness.[13]

Under the LRA, robust rights are afforded to employees, including educators, as enshrined in the Constitution, 1996.[14] The LRA's Chapter VIII, inspired by ILO Convention C158, places the onus on employers to prove the fairness of dismissals, marking a shift in the legal landscape.[15] While collective agreements offered some protections, they were often insufficient, prompting courts to challenge the notion of "public policy" and to affirm implied

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Conciliation Act 11 of 1924 entrenched racial discrimination, primarily safeguarding skilled white workers. See also McGregor et al (2017) 4 and Grogan *Dismissal* 5.

[8] See Chapter 1 para 1.1. See also Smit and Van Eck (2010) *CILSA* 61 and Van Niekerk and Smit (2023) 46.

[9] See Grogan *Dismissal* (2017) 9. See also *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA).

[10] See Grogan *Dismissal* (2017) 4, who asserts that "protection against unfair dismissal first emerged in the United States, where collective bargaining led to clauses preventing employers from dismissing employees 'without cause' or 'without just cause.' These collective agreements also introduced mechanisms for dispute resolution, such as referring dismissal disputes to arbitrators. Even in the absence of explicit provisions in collective agreements, arbitrators and labour tribunals began to infer implied obligations on employers to avoid unfair dismissals". See also Smit and Van Eck (2010) *CILSA* 60.

[11] See Van Niekerk and Smit (2023) 279 for a discussion of remedies for unfair dismissal, including reinstatement and compensation.

[12] See *Mahlangu v CIM Deltak; Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC) 375 (*Mahlangu*).

[13] See the *Mahlangu* case 375. See also Grogan *Dismissal* (2017) 372. Though not required by the Dismissal Code, disciplinary codes usually include an appeal procedure to address situations where either party is dissatisfied with the outcome of a disciplinary inquiry. Regardless of whether a disciplinary code outlines an appeal procedure, employees have the right to challenge the fairness of discipline imposed by their employer.

[14] See s 23 of the Constitution, 1966. See also s 188 of the LRA.

[15] See para 2.6 of Chapter 2 of this thesis for a discussion of ILO Convention C158.

guarantees of fair treatment in employment contracts.[16] Legislative reforms further established broad protections against unfair dismissal, mandating fair reasons for termination, outlining impermissible grounds for dismissal, and favouring reinstatement as a remedy.[17] Guidelines for dismissal were established under its jurisdiction to determine unfair labour practices. Procedural and substantive fairness in dismissals were underscored in the case of *Wahl v AECI Ltd* in 1983.[18]

The LRA created a specialised dispute resolution framework, including the CCMA and the Labour Court, designed for swift and cost-effective resolution of disputes.[19] By mandating fair reasons and procedures for termination, the LRA protects employees from unfair dismissal.[20] The emphasis on reinstatement and capped compensation provides a distinct departure from the common law, which offered limited remedies for wrongful dismissal.[21] This evolution in dismissal law is crucial for addressing cases involving educator misconduct in South African public schools, ensuring that due process is upheld.

One of the key functions of forums such as the CCMA[22] and the bargaining councils is to adjudicate on whether the dismissal of an employee by an employer at the workplace is fair.[23] Typically, alleged unfair dismissals must be referred within 30 days.[24] Following referral, conciliation takes place, and, if the matter is unresolved, arbitration follows.[25] The LRA

[16] See Grogan *Dismissal* (2017) 5. See also Brassey et al (1987) 4. See also Van Eck (2008) *Obiter* 340. See also *Schierhout v Minister of Justice* 1926 AD 99 and *National Union of Textile Workers v Stag Packings (Pty) Ltd* (1982) 3 ILJ 285 (T) 292E.
[17] See Brassey et al (1987) 4. See also Van Eck (2008) *Obiter* 340 and Grogan *Dismissal* (2017) 41. Grogan *Dismissal* (2017) 213, asserts that "in labour law misconduct is said to take place when an employee culpably disregards the rules of the workplace. These rules may arise from either the express or the implied terms of the employee's contract, from general standards accepted as applicable to the workplace or from express provisions of the employer's disciplinary codes which detail the offences deemed to justify dismissal or some lesser sanction. The legislature has also approved a general code for those employers who do not have their own codes, and against which the fairness of particular codes can be assessed. This is to be found in sch 8 to the LRA. However, it is generally accepted that even statutory codes are merely guidelines". See the Code of Good Practice: Dismissal, item 7, sch 8 to the LRA.
[18] See *Wahl v AECI Ltd* (1983) 4 ILJ 298 (IC) ("the *Wahl* case") heard in the Industrial Court of South Africa in 1983. The case dealt with the issue of fair labour practices in the employment relationship. The court's interpretation of the reality of industrial relations resulted in the imposition of fair labour practices in the employment relationship.
[19] See the discussion of this topic in para 1.1 of Chapter 1 of this thesis. See also Van Eck (2008) *Obiter* 340 and Grogan *Dismissal* (2017) 4, 8, who observes that "the present LRA provides unfairly dismissed employees with three forums for challenging their dismissals: the CCMA, bargaining councils authorised by the CCMA to conduct arbitrations and the Labour Court".
[20] See Grogan *Dismissal* (2017) 5.
[21] See Grogan *Dismissal* (2017) 5.
[22] See s 51 of the LRA. See also Van Niekerk and Smit (2023) 517.
[23] See s 115 of the LRA. See also Van Niekerk and Smit (2023) 505.
[24] Sees 191(1)(b)(i) of the LRA. See also Van Niekerk and Smit (2023) 512.
[25] See s 191(5)(a) of the LRA. See also Van Niekerk and Smit (2023) 514.

introduced a con-arb process to streamline this procedure by combining conciliation and arbitration into a single sitting. In later developments, certain collective agreements also mandated that educator dismissals proceed through con-arb by default.[26]

Before addressing the principles outlined by the LRA regarding fair and unfair dismissals, it is important to note that several legislative instruments apply to the dismissal of public-school educators. These instruments include the Educators Act;[27] the Schools Act,[28] and the SACE Act.[29] Although these instruments, alongside the LRA, define misconduct,[30] all dismissed educators retain the right to refer an unfair dismissal to the bargaining council for a determination of fairness.[31] The principles of fair and unfair dismissal are set out in the LRA. In the following sections of the discussion, unfair dismissal principles will be covered first, followed by an analysis of section 188A of the LRA.

3.3 Employee Dismissals under the LRA

The legislative framework concerning dismissals is the LRA, promulgated in 1994 after the apartheid era and influenced by international standards, with ILO experts contributing to its drafting.[32] This thesis argues that dismissal in the public education sector is still problematic. These issues present the dismissal law in the public education sector with added challenges. Some of these issues will be discussed after the LRA's approach to dismissal law has been canvassed.

3.3.1 The LRA Meaning of Dismissal

Section 185 of the LRA unequivocally proclaims employees' right not to face unfair dismissal, aligning with the constitutional guarantee in section 23, which affirms the right to fair labour practices for every employee.[33] Section 186 of the LRA provides a comprehensive definition of dismissal. It covers various scenarios such as termination with or without notice, unfavourable renewal of fixed-term contracts, refusal to allow a return from maternity leave,

[26] See s 191(5A) of the LRA. See also Van Niekerk and Smit (2023) 517 and Rycroft (2003) 24 *ILJ* 699.
[27] See the Educators Act.
[28] See the South African Schools Act 84 of 1996 ("the Schools Act").
[29] See the South African Council for Educators Act 31 of 2000 ("the SACE Act").
[30] See ss 17 and 18 of the Educators Act. See also item 9 of sch 2 to the Educators Act which provides for appeal in educators' dismissal cases.
[31] See ss 188 and 51 of the LRA.
[32] See Van Niekerk and Smit (2019) 235.
[33] See s 185(a) and (b) of the LRA on the right not to be unfairly dismissed or subjected to unfair labour practice, which states: "Every employee has the right not to be- *(a)* unfairly dismissed; and *(b)* subjected to unfair labour practice".

and constructive dismissal because of intolerable working conditions.[34] Section 186 also addresses dismissals resulting from a transfer under section 197 or section 197A of the LRA, where the new employer provides less favourable conditions.[35] Section 186(1) of the LRA defines "dismissal" as when an employer terminates employment, fails to renew a fixed-term contract on similar terms, refuses an employee's return post-maternity leave, re-employs only some employees dismissed for similar reasons, or creates intolerable working conditions, prompting the employee to resign.[36]

Notably, the potential for unfair dismissal arises when an employee's employment is terminated without proper justification, such as proven misconduct, poor performance, ill health, or retrenchment.[37] This thesis discusses a complex, unsettling reason for dismissal. Educators' sexual misconduct against learners is disturbing. It still requires adherence to dismissal guidelines under the LRA. Compliance with procedural guidelines, as outlined in the Code of Good Practice: Dismissal, in Schedule 8 to the LRA, is crucial in ensuring fairness in dismissal processes.[38] Furthermore, section 17(5) of the Public Service Act, 1994 ("the Public Service Act")[39] and sections 14 and 15 of the Educators Act[40] allow for termination by operation of law after a period of unexplained absence by an employee and striking off the register of teachers under the SACE Act.[41]

However, the prerogative of discipline is vested in the employer, who can dismiss an employee for reasons related to conduct, capacity, or operational requirements.[42] This prerogative aligns with the ILO Termination of Employment Convention C158,[43] emphasising valid reasons

[34] See s 186(1)(a)-(e) of the LRA. See also Grogan *Dismissal* (2017) 41, who observes that "section 186(1)(a) of the LRA defines the first form of dismissal as the termination by an employer with or without notice".
[35] See ss 197 and 197A of the LRA.
[36] See s 186(1) of the LRA.
[37] See Van Niekerk and Smit (2019) 235. See also Grogan *Dismissal* (2017) 11. The LRA confers on all employees the right not to be unfairly dismissed. The civil law also confers a right not to be unlawfully dismissed. This thesis is concerned with how the right is protected, especially when it pertains to educator dismissals for sexual misconduct against learners in public schools. According to Grogan (2017) 11, "the LRA recognises four permissible grounds for dismissal: misconduct, poor work performance by the employee, the inability of the employee to perform his or her contractual obligations because of ill health or injury, and the operational requirements of the employer".
[38] See sch 8 to the LRA.
[39] See s 17(5) of the Public Service Act, 1994 published in Proc 103 in *GG* 15791 of 3 June 1994.
[40] See ss 14 and 15 of the Educators Act.
[41] See s 15(2) of the Educators Act. See also s 5(c)(iii)(cc) of the SACE Act: "Subject to this Act and the National Education Policy Act, 1996 (Act 27 of 1996), the council- … *(c)* with regard to professional ethics- … (iii) subject to subparagraph (ii), may- … *(cc)* remove from the register for a specified period or indefinitely, or subject to specific conditions, the name of, an educator found guilty of a breach of the code of professional ethics".
[42] See para 2.5.1.1 in Chapter 2 of this thesis. See also Le Roux and Van Niekerk (1994) 75 and Du Toit et al (2023) 526. This concept is discussed fully in Chapter 5 of this thesis.
[43] See Arts 4 and 7 of Convention C158. See also para 2.6.1 in Chapter 2.

connected to capacity, conduct, or operational requirements for termination, as already discussed in Chapter 2 of this thesis.[44] This thesis considers a dismissal that may arise under section 188A of the LRA, which bypasses the standard internal disciplinary hearing and any subsequent appeal provided for by item 7 of Schedule 2 of the Educators Act, examining its implications for the labour rights of educators.

3.3.2 Permissible Grounds for Fair Dismissal

The LRA further stipulates that a dismissal is fair only when substantively fair reasons are proved, coupled with adherence to fair procedural practices.[45] Specifically, section 188(1) of the LRA recognises the following as acceptable reasons regarding termination of employment:

> (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-
> *(a)* that the reason for dismissal is a fair reason-
> (i) related to the employee's conduct or capacity; or
> (ii) based on the employer's operational requirements; and
> *(b)* that the dismissal was effected in accordance with a fair procedure.[46]

No doubt sexual misconduct against learners will fall under employees' misconduct.[47]

Despite the right not to face unfair dismissal and the right to a fair hearing, significant debates surround the delicate balance between the rights of educators and children, particularly in cases of sexual misconduct against learners in public schools. This thesis investigates this complex terrain, aiming to navigate the intricacies and implications of educator dismissal disputes, with a specific focus on sexual misconduct cases involving learners in public schools.

3.3.3 The Code of Good Practice: Dismissal

The Code of Good Practice: Dismissal accompanying the LRA promotes fairness in dismissal procedures.[48] The code recommends that an employer should investigate to determine grounds for dismissal and allow the employee an opportunity to respond.[49]

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[44] See Art 4 of Convention C158. See also para 2.6.1 in Chapter 2 of this thesis.
[45] See s 188(1) of the LRA.
[46] See s 17(1)(b)(c) of the Educators Act.
[47] See sch 8 to the LRA. See also Smit and Van Eck (2010) *CILSA* 60.
[48] See sch 8 to the LRA.
[49] This recommendation departs from the former court-like procedures and aligns with Convention C158.

The case of *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration and Others*[50] ("*Avril Elizabeth Home for the Mentally Handicapped*") signalled a departure from the court-like procedures and emphasised the need for dialogue and reflection before decisions about dismissal. This new direction aligns with the Code of Good Practice; Dismissal[51] and interprets it as a set of guiding factors consistent with ILO Convention C158.[52]

Though the LRA and the Code of Good Practice: Dismissal do not require an internal appeal hearing, dismissed employees have the right to refer a dispute to an independent resolution institution, such as the CCMA, a bargaining council, or the Labour Court. Item 4(3) of the Code of Good Practice: Dismissal reminds employees of their rights to pursue dispute resolution through relevant channels.[53]

Essentially, South African labour law has evolved to balance the rights of employers and employees. It emphasises fairness in dismissal procedures while acknowledging the historical context that shaped these legal developments.

In the paragraphs that follow, just cause will be discussed and then procedural fairness.

3.4 Examination of Just Cause and Due Process

This thesis examines the importance of substantive and procedural fairness in dismissing educators for sexual misconduct. As stated above, the requirements of section 188 of the LRA and the Code of Good Practice: Dismissal oblige employers to exercise the right to terminate employment within reason.

3.4.1 The Requirements for Just Cause or Substantive Fairness

Section 188 of the LRA outlines the requirement of substantive fairness or just cause as a crucial prerequisite for the fairness of any dismissal.[54] In explicit terms, a dismissal, even in

[50] *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration and Others* (JR782/05) [2006] ZALC 44 (14 March 2006); [2006] 9 BLLR 833 (LC); (2006) 27 ILJ 1644 (LC).
[51] See sch 8 to the LRA.
[52] See Arts 4 and 7 of Convention C158.
[53] See item 4(3) of the Code of Good Practice.
[54] See LSData (2024), explaining that "in legal contexts, *'justa causa'* is a Latin term employed in civil law, denoting a lawful ground or a just cause. It signifies a reason that holds legal validity, leading to potential liability or warranting the initiation of a lawsuit. Within the realm of employment law, the term is utilised to signify a legally sufficient rationale for termination. In essence, *'justa causa'* encapsulates

misconduct cases, must be based on a fair reason.[55] This requirement extends to all employees, including educators.

Item 7 of the Schedule 8 Code of Good Practice: Dismissal outlines five guidelines that must all be adhered to for a dismissal based on misconduct to be substantively fair.[56] These guidelines must be considered by the arbitrator or commissioner when evaluating the fairness of the employer's decision to dismiss for misconduct, depending on the specific issues in dispute.[57] Employers must proactively consider these guidelines before making a dismissal decision. When a sanction short of dismissal is challenged as an unfair labour practice, the same guidelines apply, still with a focus on the fairness of the non-dismissal sanction.[58]

The first guideline centres on whether the employee breached or contravened a rule or standard governing conduct within or relevant to the workplace.[59] This inquiry necessitates the existence of a rule, permits discipline for off-site conduct if it impacts the workplace, and requires proof of an actual rule violation.[60] Grogan asserts that:

> the first requirement in every case concerning the fairness of a dismissal for misconduct is that the employer must prove that the employee contravened a rule applicable to the workplace. This requirement entails proving the existence of the rule and the infraction.[61]

Sometimes, the rule may be one of the implied contractual duties of employees under the common law. It is important to note that disciplinary rules may not always be explicitly stated in the employment contract or a disciplinary code. Establishing the infringement of a rule is

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the notion of having a valid and lawful reason for undertaking an action permitted by law". See also Item 7 of sch 8 to the LRA.

[55] See s 188 of the LRA.

[56] See item 7 of sch 8 to the LRA.

[57] See Van Niekerk and Smit (2019) 310.

[58] See Grogan *Dismissal* (2017) 231.

[59] See item 7(a)-(b) of sch 8 to the LRA. See also Grogan *Dismissal* (2017) 213 and Van Niekerk and Smit (2019) 304. This issue was canvassed in the case of *Sibusiso Fortune Jele v Department of Education KwaZulu-Natal PSES* 1012-18/19KZN para 21. The case was heard by an ELRC Commissioner for arbitration, where the educator had been dismissed for allegedly sexually grooming a learner. The case was thrown out because "respondent [employer] has failed to discharge the onus of proving the fairness of the dismissal." See also *Gauteng Department of Education v Peter Williams* ELRC 924-21/22GP, where the employer failed to prove that the educator contravened a rule, and the matter was thrown out as a result. See also *Sophonia Leeto v Department of Education, Free State* PSES 527-10/11FS.

[60] See item 7(a) of sch 8 to the LRA. See also Van Niekerk and Smit (2023) 328. Workplace rules are often contained in disciplinary codes. See also Van Niekerk and Smit (2019) 304. These codes should align with the minimum standards set by the Dismissal Code. Employers can customise these codes to suit their specific workplace needs, but they must adhere to the Dismissal Code. In cases where there is no specific disciplinary code, employers should refer to the Dismissal Code for guidance on addressing misconduct.

[61] See Grogan *Dismissal* (2017) 213.

both a factual and a legal determination and depends on the specific misconduct charged.[62] The public education sector rules on sexual misconduct emanate from the Educators Act[63] and other regulations, but they still have their challenges. These will be discussed below and also in Chapter 4 of this thesis.

The second guideline focuses on whether the rule is valid or reasonable.[64] Grogan argues that:

> employees may also argue that the rule did not bind them because it was unlawful or unreasonable. A workplace rule is unlawful if it enjoins employees to perform actions which they are precluded from performing by law or which the employer may not lawfully require an employee to perform or which enjoin the impossible. Unreasonable or unlawful rules will be treated as *pro non scripto*. If employees wish to challenge the reasonableness or necessity of a long-standing rule, they should ignore it or wait until they are dismissed before doing so.[65]

Specific standard rules, such as those prohibiting dishonesty, absenteeism, or assault, are generally considered valid and reasonable and are enforced by most employers. If there is any uncertainty, rules must, at the very least, comply with the law.[66] In addition, the validity and reasonableness of rules must consider the nature of the work, the workplace specifics, and the employer's operations.[67] The context in which the rule is applied significantly influences its validity and reasonableness.[68] Though most employers can easily meet this requirement, it may pose challenges for unique rules designed within a specific employer's context.

The third guideline focuses on whether "the employee was aware, or could reasonably be expected to have been aware, of the rule or standard".[69] This guideline implies that employees should be informed of workplace rules and be made aware of what constitutes a violation of these rules that could lead to disciplinary action.[70] Though it may be difficult for employees to

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[62] See Grogan *Dismissal* (2017) 213, who asserts that "the existence of a rule is a matter of fact and law".
[63] See ss 17 and 18 of the Educators Act.
[64] See item 7(b)(i) of sch 8 to the LRA. See also *Vundla and Ashley Motors* (2003) 24 ILJ 272 (BCA).
[65] See Grogan *Dismissal* (2017) 215.
[66] See Grogan *Dismissal* (2017) 214. See also Van Niekerk and Smit (2019) 306.
[67] See Grogan *Dismissal* (2017) 214. See also Van Niekerk and Smit (2019) 306. The context of sexual misconduct in schools is more complex because it often engenders proof of cases through child witnesses.
[68] See Grogan *Dismissal* (2017) 214.
[69] See item 7(b)(ii) of sch 8 to the LRA. Employers need to establish clear disciplinary rules that are communicated to employees. This step ensures that employees understand the expected standards of conduct, and employers must consistently implement these rules.
[70] See Grogan *Dismissal* (2017) 217. See also Van Niekerk and Smit (2019) 307 and *Dikobe v Mouton NO & others* (2016) 37 ILJ 2285 (LAC) and *National Union of Mineworkers & Another v Mogale Gold, A Division of Mintails (SA) (Pty) Ltd* (2015) 36 ILJ 2815 (LAC).

claim ignorance of well-known types of misconduct, this guideline acknowledges situations in which employees are reasonably expected to know the rules.[71] However, for unique employer-specific rules, actual knowledge based on information provided by the employer will probably be necessary. This actual knowledge is typically achieved by disseminating the employer's disciplinary code to the employees.[72]

The fourth guideline emphasises that the employer must consistently apply the rule or standard in disciplinary actions and sanctions.[73] This guideline is crucial as it ensures clarity and consistency in the workplace regarding expected conduct and the consequences of rule breaches.[74] The guideline prevents unfair treatment of employees who commit the same misconduct.[75] However, it does not mean that the sanction imposed for a specific violation must be identical in all cases.[76] The circumstances of each case may warrant deviations from previous sanctions for the same misconduct.[77] What matters is whether the decision to impose discipline and the outcome of the discipline were fair. Decision-makers, such as the employer or chairpersons of disciplinary hearings, retain the discretion to impose discipline as they see fit, provided that it is fair in each case, and there is justification for different outcomes.[78]

The last aspect of substantive fairness involves determining whether dismissal was an appropriate sanction for the rule violation.[79] In this regard, the employer must justify its

[71] See Grogan *Dismissal* (2017) 217. See also Van Niekerk and Smit (2019) 307.
[72] See Grogan *Dismissal* (2017) 217. See also Van Niekerk and Smit (2019) 307.
[73] See item 7(b)(iii) of sch 8 to the LRA. See also Grogan *Dismissal* (2017) 223, who asserts that "inconsistency is also unfair because inconsistent application of rules creates confusion and possible doubt whether a rule in fact exists". In *SA Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd* 2002 (3) SA 250 (LAC); (1999) 20 ILJ 2302 (LAC), the court held that "parity is simply a general principle of fairness and that it should not be applied rigidly.
[74] See Grogan *Dismissal* (2017) 223. See also Van Niekerk and Smit (2019) 307, arguing that "the courts have held that this requirement is no more than an element of the obligation to act fairly and that it is the perception of bias inherent in selective discipline that makes it unfair".
[75] See Grogan *Dismissal* (2017) 223.
[76] See Grogan *Dismissal* (2017) 223.
[77] See Van Niekerk and Smit (2019) 307, arguing that "this does not mean that the employer has no discretion in respect of the appropriateness of dismissal as a penalty. If the employer can establish that there are differences between the cases in question, obviously there is no inconsistency. But difference is often a matter of degree and it is in this respect that the courts themselves have not always been consistent. A narrower approach, adopted by the Labour Appeal Court, suggests that inconsistency, even if it is not capricious or otherwise improperly motivated, will usually found at least a perception of bias and an unfair dismissal. See also *SA Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd* 2002 (3) SA 250 (LAC); (1999) 20 ILJ 2302 (LAC), where the court stated that it is the perception of bias inherent in selective discipline that makes it unfair and that some inconsistency is the price to be paid for flexibility, which in turn requires the exercise of a discretion in each case".
[78] See Grogan *Dismissal* (2017) 223. See also Squelch (1999) 49 and Van Niekerk and Smit (2019) 307.
[79] See item 7(b)(iv) of sch 8 to the LRA. See also Van Niekerk and Smit (2019) 310. Disciplinary measures should be applied progressively and correctively. This requirement means attempting to correct employee behaviour through measures such as counselling and warnings before considering dismissal. The success of this approach relies on the employer's discretion, which may work well in

decision to dismiss, typically supported by evidence (separate from the inquiry into the employee's guilt).[80] The commissioner or arbitrator must be convinced that the employer considered the guidelines outlined in item 7 of the Code of Good Practice: Dismissal before deciding on the sanction of dismissal.[81] The same principles apply when the employee challenges a non-dismissal sanction as an unfair labour practice.

Item 3(5) of the Code of Good Practice: Dismissal[82] elaborates on the factors to consider when deciding whether to impose the penalty of dismissal. These include the gravity of the misconduct, the employee's circumstances (length of service, previous disciplinary record, and personal circumstances), the nature of the job, and the circumstances of the infringement itself.[83] The gravity of the misconduct is only one factor. The employer must also consider the employee's circumstances, the nature of his job, and the specific circumstances surrounding the misconduct.[84] Consistency in implementing discipline for similar types of misconduct is also crucial.

In deciding, the commissioner or arbitrator should assess whether the employer substantively applied discipline and perhaps dismissal fairly. To justify dismissal, the employer must demonstrate that continued employment would be intolerable, such as when the risk associated with continued employment is considered too great.

Substantive fairness is also addressed in other legislation applicable to educators and relevant to the Educators Act.[85] There can be no doubt that sexual misconduct would constitute a valid reason for dismissal under item 7 of the Code of Good Practice: Dismissal if all factors are applied, including the existence of a rule, its validity, and employee awareness of the rule.[86]

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smaller businesses but can be challenging in larger organisations, especially in sectors such as education.

[80] See Grogan *Dismissal* (2017) 231 and Van Niekerk and Smit (2019) 310. Deciding whether to apply a formal or an informal disciplinary procedure is a critical aspect. Formal disciplinary inquiries involve meetings where the employer presents evidence obtained during an investigation, and the employee has the opportunity to respond. A chairperson determines the employee's guilt and, if necessary, imposes a suitable sanction. It is vital for employers to charge employees correctly on the basis of the available facts in order to avoid difficulties later. This is especially significant in the education sector, where a solid understanding of misconduct grounds listed in the Educators Act is essential.

[81] See item 7(b)(iv) of sch 8 to the LRA. See also Van Niekerk and Smit (2019) 310 and Grogan *Dismissal* (2017) 231.

[82] See item 3(5) of sch 8 to the LRA.

[83] See item 3(5) of sch 8 to the LRA.

[84] See Van Niekerk and Smit (2019) 310 and Grogan *Dismissal* (2017) 231.

[85] See sch 2 to the Educators Act.

[86] See item 7 of sch 8 to the LRA.

3.4.2 The Requirements for Due Process or Procedural Fairness

Procedural fairness in employee dismissal refers to the procedures that the employer follows before deciding to terminate an employee's employment. In addition to requiring that a dismissal be substantively fair, the fairness of dismissal also hinges on whether procedural fairness or due process[87] was observed during a disciplinary inquiry.

Item 4 of the Code of Good Practice: Dismissal on fair procedure outlines that the employer should conduct an investigation, notify the employee of allegations in understandable terms, and allow time for a response with trade union assistance if needed. Following this, the decision should be communicated in writing, including dismissal reasons and rights to refer a dispute to the CCMA or relevant bargaining council. In exceptional cases, pre-dismissal procedures may be bypassed.[88] These principles are discussed below in turn.

The first principle for fair procedure in item 4 of the Code of Good Practice: Dismissal mandates that an employer must investigate any misconduct allegations thoroughly to determine whether there are indeed grounds for dismissal.[89] This investigation phase is crucial, as it establishes the foundation for a fair disciplinary process and ensures that cases are prosecuted only once they are substantiated. As Grogan argues, disciplinary action can have a prejudicial impact on employees, underscoring the need for employers to proceed with caution and integrity during this initial phase.[90] The Code of Good Practice: Dismissal

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[87] See Britannica (2024) https://www.britannica.com/topic/due-process, where it is stated that "due process refers to a course of legal proceedings governed by established rules and principles within a system of jurisprudence, designed to enforce and protect private rights. The concept of due process found its early expression in the 39th article of the Magna Carta (1215). This foundational document articulated the royal commitment that 'No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed … except by the legal judgment of his peers or by the law of the land'. This declaration laid the groundwork for the fundamental principle that individuals should be safeguarded from arbitrary and unjust actions, ensuring that legal judgments are rendered through fair and lawful procedures". See also s 188(1)(b) of the LRA providing the equivalent of just cause when it states the requirement "that the dismissal was effected in accordance with a fair procedure".

[88] See item 4(1)-(4) of sch 8 to the LRA. According to Grogan *Dismissal* (2017) 318, this provision is intended to rid pre-dismissal procedures of the complex technicalities that the Labour Courts had evolved when developing their dismissal jurisprudence under the 1956 LRA. The code does not mention, for example, the right to call or cross-examine witnesses or appeal. In fact, the code gives almost no guidance on how disciplinary inquiries should be conducted or on the standards of fairness to be applied during such proceedings. This accords with the intention of the drafters of the LRA. The Labour Courts have repeatedly stated that pre-dismissal disciplinary procedures should not be assessed too rigorously. In *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd & another* (1998) 19 ILJ 635 (LC) 639, the Labour Court observed that the current LRA demands less stringent and formalised compliance than was the case under the unfair labour practice jurisdiction of the Industrial Court.

[89] See item 4(1) of sch 8 to the LRA.

[90] See Grogan *Dismissal* (2017) 321. The Dismissal Code recommends addressing minor infractions with informal advice and correction, issuing warnings for more serious misconduct, and reserving dismissal for severe or repeated violations. The decision on the procedure is typically made after a disciplinary infraction occurs and an investigation is conducted to gather evidence. In cases of serious misconduct, employers may opt for precautionary suspension, where the employee is temporarily

stipulates that the investigation need not be a formal inquiry, allowing for a flexible but diligent approach.[91] In *Avil Elizabeth Home for the Mentally Handicapped*, the Labour Court observed that the Code anticipates a process less formal than a trial, though still requiring an impartial examination of facts, formulation of allegations, and notice to the employee.[92]

The investigative process further requires that the employer must conduct a thorough, impartial, and comprehensive examination of evidence. This examination includes meticulous collection and analysis of witness statements, digital evidence, and relevant documents, ensuring that all pertinent information is gathered and scrutinised to build a solid case.[93] Evidence-gathering protocols must meet ethical and legal standards to maintain integrity, as failure to observe these standards may result in dismissed cases, particularly in serious allegations such as those involving sexual misconduct.[94] In educator dismissal disputes related to sexual misconduct, for instance, comprehensive investigations are paramount to ensure that all relevant aspects, including the perspectives of both alleged victims and accused educators, are fully and impartially considered.[95]

In the context of dismissal disputes for public educators for sexual misconduct, arbitrators have dismissed several cases of sexual misconduct against learners because the lack of grounds for dismissal prevented a possible conviction of the educator. The case of *HOD, Department of Education, Western Cape v Edgar Dean Fortuin* ("the *Fortuin* case")[96] featured severe allegations of misconduct, including that the educator "sexually groomed learner A, a grade 4 learner enrolled at Robinhill Special School, and fondling the learner's private parts,

removed from the workplace with full pay during the investigation. In some cases, educators in the education sector are unfairly charged with less serious misconduct, leading to lighter sanctions, as revealed in ELRC arbitrations. This is in line with the principle laid down in *Avril Elizabeth Home for the Mentally Handicapped.* It was held that the employer was merely required to conduct the investigation, give an employee or his representative an opportunity to respond to allegations after a reasonable period, and then take a decision and give the employee notice of the decision.

[91] See Van Niekerk and Smit (2023) 335. This provision was somewhat novel at the time the code was enacted, yet remains overlooked by many CCMA commissioners who still penalise employers for not adhering strictly to a formal approach to procedural fairness.

[92] See item 4(1)-(4) of sch 8 to the LRA. See also Grogan (2017) 318 and *Avril Elizabeth Home for the Mentally Handicapped*.

[93] See Grogan *Dismissal* (2017) 322, who argues that "a pre-hearing investigation is precisely what its name suggests. During this phase the employer investigates the offence in order to decide whether formal disciplinary action may be justified. This will normally entail interviewing witnesses, including, possibly the suspects and inspecting relevant documents".

[94] See Grogan *Dismissal* (2017) 322. See also Van Niekerk and Smit (2019) 314.

[95] See Grogan *Dismissal* (2017) 322. See also *Marvin-Leigh Christo September v Western Cape Education Department* ELRC452-22/23WC; *Department of Basic Education – Kwazulu-Natal v Thembinkosi Mpofana* ELRC16-21/22KZN; *Head of the Department of Education – KwaZulu-Natal v C T Gwamanda* ELRC20-22/23KZN.

[96] *HOD, Department of Education, Western Cape v Edgar Dean Fortuin* ELRC831-2122WC.

indulging in sexual intercourse with the learner apart from appropriating touching the minor child.[97]

A second, central requirement of item 4 is that the employee is given adequate notice of the allegations,[98] with the opportunity to state his case and sufficient time to prepare.[99] This requirement entails notifying the employee in writing of the charges and scheduling a reasonable period for him to respond.[100] This advance notice is critical, as it allows employees to organise their defence, seek representation if needed, and fully understand the case against them.[101] In accordance with the Code of Good Practice: Dismissal, employees should be afforded the choice of representation by a union representative or a fellow employee.[102] Following the conclusion of the inquiry, the employer is expected to communicate the decision to the employee, ideally in writing, to ensure clarity and transparency.[103]

3.4.3 The Role of Suspension in the Disciplinary Process

Suspension is not explicitly required by the Code of Good Practice: Dismissal but can form an essential part of the disciplinary process. It must be implemented fairly, in line with legislative regulations, collective agreements, or employment contracts, to avoid constituting an unfair labour practice as outlined in section 185 of the LRA.[104] The law differentiates between two types of suspension: precautionary and punitive. Precautionary suspension, typically with full pay, may be necessary during investigations to prevent the employee from interfering with witnesses, evidence, or the general investigation.[105] While precautionary suspensions are usually imposed without prior representation, employees are given a chance to respond to allegations at the disciplinary hearing.

By contrast, punitive suspension is a disciplinary measure used as an alternative to dismissal for employees found guilty of misconduct. This form of suspension is rarer, as it requires explicit consent from the employee or stipulation in legislation or the employment contract. An

[97] See the *Fortuin* case para 6.
[98] See item 4(1) of sch 8 to the LRA. See also Grogan *Dismissal* (2017) 318.
[99] See item 4(1) of sch 8 to the LRA. See also Grogan *Dismissal* (2017) 318 and Van Niekerk and Smit (2023) 335.
[100] See item 4(1) of sch 8 to the LRA.
[101] See item 4(1) of sch 8 to the LRA. See also Van Niekerk and Smit (2023) 335.
[102] See item 4(2) of sch 8 to the LRA. See also Van Niekerk and Smit (2023) 335.
[103] See item 4(3) of sch 8 to the LRA. See also Van Niekerk and Smit (2023) 336.
[104] See s 185 of the LRA.
[105] See Van Niekerk and Smit (2023) 228.

illustrative case is that of *Arnold Robertson*, where punitive suspension was applied, leading to further action by the SACE, which withdrew Robertson's teaching licence.[106]

In terms of Item 4, the Code of Good Practice: Dismissal states that the employer should notify the employee of the allegations. In *Moletsane v Premier of the Free State and Another*, the Department of Education provided an educator with a suspension letter without setting out the specific allegations against the incumbent.[107] The court ruled that while a general departmental investigation might suffice in less severe cases, more serious actions, such as suspension, require clear and detailed reasons to ensure fairness and due process. This underscores the importance of employers' giving employees specific and comprehensive notification of the allegations against them. Such transparency, as required under section 24(c) of the Interim Constitution of the Republic of South Africa, 1993,[108] is essential to protect the rights and interests of individuals in disciplinary processes.[109]

The Educators Act does provide for procedural fairness, including requirements such as notice,[110] suspension and investigation,[111] an opportunity for the educator to respond,[112] and a written record of disciplinary decisions.[113] However, it does not explicitly use the terms "fair reason" and "procedural fairness" as found in the LRA. Despite this, the Educators Act still mandates that the LRA and its Code of Good Practice: Dismissal apply to it.[114] This dissertation will now explore how principles of just cause and due process are incorporated through section 188A of the LRA, considering its origins, rationale, advantages, and limitations within educator dismissal disputes.

3.5 Discussion of Section 188A of the LRA and Its Use in Disciplinary Inquiries

Section 188A of the LRA outlines an alternative process for handling disciplinary inquiries by allowing an external arbitrator to conduct the proceedings instead of relying solely on internal

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[106] See para 1.2.3.3 of Chapter 1 of this thesis for an initial discussion of the *Arnold Robertson* case.
[107] See *Moletsane v Premier of the Free State and Another* 1996 (2) SA 95 (O) ("*Moletsane*").
[108] See s 24(c) of the Interim Constitution.
[109] See Squelch (1999) 49.
[110] See item 5 of the Educators Disciplinary Code.
[111] See item 6(2) of the Educators Disciplinary Code.
[112] See item 7 of the Educators Disciplinary Code.
[113] See item 7(18) of the Educators Disciplinary Code: "The presiding officer must communicate the final outcome of the hearing to the employer and the educator within five working days after the conclusion of the disciplinary enquiry, and the outcome must be recorded on the personal file of the educator." The Educators Act does not state that the employer must communicate the outcome of the disciplinary inquiry to the concerned educator. It states that after the presiding officer communicates the outcome to the employer, the employer must record it in the educator's file.
[114] See item 3 of the Educators Disciplinary Code which states as follows "Code of Good Practice. - (1) The Code of Good Practice contained in Schedule 8 of the LRA, insofar as it relates to discipline, constitutes part of this Code and Procedure."

mechanisms.[115] Section 188A significantly altered the landscape of dispute resolution processes, specifically regarding employee dismissals.[116] This option was introduced to enhance the impartiality of disciplinary processes and is particularly valuable in cases involving alleged misconduct or incapacity, where an external assessment can reduce the risk of bias and ensure a fair outcome.[117] This option provided a perfect opportunity for the education sector which needs to reduce the number of forums in which children have to testify against errant educators as discussed fully in Chapter 6 of this thesis. The arbitrator's decision at the conclusion of this inquiry has the same authority as an arbitration award, which can be enforced in line with the LRA's provisions. This process can commence either through employee consent or by means of a collective agreement, authorising the employer to appoint an arbitrator from a council, an accredited agency, or the CCMA.[118]

The pre-dismissal arbitration process was incorporated into the LRA in 2002,[119] reflecting a shift towards refining dismissal processes by offering a structured, objective approach to disciplinary inquiries.[120] This section introduces a procedural framework for pre-dismissal arbitration, enabling dispute resolution before termination decisions are finalised.[121] The 188A process was renamed inquiry by arbitrator in 2014.[122] According to the Explanatory Memorandum Labour Relations Amendment Bill, 2010 ("the Explanatory Memorandum LRAB

[115] See s 188A(1) of the LRA. This process essentially takes the place of an internal disciplinary hearing.
[116] See s 188A(1) of the LRA.
[117] See Grogan *Dismissal* (2017) 681. See also Van Niekerk and Smit (2023) 516 and Du Toit et al (2023) 196. Instead, the role of conducting the disciplinary hearing or inquiry is assumed by an arbitrator. The inquiry arbitrator closely follows the employer's established disciplinary code and/or code of conduct. Notably, the outcome and any sanctions from this disciplinary hearing take the form of an arbitration award. All other procedural aspects remain consistent with those of a traditional disciplinary hearing, with the exception that the commissioner presiding over the pre-dismissal arbitration may administer oaths to witnesses, a power not typically vested in a disciplinary chairperson.
[118] See s 188A(1) of the LRA.
[119] S 188A of the LRA was introduced by the 2002 amendment to the LRA. See also Van Niekerk and Smit (2023) 516.
[120] In terms of the Labour Relations Amendment Bill 2000, the insertion of s 188A was part of the broader Labour Relations Amendment Bill 2000. The Bill recognised the need for a novel approach to handling dismissal disputes to enhance fairness and to reduce unnecessary delays and costs in the labour dispute resolution system. This historical context highlights the evolution of s 188A and its early designation as a pre-dismissal arbitration process. It underscores the legislative intent to improve the efficiency and effectiveness of labour dispute resolution in South Africa, a context that is particularly relevant to its application in cases of educator dismissals, including those involving sexual misconduct.
[121] See s 188A of the LRA. See also item 43 of GN 444 in *GG* 23540 of 24-06-2002, which culminated in Act No. 12 of 2002: Labour Relations Amendment Act, 2002, page 28, which states "insertion of section 188A in Act 66 of 1995 '43. The following section is inserted after section 188 of the principal Act: 30 Agreement for pre-dismissal arbitration". S 188A of the LRA, inserted by s 43 of the Labour Relations Amendment Act 12 of 2002, outlines the process for conducting an arbitration into allegations regarding an employee's conduct or capacity.
[122] McGregor et al (2017) 224 put a rider on this point by stating that "in some instances the employer may, with consent of the employee, apply for a pre-dismissal inquiry (previously called 'pre-dismissal arbitration'). The benefit of this process is that it avoids a repetition of process, namely, an internal disciplinary hearing and a possible later challenge of the dismissal dispute in arbitration. It saves time

2010"), because of objections from unions and concerns regarding the terminology's presupposition of dismissal, the name of the process was changed to "inquiry by an arbitrator" in the 2014 amendments.[123]

The steps of applying the section 188A process include formally requesting the inquiry by arbitrator process using a prescribed form,[124] paying applicable fees,[125] and securing written consent from the employee for the external inquiry.[126] This framework supports transparency and ensures that employees are fully aware of the process, their rights, and the implications of pre-dismissal arbitration.

3.5.1 Processes under Section 188A

Section 188A specifies a detailed procedure for disciplinary inquiries via external arbitration, establishing a clear structure that promotes both transparency and procedural fairness. Before proceedings, the employer must issue a notice outlining the allegations against the employee,[127] which enables the employee to make an informed decision about his participation and representation. During the inquiry, employees have the right to representation by co-workers, trade union officials, organisational representatives, or, in certain cases, legal counsel if agreed upon or permitted by the arbitrator.[128] This inclusive approach reinforces the employee's right to fair representation and procedural assistance.

The appointed arbitrator in a section 188A inquiry possesses extensive powers, equivalent to those granted to a CCMA commissioner, which include investigating evidence and examining witnesses.[129] The authority to gather comprehensive evidence allows the arbitrator to fully address the issues at hand, ensuring a fair and balanced outcome based on substantive findings. Essentially, because the arbitrator's decision holds the same weight as an arbitration award, it is legally binding and enforceable, providing closure and certainty to both parties involved in the dispute.[130]

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and money". See also Du Toit et al (2023) 196. In this thesis, for ease of reference, the term "section 188A" is used interchangeably with "inquiry by an arbitrator".

[123] Item 12 of the Explanatory Memorandum LRAB 2010 para 41.3 provides: "Enquiry by arbitrator (section 188A) (a) The concept of the 'pre-dismissal arbitration' introduced in 2002 is renamed as an enquiry by an arbitrator."

[124] See s 188A(2) of the LRA.

[125] See s 188A(3)(a) of the LRA.

[126] See s 188A(3)(b) of the LRA.

[127] See s 188A(4)(a) of the LRA: "An employee may only consent to an inquiry in terms of this section after the employee has been advised of the allegation referred to in subsection (1)."

[128] See s 188A(5) of the LRA.

[129] See s 188A(7) of the LRA. See also Van Niekerk and Smit (2023) 516 and Du Toit et al (2023) 196.

[130] See s 188A(7) of the LRA. See also Van Niekerk and Smit (2023) 517.

Section 188A(5) extends the arbitrator's powers by requiring adherence to conciliation processes outlined in section 191 of the LRA.[131] This mandate underscores the LRA's preference for resolving employment disputes through conciliation as a first step before arbitration.[132] The structured process begins with conciliation, which aims to foster an amicable resolution. Where conciliation fails within a 30-day period, or within an agreed extended timeframe,[133] section 191(5) then allows the matter to progress to arbitration at the employee's request.[134] Here, dismissal disputes based on conduct or capacity are arbitrated if employment conditions were intolerable or if the reason for dismissal remains ambiguous.[135] This sequence – conciliation followed by arbitration – underscores the LRA's commitment to procedural fairness, as it provides employees, including educators charged with sexual misconduct, with a clear and accessible route for disputing dismissals based on substantive issues.[136]

Section 188A offers significant advantages in disciplinary matters, especially in enhancing the fairness and impartiality of the process.[137] By using an external arbitrator, employers and employees benefit from reduced bias that can sometimes arise in internal hearings. The structured, transparent nature of external arbitration not only improves the perception of fairness but also instils greater trust in the process among employees.[138] With the final decision carrying the weight of an arbitration award, the process ensures a definitive and enforceable resolution, helping to avoid protracted conflicts.[139] Furthermore, the initial attempt at conciliation before arbitration supports a collaborative resolution, encouraging both parties to reach a mutually agreeable outcome without the adversarial tone often associated with arbitration.[140]

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[131] See s 188A(5) of the LRA. See also s 191 of the LRA and Van Niekerk and Smit (2023) 516.
[132] See s 191 of the LRA. The 2002 amendments to the LRA also introduced a process called con-arb in dismissal and unfair labour practice disputes. In terms of this provision, s 191(5A) of the LRA, the CCMA is required to commence with arbitration as soon as it is certified that the dispute remains unresolved. See also Van Niekerk and Smit (2023) 517.
[133] See s 191(1)(b)(i) of the LRA.
[134] See s 191(5) of the LRA.
[135] See s 191(5) of the LRA.
[136] See *Diholo v Gauteng Department of Education* (JR 1775/19) [2023] ZALCJHB 117 (2 May 2023) ("*Diholo*") where the s 188A process was used. It is unfortunate the Labour Court did not investigate the jurisprudential aspects of the inquiry by arbitrator process. The unfortunate situation is that, according to the Explanatory Memorandum LRAB 2010, "little use has been made of it", including in the education sector. It is difficult to assess the impact of the s 188A process if it has not enjoyed much usage or afforded treatise by the courts since 2002.
[137] See s 188A(3) of the LRA which requires the agency or CCMA to appoint an arbitrator, who should act in good faith to arbitrate the dispute. See also Bushe (2019) 57, who asserts that "arbitration can resolve disputes quicker than court proceedings".
[138] See s 138(1) of the LRA on general provisions for arbitration proceedings, which provides: "(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities". See also Patelia and Chicktay (2014) 30 and Bushe (2019) 56.
[139] See s 188A(8) of the LRA.
[140] See s 191(5A) of the LRA.

Despite the benefits, implementing section 188A can still present practical and financial challenges. The costs associated with securing an external arbitrator and managing an independent inquiry can be prohibitive for some employers, particularly smaller entities.[141] For straightforward cases, the formal structure of section 188A may seem overly complex, making traditional internal disciplinary hearings appear more efficient.[142] Additionally, the requirement for written employee consent can be a potential barrier, particularly if the employee is hesitant to participate in an external process, potentially delaying timely resolutions for pressing matters. Logistical issues, such as the availability of qualified arbitrators, can also impact the efficiency of the process, potentially leading to delays in addressing critical disciplinary issues. Other issues that have also emerged in cases before the courts especially *South African Transport and Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others* (*MSC Depots*") include the inflexible nature of the process[143] and the non-availability of a credited agency rendering the section 188A process reviewable or moot in *Mchuba v Passenger Rail Agency of South Africa* (*Mchuba*).[144] These cases involved the implementation of Section 188A of the LRA in employee dismissal proceedings, though outside the education sector. The implications and legal principles arising from these rulings by the Labour Court are considered in Chapter 6 of this thesis.

Section 188A provides a valuable option within the LRA's disciplinary framework, blending procedural rigour with fairness. By introducing conciliation as a first step under section 188A(5), the LRA creates a process that seeks to resolve disputes amicably before engaging in formal arbitration.[145] The staged approach outlined in section 191 supports timely and

[141] See s 188A(3)(a) of the LRA which requires that the employer seeking to use the s 188A process must pay the prescribed fee as a pre-condition.
[142] See s 188A(3) of the LRA which specifies a process of implementing it. The fees, accredited agency and obtaining employee consent to invoke the process may be prohibitive.
[143] See *South African Transport and Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others* (D 449/2011) [2012] ZALCD 10 (16 July 2012); (2013) 34 ILJ 706 (LC) ("*MSC Depots*"). In *MSC Depots*, the core issue was the employer's unilateral decision to abandon a pre-dismissal arbitration process agreed upon with the union under s 188A. The court's decision underscored the mandatory nature of the arbitration framework defined in Part C of Chapter VII of the LRA. Unilateral abandonment of the s 188A process is impermissible once the employee has consented to it. See also Grogan (2017) 681, who noted that in *Mchuba v Passenger Rail Agency of South Africa* (J392/14) [2016] ZALCJHB 73 (2 March 2016); [2016] 6 BLLR 612 (LC); (2016) 37 (ILJ) 1923 (LC) ("*Mchuba*"), "the decision to abandon the proceedings accordingly constituted a breach of contract. The dismissal was set aside". This thesis argues that the implications of the s 188A process is that it is inflexible and may attract costs if not approached correctly as in *MSC Depots*.
[144] See the *Mchuba* case. After the process had commenced, it emerged that the agency Tokiso was not accredited by the CCMA and the process was challenged successfully. The employer had attempted to resort to an internal disciplinary hearing which was refused by the employee and confirmed by the court. The court ruled in favour of the applicant, deeming the employer's unilateral withdrawal from the pre-dismissal arbitration agreement a breach of the employment contract.
[145] See s 188A(5) of the LRA.

structured resolution of disputes, with specific time frames (for example, 30 days for dismissal disputes) that aim to prevent unresolved grievances from causing prolonged disruption in the workplace.[146] Through section 188A, the LRA offers a mechanism that balances employee rights with employer interests, ensuring that both parties have a fair, impartial, and legally enforceable process for resolving disciplinary issues.[147]

Section 188A of the LRA thus offers a significant advantage for the public-school sector in addressing dismissal disputes involving educators accused of sexual misconduct. The use of an external arbitrator under section 188A is designed to bypass the often lengthy and complex internal disciplinary processes, delivering a more streamlined and efficient alternative to conventional court proceedings.[148] This expedited approach aligns well with the LRA's objectives of achieving swift, cost-effective resolutions to labour disputes, particularly in matters requiring timely intervention.[149] While the combined conciliation and arbitration (con-arb) process reduces procedural delays, it remains subject to potential challenges. These include the risk of human error, procedural abandonment, and issues related to the expiration of agency accreditations,[150] which may affect the accessibility or cost-effectiveness of the process.[151]

3.6 Conclusion

Upon a comprehensive examination of the LRA dispute resolution processes and the role of an arbitrator inquiry under section 188A, several notable conclusions emerge.

The shift from a flexible to a formalised approach, solidified with the enactment of the LRA, represents a crucial development in establishing a fair and consistent dismissal framework. This thesis underscores the importance of just cause and procedural fairness in the dismissal of educators for sexual misconduct, aligning with international standards and constitutional principles.

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[146] See s 191(1) of the LRA.
[147] See Wiese (2016) 7. See Coetzee and Schreuder (2010) 470. See also Bushe (2019) 19, who stated: "There are inconclusive debates around whether arbitration should be factored into the scope of ADR given its resemblance [to] the court system (quasi-judicial nature) especially its notion of forcing decisions on disputants". The reliance of s 188A on arbitration renders it susceptible to the challenges facing such a process such as lack of precedent and the parties' reluctance to use arbitration. This view is also shared by the International Chamber of Commerce's Guide to ICC ADR in Jus Mundi (2001) 3. See also Grogan *Dismissal* (2017) 689; Van Niekerk and Smit (2019) 490; McGregor et al (2017) 222; and Du Toit et al (2023) 184.
[148] See s 188A of the LRA.
[149] See s 1(d)(iv) of the LRA.
[150] See *MSC Depots* and *Mchuba.*
[151] See s 188A(3) of the LRA.

The 1995 LRA enshrined these standards by creating dedicated bodies, including the CCMA, bargaining councils, and the Labour Courts, to ensure quick and accessible dispute resolution. Although conciliation and arbitration under the LRA generally operate as two distinct phases, the process remains complex and often protracted.

The con-arb mechanism under section 188A addresses this challenge by streamlining the process through combined conciliation and arbitration, though with its own procedural and practical limitations.

The education sector's adoption of the ELRC Collective Agreement to expedite disciplinary inquiries for sexual misconduct allegations highlights a sector-wide commitment to employing section 188A to handle these cases more efficiently. However, the effectiveness and reliability of this approach in delivering justice for educator misconduct cases require further critical assessment.

These aspects, alongside the broader implications of section 188A's role in dismissal disputes, will be explored in detail in the following chapter.

Chapter 4: A Critical Evaluation of the Legislation Regulating Educator Dismissals for Sexual Misconduct

Page

4.1 Introduction 98
4.2 The Schools Act: Management of Educator Discipline and Addressing Sexual Misconduct in Public Schools 98
4.2.1 Governance and Professional Management of Public Schools 101
4.2.2 Role of the SGB in School Governance and the Discipline of Educators 101
4.2.3 Role and Functions of the Principal in Educator Dismissal Disputes 106
4.3 The Educators Act 110
4.3.1 The Educator in terms of the Educators Act 110
4.3.2 The Employer of Educators in terms of the Educators Act 112
4.3.3 Educator Dismissal Disputes under the Educators Act 113
4.3.3.1 Deemed Dismissals under the Educators Act 113
4.3.3.2 Withdrawal of the Teaching Licence under the Educators Act 115
4.4 Educator Dismissal for Serious Misconduct under the Educators Act 116
4.4.1 Sexual Misconduct Dismissals under the Educators Act 118
4.4.2 Processing Sexual Misconduct under Schedule 2 to the Educators Act 120
4.4.3 Educator Misconduct under the Educators Act and the LRA's Code of Good Practice 121
4.4.4 "Serious" and "Less Serious" Educator Misconduct and the Principal's Role 123
4.4.5 The Code of Conduct Procedure for Educator Dismissal Disputes 125
4.4.6 The ELRC's Collective Agreement 127
4.5 The SACE Act and Its Regulatory Framework on Educators 128
4.5.1 Council for Educators Structures for Handling Sexual Misconduct Cases 129
4.5.2 The Disciplinary Committee's Mandate on the Code of Professional Ethics 130
4.5.3 The Code of Professional Ethics for Educators 130
4.5.4 Mandate to Investigate Allegations of Professional Misconduct 132
4.5.5 The Disciplinary Hearing under the SACE Act 132
4.5.6 Dispensing with Section 23 of the SACE Act 134
4.6 Register of Persons Unfit to Work with Children 135
4.7 The Role of the ECTA in Managing Sexual Misconduct Cases 136
4.8 Conclusion 137

4.1 Introduction

Building upon the insights gained in the previous chapter, which focused on the LRA and its distinctive section 188A, this Chapter 4 comprehensively analyses the legislative framework governing educator employment and regulation in South Africa.

As highlighted in Chapter 1, South Africa's education system is governed by a network of laws, including the Schools Act,[1] the Educators Act,[2] the SACE Act,[3] the Education Laws Amendment Act,[4] and the LRA.[5] Further pertinent legislation shaping this thesis includes the Public Service Act ("the PSA"),[6] the SACE Code of Professional Ethics for Educators ("Educators Code of Professional Ethics"),[7] the Children's Act,[8] and Electronic Communication and Transactions Act ("the ECTA"),[9] among others. These laws collectively aim to enhance education quality by addressing governance, management, and administrative issues, and regulating educator disciplinary conduct.

Chapter 4 of this thesis critically evaluates the Educators Act, the Schools Act, and the SACE Act, exploring the rules and regulations that govern educator behaviour. This examination aims to assess the impact of legislative enactments on the regulation of educators, particularly those facing allegations of sexual misconduct against children in public schools. Notably, this chapter draws attention to the intricate web of overlapping jurisdictions among various laws and institutions. The LRA, with its section 188A, serves as a crucial tool for addressing educator dismissal cases, especially those involving sexual misconduct. However, understanding the broader legislative context is essential for a nuanced evaluation of the challenges and intricacies inherent in regulating educators' conduct.

4.2 The Schools Act: Management of Educator Discipline and Addressing Sexual Misconduct in Public Schools

The Schools Act is a cornerstone of the education sector, guiding school management and covering everything from learner admission to the functions of school governing bodies and

[1] See Act 84 of 1996.
[2] See Act 76 of 1998.
[3] See Act 31 of 2000.
[4] See Act 53 of 2000.
[5] See Act 66 of 1995.
[6] See the Public Service Act, 1994 (PSA), published in Proc 103 in *GG* 15791 of 3 June 1994.
[7] See the Educators Code of Professional Ethics.
[8] See Act 38 of 2005.
[9] Electronic Communication and Transactions Act 25 of 2002 ("the ECTA").

principals.[10] It defines essential elements such as public schools,[11] educators, and learners, thereby providing a foundational framework for this thesis. The roles assigned to principals are particularly pertinent in the context of educator discipline and the processes leading to dismissal, especially given that schools are often where interactions between learners, teachers, and the employer occur, sometimes resulting in sexual abuse.[12]

A report from the South African Council for Educators ("SACE"), responsible for regulating the sector, identifies specific environments conducive to educator sexual misconduct against learners.[13] Instances of misconduct have been documented in various school settings, including classrooms, school offices, staff rooms, in guesthouses arranged by the offending teachers,[14] and even during school trips,[15] extracurricular activities[16] and even within teachers' vehicles,[17] among other locations. This pattern underscores the urgency of understanding these environments to implement effective measures against sexual abuse within the educational sphere.

The legal status of a public school is defined under section 15 of the Schools Act, which grants it legal personality to perform its functions.[18] As juristic entities, public schools operate through designated agents, primarily the school governing body ("SGB") and the principal, acting on behalf of the Head of Department ("HOD").[19] The Schools Act distinguishes between public schools and independent schools, defining a public school in Chapter 3.[20] This chapter,

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[10] See the Schools Act.
[11] See s 1(xix) of the Schools Act. The school is defined as "a public school or an independent school which enrols learners into one or more grades from grade R (reception) to grade twelve".
[12] See s 16A of the Schools Act.
[13] See South African Council for Educators (2017).
[14] *Gauteng Dept of Education Employer v S Rasekhula* ELRC 990-21/22GP para 7 shows that the perpetrator had sex with a child at a guesthouse in Dobsonville and also during extra classes that took place on Saturdays.
[15] See *Free State Provincial Department of Education v NAPTOSA obo D. Khongoana* ELRC 1030-21/22FS para 7: the teacher conceded that he gave the learners a lift and took one to his house, where she was sexually abused.
[16] In *Superintendent General Free State Department of Education v Mr Setsumi April Ntoni* ELRC169-21/22FS para 14, the arbitrator notes: "The Learner explained how the employee followed her down the street after school and offered her a lift. She testified that instead of dropping her off in or nearby her residential street, the employee continued to drive the vehicle and stopped at his own private residence. The Learner stated that the employee opened his gate and garage door and [held] her by the hand and took her into his bedroom after closing the gate and doors behind them."
[17] See *Mr. A Leeuw v Department of Education – Free State* ELRC 115-21/22FS para 34.
[18] See s 15 of the Schools Act. "Every public school is a juristic person, with legal capacity to perform its functions in terms of this Act."
[19] See s 15 of the Schools Act.
[20] See s 12(1)-(6) of the Schools Act. As regards provision of public schools (s 12), the Act mandates the Member of the Executive Council to provide public schools for learners' education, using funds allocated by the provincial legislature. See also s 13(1)-(8) of the Schools Act. As regards public schools on state property, s 13 addresses the provision of schools on immovable state-owned property, including property held in trust for a tribe by a trust established through statute. See s 15 of the Schools

entitled “Public Schools”, encompasses sections 12 to 33A of the Act and delineates public schools on state property and those on private property. This framework is vital to understanding the environments in which sexual misconduct may occur, shedding light on the responsibilities for managing educator misconduct within schools.

Key stakeholders in the school system include learners, educators, principals, and HODs. The Schools Act broadly defines a learner, but it lacks specificity, potentially including adult learners.[21] This generalisation poses challenges in prioritising and processing cases of sexual misconduct against children, highlighting the need for a precise definition that aligns with constitutional[22] and international norms.[23] The lack of clarity in defining children as learners complicates the management of educator dismissal disputes arising from sexual misconduct allegations in public schools.

The term “educator” is defined in the Act as anyone involved in teaching or providing professional education services, excluding those appointed for extracurricular duties.[24] This definition has evolved, now referring to the Educators Employment Act, but challenges remain in understanding the scope of an educator’s responsibilities, particularly concerning sexual misconduct cases.[25]

The principal, defined as an educator acting as the head of the school,[26] bears significant responsibility for managing discipline and prosecuting serious misconduct, including sexual

Act. As regards public schools on private property, s 14 provides that, subject to constitutional and legal provisions, public schools on private property can only be established through an agreement between the Member of the Executive Council and the private property owner, as outlined in s 15.

[21] See s 1(ix) of the Schools Act: “‘**learner**’ means any person receiving education or obliged to receive education in terms of this Act” (original bolding).

[22] See s 28(3) of the Constitution, 1996 which defines a child as follows: “In this section **‘child’** means a person under the age of 18 years” (original bolding).

[23] Art 2 of the African Children’s Charter on the definition of a child provides: “For the purposes of this Charter, a child means every human being below the age of 18 years.” Art 1 of the CRC states that a child is any human being under 18. See also Memzur (2008) *SAPR/PL* 16. This thesis argues that the Schools Act must define a child to differentiate the child from “any persons”, as the expression “any persons” may pertain to adult learners within the school system. This differentiation helps to identify children as needing protection, and it does not suggest that adult learners do not need protection. This recommendation aligns with international norms pertaining to the protection of the rights of a child.

[24] See s 1 of the Schools Act. An educator is “any person excluding a person who is appointed to exclusively perform extracurricular duties who teaches, educates or trains other persons or who provides professional education services including professional therapy and educational psychological services, at a school”. See also s 1(iv) of the Schools Act. This definition had limitations, prompting a change through Proclamation 138 of 1994 to state that an educator means an educator as defined in the Educators Act.

[25] See s 3 of the Educators Act.

[26] See s 1 of the Schools Act. A principal is defined as “an educator appointed or acting as the head of the school.”

misconduct.[27] Given their proximity to incidents, principals are ideally positioned to intervene effectively. The role of the HOD is equally important,[28] as he is responsible for disciplining educators and overseeing the principal's functions,[29] which are crucial in handling cases of sexual misconduct.[30]

4.2.1 Governance and Professional Management of Public Schools

Section 16 of the Schools Act, accordingly, provides for the governance of a public school to be vested in its governing body as follows:

> (1) Subject to this Act, the governance of every public school is vested in its governing body.
>
> (2) A governing body stands in a position of trust towards the school.
>
> (3) Subject to this Act and any applicable provincial law, the professional management of a public school must be undertaken by the principal under the authority of the Head of Department.[31]

On the other hand, the professional management of a public school must be undertaken by the principal under the authority of the HOD, as required by section 16(3) of the Schools Act.[32] The Schools Act thus clearly provides that the Department's management function is limited to the professional management of the school through the principal as the employee.[33] This thesis is interested in delineating between these roles as they have become problematic in dealing with educator dismissal disputes within the school system.

4.2.2 Role of the SGB in School Governance and the Discipline of Educators

The Schools Act unequivocally assigns the governance of public schools to their respective governing bodies, marking them as custodians in a position of trust.[34] Joubert and others emphasise this authority, which grants the governing body the original power to act as the duly designated agent of a public school, as outlined in section 16 of the Schools Act.[35]

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[27] See ss 16 and 16A of the Schools Act. As will be clear in Chapter 7, the principal in England has the power to dismiss teachers. See Chapter 7 para 7.3.4.1.
[28] See s 1(vii) of the Schools Act, which states: "'Head of Department' means the head of an education department."
[29] See ss 16 and 16A of the Schools Act.
[30] See s 16A of the Schools Act.
[31] See s 16(1)-(3) of the Schools Act.
[32] See s 16(3) of the Schools Act.
[33] See Van der Merwe (2013) *DJ* 239.
[34] See s 16(1) and s 16(2) of the Schools Act.
[35] See Joubert et al (2015) 81.

The term "governance" remains undefined in the Schools Act, leading to challenges, particularly concerning the authority of the School Governing Body (SGB) in disciplining educators. Light is shed on these challenges in subsequent court cases such as *Head of Department, Department of Education, Free State Province v Welkom High School and Others* ("the *Welkom case*") and others.[36]

According to Deacon, sections 20 and 21 of the Schools Act deal with the functions of the SGB.[37] In accordance with section 20(1) to (3) of the Act, on the functions of all governing bodies:

> the governing body of a public school is tasked with promoting the school's interests and ensuring quality education for all learners. They must adopt a constitution, develop a mission statement, and establish a code of conduct for students. The governing body is also responsible for supporting the principal and staff, managing school property, and recommending the appointment of educators and non-educator staff to the Head of Department. Additionally, they may permit reasonable use of school facilities for community and fundraising activities, following established conditions.[38]

The term "governance," originating from the late 14th Century Old French word "governance", signifies the act of governing and reflects linguistic changes over time, linking to the Modern French "*gouvernance*" and "*gouverner*", which means to govern or rule.[39] The *Oxford Advanced Learner's Dictionary* defines "governance" as the activity of governing or managing an organisation.[40] The Constitutional Court in the *Welkom* case emphasised key aspects such as directing and regulating, as well as the systems of management in place.[41]

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[36] *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 (2) SA 228 (CC) para 63. See also *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC); *Scheepers v School Governing Body, Grey College Bloemfontein and Others (Suid-Afrikaanse Onderwys-Unie Intervening)* (2612/2018) [2018] ZAFSHC 210 (6 September 2018); *Scheepers v South African Council for Educators and Others* (4988/2020) [2021] ZAFSHC 212 (29 July 2021) and *School Governing Body Grey College, Bloemfontein v Scheepers and Another* (506/19) [2020] ZASCA 82 (3 July 2020); [2020] 3 All SA 704 (SCA).

[37] See Deacon (2015) 21.

[38] See s 20 of the Schools Act. The functions of SGBs, as outlined in the Schools Act, are pivotal in the effective governance of public schools. These functions include policy-making responsibilities such as drafting admission policies (ss 5 and 5A), language policies (s 6), religion policies (s 7), and establishing codes of conduct for learners, along with conducting disciplinary proceedings (s 8). SGBs also play a crucial role in recommending educator and non-educator appointments to the HOD (s 20(1)(i)), managing school funds and assets, overseeing the annual budget, enforcing payment of school fees, maintaining financial records, and ensuring the safety of learners within school premises.

[39] Online Etymology Dictionary "governance" (2023). Fowler (1926) 220 notes that "governance" has acquired the dignity of incipient archaism, yet it retains utility in its original sense, particularly as "government" primarily refers to the governing power in a state.

[40] See Hornby (2005) 646.

[41] See the *Welkom* case para 60.

In South African schools, the Schools Act assigns governance responsibilities to school governing bodies (SGBs), positioning them as custodians with a duty of trust, though it does not specifically define "governance". This framework highlights the crucial role of SGBs in overseeing public schools and disciplining educators, underscoring their authority in maintaining educational standards.

The establishment of SGBs aligns with the democratic governance framework set out in the Schools Act, specifically aimed at decentralising power and promoting participatory decision-making in the realm of educator discipline in public schools.[42] This structure mirrors the democratic principles enshrined in the Constitution, 1996, which emphasises the equitable distribution and sharing of decision-making authority among stakeholders in the education sector.[43] The Constitution, 1996 advocates for universal adult suffrage and a multi-party democratic system, fostering an environment in which individuals can engage directly in decision-making processes affecting their schools.[44] The essence of representative democracy is rooted in this equitable sharing of power,[45] which is vital for SGBs as they navigate disciplinary issues among educators.[46] Verava and others draw parallels between

[42] See Joubert et al (2015) 79. The Schools Act was enacted to "provide for a uniform system for the organisation, governance and funding of schools; to amend and repeal certain laws relating to schools and to provide for matters connected therewith" (see the Preamble to the Schools Act). S 16(1) of the Schools Act states that the governance of a public-school vests in the school's governing body. S 16(2) adds that the governing body stands in a position of trust towards the school. See also Deacon (2015) 21.

[43] Joubert et al (2015) 81 observe: "It is crucial to recognise that the establishment of SGBs was rooted in the promotion of democratic governance within schools. Democracy, in this context, connotes a system of government by the people, fostering accountability, responsiveness, and openness." Joubert and others (2015) also make the crucial point that especially since the introduction of the Schools Act, the SGBs of public schools have become responsible for a wide range of functions that were previously the responsibility of the Department of Education. Central to the policy framework was the idea of devolving power and authority – essentially a decentralisation approach – to the ground level of the people. Partnerships between state and non-state structures such as public-school governing bodies have become a strategic element in the implementation of policy and the transformation processes. Initially, the motivation for establishing the SGB was to increase democratic decision-making and participation at ground level.

[44] According to Joubert et al (2015) 81, "the principles of democracy are referred to in the Constitution 1996 (section 1): the Republic of South Africa is one, sovereign, democratic state founded on, amongst others, the values of universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. The primary aim of the Constitution, 1996 is to establish a representative democracy (government by the elected representatives of the people) which is supplemented by direct and participatory democracy: people themselves participate in government decisions that affect them (e.g. law-making) and also participate directly where they are asked to decide (e.g. a referendum)".

[45] Joubert et al (2015) 81. Usually, in a partnership, agreements about responsibilities, liabilities, and roles are clearly defined, and each partner is expected to contribute to and collaborate in some joint activity or goal for the perceived benefit of all. However, since the enactment of the Schools Act in 1996, the Act has been annually amended, mostly to prescribe and limit SGBs' democratic decision-making functions.

[46] See Act 84 of 1996. See also Joubert et al (2015) 81 and Oosthuizen et al (2004) 46.

school governance and state governance, highlighting the hierarchical structure in which the Department of Basic Education oversees national education policy, provincial education departments manage regional affairs, and SGBs operate at the school level while remaining accountable to the HOD.[47] Thus, the distribution and sharing of decision-making authority are fundamental to the democratic framework governing educator discipline,[48] a perspective supported by the Constitutional Court in landmark cases such as *Welkom*[49] and *SGB-Scheepers*.[50]

Furthermore, section 21 of the Schools Act allows governing bodies to apply for additional functions related to property maintenance, determining the extra-mural curriculum, purchasing educational materials, paying for services, or other functions consistent with the Schools Act. The HOD may approve or refuse such applications based on the governing body's capacity. Subject to the Schools Act, section 21 of that Act on the allocated functions of governing bodies states that a governing body may submit a written request to the Head of Department for the allocation of various functions, such as maintaining school property, determining the extra-mural curriculum, purchasing educational materials, and providing adult basic education classes. The Head of Department can refuse the request if the governing body lacks the capacity to perform the function effectively and may approve it unconditionally or with conditions. The decision must be communicated in writing, including reasons, and any party dissatisfied with this decision can appeal to the Member of the Executive Council. Additionally, the Member may permit certain governing bodies to exercise specific functions without an application if they demonstrate the capacity to do so on a reasonable and equitable basis.[51]

The classification of SGBs allocated functions in sections 20 and 21 is noteworthy. Section 21 outlines procedures for allocating functions, either through applications to the HOD or Member of the Executive Council (MEC) allocations through notices in the *Provincial Gazette*. Understanding the role and authority of SGBs is crucial in the context of educator discipline, a topic discussed extensively in Chapter 5 of this thesis.

[47] Veriava et al (2017) 77 explain that there are a number of different groups of people responsible for governing a school. Various levels of government govern at national, provincial, district and circuit levels, and SGBs govern at school levels. The Department of Basic Education is responsible for governing schools at the national level. The head of the provincial department of basic education in each province is responsible for carrying out school governance at a provincial level.
[48] Van Rooyen and Rossouw (2007) 15.
[49] See the *Welkom* case para 63.
[50] See the *SGB-Scheepers* case para 66.
[51] See s 21 of the Schools Act.

However, it is essential to note that, according to the courts' legal interpretations, none of these functions explicitly empower SGBs to discipline educators,[52] even in cases involving serious misconduct such as sexual misconduct. The delineation of SGB functions in the Schools Act does not explicitly grant disciplinary authority over educators.

Nevertheless, the financial scope of SGBs extends beyond basic education provision. Section 20(4) of the Schools Act regulates the power to employ additional educators.[53] Beyond this power, SGBs possess the authority to employ both educators and non-educators, augmenting staffing establishments funded by the state, subject to conditions specified in sections 20(4) to 20(11) of the Schools Act.[54] This authority implies that public schools, through their SGBs, can assume the role of employers, subjecting them to the provisions of relevant legislation, including the LRA,[55] the Educators Act,[56] the Basic Conditions of Employment Act ("the BCEA"),[57] and the Public Service Act, 1994 ("the PSA"). This authority essentially means that educators employed under that provision cannot be disciplined under the Educators Act because they are not employed within that legislative framework.

While SGBs lack explicit authority to discipline educators under the Schools Act, an interesting power dynamic emerges through their ability to employ educators, colloquially known as "SGB educators".[58] This provision introduces a nuanced perspective, suggesting that SGBs have the potential to discipline educators within their employ.[59] This employment-discipline dualism presents a potential source of confusion and disparities, especially considering the traditional understanding that SGBs lack direct disciplinary authority over educators.[60] The provision regarding SGB educators adds a layer of complexity to the governance structure within schools, raising questions about the extent of the SGB's influence and the potential for conflict, particularly in cases of disciplining principals. Principals are to be disciplined only in terms of the Schools Act read together with the LRA and the PSA. Furthermore, any disciplinary action against an educator, including cases of serious misconduct such as sexual misconduct, should

[52] See ss 20 and 21 of the Schools Act.
[53] See s 20(4) of the Schools Act.
[54] See s 20(4), (7A), and (11) of the Schools Act. Moreover, SGBs can seek permission from the employer of staff, hired under the Educators Act or the Public Service Act (PSA), to provide additional remuneration to staff members. This additional remuneration, however, must meet the stipulations of s 38A of the Schools Act.
[55] See Act 66 of 1995.
[56] See Act 76 of 1998.
[57] See Act 75 of 1997.
[58] See s 37 of the Schools Act. See also Joubert et al (2015) 79 and Deacon (2015) 21.
[59] See Joubert et al (2015) 79. See also Deacon (2015) 21.
[60] This intricate situation implies that if an educator is employed by the SGB, the SGB is responsible for initiating disciplinary proceedings in accordance with the legal framework outlined in the LRA. Notably, this authority is distinct from the disciplinary powers granted to SGBs under the Schools Act.

be reported to the South African Council for Educators (SACE).[61] It is vital to consider the role of the principal as juxtaposed to the role of the SGB just discussed.

4.2.3 Role and Functions of the Principal in Educator Dismissal Disputes

The Schools Act delegates the professional management of public schools to the principal, under the authority of the HOD,[62] although it does not explicitly define "professional management". This term encompasses both "professional" and "management" aspects.[63] "Professional" has evolved from its mid-15th century origins related to religious orders to denote skilled engagement in a trade.[64] "Management" dates back to the 1590s, referring initially to horsemanship and later expanding to encompass the governance of organisations.[65]

Professional management thus involves the systematic administration of an institution, including strategic planning, resource allocation, and oversight, requiring principals to possess professional qualifications and experience.[66] This multifaceted role is crucial for achieving the school's objectives and maintaining high professional standards.[67] The Schools Act initially highlighted the principal's management role but lacked a clear definition, leading to varied interpretations.[68] Recognising this gap, the Education Laws Amendment Act of 2007 introduced section 16A,[69] aiming to clarify the principal's responsibilities in professional management, particularly concerning educator dismissal disputes.[70] Amongst other

[61] See also Deacon (2015) 21.
[62] See s 16(3) of the Schools Act. According to the Schools Act, the professional management of a public school is entrusted to the principal under the authority of the HOD, subject to the provisions of the Schools Act and any applicable provincial laws.
[63] This thesis is concerned with the professional management of the school in respect to discipline and dismissal of educators. See Smit et al (2013) 315.
[64] See Online Etymology Dictionary "professional" (2020). The term "professional" historically referred to religious orders in the mid-15th century and evolved to denote activities appropriate to a specific trade or occupation by 1747. In the context of sports and occupations, the term later came to signify engagements undertaken for financial remuneration. As a noun, "professional" denotes an individual engaged in a trade or occupation in a skilled or learned manner.
[65] See Online Etymology Dictionary "management" (2022).
[66] See Online Etymology Dictionary "professional" (2020).
[67] See Smit et al (2013) 315. Professional management involves planning, organisation (including resource allocation and machinery), leading, and controlling organisational activities to realise its vision, mission, goals, and objectives. Managers, from the top level to the lower level, must possess professional qualifications, technical skills, and substantial experience to contribute to the organisation's professionalism. In other disciplines, management is contrasted with leadership. For instance, Smit and others argue that management is about coping with the complexity of practices and procedures to make organisations, especially large ones, work. Leadership, on the other hand, is about setting the direction of the organisation and coping with change.
[68] See Smit et al (2013) 315.
[69] See s 8 of the Education Laws Amendment Act 31 of 2007. See also s 16A of the Schools Act.
[70] The definitions section of the Schools Act defines the "principal" as "an educator appointed or acting as the head of the school": see s 1 "principal". See also para 4.2.4.4 of this chapter of the thesis for a

responsibilities pertaining to the principal's position, section 16A(2) of the Schools Act requires the principal to assist the Head of Department (HOD) in disciplining teachers, alongside managing educational programmes, staff, and resources. The principal must support the governing body in disciplinary matters, report on the school's professional management, and ensure adherence to policies. Additionally, the principal aids the governing body with financial management, while taking measures to prevent and report any financial mismanagement to the HOD.[71]

Section 16A serves as a beacon, elucidating the intricate responsibilities vested in the principal. These responsibilities encompass a spectrum of activities, ranging from overseeing educational programmes and managing staff to handling curriculum activities, maintaining records, and executing policy.[72] The insertion of section 16A aimed to address the interpretational ambiguities arising from the undefined term "professional management".[73] By providing a detailed framework, the amendment sought to foster a more nuanced and uniform understanding of the principal's multifaceted role. The amended Schools Act not only clarifies the principal's duties but also establishes a foundation for effective school governance. With a well-defined scope, the principal becomes a linchpin in steering various aspects of school functioning, ensuring accountability and efficiency.

Section 16A of the Schools Act delineates the powers and functions of the principal when representing the HOD within the governing body. Acting in accordance with sections 23(1)(b)[74] and 24(1)(j) of the Schools Act, the principal, as an employee of the Provincial Education Department,[75] is required to execute departmental policy. In the context of South African public schools, the principal assumes a dual role, acting both as a member of the governing body and as a representative of the Department of Education, as outlined in section 23(1)(b) of the Schools Act.[76] Simultaneously, the principal is accountable to the HOD for the efficient professional management of the school. This official capacity, designated as an *ex officio* member, was clarified by Moseneke J in *Schoonbee and Others v MEC for Education, Mpumalanga and Another* ("the *Schoonbee* case").[77]

discussion of the term "principal". The term "head of the school" signifies the most senior role within a school.

[71] See s 16A of the Schools Act. See also s 8 of the Education Laws Amendment Act 2007.
[72] See s 16A of the Schools Act. See also s 8 of the Education Laws Amendment Act 2007.
[73] See s 16A of the Schools Act. See also s 8 of the Education Laws Amendment Act 2007.
[74] See s 23(1)(b) of the Schools Act.
[75] See s 24(1)(j) of the Schools Act.
[76] See s 23(1)(b) of the Schools Act.
[77] *Schoonbee and Others v MEC for Education, Mpumalanga and Another* 2002 (4) SA 877 (T).

Section 16A of the Schools Act delineates the duties of the principal concerning the management of educators and support staff. Two pertinent subsections outline these responsibilities: the management of all educators and support staff,[78] and assisting the HOD in handling disciplinary matters concerning educators and support staff employed by the HOD.[79] However, the legislation remains notably silent on the principal's independent disciplinary authority.

The language used suggests a subordinate role for the principal in disciplinary proceedings. The principal's involvement is framed as assisting the HOD rather than possessing autonomous disciplinary powers.[80] The principal's capacity to discipline is contingent on acting as an assistant, acting under the directive of the HOD.[81] This position curtails the principal's independent disciplinary authority within the statutory framework.

In 2016 the Policy on the South African Standard for Principalship: Enhancing the Professional Image and Competencies of School Principals was issued under the National Education Policy Act.[82] This policy identifies eight key interdependence areas which constitute the core purpose of the principal in any South African context. The principal's role in disciplining teachers includes guiding teaching and learning within the school, setting its strategic direction, ensuring quality and accountability, and managing human resources effectively. Additionally, the principal is responsible for developing both self and staff, overseeing the school's organisational functions, engaging with the community, and supporting extra-mural programmes.[83]

Although this policy outlines crucial elements such as leadership, school development, quality management, self-empowerment, organisational management, community engagement, human resource management, and extramural activities,[84] the policy remains silent on the explicit powers of the principal to address serious misconduct, including cases of sexual

[78] See s 16A(2)(a)(ii) of the Schools Act.
[79] See s 16A(2)(e) of the Schools Act.
[80] See s 16A(2)(e) of the Schools Act.
[81] See s 16A(2)(e) of the Schools Act. See also s 3(4) of the National Education Policy Act 27 of 1996.
[82] See s 3(4) of the National Education Policy Act 1996.
[83] See the Foreword to the Policy on the South African Standard for Principalship: Enhancing the Professional Image and Competencies of School Principals 2015 GN 323 in *GG* 39827 of 18 March 2016; published by the Department of Basic Education in terms of s 3(4) of the National Education Policy Act 1996. The eight key interdependence areas which constitute the core purpose of the principal's job are: a) Leading teaching and learning in the school; b) Shaping the direction and development of the school; c) Managing quality and securing accountability; d) Developing and empowering self and others; e) Managing the school as an organisation; f) Working with and for the community; g) Managing human resources (staff) in the school; and h) Managing and advocating extra-mural activities.
[84] See s 3(4) of the National Education Policy Act 1996.

misconduct among educators. Despite mentioning "Managing human resources (staff) in the school",[85] the policy does not clearly confer authority on the principal to handle sensitive matters such as serious misconduct within the principal's jurisdiction as executive leader.[86]

In the subsequent discussion of the Educators Act, a more comprehensive examination will reveal the nuanced mandate of principals in dealing with sexual misconduct and other serious transgressions. It is crucial to note that the legal standing of a principal does not differ from that of an educator in the extent of the authority to discipline educators. The stipulations in section 16A of the Schools Act, the Personnel Administration Measures ("PAM"), and the Policy on the South African Standard for Principalship do not explicitly assign responsibility to principals for addressing cases of sexual misconduct.[87]

Before the Educators Act and its educator dismissal disputes mandate are considered, it is important to point out some pertinent issues around the Schools Act. The Act inadequately addresses the management of educator discipline, notably in cases of serious sexual misconduct.[88] While assigning the title "head of school" to a principal, the legislation restricts the principal's authority in handling such instances, leaving the principal with delegated responsibility by the HOD.[89] This limitation is paradoxical because instances of sexual misconduct often occur within the immediate context overseen by the principal. The inherent power disparity is evident, as the principal lacks independent authority.[90]

The appointment of SGB educators raises concerns about jurisdiction and accountability. Although these educators are expected to be professionally managed by the principal within the public-school framework, a notable disparity arises.[91] The SGB-appointed educator reports to a principal, who, in turn, is accountable to the HOD, bypassing any direct reporting

[85] See item 5.1.5 of the Policy on the South African Standard for Principalship.
[86] See item 5.1.1.2 of the Policy on the South African Standard for Principalship, which provides that principals are executive leaders of schools.
[87] See s 16A(2)(e) of the Schools Act. See also s 3(4) of the National Education Policy Act 1996.
[88] See para 3.5 of Chapter 3 to this thesis where the thesis indicated that the Act lacks proper delineations of serious and minor misconduct and does not compel parents to provide consent for their children to testify in disciplinary hearings against teachers, among other limitations.
[89] See s 1 of the Schools Act. See also s 16A of the Schools Act and item 5.1.1 of the Policy on the South African Standard for Principalship.
[90] Additionally, Chapter 3 of the Schools Act on public schools outlines the establishment of an SGB, whose role and responsibilities have faced scrutiny in legal proceedings. Instances of overstepping authority, as illustrated in the *Scheepers-SGB* case (discussed in Chapter 5 of this thesis), have led to forum avoidance of LRA processes. The Schools Act further complicates matters by assigning the recruitment of educators, termed SGB-appointed educators, to the SGB. This assignment thrusts the SGB into an employer-like role, introducing confusion in managing and prosecuting sexual offenders within the school context.
[91] See s 20(4), (5), (7A), and (11) of the Schools Act.

relationship to the SGB. This structural ambiguity within the public-school system is exacerbated by legislative enactments and necessitates clear lines of authority for effective disciplinary management.

4.3 The Educators Act

The Educators Act, enacted in 1998,[92] stands as a foundational legal framework governing the employment, conduct, and dismissal of educators in South Africa. Its significance becomes pronounced when addressing issues of sexual misconduct within the complex dynamics of the educator-employer relationship. Enacted on 30 September 1998, with a commencement date of 2 October 1998, the Educators Act outlines its objectives, focusing primarily on the employment of educators by the State. The objectives of the Educators Act are stated as follows:

> To provide for the employment of educators by the State, for the regulation of the conditions of service, discipline, retirement and discharge of educators and for matters connected therewith.[93]

Key sections germane to this thesis include section 1: definitions; section 2: application of the Act; section 3: employers of educators and other persons; section 11: discharge of educators; section 14: certain educators deemed to be discharged; section 15: resignations; sections 17 and 18: misconduct; and Schedule 2: procedures for handling disciplinary hearings.[94] The Educators Act provides a critical backdrop for understanding the legal landscape surrounding educator dismissal disputes, particularly those involving sexual misconduct. Each outlined provision plays a pivotal role in shaping the parameters within which dismissal disputes are adjudicated and managed.

4.3.1 The Educator in terms of the Educators Act

In the *SGB-Scheepers* case,[95] the Supreme Court of Appeal was obliged to deal with issues of the employer and educator as defined by the Educators Act. The term “educator” is defined in section 1 of the Educators Act:

[92] See Act 76 of 1998.
[93] See the Preamble to the Educators Act.
[94] See the Educators Act.
[95] See the *SGB-Grey College-Scheepers* case para 56.

> **'educator'** means any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at any public school, departmental office or adult basic education centre and who is appointed in a post on any educator establishment under this Act.[96]

The Educators Act covers all educators appointed to positions within the scope of the Educators Act.[97] The definition of "educator" is already contentious in that it differentiates between the educator appointed in terms of the Educators Act and the one appointed by the SGB in terms of the Schools Act.[98]

Even so, the definition of "educator" is important in the context of Chapter 2 of this thesis where the concept of *in loco parentis* was introduced.[99] This principle, meaning "in place of the parent or guardian", has already been canvassed in various sexual misconduct cases against educators.[100] The undertaking is that educators are placed at a high level of responsibility and trust which requires protecting children from abuse.

In the unreported case of *Diholo v Gauteng Department of Education and Others* (the "*Diholo case*"),[101] the key issue concerned allegations of misconduct against a schoolteacher. He was accused of behaving inappropriately towards a female student, such as hugging, squeezing, and making inappropriate comments to her.[102] These actions made the student uncomfortable, prompting her mother to file a complaint with the school's deputy principal. The teacher argued that his conduct was meant to be supportive and fatherly, and the student and her friend

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[96] S 1 "educator" of the Educators Act (original bolding).
[97] S 1 of the Educators Act defines who is an educator in the public education system.
[98] See para 4.2.7 of this chapter for a discussion of SGB-appointed educators.
[99] See para 2.5.1.1 of Chapter 2 of this thesis for a discussion of the *in loco parentis* principle.
[100] See *Gauteng Department of Education v Peter Williams* ELRC 924-21/22GP paras 53 and 66. See also *Superintendent General Free State Department of Education v Mr Setsumi April Ntoni* ELRC169-21/22FS para 63; *Superintendent General Free State Department of Education v Mr Moshe Moses Mofokeng* ELRC276-20/21FS para 55; and *Masina S v Respondent: Department of Education Gauteng* PSES 865-17/18GP ("the *Masina* case"). In the *Masina* case para 130, the arbitrator ruled: "The charge that the applicant faced, although not a section 17 offence was sexual in nature and it was involving a child. The nature of the applicant's employment and position would require him to work with a child on a daily basis. How is the respondent to entrust him with the children with a finding of guilt in such cases? The best interest of the child has to be considered and protected and the courts have said even without a submission by the respondent to that effect. There can be no gainsaying the fact that the post to which the applicant was appointed in is a trust-requiring position, an in loco parentis, which requires a high level of trust. The guilt finding of an offence such as this breaks that trust relationship."
[101] See *Diholo v Gauteng Department of Education and Others (*JR 1775/19) [2023] ZALCJHB 117 (2 May 2023). The accusations levelled against the teacher, which comprised behaving inappropriately towards a female student, involving actions such as hugging, squeezing, and making inappropriate comments, are not covered extensively in the Educators Act, which only refers to sexual assault on a learner, student, or other employee and sexual relationship with a learner.
[102] The legal framework underpinning the case included the Educators Act, particularly ss 17(1)(b) and 18(1)(q). S 17(1)(b) pertains to serious misconduct, specifically sexual assault on a learner, and s 18(1)(q) deals with general misconduct, such as behaving in an improper, disgraceful, or unacceptable manner while on duty.

corroborated the allegations. The arbitrator ultimately found the teacher guilty of misconduct under the Educators Act. The case also involved a review application seeking to set aside the arbitration award. In its judgment, the court found that the arbitrator had correctly analysed the evidence and reached a reasonable decision. As a result, the review application was dismissed, and no costs were awarded.[103] This case serves as a notable example of the legal responsibilities of educators in providing a safe and respectful learning environment and underscores the consequences of misconduct in the education sector, as outlined in the Educators Act.

4.3.2 The Employer of Educators in terms of the Educators Act

Under section 3 of the Educators Act, the Director-General of Basic Education is designated as the employer of educators in the national department. The HOD assumes the employer role for educators in the provincial department of education, specifically for positions within the purview of the provincial education department.[104] This comprehensive employer-employee dichotomy was firmly established, encompassing various aspects of employment, including conditions of service. Additionally, section 4 of the Educators Act grants the Minister the authority, subject to the LRA and collective agreements, to determine the specific conditions of service, considering different ranks and grades of educators.[105]

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[103] The court also considered principles of condonation for late filing and reviewed the merits of the case. The court emphasised the importance of maintaining appropriate boundaries between educators and students, particularly in the context of protecting learners' rights and ensuring a safe learning environment.

[104] This view is shared by Deacon (2015) 21; Joubert and Prinsloo (2001) 163; and Joubert et al (2015) 81. The heading of s 3 of the Educators Act reads as follows: "Employers of educators and other persons", and covers who is the employer of educators, and which is the HOD, premier and director general, depending on the sphere, whether school level, provincial or national education office. It thus also determines who gets to discipline educators and principals such as Scheepers. Nowhere does the SGB feature in that section to warrant the actions which the SGB took against Scheepers.

[105] In the *SGB-Grey College-Scheepers* case para 56, the Supreme Court of Appeal explained the importance of examining the LRA directives regarding the appointment of educators, their conditions of service under s 4(3) of the Educators Act, and the role of collective agreements therein. In so doing, Navsa JA dwelt on the Personnel Administrative Measures (PAM) in terms of which the Minister of Education may, from time to time, determine the "salaries and other conditions of service of educators". S 20(8) of the Schools Act further emphasises that appointments should adhere to the values and principles enshrined in s 195 of the Constitution, 1996 considering factors such as candidate ability and the need to address historical imbalances and promote broader representation, as stipulated in s 7 of the Educators Act. Notably, s 6 of the Educators Act specifies that appointments must be made on the recommendation of the governing body of a public school, as was the case in the present situation where the SGB recommended Scheepers for the position, leading to his appointment by the provincial HOD.

4.3.3 Educator Dismissal Disputes under the Educators Act

The dismissal of educators under the Educators Act is guided not only by the Act itself but also by the LRA in so far as this dismissal should follow legal principles of just cause and due process under section 188 of the LRA. The dismissal of educators in the public-school system presents challenges, especially as it pertains to complex modes of dismissals ranging from concepts such as deemed dismissals, deemed resignations, and withdrawal of the licence to teach, as sketched in the previous chapter. These types of dismissals have also attracted the attention of the courts as being unstraightforward, controversial, and problematic.

4.3.3.1 Deemed Dismissals under the Educators Act

Section 14 of the Educators Act, which governs deemed dismissals, presents challenges in addressing teacher misconduct effectively,[106] as illustrated in various Labour Court cases.[107] Section 14 allows an educator to be deemed dismissed without recourse if absent from duty without permission or if assuming another job, effectively limiting the educator's access to the ELRC for redress. Notably, the courts, as in *HOSPERSA*[108] and *Phenithi v Minister of Education and Others* ("the *Phenithi* case"),[109] have criticised this "draconian procedure" as denying educators the right to fair labour practices under section 23 of the Constitution, 1996.[110] Judicial discretion may reinstate an educator for "good cause", but misuse of this discretion risks injustice. *Member of the Executive Council, Department of Education, Western Cape Government v Jethro & another NNO* ("the *Jethro* case")[111] and *Mogola and Another v*

[106] See s 14(1) of the Educators Act.
[107] See *HOSPERSA & another v MEC for Health* (2003) 24 ILJ 2320 (LC).
[108] See *HOSPERSA & another v MEC for Health* (2003) 24 ILJ 2320 (LC). *HOSPERSA* was not an education case, yet it concerned a deemed dismissal in the public sector. The Labour Court expressed concern over the provisions on deemed dismissal and called them a rather "draconian procedure".
[109] See *Phenithi v Minister of Education and Others* 2008 (1) SA 420 (SCA) para 19. In *Phenithi* the SCA held that s 14 of the Educators Act was not unconstitutional but needed further enquiry. The court held that "the provision creates an essential and reasonable mechanism for the employer to infer 'desertion' when the statutory prerequisites are fulfilled". The educator is therefore provided with an expensive process as the only method available to ventilate any dispute with respect to a deemed dismissal case, given that the cases will not be the same in nature and circumstance. A key question would be: what happens if the employer exercises discretion wrongly and denies a deserving educator reinstatement? The purpose of the ELRC as an LRA institution (see s 37 of the LRA) is, among other things, to provide an inexpensive process, especially to educators to ventilate their dismissal disputes. That window is closed to educators deemed dismissed.
[110] See the *HOSPERSA* case para 37. Section 14(2) of the Educators Act states: "If an educator who is deemed to have been discharged under paragraph *(a)* or *(b)* of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine."
[111] See *Member of the Executive Council, Department of Education, Western Cape Government v Jethro & another NNO* (2019) 40 ILJ 2318 (LAC) para 41. In *Jethro*, the Labour Appeal Court confirmed

Head of Department of Education ("the *Mogola* case")[112] underline this legal gap, reinforcing the need for fair disciplinary processes that also apply to more severe misconduct such as sexual misconduct.

This issue was canvased in the *Mogola* case, where the Labour Court aligned with the decision in *De Villiers v Minister of Education and Another*[113] when it held:

> If this court were to adopt a 'hands-off' approach to its oversight functions over the exercise of a discretion such as that established by s 14 of the [Educators Act], the respondent's power would effectively be unchecked, and the applicant would be left without a remedy.[114]

In the *Mogala* case, the Labour Court overruled the claim that there was no jurisdiction in LRA institutions over deemed discharged cases under section 14 of the Educators Act.[115] The ELRC and employer had argued that they lacked jurisdiction because deemed dismissals had been relied on as a matter of operation of law.[116]

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that the Department of Education's decision in terms of s 14(2) of the Educators Act amounts to the "exercise of a statutory power and the performance of a public function". In this situation, the educator is left without the protection of the ELRC process, as well as s 23 of the Constitution, 1996, on the protection of the right to fair labour practice.

[112] See *Mogola and Another v Head of the Department: Department of Education NO* (JR2987/2010) [2011] ZALCJHB 100 (17 November 2011); [2012] 6 BLLR 584 (LC); (2012) 33 ILJ 1203 (LC).

[113] See *De Villiers v Head of Department: Education, Western Cape Province* (2010) 31 ILJ 1377 (LC) ("the *De Villiers-HoD* case"). In the *De Villiers-HoD* case, the Labour Court cited *De Villiers v Minister of Education, Western Cape, and Another* 2009 (2) SA 619 (C); (2009) 30 ILJ 1022 (C) para 21, in which the High Court had held: "In our view, therefore the employer's conduct in exercising his or her discretion in a manner which failed to prevent a sanction of dismissal as provided by section 14(1) ought to be subjected to the same scrutiny as conduct in terms of section 18(3)*(i)*. Such conduct is therefore capable of being tested against the Code of Good Practice contained in Schedule 8 of the LRA." This thesis also argues that the continued confusion around these cases, though they are employment cases, ends up with the evasion of LRA remedies to seek ventilation at civil courts as occurred with this case.

[114] See the *Mogola* case para 33.

[115] See s 23 of the Constitution, 1996. See also s 188 of the LRA. See the *Mogola* case para 33. The issue is that once an act or omission is named misconduct, whatever its form, this issue invokes the labour rights of educators and they must be afforded the processes that protect that constitutional right to fair labour practices, both of the employer and employee. Yet the Labour Court reasoned that jurisdiction would arise from the legality principle. In the *Mogola* case, the Labour Court articulated two potential bases for its jurisdiction in matters involving s 14(2) of the Educators Act. This thesis therefore argues that the Educators Act only afforded the employer the right to safeguard its interests but denied the employee the right to safeguard his interests through recourse to the LRA.

[116] See the *Mogola* case para 33. First, the Labour Court considered the approach of s 158(1)(h) of the LRA, read in conjunction with s 1 of the Constitution, 1996, establishing jurisdiction under the principles of legality. The court emphasised the imperative for the state, at all levels, to adhere to the rule of law, ensuring that its actions align with legality.

In the *De Villiers* case, the court further emphasised that public officials must not act with malicious intent or improper motives, and if an official fails to apply discretion or disregards statutory provisions, the court may intervene through review.[117]

The provision on deemed dismissal mentioned above resembles the procedure under sections 14(1) and 14(2) of the Educators Act for educators deemed dismissed.[118] .

Though the cases mentioned above may not be applicable to sexual misconduct dismissals, this issue adds to the layer of complexities in dismissal law pertaining to educators. Still, it is crucial for this thesis to note that deemed dismissal cases have arisen in the sector involving sexual misconduct cases.[119] Another issue pertains to deemed resignations, which may include sexual misconduct cases.

4.3.3.2 Withdrawal of the Teaching Licence under the Educators Act

The Educators Act, through section 15, adds complexity to the discipline of educators by allowing for "deemed resignations"[120] when the SACE strikes an educator off its register.[121] This measure, highlighted in paras 1.3.3.1 of Chapter 1 of this thesis, limits the educator's access to remedies under the LRA by precluding disciplinary procedures under section 18, thereby side lining the educator's right to fair labour processes.[122] The *Robertson* case

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[117] See *De Villiers v Minister of Education, Western Cape, and Another* 2009 (2) SA 619 (C) para 21. See also *Grootboom v National Prosecuting Authority and Another* (C696/08) [2009] ZALC 143 (18 December 2009); (2010) 31 ILJ 1875 (LC); [2010] 9 BLLR 949 (LC).

[118] See s 14(1) and (2) of the Educators Act.

[119] See *Fletcher, Anto Davids v Gauteng Department of Education* PSES428-17/18GP, in which an educator resigned from his employment on the basis of s 14(1)(c) and (d) of the Educators Act after the respondent department had begun disciplinary action against him for alleged sexual misconduct against a learner.

[120] As already highlighted in the preceding chapter and in Chapter 1 of this thesis, the provision of s 15 of the Educators Act adds a layer of challenges to the dismissal process for educators. Its implications will be examined within the broader context of educator dismissals, particularly in cases involving sexual misconduct. It introduces the Council for Educators into the dismissal provisions for educators. This provision means that if an educator is removed from the register of practising educators for professional misconduct, he no longer has an LRA remedy, as the removal triggers the operation of s 15(2) of the Educators Act.

[121] See s 15(1) and (2) of the Educators Act: "(1) An educator may resign by giving 90 days' notice in writing or such shorter notice as the employer may approve at the request of the educator. (2) If the name of an educator is struck off the register of educators kept by the South African Council for Educators, the educator shall, notwithstanding anything to the contrary contained in this Act, be deemed to have resigned with effect from the day following immediately after the day on which the educator's name was so struck off."

[122] See Newaj (2022) *ILJ* 2189. In employment disputes that escape resolution through LRA processes, individuals often resort to administrative action to establish jurisdiction in civil courts, such as the High Court and the Supreme Court of Appeal. This practice is evident when people encounter challenges in ventilating their employment disputes in LRA processes and institutions. The Labour Courts and the Labour Appeal Court, having correspondingly equal status to the High Court and the Supreme Court of

underscores this issue: after SACE struck him off the register, Robertson's attempt to seek redress from his employer was dismissed under section 15(2), with the ELRC ruling that it lacked jurisdiction since his removal from the register amounted to a resignation rather than a dismissal.[123] Educators in such cases face regulatory hurdles that restrict their LRA recourse and compel them to challenge SACE's decisions in civil courts, underscoring a gap in the Educators Act's integration with LRA protections.

The Minister of Basic Education has further reinforced section 15(2) of the Educators Act by enacting a gazetted protocol restricting the re-employment of educators through the operation of law.[124] The intricacies of this process will be elaborated upon in the subsequent discussion of the SACE Act and its regulatory framework.

4.4 Educator Dismissal for Serious Misconduct under the Educators Act

Sections 17 and 18 of the Educators Act are pivotal for addressing dismissal disputes about educators accused of sexual misconduct. Section 17 of the Educators Act on serious misconduct stipulates:

> An educator must be dismissed if found guilty of serious offences such as theft, fraud, sexual assault, an inappropriate relationship with a learner, or illegal substance possession. The principal must initiate disciplinary action under Schedule 2 when allegations of such misconduct arise, ensuring adherence to strict accountability measures within the school.[125]

By contrast with section 17, section 18 of the Educators Act on misconduct lacks a categorical directive stipulating mandatory dismissal for educators found guilty of the enumerated misconduct.[126] The scope of misconduct delineated in section 18(1) is expansive, and this subsection provides:

Appeal, respectively, offer a dedicated platform for addressing employment disputes. This approach is underscored by the principle of legality as articulated in s 1(c) of the Constitution, 1996.

[123] See s 15(2) of the Educators Act. See also *Robertson* para 4.

[124] See GN 331 in *GG* 44433 of 9-04-2021. See also para 1.1 of Chapter 1 of this thesis for a discussion of the Regulations for Prevention of Re-Employment of Former Educators Discharged or Deemed Discharged for Misconduct or Deemed Resigned. According to this regulation, the re-employment of educators deemed to have resigned under section 15(2) of the Educators Act is contingent upon their re-enrolment on the register of practising educators. Consequently, these educators' LRA rights are superseded by the operation of law dynamic implied in section 15(2), and their recourse is limited to challenging SACE's decision in the civil courts, as exemplified by Robertson's successful case.

[125] See s 17 of the Educators Act. See also s 10 of the Education Laws Amendment Act 53 of 2000.

[126] See ss 17 and 18 of the Educators Act for provisions about serious misconduct and misconduct by educators.

> Misconduct under section 18(1) covers a wide range of offences, including breaches of educational law, mismanagement of school or state resources, endangerment, and discrimination. Educators may also be disciplined for actions such as insubordination, unauthorised work, abuse, dishonesty, and improper workplace conduct. Violations include intoxication on duty, falsification of records, incitement, and unprocedural strikes, with provisions to address intimidation and victimisation, as well as the misuse of authority.[127]

Sections 18(3) to 18(5) of the Educators Act delineate potential sanctions for educators found guilty of misconduct listed in section 18(1). These three subsections stipulate:

> Following a misconduct finding under subsection (1), the employer may impose sanctions ranging from counselling to dismissal, based on the disciplinary code in Schedule 2. Sanctions include warnings, fines, suspension, demotion, or a combination of these, and may be conditionally suspended. Dismissal applies to severe offences such as dishonesty, victimisation, discrimination, rape, murder, or violating section 10 of the Schools Act.[128]

Several noteworthy observations emerge from analysing sections 17 and 18 of the Educators Act on adjudicating educators' misconduct cases. First, these sections 17 and 18, entitled "serious misconduct"[129] and "misconduct",[130] respectively, present a notable ambiguity by not explicitly delineating whether the term "misconduct" in section 18 encompasses transgressions less severe than those stipulated in section 17.[131]

Secondly, a distinctive feature arises in section 17(1), where educators "must" face dismissal for specified forms of serious misconduct.[132] Conversely, section 18(1) enumerates a broader range of misconduct, allowing for various sanctions, including counselling, warnings, fines, punitive suspension, demotion, or a combination of them, with the most severe being dismissal.[133]

Thirdly, it is notable that section 18(5) introduces a peculiar distinction by stating that educators "may" face dismissal for what seem to be serious misconducts such as dishonesty, victimisation, unfair discrimination, rape, and murder – commonly criminal offences.[134]

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[127] See s 18(1) of the Educators Act.
[128] See s 18(3) to 18(5) of the Educators Act.
[129] See the title of s 17 of the Educators Act.
[130] See the title of s 18 of the Educators Act.
[131] See s 18(3) of the Educators Act.
[132] See s 17(1) and (2) of the Educators Act. S 17(2) of the Educators Act states: "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."
[133] See s 18(1) of the Educators Act.
[134] See s 18(5)(a), (d), and (e) of the Educators Act. This thesis argues that if s 18 was to categorise less serious misconduct, then misconduct such as dishonesty, victimisation, unfair discrimination, rape,

Confusion is created by the use of the word "must" in section 17 for serious misconduct[135] and "may" in section 18(5)[136] for apparently serious offences.

Fourthly, a further perplexing aspect is evident in the treatment of dishonesty, rape, and murder, traditionally criminal acts, receiving a "may" be dismissed sanction, unlike offences such as fraud, sexual assault, and corruption which are included in the list of serious misconduct in section 17.[137] Specifically, in the context of this thesis, the classification of rape as an offence subject to potential ("may") dismissal under section 18 raises questions, considering rape's inherently criminal nature.[138] Rape is typically one of the forms of misconduct that the public school sector confronts.[139] This thesis argues that the omission of rape as a serious misconduct under section 17, and the ascription of "may" lead to instead of "must" lead to dismissal for those found guilty of rape, warrant scrutiny and necessitate exploring the legislative rationale behind this distinction in the Educators Act.[140]

4.4.1 Sexual Misconduct Dismissals under the Educators Act

Within the Educators Act, section 17 emerges as a pivotal provision, explicitly defining serious misconduct that encompasses sexual misconduct by educators. Section 17 categorically identifies two crucial elements: sexual assault and inappropriate relationships with learners or employees at the same school.[141] Although section 17 addresses certain forms of sexual misconduct, such as sexual assault, it overlooks other critical forms such as exposure to explicit material, cyber sexual misconduct, and child pornography, thus revealing limitations in its ability to deal comprehensively with educator sexual misconduct. The Educators Act also

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and murder would have been factored into the serious misconduct category in s 17. The present framing of s 18(5)(a), (d), and (e) of the Educators Act is confusing and needs to be revised. It is also problematic that if the educator is found guilty of these offences, the term "may" lead to dismissal, rather than the word "must" lead to dismissal, is ascribed to these offences.

[135] See s 17(1) of the Educators Act.

[136] See s 18(5) of the Educators Act.

[137] See ss 17(1) and 18(5) of the Educators Act.

[138] See s 18(5)(d) of the Educators Act.

[139] See para 1.3.1 of Chapter 1 of this thesis for a discussion of the prevalence of sexual misconduct in public schools of which rape and attempted rape form part. See *Velile Blessing Ngcobo v Department of Education: Kwa-Zulu Natal* ELRC196-20/21KZN paras 11, 20, 29, and 48, where it is alleged that an educator raped a learner. It is unfortunate that ELRC ruled that it lacked jurisdiction (paras 88 and 91), and that the following reason was provided in para 88: "A letter informing an employee of his or her deemed discharge by operation of law under section 14(1) of the EEA involves no decision or exercise of a public power, and thus cannot constitute administrative action; but a decision taken under section 14(2) of the [Educators Act] constitutes an exercise of a statutory power and the performance of a public function by the Department."

[140] See ss 17(1) and 18(5) of the Educators Act.

[141] S 17(1) of the Educators Act states that serious misconducts include "*(b)* committing an act of sexual assault on a learner, student or other employee; [or] *(c)* having a sexual relationship with a learner of the school where he or she is employed".

omits rape and statutory rape from its categorisation of serious misconduct, both of which are grave forms of sexual misconduct.[142] The Educators Act lacks the breadth and depth necessary to encompass the spectrum of sexual misconduct cases. An example is the *Robertson* case, where an educator engaged in sexually abusive behaviour towards a learner by sending unsavoury remarks through a phone.[143] This form of sexual misconduct falls outside the scope of section 17 of the Educators Act, exposing a significant limitation in the Act's ability to comprehensively address educator sexual misconduct.[144]

Furthermore, the definition of serious misconduct in the Educators Act centres primarily on sexual misconduct involving learners and employees within the same school. A notable omission is the exclusion of other types of sexual misconduct perpetrated by educators against fellow teachers and colleagues, which should also be regarded as serious misconduct.[145] This omission highlights the necessity of a more comprehensive definition that considers all potential victims and situations within the educational context, ensuring a holistic approach to addressing sexual misconduct by educators.

Moreover, the Educators Act empowers employers, typically provincial departments of education, to initiate disciplinary processes against educators found guilty of sexual misconduct.[146] However, the Act's effectiveness depends on the implementation of its provisions, investigative capacity, fair disciplinary proceedings, and protection of the rights of all parties involved.[147] A critical gap in the regulatory framework becomes evident when considering that, whereas the Children's Act requires the reporting of suspicions of child abuse,[148] the Educators Act remains silent on this matter. Consequently, educators are not

[142] See para 1.3.1 of Chapter 1 of this thesis, discussing the prevalence of sexual misconduct in public schools of which rape and attempted rape form part. When the Educators Act mentions rape and attempted rape, they fall outside the scope of serious misconducts in s 17 of the Educators Act. Whether ss 1 and 18 of the Educators Act define what is serious and not serious misconduct remains confusing. The Educators Act suffers from challenges of imprecision.
[143] See the *Robertson* case para 3.
[144] See s 17 of the Educators Act.
[145] S 17(1)(b) of the Educators Act focuses on the learner, student, and other employee but does not specify other educators and colleagues. This thesis argues that educators who committee sexual acts against colleagues are also a risk to learners.
[146] S 17(2) of the Educators Act states: "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."
[147] In the *CS-Swanepoel* case, the court found that the Department failed to dispense justice in prosecuting sexual misconduct against a teacher and that this failure led the victim to seek relief in the civil courts rather than the LRA forums.
[148] See s 110(2) of the Children's Act, which states: "Any person who on reasonable grounds believes that a child is in need of care and protection may report that belief to the provincial department of social development, a designated child protection organisation or a police official."

legally obliged to report suspicions of sexual abuse by their colleagues, creating a concerning gap in child protection.

In the context of these issues, it is imperative to comprehensively review and amend the Educators Act and the SACE Act to effectively address all forms of sexual misconduct. This improvement of these two statutes includes the obligation to report suspicions of abuse, regardless of the specific nature of the misconduct, to ensure the holistic protection of children in educational settings and the upholding of professional standards within the teaching profession.[149] These amendments are essential to bridge existing regulatory gaps and provide a more robust framework for dealing with cases of educator sexual misconduct in all its manifestations.

4.4.2 Processing Sexual Misconduct under Schedule 2 to the Educators Act

Processing sexual misconduct cases under the Educators Act involves applying both sections 17 and 18, each of which refers to Schedule 2 to the Educators Act, known as the "Disciplinary Code and Procedures for Educators".[150] This schedule, introduced by section 15 of the Education Laws Amendment Act[151] in 2000 and subsequently amended,[152] serves specific purposes and outlines the following regarding its purpose and scope as stated in item 1 of the schedule:

> This Code and Procedures aims to foster constructive labour relations in education, promote mutual respect, and ensure a shared understanding of misconduct and discipline. It encourages acceptable conduct, offers a quick reference for disciplinary measures, seeks to correct misconduct, and prevents arbitrary or discriminatory employer actions.[153]

These provisions aim to establish a framework that encourages positive labour relations, fosters respect, defines misconduct and discipline, guides the application of disciplinary measures, promotes acceptable behaviour, and safeguards educators from arbitrary or discriminatory actions by their employers.[154] It is crucial to emphasise that the Code of Good Practice: Dismissal outlined in Schedule 8 to the LRA,[155] specifically concerning misconduct

[149] See s 28(1)(d) of the Constitution, 1996, which sets out the right of a child to be protected from abuse.
[150] See sch 2 to the Educators Act.
[151] See Act 53 of 2000.
[152] Sch 2 to the Educators Act was amended by the Education Laws Amendment Act 57 of 2001, the Education Laws Amendment Act 50 of 2002, and the Education Laws Amendment Act 1 of 2004.
[153] See item 1 of sch 2 to the Educators Act.
[154] See s 15 of the Education Laws Amendment Act 53 of 2000.
[155] See sch 8 to the LRA.

as well as incapacity, forms an integral part of the Code and Procedures outlined in the Educators Act.[156]

Schedule 2 to the Educators Act establishes principles guiding the Code and Procedures for educators' discipline.[157] These principles emphasise that discipline is corrective, not punitive, and must be administered promptly, fairly, consistently, and justly. Item 2 of Schedule 2 on principles asserts that discipline should be corrective, not punitive, and applied promptly, fairly, and consistently by employers. It guarantees educators a fair hearing, timely notification of allegations, written reasons for decisions, and appeal rights. Disciplinary procedures, ideally held at the workplace, remain distinct from criminal proceedings and should conclude swiftly.[158]

The employer is responsible for discipline.[159] A disciplinary code is deemed necessary for efficient service delivery, ensuring educators' fair treatment and providing them with essential rights, including a fair hearing, timely notification of allegations, written reasons for decisions, and the right to appeal.[160] The disciplinary procedures aim at workplace convenience and clarity for all educators. In cases where misconduct aligns with a criminal offence, criminal and disciplinary proceedings remain separate.[161] Moreover, disciplinary processes should conclude within the shortest possible time frame.[162]

4.4.3 Educator Misconduct under the Educators Act and the LRA's Code of Good Practice

The Code of Good Practice: Dismissal, embedded in Schedule 8 to the LRA is significant within the context of the Disciplinary Code and Procedures for Educators in Schedule 2 to the Educators Act (Educators Disciplinary Code).[163] Notably, the Educators Disciplinary Code primarily concerns educator disciplinary matters. Item 3 of Schedule 2 to the Educators Act on the Educators Disciplinary Code provides:

[156] See sch 2 to the Educators Act.
[157] See sch 2 to the Educators Act.
[158] See item 2 of sch 2 to the Educators Act.
[159] See item 2(c) of sch 2 to the Educators Act.
[160] See item 2(b) of sch 2 to the Educators Act. This provision is consistent with the provisions for a fair process in the LRA.
[161] See item 2(f) of sch 2 to the Educators Act.
[162] See items 2(d)(ii) and 2(g) of sch 2 to the Educators Act.
[163] See item 3 of sch 2 to the Educators Act. The disciplinary code and procedures in sch 2 to the Educators Act incorporate the LRA's Dismissal Code.

> The Code of Good Practice: Dismissal in Schedule 8 of the LRA governs disciplinary actions and is part of this Code and Procedure. Conduct warranting discipline is outlined in sections 17 and 18, with the Minister able to prescribe additional misconduct after consulting trade unions. In assessing misconduct, the employer must consider its impact on the educational institution, the educator's responsibilities, and the circumstances of the incident. The employer determines the specific disciplinary procedure to follow in each case.[164]

In terms of the Educators Act's Code and Procedure, sections 17 and 18 of the Educators Act state the types of misconduct that may lead to disciplinary action.[165] However, it is pertinent to acknowledge that the Minister, after consulting trade unions, has the authority to prescribe additional forms of misconduct.[166]

When addressing misconduct as outlined in section 18, the employer must evaluate the gravity of the alleged misconduct by considering its impact on the Department of Basic Education, the provincial department of basic education, or the specific educational institution. This assessment also considers the nature of the educator's responsibilities and the circumstances surrounding the alleged misconduct.[167]

It is crucial to emphasise that the types of misconduct specified in sections 17 and 18, according to Schedule 2 to the Educators Act, are exhaustive and may only be expanded through consultation with "the trade unions".[168] Consequently, evaluating the substantive and procedural fairness of an educator's dismissal or disciplinary action, short of dismissal, necessitates considering sections 17 and/or 18 of the Educators Act, Schedule 2 to the Educators Act Disciplinary Code and Procedure, and the LRA's Dismissal Code.[169] This integration implies that the principles, processes, and procedures governing employee dismissal, as discussed in Chapter 3 of this thesis, align with the dismissal of educators, incorporating the same standards found in the LRA's code, Schedule 8. The challenges of the Educators Act, as pointed out when discussing the principal's role under the Schools Act, derive from the legislature's failure to allocate that role the clear responsibility to deal with serious misconduct such as the one under consideration in this thesis.

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[164] See item 3(2)(a) of sch 2 to the Educators Act.
[165] See item 3 of sch 2 to the Educators Act.
[166] See item 3(2)(a) of sch 2 to the Educators Act. Chapter 8 of this thesis will discuss the challenges associated with abrogation by the employer giving away too much power to teacher unions to determine disciplinary procedures.
[167] See item 3(3)(a)-(c) of sch 2 to the Educators Act.
[168] See item 3(2)(a) of sch 2 to the Educators Act.
[169] See item 3 of sch 2 to the Educators Act.

This thesis argues that the Educators Disciplinary Code aligns with the LRA Code of Good Practice: Dismissal, as the latter is binding on the former. While the Educators Disciplinary Code aims to focus on industry-specific issues, it presents gaps that are discussed below. Unfortunately, despite the Educators Disciplinary Code outlining procedures for conducting internal disciplinary actions in cases of educator misconduct, the ELRC Collective Agreement, as discussed in detail in Chapter 6 of this thesis, remains silent on the Educators Disciplinary Code. Both documents fail to address crucial issues, such as how to handle situations where children refuse to testify or parents decline consent for their children to testify, often allowing errant educators to escape accountability. This thesis contends that the LRA holds greater authority over the process outlined in section 188A of the LRA[170] than the provisions of the Educators Act.

4.4.4 "Serious" and "Less Serious" Educator Misconduct and the Principal's Role

The Educators Act, particularly item 4 of Schedule 2, plays a crucial role in delineating responsibilities in handling educator misconduct within the South African education system.[171] This provision entrusts the HOD with the authority to delegate disciplinary functions for what is deemed "less serious misconduct" to the head of the institution or the immediate superior of the educator. In public schools, this empowerment typically extends to school principals. A pivotal change occurred with the introduction of item 4(1)(a) of Schedule 2, brought about by the Education Laws Amendment Act 2000, providing legal authority to principals for addressing the initial stages of "less serious" misconduct.[172] This step marked a significant departure from these principals' prior lack of power to enforce disciplinary measures, leading to inconsistencies in addressing cases, as seen in previous legal disputes.[173] The departure from the decentralisation of power to principals is in line with the public service policy at

[170] See s 188A of the LRA adopted for use in prosecuting educators charged with sexual misconduct against learners in terms of the ELRC Collective Agreement.
[171] See item 4 of sch 2 to the Educators Act.
[172] See item 4(1)(a) of sch 2, introduced by the Education Laws Amendment Act 2000.
[173] See *Juta v Western Cape Department of Education* CCMA WE2430. See also *Bennete v Bethany Playschool* EC9133 *and Rangasami v Western Cape Education Department* CCMA WE1266. This sentiment was expressed by the Department of Public Service and Administration *Guide on Managing Discipline in the Public Service* (March 2021) para 1 p 3: "Initially, discipline management in the post-apartheid Public Service was solely based on the applicable provisions in the Public Service Act, 1994 (Proclamation 103 of 1994). The centralisation of procedures was soon found to be hindering rather than helping the management of discipline in the Public Service. Consequently, a new discipline management framework was introduced from the 1st of July 1999 (later amended by Resolution 1 of 2003). This essentially marked a shift away from statutory prescription to collective agreements, as the New Disciplinary Code and Procedures devolved the powers to institute disciplinary action to the national and provincial departments."

large.[174] Yet the challenge with the Educators Act lies in defining the criteria for classifying misconduct as "less serious" because the Educators Act and its regulations provide no explicit guidance.

Section 17 of the Educators Act designates misconduct as "serious", explicitly excluding the principal's delegated authority in such cases.[175] Regarding misconduct outlined in section 18 of the Educators Act, seriousness is gauged according to three factors: the impact on the school, the nature of the educator's responsibilities, and the circumstances surrounding the misconduct.[176]

The determination of "less serious" misconduct relies on guidelines circulated by the National Department of Education, yet the current status outlined in item 4(2) of Schedule 2 remains uncertain.[177] In practice, principals exercise discretion and apply contextual analysis to decide whether misconduct qualifies as "less serious".[178] This determination shapes the disciplinary process, leading to either informal resolutions at the school level or formal proceedings overseen by the provincial department of education. It is essential to note that this distinction applies primarily to departmental educators and employees of the provincial department of education. Public schools, represented by their SGBs, also employ educators outside the provincial post establishment, subjecting them to the principles of the LRA rather than the Educators Act.[179]

In the context of addressing sexual misconduct, the powers granted to school principals are notably restricted under the Code of Conduct in the Educators Act. Amendments in 2000 confined the principal's role primarily to reporting and sanctioning, with specific limitations on prosecuting and charging educators for sexual misconduct. In instances of serious misconduct, the principal is responsible for reporting and issuing counselling or warnings, but the crucial task of prosecuting and charging educators rests with higher authorities, such as

[174] See item 1 of the Department of Public Service and Administration *Guide on Managing Discipline in the Public Service* para 1 p 3: "This decentralized nature of discipline management poses its own challenges, especially when abused by unscrupulous supervisors. The *Guide on managing discipline in the Public Service* (the 'Guide') attempts to address these challenges, especially where suspensions and appeals are concerned, by providing clear guidance on the discipline management process. Unless radical steps are taken to stamp out the propensity to abuse discipline management for self-interest, a culture of Professionalism in the Public Administration will not be attained. Executive Authorities and Accounting Officers have an important role in ensuring that this Guide is properly implemented when enforcing discipline in departments."
[175] See s 17 of the Educators Act.
[176] See item 4 of sch 2 to the Educators Act.
[177] See item 4(1)(a) of sch 2 to the Educators Act, introduced by the Education Laws Amendment Act 2000.
[178] See item 4(1)(b) of sch 2 to the Educators Act.
[179] See s 37 of the Schools Act.

the circuit manager or HOD.[180] This hierarchical approach does not align with standard organisational practices, where line managers often initiate charges against errant employees.[181] The Policy on the South African Standard for Principalship further emphasises this hierarchical reporting structure, mandating principals to report cases of misconduct and grievances to circuit managers within the parameters set by the Agreements of the ELRC and the Public Service Commission.[182] This system that makes principals mere reporters of sexual misconduct cases to circuit managers and HODs does not help the education sector.

4.4.5 The Code of Conduct Procedure for Educator Dismissal Disputes

In the framework of addressing educator misconduct, the Educators Act establishes a Code of Conduct Procedure, delineating the processes for disciplinary hearings against educators. Several key provisions of this Code govern handling educators' sexual misconduct towards learners. Joubert and Prinsloo define misconduct as "bad or illegal behaviour".[183] The criminal justice system also defines sexual misconduct as criminal behaviour.[184]

Item 5 of the Code mandates the issuance of a notice of inquiry for misconduct cases other than those contemplated in item 4, outlining the procedural steps. In instances of serious misconduct under section 17, item 6 authorises the employer to suspend the educator on full pay for a maximum of three months.

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[180] See item 5.1.5(g) entitled "Managing Human Resources (Staff) in the School" of the Policy on the South African Standard for Principalship ("GN 323 in *GG* 39827 of 18-03-2016").
[181] This aligns with the Department of Public Service and Administration *Guide on Managing Discipline in the Public Service* (2021) 15, which states in s 6(4), entitled "Role-Players in the Disciplinary Process", that "the Supervisor/manager is responsible for discipline in his/her unit. Will then take action as indicated above when there is a need". However, item 6(3) of the *Guide on Managing Discipline in the Public Service* 15 states that the HOD's responsibilities for discipline in the department include the following: "(i) Appoint investigators/employer representative and chairperson; (ii) Implement sanctions as pronounced by the chairperson of a disciplinary hearing; (iii) Check and approve reports to the DPSA before they are submitted; (iv) Reporting of steps taken in terms of PAMA ss 15(5)(b) and 15(6)(b) to the TAU and (v) Reporting criminality to the SAPS."
[182] See item 5.1.5(g) entitled "Managing Human Resources (Staff) in the School" of the Policy on the South African Standard for Principalship ("GN 323 in *GG* 39827 of 18-03-2016").
[183] See Joubert and Prinsloo (2001) 184.
[184] See s 1 of the Criminal Procedure Act 51 of 1977: "**'offence'** means an act or omission punishable by law" (original bolding). See also s 1 of the Children's Act, which provides the foundation for categorising and addressing various forms of sexual misconduct within the educational context. This thesis takes the stance that any sexual misconduct, as outlined in this section, should be comprehensively viewed as "sexual misconduct". This inclusive term encompasses a range of specific offences, including but not limited to rape, sexual assault, violation, abuse, sexual grooming of children, sexual harassment, compelling or exposing learners to sexual offences or acts, and engaging in sexual relationships with learners at schools. The aim is to provide a holistic understanding of sexual misconduct, acknowledging its diverse manifestations and ensuring a comprehensive approach to addressing these issues within the educational framework. See also *Mr L J Davids v Department of Education – Western Cape* ELRC767-21/22WC, in which an educator was dismissed as a result of sexual grooming, sexual exploitation, and showing children pornographic material.

The disciplinary hearing, as detailed in item 7, involves a presiding officer who, upon finding an educator guilty of misconduct, must impose a sanction in accordance with section 18(3) of the Educators Act.[185] This step entails a comprehensive assessment, considering the nature of the case, the seriousness of the matter, the educator's previous record, and any mitigating or aggravating circumstances.[186] Squelch emphasises that the Educators Act delineates legal procedures, ensuring an educator's right to just administrative action, encompassing notice, hearing, reasons for decisions, and representation.[187]

The procedural journey commences with a preliminary investigation of misconduct, allowing the employer, typically the provincial HOD, to appoint an investigator.[188] This phase emphasises the educator's right to representation and the option not to make any statement without consequences. If sufficient evidence emerges, the employer may charge the educator in writing, and then, within 21 days, the educator must admit or deny the charge in writing.[189] The provisions of the Educators Act aim to facilitate the involvement of child witnesses in disciplinary proceedings against educators but fall short in certain areas. Item 7(10)(a) broadly includes children under "any person" who can provide material information, yet lacks specific guidelines for securing children's attendance and obtaining parental consent.[190] The subsequent amendment, Item 7(10A)(a), enhances the protection of child witnesses by allowing the appointment of intermediaries to mitigate the stress of testifying.[191] However, Item 7(10A)(a) still does not address the critical issue of compelling attendance, highlighting a significant legislative gap that undermines the effectiveness of proceedings involving allegations of abuse by educators.[192]

Suspension, a procedural step to facilitate an unhindered disciplinary inquiry, may precede or follow the charging of an educator.[193] If the charge is denied or not complied with, a disciplinary tribunal is appointed.[194] This internal body, consisting of a chairperson and two others,

[185] See item 7 of sch 2 to the Educators Act. See also s 18(3) of the Educators Act and Squelch (1999) 49.
[186] See item 8(1)(c) of sch 2 to the Educators Act.
[187] See Squelch (1999) 49.
[188] See item 7(10) of sch 2 to the Educators Act.
[189] See item 7(10)(a) and (b) of sch 2 to the Educators Act. See also Squelch (1999) 49.
[190] See item 7(10)(a) of sch 2 to the Educators Act.
[191] See item 7(10A)(a) of sch 2 to the Educators Act, inserted by s 13(b) of the Education Laws Amendment Act 50 of 2002.
[192] The analysis is based on the absence of explicit provisions for securing attendance and obtaining parental consent for child witnesses.
[193] See item 6 of sch 2 to the Educators Act.
[194] See Squelch (1999) 49.

conducts the inquiry, following principles of privilege, witness appearance, and evidence, akin to a court of law.

The educator's rights during the inquiry include attending, whether he is assisted or represented; testifying; calling witnesses; and cross-examining individuals supporting the charge. Following the inquiry, the disciplinary tribunal determines guilt and, if applicable, recommends steps against the educator.

Within five days of the inquiry's conclusion, the chairperson reports the findings to the employer.[195] Upon considering the documents, the employer may take various actions, such as cautioning or reprimanding the educator, imposing a fine, reducing the salary, or discharging the educator from service.[196] An educator has the right to lodge an appeal to the Minister of Education or the Education MEC, the decision being suspended until the appeal is heard.[197]

Within the framework of educator disciplinary proceedings driven by the employer, it is crucial to highlight the existence of two concurrent processes for addressing cases of serious misconduct. The Educators Act outlines one process to manage various forms of misconduct necessitating disciplinary hearings,[198] excluding sexual misconduct. Simultaneously, another process, discussed shortly, aligns with section 188A of the LRA[199] within the ELRC Collective Agreement. This thesis contends that this approach duplicates processes unnecessarily, often resulting in disparities and fragmentation. Instead, the most pragmatic solution advocates for a unified process to handle all instances of serious misconduct.

4.4.6 The ELRC Collective Agreement

This discussion has elucidated the provisions of the Educators Act for handling educator misconduct, particularly emphasising sexual misconduct as both serious and dismissible.[200] Yet it must be noted that these procedures no longer govern sexual misconduct cases involving educators. A pivotal shift occurred on 25 September 2018: ELRC members[201] resolved to process all sexual misconduct cases through arbitrator inquiries under

[195] See item 7(18) of sch 2 to the Educators Act. See also Squelch (1999) 49.
[196] See item 9 of sch 2 to the Educators Act. See also Squelch (1999) 51.
[197] See item 9 of sch 2 to the Educators Act. See also Squelch (1999) 51.
[198] See item 7 of sch 2 to the Educators Act. See also s 18(3) of the Educators Act and Squelch (1999) 49.
[199] See s 188A of the LRA.
[200] See ss 17 and 18 of the Educators Act.
[201] The employer of educators and teacher unions are members of the ELRC in terms of the LRA.

section 188A of the LRA. This process in the ELRC Collective Agreement was discussed in Chapter 3 and is further explored in Chapter 6 of this thesis.

Despite this transformation, a critical observation emerges: ELRC members may not fully appreciate how far the success of the arbitrator inquiry process relies on the employer's effective management of the initial disciplinary stages.[202] These stages encompass investigations, notice issuance, prosecutions, witness securing, and coordination with the ELRC. Chapter 6 of the thesis will explain the employer's challenges in this regard, underscoring the limitations imposed by the Educators Act on principals' authority in navigating the preliminary stages before the section 188A process begins. However, in the complicated landscape of handling sexual misconduct cases involving educators, a noteworthy concern is the non-binding nature of ELRC rulings on SACE.

4.5 The SACE Act and Its Regulatory Framework on Educators

SACE plays a crucial regulatory role in the education sector. Established under the SACE Act,[203] SACE is responsible for overseeing the registration of teachers,[204] promoting their professional development,[205] and enforcing ethical and professional standards within the teaching profession.[206]

The SACE Act replaced Chapter 6 of the Educators Act when SACE was established in 2000.[207] As a statutory body, SACE exercises its authority over all educators in South Africa, regardless of whether they work in private, independent, or public schools.[208] Teachers are required to register with SACE before they can teach in South Africa,[209] and they must follow the SACE Code of Professional Ethics for Educators developed and reviewed by SACE.[210]

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[202] See s 188A of the LRA.
[203] See the SACE Act.
[204] See s 5(a) of the SACE Act.
[205] See s 5(b) of the SACE Act.
[206] See s 5(c) of the SACE Act. Joubert and Prinsloo (2001) 184 define misconduct as "bad or illegal behaviour". The SACE Code of Professional Ethics makes it clear how educators should conduct themselves as professionals.
[207] See s 28 of the SACE Act: "Chapter 6 of the Employment of Educators Act, 1998 (Act No. 76 of 1998), is hereby repealed."
[208] See Deacon (2015) 143, who advises that "in the event of educator misconduct, if the school principal fails to act against an educator, the parent or learner may approach the Education Department or the South African Council for Educators". S 21 of the SACE Act states: "(1) A person who qualifies for registration in terms of this Act must register with the council prior to being appointed as an educator. (2) No person may be employed as an educator by any employer unless the person is registered with the council."
[209] See s 21 of the SACE Act.
[210] See cl 2 of the SACE Code of Professional Ethics for Educators. Joubert and Prinsloo (2001) 184 define misconduct as "bad or illegal behaviour". Further, the SACE Code of Professional Ethics makes

4.5.1 Council for Educators Structures for Handling Sexual Misconduct Cases

The SACE Act established a regulatory structure which includes the Council, consisting of the chairperson,[211] 18 representatives from the teaching profession,[212] five members from the Department of Basic Education,[213] one member from independent school bodies,[214] one member from the School Governing Bodies (FEDSAS),[215] one person nominated by the Council on Higher Education,[216] and the chief executive officer (CEO) of the council.[217] Key committees within SACE include the Executive Committee,[218] Registration Committee,[219] Professional Development Committee,[220] Risk and Audit Committee,[221] Staffing Committee,[222] Finance Committee,[223] and Disciplinary Committee.[224] This thesis specifically examines the Disciplinary Committee,[225] the Executive Committee,[226] and the Council's roles in regulating teachers facing sexual misconduct charges and the potential withdrawal of their teaching licences.[227] It is noteworthy that 18 members of the Council are from the teacher unions and have the power to form a quorum and make decisions on the basis that a quorum equals 50 per cent members plus one. This position is regarded as the recognition of the peer review mechanism by which elected educators regulate other educators.[228]

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it clear how educators should conduct themselves as professionals, hence avoiding bad or illegal behaviour.

[211] Subject to s 7 of the SACE Act.
[212] See s 6(1)(b) of the SACE Act.
[213] See s 6(1)(c) of the SACE Act.
[214] See s 6(1)(d) of the SACE Act.
[215] See s 6(1)(d) of the SACE Act.
[216] See s 6(1)(g) of the SACE Act. The Council on Higher Education was established by s 4 of the Higher Education Act 101 of 1997.
[217] Subject to s 17: see s 6(1)(h) of the SACE Act.
[218] See s 11 of the SACE Act.
[219] See s 12 of the SACE Act.
[220] See s 13 of the SACE Act.
[221] See s 15 of the SACE Act.
[222] See s 15 of the SACE Act.
[223] See s 15 of the SACE Act.
[224] See s 14 of the SACE Act.
[225] See s 15 of the SACE Act.
[226] See s 11 of the SACE Act.
[227] See s 5(c)(iii)(cc) of the SACE Act.
[228] See s 6(1)(b) of the SACE Act, which states "14 educators and 4 lecturers collectively nominated by the organised profession", implying that they are nominated by their peers to regulate each other. This thesis submits that the peer review mechanism needs to be reviewed to allow for a balanced Council that may not pursue goals that are skewed towards protecting errant educators at the expense of the rights of children to basic education and protection from sexual abuse.

4.5.2 The Disciplinary Committee's Mandate on the Code of Professional Ethics

The SACE Act required SACE, through its Disciplinary Committee, to compile, maintain and review a Code of Professional Ethics for Educators.[229] This mandate is accompanied by the broad mandate to enforce ethical and professional standards in the teaching profession.[230] The Disciplinary Committee of SACE, chaired by the deputy chairperson of SACE, consists of members appointed by SACE, including at least one referred to in section 6(1)(c), and the CEO.[231] This committee is responsible for maintaining and periodically reviewing a code of professional ethics.[232] The committee's duties include overseeing investigations of alleged breaches of the code, establishing panels to investigate and hear complaints against educators,[233] ensuring fair hearings according to procedures defined by the council,[234] and making recommendations to the council based on panel findings.[235] The committee may summon individuals with relevant information for investigations.[236] Proceedings are documented for record-keeping.[237]

These duties of the SACE Disciplinary Committee are executed under the SACE Act and the SACE Code of Professional Ethics for Educators. As shown below and in the following chapter too, the Constitutional Court in the *Scheepers-SACE* case criticised SACE for not following the SACE Act directive to investigate cases before proceeding to charge educators.[238] The *Robertson* case also reveals SACE's failure to implement section 23(3) of the SACE Act in managing the prerequisite process to withdraw a teacher's licence to teach, which did not meet with the approval of the High Court.[239]

4.5.3 The Code of Professional Ethics for Educators

Educators registered with SACE are subject to SACE's Code of Professional Ethics.[240] The code determines the educator's expected conduct toward various role-players in education: learners, parents, colleagues, the employer, the community, the council, and the profession.[241]

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[229] See s 14 of the SACE Act.
[230] See s 5(c)(i) of the SACE Act.
[231] See s 14 of the SACE Act.
[232] See ss 14(2)(a) and 5(c)(i) of the SACE Act.
[233] See s 14(2)(c) of the SACE Act.
[234] See ss 14(2)(d) and 5(c)(ii) of the SACE Act.
[235] See s 14(2)(e) of the SACE Act.
[236] See s 14(4)(a) and (b) of the SACE Act.
[237] See s 14(7) of the SACE Act.
[238] See the *Scheepers-SACE* case.
[239] See s 23(3) of the SACE Act. See also the *Robertson* case para 24.
[240] See s 5(c) of the SACE Act.
[241] See cl. 1 to 9 of the SACE Code of Professional Ethics for Educators.

Although educators' conduct concerning each of these role-players is important, two aspects deserve particular attention. First, clause 3 of the SACE Code of Professional Ethics, entitled "Conduct: The educator and the learner", states regulations and stringent expectations for educators' conduct towards learners as follows:

> An educator must respect the dignity and constitutional rights of learners, acknowledging their individuality and unique needs. They should promote gender equality, refrain from any form of abuse or improper contact, and avoid relationships with learners. Educators must use appropriate language, ensure learner safety, and not exploit their position for personal gain. Lastly, they should recognise learners as partners in education.[242]

Secondly, these regulations encompass respecting learners' dignity, beliefs, and constitutional rights, promoting gender equality, and refraining from any form of abuse, improper physical contact, sexual harassment, or relationships with learners.[243] The code also requires educators to ensure learners' safety, exercise authority with compassion, and refrain from actions that could compromise educators' professional duties.[244] Breaches of this code, whether through misconduct or other ways incompatible with the expected conduct of an educator, have significant implications for an educator's continued registration with SACE, a prerequisite for employment as an educator.[245]

The breach of the SACE Code of Professional Ethics because of professional misconduct can impact an educator's ability to teach, influencing his registration status with SACE.[246] Complaints against educators for such breaches can be lodged in writing or by telephone by any concerned party. Upon receiving a complaint, SACE opens a case file, assigning a unique case number. The accused educator is then contacted to provide a written response to the allegations within a specified time frame, typically ten days. The Ethics Committee evaluates the response to determine whether the matter requires investigation, mediation, disciplinary action, or referral to relevant authorities such as the provincial education department (PED), the ELRC, or the South African Police Service (SAPS).

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[242] See cl 3 of the SACE Code of Professional Ethics for Educators.
[243] See cl 3 of the SACE Code of Professional Ethics for Educators.
[244] See cl 3 of the SACE Code of Professional Ethics for Educators. See also s 28(1)(d) of the Constitution, 1996 and s 110(2) of the Children's Act.
[245] See s 21 of the SACE Act. See also s 15(2) of the Educators Act.
[246] See ss 14(2)(b) and 5(d)(iii)(bb) of the SACE Act. In terms of s 5(d)(iii)(bb) of the SACE Act, "the council– … may, after a fair hearing- … remove from the register for a specified period or indefinitely, or subject to specific conditions, the name of, an educator found guilty of failing to pay the fees determined by the council".

4.5.4 Mandate to Investigate Allegations of Professional Misconduct

The SACE Act, in conjunction with the Code of Professional Ethics for Educators, empowers SACE to investigate complaints of professional misconduct committed by educators.[247] This mandate extends to cases of sexual misconduct. Acting under the authority of its CEO, the SACE secretariat investigates allegations of professional misconduct and compiles comprehensive reports in accordance with section 14 of the SACE Act.[248]

Subsequently, the investigation reports are presented to the Disciplinary Committee during a formal meeting authorised by the Council.[249] The Disciplinary Committee, in its deliberations, considers various recommendations, which may involve (1) preferring charges and formulating instructions to proceed with a disciplinary hearing, (2) withdrawing charges when there is no prospect of a case to answer, or (3) temporarily withdrawing the case pending the discovery of further evidence.[250]

A landmark case, *Scheepers-SACE*, emphasised the Constitutional Court's recognition of the imperative to investigate cases of misconduct diligently. The Constitutional Court stressed SACE's responsibility to conduct thorough investigations in line with its mandate.[251]

4.5.5 The Disciplinary Hearing under the SACE Act

Under the SACE Act, if charges are preferred as a result of the investigation, SACE is empowered to conduct a fair disciplinary hearing employing a panel of experts.[252] This panel, including a presiding officer, prosecutor, the accused educator, witnesses, and interpreters if

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[247] See s 14(2)(b) of the SACE Act. See also cl 2.1.1 of the SACE Code of Professional Ethics. S 14(2)(b) of the SACE Act directs that the "disciplinary committee must - … ensure that an alleged breach of the code of professional ethics is investigated". S 14(4), (5), and (6) of the SACE Act grants the panel the authority to investigate complaints of professional misconduct against educators by summoning individuals with pertinent information or custody over relevant items. They must appear and produce the requested items in accordance with the prescribed summons, served through recognised means: hand delivery, telefax, or registered post. The date of service is determined accordingly: delivery date for hand service, telefax dispatching date, and date of letter signing for registered post, unless proven otherwise. Adherence to prescribed service methods ensures transparency and accountability. S 14(7) requires the disciplinary committee and panel to meticulously record all proceedings for a comprehensive account. This record preserves an accurate chronicle, promoting fairness and procedural integrity under the SACE Act.

[248] See s 14(2)(c) of the SACE Act.

[249] See s 14(3) and (4) of the SACE Act. See also cl 7.1 of the SACE Code of Professional Ethics for Educators.

[250] See s 14(2)(e) of the SACE Act. See also cl 7.1 of the Disciplinary Procedures in the SACE Code of Professional Ethics.

[251] See the *Scheepers-SACE* case, fully discussed in Chapter 5 of this thesis.

[252] See s 14(2)(d) of the SACE Act.

necessary, ensures due process.[253] The procedures for disciplinary hearings align with both section 14 of the SACE Act[254] and the disciplinary hearing procedures outlined in the SACE Code of Professional Ethics for Educators.[255]

After the committee prefers charges, the secretariat informs the educator of the hearing date, appoints a presiding officer, conducts the hearing, and produces a disciplinary recommendation.[256] The Disciplinary Committee, convened in formal meetings authorised by the Council, reviews all recommendations and decides whether to ratify or revise the hearing or order a new hearing afresh (*de novo*) because of fatal errors.[257]

SACE is authorised to impose sanctions, ranging from cautions to removal from the register of practising educators, depending on the severity of the misconduct.[258] For minor infractions, the Disciplinary Committee may issue cautions, reprimands, suspensions, or monetary fines. The regulatory role of SACE, as illustrated in the *Scheepers-SACE* case, underscores its directive from the SACE Act to enforce ethical standards and professional conduct among educators.[259]

The Disciplinary Committee's decision, may, for instance, acquit the educator, or it may extend to striking the educator off the register. Whichever decision is reached must be communicated to the educator. These decisions are presented to Exco and Council, where they are ratified and noted as official decisions. The Disciplinary Committee, comprising educators and legal experts, is entrusted with due diligence, adhering to due process and just cause in decision-

[253] See s 14(2)(c) of the SACE Act. See also cl 2 of the Disciplinary Procedures in the SACE Code of Professional Ethics for Educators.
[254] See s 14(2)(d) of the SACE Act. See also cl 2 of the Disciplinary Procedures in the SACE Code of Professional Ethics for Educators.
[255] See the Disciplinary Procedures in the SACE Code of Professional Ethics for Educators.
[256] See item 4.1 of the Disciplinary Procedures in the SACE Code of Professional Ethics. See also s 14(2)(d) of the SACE Act.
[257] See cl 7.1 of the Disciplinary Procedures in the SACE Code of Professional Ethics, which states: "On the basis of the recommendation of the disciplinary panel and the submissions of the educator charged with a breach of the code, if any, the disciplinary committee must recommend a finding and appropriate sanction, if any, to the Council and inform the educator concerned accordingly."
[258] See s 5(c)(iii)(cc) of the SACE Act states: "Subject to this Act and the National Education Policy Act, 1996 (Act 27 of 1996), the council- … may remove from the register for a specified period or indefinitely, or subject to specific conditions, the name of, an educator found guilty of a breach of the code of professional ethics." A teacher removed from the register by SACE is not allowed to teach anywhere in South Africa. It is important to note that SACE is required to follow due process throughout this entire process. See also cl 8.2 of the Disciplinary Procedures in the SACE Code of Professional Ethics.
[259] See the *Scheepers-SACE* case. See also cl 2 of the Disciplinary Procedures in the SACE Code of Professional Ethics and Deacon (2015) 143.

making.[260] The *Robertson* case highlighted the need for SACE to address neglected processes outlined in section 23 of the SACE Act.

4.5.6 Dispensing with Section 23 of the SACE Act

Section 23 of the SACE Act requires that when SACE decides to remove an educator, the educator must be allowed to present a reasonable recommendation about why his name should not be removed from the register.[261] Failure to afford this right, as seen in the *Robertson* case, led the High Court to order reinstatement because SACE had not complied with section 23 of the SACE Act.[262]

Section 23(3) provides a crucial additional opportunity for the educator to make representations after a decision to remove him from the register of practising educators after a disciplinary hearing and investigation.[263] This second chance allows the educator to present arguments against the removal of his name from the register. As the Disciplinary Committee is responsible for this decision, there is a necessity for an overseeing authority within the Council to review and endorse this outcome. This dual-layered process ensures a comprehensive and fair evaluation of an educator's case before any definitive action is taken.

In the *Robertson* case, the High Court determined that the rights afforded by section 23(2) of the SACE Act, allowing for reasonable representation,[264] were deemed procedurally unfair under the Promotion of Administrative Justice Act ("the PAJA").[265] Relying on that Act, the court emphasised that the PAJA codifies the common-law grounds of review although not the exclusive legislative basis of review and that administrative actions significantly impacting an individual's rights or legitimate expectations must adhere to fair administrative procedures.[266] Section 6(2)(c) of PAJA outlines the grounds for review, including procedural unfairness, and section 6(2)(h) highlights the reviewable circumstance of actions deemed "so unreasonable

[260] See s 14 of the SACE Act.
[261] See the *Robertson* case para 24, where the court stated: "Furthermore, it is not apparent from the record that the applicant was provided an opportunity to make representations to SACE prior to the removal of his name from the roll of educators, as he required under the provisions of s 23(3) of the SACE Act."
[262] See the *Robertson* case para 24.
[263] See s 23(3) of the SACE Act.
[264] See s 23(2) of the SACE Act. See also the *Robertson* case para 21.
[265] See the Promotion of Administrative Justice Act 3 of 2000. See also s 33 of the Constitution, 1996 on just administrative action, which states: "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons." See also the *Robertson* case para 21.
[266] See the *Robertson* case para 21.

that no reasonable person could have exercised the power or performed the function".[267] This ruling underscores the importance of fair administrative procedures, subject to the specifics of each case, as the PAJA requires.[268] Before concluding this chapter of the thesis, it is also critical to briefly consider the Children's Act because of its implications for educator sexual misconduct cases.

4.6 Register of Persons Unfit to Work with Children

Navigating the complex terrain of educator dismissal disputes, it becomes evident that the Children's Act, alongside the Schools Act and the SACE Act, assumes a significant role in framing the discourse on sexual misconduct by educators in the public-school sector. Sections 120 and 121 of the Children's Act delineate the process of finding individuals unsuitable to work with children.[269] This finding can be made by various entities, including children's courts, other courts in relevant proceedings, or forums engaged in disciplinary proceedings related to a child's conduct. Any inquiry regarding an educator that establishes his guilt as empowered by section 120(1)(c)[270] is specifically authorised to assess the suitability of an individual, such as an educator, to work with children, aligning with the employer's request under section 120(2)(a) of the Children's Act.[271]

Section 122(1) of the Children's Act requires the registrar or relevant administrative forum to inform the Director-General of Education of any findings about a person's unsuitability to work with children.[272] This notification encompasses details of the findings under section 120 of the Children's Act and any subsequent appeal or review initiated by the person affected.[273] The Director-General, in turn, is required to record the name of the individual found unsuitable in Part B of the Register, irrespective of ongoing appeal proceedings.[274]

These entries in the register carry distinct consequences. When made by the ELRC pursuant to section 188A of the LRA, the outcome does not bind SACE. Conversely, if SACE requires the inclusion of an educator's name in the register of persons unfit to work with children, SACE

[267] See the *Robertson* case para 21. See s 6(2)(c) of the PAJA.
[268] Essentially, in the *Robertson* case paras 21 and 24, the court ruled that SACE's decision to remove Robertson from its register without giving him the right to make reasonable representation was "so unreasonable that no reasonable person could have exercised the power or performed the function". The decision was reviewed and set aside.
[269] See ss 120 and 121 of the Children's Act.
[270] See s 120(1)(c) of the Children's Act.
[271] See s 120(2)(a) of the Children's Act.
[272] See s 122(1) of the Children's Act.
[273] See s 120(2)(a) of the Children's Act.
[274] See s 122(2) of the Children's Act.

exercises binding authority over the employer in accordance with section 15(2) of the Educators Act in conjunction with section 26(1) and section 26(2) of the SACE Act.[275] These intricacies contribute to the challenges inherent in processing educator dismissal disputes, particularly those related to sexual misconduct offences. For this reason, the SACE Act included section 23(3) safeguards to ensure that educators are not entered into that register arbitrarily because this step may carry grave consequences for these educators.

4.7 The Role of the ECTA in Managing Sexual Misconduct Cases

This thesis acknowledges the significance of the ECTA[276] within the educational context, particularly in addressing educator misconduct. The ECTA, enacted in late 2002, plays a pivotal role in regulating electronic communication, with specific relevance to legal practice. Notably, Chapters 3 and 7 of the ECTA directly impact lawyers and provide clear principles for criminalising activities such as hacking and illegal data manipulation, aligning South Africa with fewer than 60 countries globally having such legislation.[277]

Within the legal landscape, the ECTA governs the admissibility of electronic evidence in court proceedings. Sections 14 and 15 of the ECTA are particularly pertinent, addressing the presentation and retention of data messages in their original form, along with rules about admissibility and evidential weight.[278] The ECTA emphasises the importance of ensuring the integrity and reliability of electronic information presented as evidence in court, incorporating assessments of generation, storage, communication, and the identification of the originator.[279]

The question of social media admissibility in court also emerges, with cases such as *Fredericks v Jo Borkett Fashions*[280] and *Sedick & another v Krisray (Pty) Ltd*[281] setting precedents. The CCMA deemed the dismissals of employees because of derogatory Facebook posts fair, emphasising the importance of privacy settings and adherence to

[275] See s 26(1) and (2) of the SACE Act.
[276] See the ECTA.
[277] See Chapters 3 and 7 of the ECTA.
[278] See ss 14 and 15 of the ECTA.
[279] See ss 14 and 15 of the ECTA. Despite the advancements in electronic data creation and storage, the ECTA does not automatically render data messages admissible. The Sedona Conference Principles provide a comprehensive approach to electronic data treatment, representing consensus views for resolving complex issues arising from electronic discovery and litigation. These principles are recognised internationally and contribute to the evolving landscape of electronic data in legal proceedings.
[280] See *Fredericks v Jo Borkett Fashions* [2011] JOL 27923 (CCMA).
[281] See *Sedick & another v Krisray (Pty) Ltd* (2011) 32 ILJ 752 (CCMA).

relevant legislation such as the Regulation of Interception of Communications and Provision of Communication-related Information Act ("RICA").[282]

Significantly, educators have faced disciplinary actions, including cases of sexual misconduct, based on electronic communications on platforms such as WhatsApp.[283] The Supreme Court of Appeal affirmed the legal validity of electronic messages, specifically WhatsApp messages, in *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another* ("the *Spring Forest Trading* case").[284] Additionally, in *Trend Finance (Pty) Ltd and Another v Commissioner for the South African Revenue Service and Another*,[285] the High Court stressed that, to rely on section 15(4) of the ECTA, a party must demonstrate that the document sought to be admitted is a printout of information originally existing in electronic form, highlighting the importance of establishing a direct connection between electronic information and printed documents in legal proceedings.[286] The implications of the ECTA extend to the realm of educator dismissals, highlighting the intersection of technology, legislation, and legal practice in addressing misconduct cases within the educational sector. Aligning education laws with this legislation becomes imperative for the education community to adapt and amend its regulations accordingly.

4.8 Conclusion

Having traversed the role of the legislative enactments regulating educator dismissal for sexual misconduct against children in South Africa, this chapter draws the following conclusions.

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[282] See the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (RICA).
[283] See the case of *Gino Carl Collin Rhoda v Respondent: Department of Education Western Cape* ELRC814-19/20WC, where an educator was dismissed on the basis of proof obtained from WhatsApp messages between the educator and a learner. In the context of applying s 188A of the LRA in cases under the ELRC, numerous instances have demonstrated the significance of retrieving WhatsApp communications as evidence. These cases involve sexually abusive educators who have engaged in inappropriate communication with children, such as sending explicit texts, images, and videos or proposing romantic involvement. See also *Department of Education, KZN v Sugan Naidoo* ELRC325-20/21KZN.
[284] See *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another* (725/13) [2014] ZASCA 178 (21 November 2014); 2015 (2) SA 118 (SCA). The SCA clarified that the definition of a "data message" under the ECTA encompasses WhatsApp messages, as they are transmitted, received, and stored electronically.
[285] See *Trend Finance (Pty) Ltd and Another v Commissioner for the South African Revenue Service and Another* (8712/01) [2005] ZAWCHC 55 (8 August 2005); [2005] 4 All SA 657 (C); 2006 (2) BCLR 304 (C).
[286] See the *Trend Finance* case para 49 and s 15(4) of the ECTA.

First, the Schools Act introduces confusion in section 20(7), creating a distinction in the employment of educators. SGB-employed educators, excluded from the scope of the Educators Act by section 20(11), pose challenges, particularly when sexual misconduct committed against learners is addressed.[287] The thesis argues that amending the Schools Act to eliminate the provision for SGB-appointed educators is an urgent imperative. This amendment aligns with the democratic governance model of schools, emphasising the separation of powers and responsibilities. The amendment questions the notion of the SGB's both acting as the legislative wing of the school and wielding executive powers for educator appointments. The proposal aims to establish a unified system for appointing educators, allowing funds generated by the SGB to be recommended for the appointment of additional educators by the employer.

Secondly, this thesis contends for amendments to the Educators Act, proposing that once an educator faces dismissal by the employer for serious misconduct, SACE should promptly remove this educator from the register of practising educators upon receiving the dismissal record as outlined in section 26 of the Educators Act in conjunction with section 26 of the SACE Act.

Thirdly, the Educators Act, through sections 15 and 26,[288] authorises SACE to withdraw an educator's teaching licence, intertwining regulatory and employment realms. The *Robertson* case exemplifies this complexity, where a civil court had to intervene, emphasising potential differentiations in the severity of misconduct. The thesis argues for establishing an interim joint committee comprising representatives from the employer and SACE pending drastic amendments of education sector legislation to eliminate the identified disparities. This committee would be tasked with implementing section 23(2) of the SACE Act and determining the reasonable representations of dismissed educators regarding the removal of their names from the register. The committee's decisions would be final and hold the same status as a magistrate's court ruling, subject to review only by the High Court or the Labour Court. This approach aims to streamline processes, preventing the need for a fresh disciplinary procedure after the employer has already addressed the same set of facts. Educators dissatisfied with the committee's decision would have recourse to the High Court or the Labour Court.

Thirdly, examining the SACE Act reveals critical components and limitations. The SACE Act, entrusted with overseeing teacher registration and upholding ethical standards, exhibits gaps

[287] See s 20(4), (7A), and (11) of the Educators Act. See also Joubert et al (2015) 79 and Deacon (2015) 21.
[288] See ss 15(2) and 26(2) of the Educators Act. See also s 26(2) of the SACE Act.

in conceptual alignment with the Sexual Offences Act.[289] The misalignment raises concerns about educators found guilty of sexual misconduct not being included in the national register of sexual offenders, leading to potential gaps in oversight.

Fourthly, further exploration exposes deficiencies in reporting obligations within the SACE Act concerning suspected child abuse, especially sexual abuse. Unlike the Children's Act, the SACE Act lacks clear directives for educators and school officials such as requiring educators to report the abuse of children, creating a less robust protective framework for children.[290] The SACE Act's conceptual framework on sexual abuse also falls short, lacking comprehensive definitions and descriptions compared to the Sexual Offences Act.

Fifthly, the complexity of defining and categorising sexual misconduct within the educational sector becomes apparent. Variations in definitions across legal documents, such as the Educators Act and the SACE Act, contribute to challenges in identification and adjudication.[291] The educational context introduces unique power dynamics and vulnerabilities, necessitating flexible and accurate definitions.

Sixthly, a significant concern lies in potential contradictions between sanctions imposed by SACE and sanctions imposed by the employer.[292] Misalignments can result in educators' retaining licences despite dismissals, highlighting the need for coherence and coordination within the regulatory framework. Achieving alignment between the SACE and employer decisions is essential for consistency, fairness, and maintaining public trust in the education system.

Seventhly, although the SACE Act sets ethical standards, its limitations in aligning with child protection measures and addressing sexual abuse underscore the need for legislative amendments. Ensuring comprehensive protection for South African children demands a more inclusive framework that considers various forms of sexual misconduct involving educators and provides effective mechanisms for addressing misconduct within the education sector.

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[289] Several categories of sexual misconduct, such as showing children pornographic material, sexual grooming, and social media dating of children by educators, have been identified.
[290] See s 110(2) of the Children's Act.
[291] See the disparities between cl 3 of the SACE Code of Professional Ethics for Educators and ss 17 and 18 of the Educators Act.
[292] See the *Robertson* case, where the employer suspended the educator and SACE struck Robertson off the register of practising educators indefinitely in terms of s 5(d)(iii)(bb) of the SACE Act.

The discussion now moves to analysing the role-players regulating educator sexual misconduct disputes.

Chapter 5: Analysis of Role-players Regulating Educator Sexual Misconduct

Page

5.1 Introduction 142
5.2 The Fragmented Role of the Employer, the SGB, and the Principal 143
5.2.1 The *Scheepers-SGB* High Court Case: Analysis 144
5.2.2 The *SGB-Scheepers SCA* Case: Analysis 148
5.2.3 The *Leeto* Case Analysis and the Employer's Negligent Conduct 154
5.2.4 Analysis of the *CS-Swanepoel* Case and the Employer's Vicarious Liability 155
5.2.4.1 Background to the Case 155
5.2.4.2 The Clarity of the Relationship between the Employer and Educator 159
5.2.4.3 Fragmented Roles of the Council for Educators, SGB, and the Employer 161
5.2.4.4 Failure of the Employer to Manage Educator Discipline 161
5.2.4.5 Implications of Arbitrator and Presiding Officer Quality for Applying Laws 161
5.3 The Fragmented Role of the Employer, the SGB, and SACE 163
5.3.1 Analysis of the *Scheepers-SACE* Case 163
5.3.2 Background to the *Scheepers-SACE* High Court Case 164
5.3.3 Fragmentation Challenge in the *Scheepers-SACE* High Court Case 167
5.4 The *SACE-Scheepers* Supreme Court of Appeal Case 168
5.5 The *Council for Educators-Scheepers* Constitutional Court Case 168
5.6 Analysis of the *Robertson* Case and the Fragmented Public Schools System 169
5.6.1 Background to the *Robertson* Case 169
5.6.2 The Challenges of Forum Shopping in Educator Misconduct Cases 171
5.6.3 Deemed Resignation Jurisdiction in the *Robertson* Case 174
5.7 Unravelling the Complexities of the Fragmented Landscape of Oversight 175
5.7.1 Overlapping Authority over Public School Teachers 176
5.7.2 The Lack of Clarity on the Disciplinary Authority over Educators 177
5.7.3 Cooperative Governance and Meaningful Engagement 178
5.7.3.1 Democratisation of Education 178
5.7.3.2 Cooperative Governance 179
5.7.3.3 Meaningful Engagements 179
5.7.4 Employer Delay Contributes to Neglect of LRA Remedies 179
5.7.5 The Role of the Employer in Educator Sexual Misconduct Cases 180
5.7.6 Extended Traditional Relationship between the Educator and the Employer 181
5.7.7 Disparities in Treatment and Sanction of Educators 182
5.8 Conclusion 183

5.1 Introduction

Chapter 5 analyses the complex dynamics surrounding the regulation of educator dismissal disputes for sexual misconduct within the public-school sector in South Africa. Building upon the legislative foundation established in Chapter 4, this chapter critically examines the practical application of the laws by key stakeholders involved in the dismissal process: the employer of educators, the regulatory authority, the South African Council for Educators (SACE), the school governing bodies (SGBs), the Education Labour Relations Council (ELRC), and the judicial system.

The chapter focuses on understanding how these stakeholders, each wielding significant influence, navigate and impact the management of educator dismissal disputes. Notable cases, including *Scheepers*,[1] *Robertson*,[2] *Leeto*,[3] *CS-Swanepoel*,[4] *Welkom,*[5] *Ermelo*,[6] and others, are examined to draw insightful conclusions on optimally managing educator dismissal disputes. This analysis is conducted with a dual objective: safeguarding children's rights to basic education and ensuring that educators are treated fairly and not unfairly dismissed in terms of the LRA.

The initial analysis centres on dissecting the roles of the employer and the SGB in educator dismissal disputes, unravelling potential disparities and conflicts in their functions. Then the focus shifts to exploring the interplay between the employer, SGB, and SACE, which added another layer of complexity; the challenges arising from concurrent oversight are considered. The chapter concludes by comprehensively examining the roles played by the ELRC, alongside other institutions within the purview of the LRA, in comparison to the civil courts.

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[1] *Scheepers v School Governing Body, Grey College Bloemfontein and Others (Suid-Afrikaanse Onderwys-Unie Intervening)* (2612/2018) [2018] ZAFSHC 210 (6 September 2018) ("the *Scheepers-SGB HC* case"); *School Governing Body Grey College, Bloemfontein v Scheepers and Another* (506/19) [2020] ZASCA 82; [2020] 3 All SA 704 (SCA) (3 July 2020) ("the *SGB-Scheepers SCA* case"); *Scheepers v South African Council for Educators and Others* (4988/2020) [2021] ZAFSHC 212 (29 July 2021) ("the *Scheepers-SACE HC* case"); *South African Council for Educators v Deon Scheepers and Others* SCA 045/2022 (24 March 2022) ("the *SACE-Scheepers SCA* case"); *South African Council for Educators v Deon Scheepers and Others* (CCT 127/22) [2023] ZACC 23 (12 July 2023); [2023] 10 BLLR 981 (CC); (2023) 44 ILJ 2191 (CC); 2024 (5) BCLR 663 (CC) ("the *Council for Educators v Scheepers CC* case")

[2] See the *Robertson* case.

[3] See *Department of Education: Free State v ELRC and Others* (JR2278/12, J2935/12) [2017] ZALCJHB 129 (20 April 2017) ("the *Leeto* case").

[4] See *CS and Another v Swanepoel and Others* (19027/13) [2022] ZAWCHC 37 (17 March 2022); [2022] 2 All SA 810 (WCC); [2022] 7 BLLR 660 (WCC) ("the *CS-Swanepoel* case").

[5] See *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 (2) SA 228 (CC) ("the *Welkom* case").

[6] See *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) ("the *Ermelo* case")

This exploration seeks to untangle the complexities of concurrent authority, oversight, and jurisdiction, which have often resulted in forum shopping and forum avoidance by litigants.

5.2 The Fragmented Role of the Employer, the SGB, and the Principal

The SGB of Grey College was dissatisfied with Scheepers's performance in his principalship of the school. Unilaterally, without offering him the opportunity to state his case, the SGB stripped him of most of his SGB-delegated powers. Understandably disgruntled, Scheepers lodged a matter in the High Court,[7] challenging the SGB's decision to strip him of his responsibilities. The High Court ruled in his favour, determining that the SGB's actions constituted unlawful administrative action.[8] The SGB's appeal against the High Court ruling failed in the Supreme Court of Appeal ("the SCA").[9] The SCA endorsed the High Court's decision, highlighting the delicate relationship between the SGB and the principal, akin to the relationship between the legislative and executive arms of government.

Frustrated by delays, the SGB reported the matter to SACE. In its proceedings, SACE relied on an investigative report provided by the HOD, which was not acted upon.[10] This step prompted Scheepers to lodge an application in the High Court against SACE in which he argued that SACE had failed to execute its mandate to investigate the case but had instead relied arbitrarily on the investigation report furnished to it by the SGB, which had received the report in confidence from the HOD. The High Court ruled that SACE had failed to fulfil its duty under the SACE Act.[11] The SACE appealed and lost in the SCA,[12] and this matter was finalised by the Constitutional Court.[13] In a landmark decision in July 2023, the apex court directed SACE to conduct a proper investigation independent of the HOD's report and to fulfil its statutory regulatory role.

The following discussion deals separately with two issues: the one between Scheepers and the SGB and the one between Scheepers and SACE. The matter had nothing to do with sexual misconduct, dismissal, or withdrawal of Scheepers's licence to teach. Yet the issues in this

[7] See the *Scheepers-SGB HC* case.
[8] See the *Scheepers-SGB HC* case para 94. The court set aside the SGB's decision because the Schools Act does not authorise the SGB to strip the principal of his powers. The SGB decision fell afoul of s 6(2)(a)(i) of the PAJA.
[9] See the *SGB-Scheepers SCA* case.
[10] See the *Scheepers-SACE HC* case. The role and function of the South African Council for Educators (SACE) are regulated in terms of the South African Council for Educators Act 31 of 2000 ("the SACE Act").
[11] See the *Scheepers-SACE HC* case para 1.
[12] See the *SACE-Scheepers SCA* case.
[13] See the *Council for Educators v Scheepers CC* case.

matter highlight the complexities that impact Scheepers's mandate. The roles of the employer, the SGB, and the principal have been tested in cases such as *Scheepers*, revealing challenges in concurrent jurisdiction that often lead to confusion.

5.2.1 The *Scheepers-SGB* High Court Case: Analysis

Scheepers took the SGB to court seeking urgent relief.[14] He highlighted four, if not six, critical issues. First, the case arose from the SGB's decision to withdraw duties from Scheepers, the principal of Grey College, citing that he exercised inadequate school management, as highlighted above.[15]

Secondly, in a meeting on 15 May 2018, following a notice to members on 3 May 2018 and by way of a secret ballot, the SGB removed Scheepers's duties, assigning them to an interim manager, Mr Geldenhuys.[16] Scheepers had written a letter to the SGB seeking clarity on the powers they intended to withdraw, which had contributed to a breakdown in the relationship between him and the SGB. He had not received an adequate response to his letter.[17] The meeting turned dramatically into a pseudo-hearing, including cross-examination by SGB members, and denying Scheepers an opportunity to present his side of the issues.[18] The meeting concluded with a letter to Scheepers listing the duties and responsibilities that had been withdrawn from him as the principal.[19]

Thirdly, Musi AJP in the High Court was provided with an opportunity to consider whether the SGB had the authority to delegate and subsequently withdraw functions and whether it was

[14] See the *Scheepers-SGB HC* case para 5. The court held: "The applicant approached this Court, on an urgent basis, seeking the following relief…." Scheepers sought urgent relief from the High Court which included condoning procedural lapses, reviewing and setting aside decisions by the governing body, and declaring them unlawful. The decisions involved recalling powers from Scheepers and appointing an interim manager.
[15] See the *Scheepers-SGB HC* case paras 20 and 21, where the court observed as follows: "[20] The members of the first respondent were elected on 16 March 2018. Some of them had been members of a differently constituted Grey College School Governing Body (SGB). There were already tensions between some members of the SGB, notably its chairperson, and the applicant when it, as currently constituted, resumed office. [21] On 3 May 2018, the first respondent's Executive Committee issued a notice to SGB members to attend a special meeting on 15 May 2018. The notice indicated that the only point on the agenda would be the retraction of the rights and duties delegated to the applicant by the first respondent."
[16] See the *Scheepers-SGB HC* case paras 20-25.
[17] See the *Scheepers-SGB HC* case para 23.
[18] See the *Scheepers-SGB HC* case para 24. Despite Scheepers's requests for time to prepare and his protests at being unprepared, he was subjected to cross-examination by some members of the SGB.
[19] See the *Scheepers-SGB HC* case para 26: the SGB issued a notice entitled "Drastic management decision following breakdown of trust between Grey College governing body and school principal", followed by the duties to be withdrawn.

within the SGB's power to appoint an interim manager.[20] The court acknowledged the SGB's implied authority to delegate but highlighted restrictions on delegating statutory powers under the Educators Act.[21] In assessing the issues, the court considered the ruling in *Schoonbee and Others v MEC for Education, Mpumalanga and Another* ("the *Schoonbee* case"),[22] which confirmed the SGB's implied authority to delegate its functions and form committees under that authority. However, the court also noted that in *Makhitshi v SGB Ntilini JSS*,[23] it was held that the SGB lacked the right to delegate its statutory powers and could not delegate its statutory function within the context of the Schools Act.[24] Accordingly, the SGB could not delegate power which the Educators Act did not give.[25] Instead, this conduct was not a delegation: it denuded the principal of certain powers or functions.[26]

Fourthly, the court assessed whether the power to denude the principal of powers or functions constituted administrative action in this context.[27] Musi AJP evaluated the SGB's actions in the context of cases such as *Minister of Defence and Another v Xulu*[28] and the *Welkom* case.[29] Regarding the *Welkom* case, Musi AJP emphasised the need for all partners to work together to manage the school effectively.[30] The court ruled that the SGB's actions fantastically achieved the opposite of that cooperation and explained that professional school management lay with the principal under the Schools Act.[31]

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[20] See the *Scheepers-SGB HC* case para 24. Scheepers was accused of many indiscretions and misconduct. Once misconduct and indiscretions were cited, it behoved the SGB not only to allow due process to take place but also to consider whether the SGB had the authority to take Scheepers on such an inquiry given that the SGB did not employ Scheepers.
[21] See the *Scheepers-SGB HC* case para 51.
[22] See the *Scheepers-SGB HC* case para 52. See also *Schoonbee and Others v MEC For Education, Mpumalanga and Another* 2002 (4) SA 877 (T) ("the *Schoonbee* case").
[23] See *Makhitshi v School Governing Body Ntilini JSS* unreported Judgment Eastern Cape High Court Mthatha, case no 615/08, delivered on 20 March 2009. See also the *Scheepers-SGB HC* case para 55.
[24] The SGB derives much of its statutory power from the Schools Act.
[25] See also the *Scheepers-SGB HC* case para 55.
[26] See also the *Scheepers-SGB HC* case para 59.
[27] See the *Scheepers-SGB HC* case paras 59 and 60. The court said (para 59): "As stated above, the SGB could not revoke a delegation that it did not give. The decision of the SGB was therefore not a revocation of a delegation but denuding the principal of certain powers or functions. Was the decision to denude the principal of those powers or functions administrative action?" The court also observed that the SGB, as an organ of the state, engaged in administrative action by revoking delegated powers.
[28] See *Minister of Defence and Another v Xulu* 2018 (6) SA 460 (SCA) para 34.
[29] See the *Welkom* case para 36. See also the *Scheepers-SGB HC* case para 65; the court held: "The effective management of the school requires all the partners to work together in the best interests of the school and the learners."
[30] See the *Scheepers-SGB HC* case para 65.
[31] See the *Scheepers-SGB HC* case para 66. The question before the court was whether, first, the SGB had either express or implied authority to delegate any of its functions to a school principal such as Scheepers.

The principal represents the Head of Department in all school matters, including at the SGB, where he is a member.[32] A pivotal argument arose in court about whether the SGB had the legal authority to delegate its statutory powers to anyone, including Scheepers, to justify revoking them. The court observed that this notion had been rejected in *Executive Council, Western Cape Legislature v President of the Republic of South Africa* ("the *RSA President* case"),[33] leading to the conclusion that the SGB did not delegate these powers to Scheepers.[34] This prompted an assessment of whether the SGB's decision to withdraw certain powers constituted administrative action.

The court detailed the duties that the SGB delegated to the interim manager, including managing school finances.[35] The court observed that the SGB has many functions related to the school's finances that cannot be delegated to someone else.[36] Section 16A of the School Act requires the SGB to be assisted by the principal in providing information necessary for running the school's affairs.[37] The SGB did not apply its mind but delegated all its financial functions to the interim manager, Mr Geldenhuys of Grey College Primary School.[38] Regarding the Personnel Administrative Measures (PAM), the school principal is responsible for keeping various kinds of school accounts and records for use by the school. The question arose: how would Scheepers perform those functions when they had been taken away from him?[39]

The second issue was the management of extracurricular activities such as sports and culture, which the SGB also withdrew.[40] The principal must carry out functions related to these

[32] See the *Scheepers-SGB HC* case para 48, where the court observed: "In any event, it is a bit rich for the first respondent to argue that there was a duty on the applicant to try and resolve this matter before approaching this Court. The first respondent was expressly requested by the HoD to rescind its decision pending an endeavour to resolve the dispute amicably. It was unwilling to do so. The parties unsuccessfully tried to resolve the dispute after their respective attorneys were engaged. The contention of the first respondent lacks merit." The SGB expressly rejected the duty to resolve the matter as a prerequisite for court intervention. It is also interesting to note that in paras 1 to 19, the court spent a lot of time dealing with preliminary issues of whether the teacher union Suid Afrikaanse Onderwys Unie should be permitted to join the *Scheepers-SGB HC* case as contended by the SGB, and its further claim that the case was premature because Scheepers had filed to join the HoD in the lawsuit. The court dismissed all these issues and still proceeded to deal gracefully with the main dispute as explained below.
[33] See *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) ("the *RSA President* case") para 173.
[34] See the *Scheepers-SGB HC* case para 56. See also the *RSA President* case para 173.
[35] See also the *Scheepers-SGB HC* case para 65.
[36] See also the *Scheepers-SGB HC* case para 69.
[37] See the *Scheepers-SGB HC* case para 67.
[38] See the *Scheepers-SGB HC* case para 74.
[39] See the *Scheepers-SGB HC* case para 69.
[40] See the *Scheepers-SGB HC* case para 76.

activities, including searching school premises to ensure that dangerous items are not brought into the school, and such functions cannot be withdrawn from the principal.[41]

Thirdly, as regards the management of the school campus and assets, including the hostels, the PAM also requires the principal to inspect these premises regularly to enhance safety.[42] The SGB took those functions away.

Fourthly, as for managing personnel not performing academic functions, the principal was afforded the power to manage teachers and support staff and delegate duties to them in terms of section 8A(2).[43] The duties towards support staff cannot be taken away from him as the SGB had done.

Fifth was communication and liaison internally and externally; the SGB also removed that function. The PAM also makes it clear that one of the duties and responsibilities of the principal is to communicate with parents on learners' progress and conduct, as well as liaise with government departments such as public works, health, and police.[44] The Policy on the South African Standard for Principalship[45] also obliges principals to build collaborative relationships and partnerships within and outside the school.[46] Further, the principal is required to represent the school in non-academic forums, which envisages internal and external liaison,[47] managing the school ethos, mission, values, and spirit within the school context, and managing discipline.[48] The SGB took all these functions away from Scheepers.

Sixthly and finally, Musi AJP ruled that the SGB was not entitled to make the decision that it did, as the Schools Act and other policy instruments governing the role and responsibilities of the principal did not sanction such actions.[49] The SGB decision was taken without regard for

[41] See the *Scheepers-SGB HC* case para 76.
[42] See the *Scheepers-SGB HC* case para 79.
[43] See the *Scheepers-SGB HC* case para 80. See also s 16A(2)(a)(ii) of the Schools Act.
[44] See the *Scheepers-SGB HC* case para 81.
[45] See the *Scheepers-SGB HC* case para 85. See cl 5.1.2 of the Policy on the South African Standard for Principalship.
[46] See the *Scheepers-SGB HC* case para 82.
[47] See the *Scheepers-SGB HC* case para 85.
[48] See the *Scheepers-SGB HC* case para 86.
[49] See the *Scheepers-SGB HC* case para 87. The decision was procedurally unfair, with the principal being denied adequate time for preparation and facing a barrage of accusations without a reasonable opportunity to respond. The unlawfulness extends to the summary and unlawful appointment of Mr Geldenhuys as the school manager without HOD intervention or authorisation. The decision to appoint Mr Geldenhuys, lacking proper legal foundation, warranted dismissal. The court ruled that the SGB's decision lacked legal authority, as the Schools Act and related policy instruments did not sanction such actions.

procedural fairness and Scheepers's rights.[50] Appointing Mr Geldenhuys of Grey College Primary School as the interim manager further compromised fairness and reasonableness.[51] In response to these violations of fairness and procedural standards outlined by the Promotion of Administrative Justice Act ("the PAJA"), the High Court set aside the SGB's decision.[52] The court considered the impact of the SGB's decision on Scheepers's right to manage the school, coupled with its adverse effects. The court established its classification as administrative action subject to review under the PAJA.[53] Musi AJP's conclusion underscored the principal's mandate for professional school management, citing relevant legal provisions, and set the stage for examining the components of the SGB's decision.[54]

The Scheepers High Court case highlighted several principles. First, the SGB's role is never about disciplining a principal or educators but about working alongside them as the school's legislative and executive authorities, respectively.[55] The actions of the SGB in attempting to discipline Scheepers were illegal and invalid and sought to usurp the power of the HOD. Secondly, the HOD's failure to expedite the management of discipline of the principal and the management of disputes within Grey College deepened the quagmire between Scheepers and the SGB. Thirdly, the failure of all the parties to understand the responsibility principle of democratising public schools and the responsibility for meaningful engagements and cooperative governance made a mockery of the architecture of the Schools Act, which provided for their roles. Navsa JA also buttressed this insight in the SCA judgment discussed below. Musi AJP's judgment did not put this matter to rest. The SGB took the High Court decision on review to the Supreme Court of Appeal, which is analysed below, and at the same time reported Scheepers to SACE, giving rise to three further court cases that will be discussed later.

5.2.2 The *SGB-Scheepers SCA* Case: Analysis

The *SGB-Scheepers SCA* case presents several crucial points relevant to the present study. First, it originated from the SGB's attempt to strip Scheepers, a principal, of certain duties. In subsequent appeals in the High Court and the SCA, the SGB sought to assert its firmly held position against Scheepers.[56] The SGB, dissatisfied with Scheepers's performance,

[50] See the *Scheepers-SGB HC* case para 94.
[51] See the *Scheepers-SGB HC* case para 91.
[52] See the *Scheepers-SGB HC* case para 94. See also s 6(2)(a)(i) of the PAJA.
[53] See the *Scheepers-SGB HC* case para 63. See also s 1 of the PAJA.
[54] See the *Scheepers-SGB HC* case para 63.
[55] See the *Scheepers-SGB HC* case para 56.
[56] See the *SGB-Scheepers SCA* case para 2.

conducted meetings and voted to withdraw his roles, assigning them to Mr Geldenhuys, who became the new school manager.[57] Through Navsa JA, the SCA set out the issues as they appeared from the record of the *Scheepers-SGB HC* case. The record will not be repeated here except to observe salient points warranting attention. The SCA set out the issues that the SGB, through a meeting, had taken a vote on in terms of which it moved to revoke what it termed to be its duties delegated to the principal, and Mr Geldenhuys became the newly appointed school manager in his stead. Some interesting issues brought to the fore by the SCA include the fact that it exposes the name of Mr Büchner, who was the chairperson of the SGB responsible for chairing the meeting which took the vote and also for the communications which led to Scheepers's ouster. The SCA indicated that "Mr Büchner went on to indicate that the purpose of the meeting was to determine whether the SGB was 'comfortable' with how Mr Scheepers had discharged those delegated functions and duties".[58] Further, the SCA indicated: "The SGB urged [Scheepers] to accept that all of the functions and responsibilities that s 20 of the Act assigned to a school governing body were at least tacitly delegated to him by the SGB."[59] The SGB, however, declined to postpone the meeting to allow Scheepers to prepare for what appeared to be an inquiry against him.[60]

Secondly, the SGB argued that withdrawing Scheepers's duties did not constitute administrative action but rather the reclaiming of roles initially delegated to him under the Schools Act.[61] If the SGB's argument had prevailed, it would have implied that its decision did not qualify as an administrative action, thereby obviating the need to resort to the court under the provisions of the PAJA.[62] Consequently, the SGB maintained that there would be no requirement to approach the court by the PAJA.[63] The SGB argued that it did not strip the

[57] See the *SGB-Scheepers SCA* case para 14.
[58] See the *SGB-Scheepers SCA* case para 9. During the May 2018 meeting, the SGB presented a list of complaints against the principal, including allegations of harsh treatment of staff, victimisation of teachers, lack of visible discipline, and an inability to uphold school values and traditions. The SGB also claimed that the principal mishandled racial issues, interfered in the SGB's election process, and breached contractual obligations with the education department.
[59] See the *SGB-Scheepers SCA* case para 11.
[60] See the *SGB-Scheepers SCA* case paras 10 and 11.
[61] See the *SGB-Scheepers SCA* case para 72.
[62] See the *SGB-Scheepers SCA* case para 22. The SCA held that the lower court correctly determined that the SGB lacked the statutory authority to impede the principal from fulfilling his statutory functions and duties. Any assertion that the lower court erred in characterising the SGB's decision as administrative action was devoid of merit. In *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA), the SCA established that a public school, together with its governing body, constitutes an organ of state. Referring to *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA), the Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) endorsed this SCA decision, providing a practical guideline by dividing the definition of "administrative action" in s 1 of the PAJA into seven elements.
[63] See the *SGB-Scheepers SCA* case paras 3 and 73. The SGB's challenge on this matter may have stemmed from an attempt to evade addressing concerns pertaining to procedural fairness. This stance

principal of powers but instead assumed duties that were originally within its purview. The SGB even raised the issue of the Personnel Administrative Measures (PAM), which directed that "the principal's role in managing the school's accounts and records is one in terms of which he is required to act in consultation with the governing body".[64]

Thirdly, the court, led by Navsa JA, was tasked with determining the lawfulness of the SGB's actions and whether they amounted to administrative action to review them for fairness.[65] In this process, the court revisited the decisions of the Constitutional Court and examined the definitions of "employer" and "educator" based on the Educator Act.[66] Navsa JA clarified that the authority to discipline an educator or principal rested with the Minister at the national level and with the HOD at the provincial level, not with the SGB.[67] This determination also pertains to the appointment of public school educators.[68] The SCA also pinpointed the issue that Scheepers had contended that if the SGB had contemplated a disciplinary inquiry into misconduct against him, it would have followed the school's disciplinary code, which it did not.[69] The SGB had therefore acted outside its powers and defied the principle of legality in violation of the provisions of section 16(3) of the Schools Act:[70] indeed, the SGB had

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seems to be based on the belief that a legality challenge inherently circumvents issues related to procedural impropriety. However, even in this regard, the SCA found that the SGB's position appeared misguided.

[64] See the *SGB-Scheepers SCA* case para 24. See also the PAM, as determined by the Minister in terms of s 4 of the Educators Act and GN 170 in *GG* 39684 of 12-02-2016.

[65] See the *SGB-Scheepers SCA* case para 21.

[66] See the *SGB-Scheepers SCA* case para 56. The next challenge that this thesis needs to address is who is the employer of educators and who are the educators. The SCA affirmed that the Educators Act governs the employment of educators by the state, including the regulation of their terms of service, disciplinary matters, retirement, and related issues. Navsa JA noted that the term "educator" is defined in s 1 of the Educators Act to encompass individuals who teach, educate, train, or provide professional educational services, including therapy and psychological services, at public schools, departmental offices, or adult basic education centres. Educators appointed to positions within the scope of this Act are covered by its provisions. Here the SCA was referring to SGB educators in terms of s 16(4), (7A), and (11) of the Schools Act, discussed in Chapter 4 of this thesis. These types of educators bring their own layer of issues.

[67] See the *SGB-Scheepers SCA* case para 56. Navsa JA ruled that according to s 3 of the Educators Act, the Director-General of Basic Education serves as the employer of educators within the national department, while the Head of the Department acts as the employer of educators within the provincial department of education, specifically for positions on the educator establishment of that department. This employer designation applies to all aspects of employment. S 4 stipulates that the Minister has the authority to determine the conditions of service, subject to the provisions of the LRA and collective agreements. Different ranks and grades of educators may have distinct salary and condition arrangements as determined by the Minister.

[68] See the *SGB-Scheepers SCA* case para 56. Navsa JA took time to explain that in accordance with the Act, s 7 of the Educators Act requires that appointments must consider the values and principles enshrined in s 195 of the Constitution, 1996. Accordingly, factors such as candidate ability and the need to address historical imbalances and achieve broad representation should also be considered. S 6 of the Educators Act specifies that any appointment must be recommended by the governing body of a public school. In the present case, the SGB recommended the appointment of Mr Scheepers, and he was subsequently appointed by the provincial HOD.

[69] See the *SGB-Scheepers SCA* case para 17.

[70] See the *SGB-Scheepers SCA* case para 19.

adamantly maintained that the functions in question were its own in terms of section 16(1) of the Schools Act and that it had simply recalled those functions.[71]

Navsa JA reiterated that previous Constitutional Court cases had expounded on the definitions and delineation of the responsibilities of the employer, employee, and SGB. Under these judicial rulings, the employer, which may be the Director-General or the Head of Department, depending on the context, assumes the duty of professional management of the school.[72] The employee, such as the principal, is entrusted with executing relevant policies and the daily operation of the school, operating under the employer's authority.[73] For its part, the SGB serves as a legislative authority within the school environment.[74] It formulates policies and regulations that govern the daily management of the school, ensuring the establishment of an appropriate educational milieu.[75] By comprehending these definitions and their implications, it becomes evident that properly aligning roles and responsibilities is crucial to avert disputes and unnecessary recourse to civil courts, as exemplified in the *Scheepers* case.[76]

Fourthly, the court ruled that the SGB lacked the authority to act as it did, and its actions constituted administrative action, usurping the HOD's authority to discipline Scheepers.[77] The SCA overturned the appeal, emphasising the unlawfulness of the SGB's decision, which not only denied Scheepers a fair procedure but also disregarded his labour rights.[78] Towards the conclusion of its analysis, the SCA aptly situated the issues arising from the *SGB-Scheepers SCA* case[79] within their proper context. Navsa JA stated: "In taking the impugned decision the

[71] See the *SGB-Scheepers SCA* case para 22, in which the SCA recorded: "The SGB, in opposing the application by Mr Scheepers, adopted the position it had adopted prior to the litigation, namely, that the powers, functions and duties that the principal had exercised before its impugned decision had been delegated to him by the SGB. It was adamant that, as the repository of the original power and functions, it could revoke them at will."
[72] See the *SGB-Scheepers SCA* case para 61. See also s 20(1) of the Schools Act and the *Welkom* case para 39.
[73] See the *SGB-Scheepers SCA* case para 66.
[74] See the *SGB-Scheepers SCA* case para 61.
[75] See the *SGB-Scheepers SCA* case para 66.
[76] See the *SGB-Scheepers SCA* case para 66.
[77] See the *SGB-Scheepers SCA* case para 72. Navsa JA correctly held that it was evident that the decision under scrutiny qualified as an administrative action. However, in this particular case, this aspect was not significant. All parties involved conceded that if it were determined that the SGB lacked statutory authority to make the decision, such a finding would conclusively resolve the appeal, regardless of whether the decision constituted administrative action.
[78] See the *SGB-Scheepers SCA* case para 18. Clearly, the correct approach in this situation would have been for either the HOD or Scheepers to seek labour law remedies, with the possibility of the SGB's making recommendations if necessary. The LRA provides for the resolution of labour law disputes between employers and employees. Education legislation, including the Educators Act and the Schools Act, supports these labour law remedies. S 20(1)(i) of the Schools Act specifically directs the SGB to make recommendations for the appointment of educators as directed by the LRA.
[79] See *School Governing Body Grey College, Bloemfontein v Scheepers and Another* (506/19) [2020] ZASCA 82 (03 July 2020); [2020] 3 All SA 704 (SCA) ("the *SGB-Scheepers SCA* case").

SGB not only acted beyond its statutory authority, but negated Mr Scheepers' labour law rights."[80] The SGB's challenge on this matter might stem from an attempt to evade addressing concerns about procedural fairness.[81] This stance seemed to be based on the belief that a legality challenge inherently circumvented issues related to procedural impropriety. However, the SCA found that the SGB's position appeared misguided even in this regard.[82]

Navsa JA referred to several Constitutional Court cases discussed in the High Court case, including *Welkom*[83] and the earlier decision in *Ermelo*[84] where the role and responsibilities of the SGB vis-à-vis those of the principal had to be clarified.[85] The SCA appreciated that managing a school involves a complex interplay of responsibilities between principals and SGBs, often leading to conflicts.[86] The SCA held that the role of the SGB is set out in the Schools Act, which outlines the responsibilities of SGBs, encompassing crucial functions such as managing school funds, maintaining a school bank account, preparing annual budgets for parental approval, submitting audited financial statements, procuring educational resources, administering school fees, and adjudicating fee exemption applications.[87] SGBs also oversee school property, adopt constitutions, and decide on community use of school facilities.[88] The SGB's primary responsibility lies in formulating policies and regulations that guide the daily management of the school, safeguarding the realisation of the right to education in an appropriate environment.[89] Conversely, the principal's role is more executive and

[80] See the *SGB-Scheepers SCA* case para 71. Navsa JA criticised the SGB for exceeding its statutory authority and infringing upon the principal's labour law rights. Navsa JA further emphasised that if there were legitimate disciplinary concerns against the principal, they should be pursued through the appropriate channels, rather than through the approach taken by the SGB. The proper channel would have been through the HOD, who essentially employs the principal.
[81] See the *SGB-Scheepers SCA* case para 18.
[82] See the *SGB-Scheepers SCA* case para 73.
[83] See the *SGB-Scheepers SCA* case para 66. See also the *Welkom* case para 39. In the *Welkom* case, the Constitutional Court significantly elucidated the distinct roles played by the employer, employee, and SGB. The court emphasised the governance obligations vested in the governing body, likening it to a legislative authority within the context of public schools.
[84] See the *Ermelo* case.
[85] See the *SGB-Scheepers SCA* case para 64.
[86] See the *SGB-Scheepers SCA* case para 63.
[87] See the *SGB-Scheepers SCA* case paras 47 and 61. See also s 20(1) of the Schools Act.
[88] See the *SGB-Scheepers SCA* case para 35. See also s 20(1) of the Schools Act and the *Welkom* case para 39.
[89] See the *SGB-Scheepers SCA* case para 66. See also the *Welkom* case para 63, where Khampepe J held: "To my mind, therefore, a governing body is akin to a legislative authority within the public-school setting, being responsible for the formulation of certain policies and regulations, in order to guide the daily management of the school and to ensure an appropriate environment for the realisation of the right to education. By contrast, a principal's authority is more executive and administrative in nature, being responsible (under the authority of the HOD) for the implementation of applicable policies (whether promulgated by governing bodies or the Minister, as the case may be) and the running of the school on a day-to-day basis. It is this understanding of a governing body's governance obligations which must inform our interpretation of the Schools Act."

administrative, entailing the implementation of applicable policies and the efficient operation of the school under the authority of the HOD.[90]

Finally, Navsa JAA highlighted the need for school authorities to understand their roles and the principles of cooperative governance, revealing complex issues of concurrent authority over educators between the SGB and HOD.[91] Notably, the SCA judgment highlights the intricate challenges inherent in the overlapping jurisdiction between the SGB and the HOD, as well as the associated difficulties in determining the appropriate legislative framework and forum for addressing disputes concerning teachers within public schools in South Africa.[92] This aspect affects all types of disputes, including the one that this thesis discusses. Failing to comprehend these roles could lead to conflicts and costly court battles, exemplified by the lengthy disputes involving Scheepers. The *Leeto* and *CS-Swanepoel* cases further underscore the employer's failure to manage educators, contributing to frustrations and unacceptable actions by the SGB.

Several observations have been offered in this thesis that will be considered in the context of managing the discipline of educators that the High Court and the Supreme Court of Appeal traversed. These include the overlapping authority over public educators, clarity about disciplinary authority over educators, the principle of cooperative governance and meaningful engagement, the lack of promptness and judiciousness (the lacklustre approach) by the employer in managing discipline and charging educators, and the role of the employer in managing sexual misconduct cases against educators. These critical themes will be discussed at the end of the case analysis because they represent a common thread of themes running through all the cases. Some of the issues that arose in the two *Scheepers* cases also emerged in sexual misconduct cases such as the *Leeto* case and the *CS-Swanepoel* case, both of which involved the employer's failure to address educator sexual misconduct cases adequately and which warrant further examination.

[90] See the *SGB-Scheepers SCA* case para 66.
[91] See the *SGB-Scheepers SCA* case para 63.
[92] See the *SGB-Scheepers SCA* case para 64. The subsequent matter that required resolution in the *SGB-Scheepers SCA* case was the overlapping jurisdiction between the HOD and the SGB concerning educators and principals, which directly related to Scheepers's predicament. Navsa JA sought to untangle the intricate network of concurrent authority exercised by both the employer and the SGB over the principal of Grey College.

5.2.3 The *Leeto* Case Analysis and the Employer's Negligent Conduct

As in the *CS-Swanepoel* case, so also in the *Leeto* case,[93] the employer failed to do justice. In *Leeto*, a school principal, the third respondent, was accused of sexual assault against a learner.[94] The charges stemmed from incidents that allegedly occurred in 2010, involving sexual intercourse with the complainant in the principal's car. An alternative charge accused the principal of inappropriate touching and penetration when the complainant was at school. The principal was found guilty of the primary charge and dismissed in 2011.[95]

Dissatisfied with the outcome, the principal contested the dismissal, leading to arbitration.[96] The arbitration process, which offered the first opportunity to adjudicate the case, resulted in the arbitrator's finding in favour of the third respondent, the accused principal. The arbitrator ruled that the complainant's testimony was unreliable owing to inconsistencies and contradictions. Consequently, the arbitrator ordered the retrospective reinstatement of the accused principal.[97]

The Department of Education: Free State took the *Leeto* case on review to the Labour Court, which was the second opportunity to consider it.[98] The court examined the record of proceedings and found that although there was a strong suspicion that the complainant had been sexually abused, the case against the accused principal had been poorly prepared and prosecuted.[99] The court concluded that the applicant could not complain about the outcome now, during the review process, since the evidence did not establish the accused's guilt.[100] As a result, the court dismissed the review application, meaning that the arbitration award in

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[93] See the *Leeto* case para 1.
[94] See the *Leeto* case para 1.
[95] See the *Leeto* case para 1.
[96] See the *Leeto* case para 1.
[97] See the *Leeto* case para 1.
[98] See the *Leeto* case para 2.
[99] In the *Leeto* case, Whitcher J observed in paras 27 and 28: "[27] In light of my findings, the ultimate conclusion reached by the arbitrator that she could not safely rely on the evidence of the complainant and that the applicant failed to discharge its burden of proof against the third respondent is one that could be reached by a reasonable decision-maker using the same material that was before the arbitrator. … [28] In my view, the evidence gives rise to a strong suspicion that the complainant was sexually abused in some manner, but the applicant's case against the third respondent faltered badly because it was not competently prepared and prosecuted. It cannot now on review complain about the outcome."
[100] It might just be that had it not been for the employer's failure to prepare adequately, the educator would have been found guilty. These critical paras 27 and 28 in the *Leeto* case indicate that there was a strong suspicion of sexual abuse in the case but owing to inadequate preparation and prosecution by the Department of Education, the evidence could not establish guilt beyond a reasonable doubt. This implies that the failure of the Department of Education to effectively present its case may have allowed the accused, the school principal, to evade accountability for the alleged sexual misconduct, potentially leading to an injustice where the guilty party escaped punishment.

favour of the accused principal, which ordered his retrospective reinstatement, remained valid. The accused principal was reinstated to his position, and the Department of Education's attempt to challenge this outcome through the review process failed.[101]

Employers have the authority to suspend an educator accused of sexual misconduct pending the outcome of an investigation. This temporary removal from the educational environment is a precautionary measure to protect students and the investigation's integrity.[102] If, following an investigation, it is established that an educator has engaged in sexual misconduct, employers have the power to recommend dismissal to the relevant authorities.[103] This recommendation is based on the investigation's findings and the severity of the misconduct. Employers must also cooperate with legal processes, including providing evidence and testimony during hearings and court proceedings, to ensure that educators found guilty of sexual misconduct are held accountable.

However, employers must perform a delicate balancing act in this process. This involves safeguarding the rights of accused educators, ensuring that due process is followed, and preventing potential harm to both students[104] and educators.[105] Striking this balance is critical to upholding fairness and justice throughout the dismissal process. The employer negated its duty to manage a disciplinary process and thus failed the learner. From the *Leeto* case the discussion moves to the *CS-Swanepoel* case, another clear instance of the employer's failing to protect a learner from sexual abuse by an errant educator.

5.2.4 Analysis of the *CS-Swanepoel* Case and the Employer's Vicarious Liability

5.2.4.1 Background to the Case

In *CS and Another v Swanepoel and Others* ("the *CS-Swanepoel* case"), Sher J presiding, the issue was a damages claim stemming from an alleged sexual assault of a learner named CS by the educator, Swanepoel.[106] The incident happened a decade previously when CS was a 12-year-old learner at Vleiplaas Primary School,[107] where Swanepoel served as acting principal and her class teacher.[108] Sher J ruled in favour of the learner, establishing a solid

[101] See the *Leeto* case para 1.
[102] See item 6 of sch 2 to the Educators Act.
[103] See item 7 of sch 2 to the Educators Act.
[104] See s 28(1)(d) of the Constitution, 1996.
[105] See s 23 of the Constitution,1996.
[106] See the *CS-Swanepoel* case.
[107] See the *CS-Swanepoel* case para 1.
[108] See the *CS-Swanepoel* case para 2.

case of vicarious liability against Swanepoel's employer, consistent with corroborating witnesses.[109]

The High Court judgment deliberated on a delictual claim involving sexual abuse perpetrated by an educator during school hours.[110] Key issues included the learner's claim for damages, Swanepoel's counterclaim alleging wrongful and malicious legal proceedings by laying a false charge of rape,[111] and the vicarious liability of the employers (the Western Cape Education Department and Vleiplaas Primary School) and SACE for failing to vet Swanepoel adequately[112] and to manage him as an educator to prevent him from abusing a child.

CS presented her case, supported by witnesses, including her mother, Ms Colleen Kees, the former school secretary; Ms De Waal, a local community member who regularly used the school library; and Capt. De Jongh, a retired police officer. Swanepoel testified, and representatives from SACE and the Western Cape Education Department provided evidence on behalf of the employers. The allegations centred on the employer's failure to vet Swanepoel adequately, resulting in porous systems that allowed him to prey on CS. The employer was further accused of neglecting to manage Swanepoel, enabling him to victimise children.[113]

The central allegation in the rape claim involved an incident in September 2011, where Swanepoel allegedly instructed CS to assist in moving boxes but led her to the staff toilet, where the sexual assault occurred.[114] CS further claimed inappropriate behaviour by Swanepoel on various occasions, including incidents such as tugging at her clothes or making inappropriate requests.[115]

The witness Colleen Kees testified to her observations on the day in question, noting CS and Swanepoel's absence from their designated locations.[116] Upon investigating, she found the staff toilet locked with Swanepoel inside.[117] Both CS and Swanepoel emerged later, raising

[109] See the *CS-Swanepoel* case paras 101.1 and 101.2.
[110] See the *CS-Swanepoel* case para 1.
[111] See the *CS-Swanepoel* case para 1.
[112] As a result, the employer's systems were porous and allowed Swanepoel in as one would let a wolf into a kraal of sheep and he did prey on CS. The employer was further accused of failing to manage Swanepoel to prevent him from preying on children as he did.
[113] See the *CS-Swanepoel* case para 5.
[114] See the *CS-Swanepoel* case para 5.
[115] See the *CS-Swanepoel* case para 17.
[116] See the *CS-Swanepoel* case para 17.
[117] See the *CS-Swanepoel* case para 17.

concerns because of Kees's prior observations of favouritism towards CS and a suspicious incident where they were alone in the kitchen.[118]

During cross-examination, Kees's testimony faced challenges, including contested statements about CS being the favourite and her omission of this detail during the disciplinary hearing.[119] Comments from a forensic social worker's report were introduced but deemed limited in relevance to the case.[120]

The witness Salome De Waal corroborated Kees's account, stating that she saw CS exit the staff toilet, followed by Swanepoel carrying a wash rag.[121]

CS's credibility was a focal point of the trial. Swanepoel had argued that there were discrepancies between her testimony and statements made during the disciplinary hearing in January 2012. The district surgeon's report, conducted ten days after the incident, lacked a detailed examination of the alleged assault. The withdrawal of the rape charge was noted in a letter from the senior prosecutor, but the specifics were not disclosed, and the source did not testify.[122] The court rejected Swanepoel's averments in this regard and observed that CS's testimony accorded broadly and materially with the evidence she gave in her sworn testimony to the police in January 2012, as corroborated by Ms Kees.[123]

Swanepoel denied favouritism or inappropriate behaviour, asserting equal treatment of all children. He contested the rape and molestation allegations but was unable to identify a motive for CS's accusations.[124]

The cross-examination raised Swanepoel's other 1992 conviction for "indecent" assault. Swanepoel claimed correctness in his departmental application answers, citing the offence's

[118] See the *CS-Swanepoel* case para 18.
[119] See the *CS-Swanepoel* case para 27.
[120] See the *CS-Swanepoel* case para 27.
[121] See the *CS-Swanepoel* case para 29. This thesis observes that most sexual abusers seem to use favouritism towards their victims as a lure to execute their shenanigans.
[122] See the *CS-Swanepoel* case para 9.
[123] See the *CS-Swanepoel* case para 55.
[124] See the *CS-Swanepoel* case para 27.

non-relevance to employment.[125] However, discrepancies in the Z83 form[126] raised concerns, acknowledged by Swanepoel as a mistake, not intentional concealment.[127]

Mr G Moroasui from SACE discussed registration requirements until 2017, stating that police clearance was not mandatory. Swanepoel was registered without vetting. In 2018, SACE introduced this requirement because of public concerns. Mr Harry Wyngaardt, a Deputy Director in the Western Cape Education Department, confirmed that the department relied on SACE vetting, not requiring disclosure beyond employment-related convictions if registration proof was provided.[128]

In analysing the evidence, Sher J supported CS's account of the alleged sexual assault, citing its clarity, consistency, and authenticity.[129] Swanepoel's testimony was judged unreliable, marked by smugness and evasion. The court criticised the disciplinary hearing's presiding officer for not considering overall probabilities and CS's potential trauma by focusing on minor insignificant discrepancies.[130]

The court found Swanepoel's claim of a mistake on the application form weak, suggesting intentional omission to hide his unsuitability. Consequently, the court rejected Swanepoel's evidence conflicting with CS's version and held him liable for a delictual act causing physical and psychological harm to the learner.[131]

The remaining defendants, the Council for Educators and the Western Cape Education Department, were liable for alleged omission. The court examined its duty to protect children and highlighted that liability for omissions depends on various factors, including legal policy and constitutional norms.[132] The duty of care, viewed in a post-constitutional context, requires

[125] See the *CS-Swanepoel* case para 36.
[126] See Department of Public Service and Administration "Z83 Application for Employment" form. The "Z83 form" refers to the "Application for Employment" form used by job seekers to apply for government vacancies in South Africa. The form also helps government departments to shortlist qualifying applicants for advertised posts more efficiently. It requires applicants to provide their biographical and professional details, including any criminal history they may have.
[127] See the *CS-Swanepoel* case paras 36-40.
[128] See the *CS-Swanepoel* case para 47. The *Scheepers* case featured SACE and so did *CS-Swanepoel*, this time in a delictual claim emanating from a child sexual abuse case.
[129] See the *CS-Swanepoel* case para 61.
[130] See the *CS-Swanepoel* case para 61.
[131] See the *CS-Swanepoel* case para 62. This same behaviour is evident in inquiries by arbitrators for sexual misconduct. See *HOD, Department of Education, Eastern Cape v J Leisa* PSES893-18/19EC, where an educator arrogantly declined to present closing arguments, and the arbitrator found the educator guilty on the basis of the evidence submitted on behalf of the employer.
[132] See the *CS-Swanepoel* case para 62.

protection from harm. CS argued that the defendants failed in their duty by not properly vetting Swanepoel.[133]

The court dismissed the attempt to shift responsibility to SACE, emphasising that the duty to vet for registration does not imply a duty to protect CS and any other learner from harm.[134] The court held that the Western Cape Education Department could be vicariously liable for Swanepoel's actions because his assault was "sufficiently closely linked" to the educational business.[135] Despite the department's vetting process, Swanepoel's criminal history was not adequately screened, leading to criticism of the deficient application process.[136]

The ruling declared Swanepoel liable for the assault[137] and the Western Cape Education Department vicariously liable.[138] The department's vetting process was found deficient, resulting in liability for damages suffered by CS.[139]

Four key problems emerged from the *CS-Swanepoel* case. First, the fragmented role of SACE, the SGB, and the employer in managing sexual misconduct cases against educators was highlighted. Secondly, the failure to provide a proper educator dismissal dispute resolution for sexual misconduct perpetuated an abusive system. Thirdly, the relationship between the employer, educator, and learner depends on the contractual relationship. This supports the arguments made in this thesis. Fourthly, applying laws such as section 188A of the LRA and the quality of dispute resolution systems depends on the competence of arbitrators and presiding officers.

5.2.4.2 The Clarity of the Relationship between the Employer and Educator

The court held both the educator and the employer accountable for a sexual abuse incident against a learner that happened a decade previously.[140] This scrutiny of a historical event underscores the intricate nature of these cases, especially when minors are involved. The

[133] See the *CS-Swanepoel* case para 67. See also *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) para 122.
[134] The previous chapter discussed the role of SACE in terms of s 5 of the SACE Act, which includes the duty to register and develop educators and enforce ethical standards among them. The role of SACE is clearly confused with supervisory responsibility over educators that would deter educators from committing acts of sexual abuse against learners. The further issue is that the only persons able to discharge the duty to protect children are the school principal and the employer.
[135] See the *CS-Swanepoel* case para 86.
[136] See the *CS-Swanepoel* case para 73.
[137] See the *CS-Swanepoel* case para 65.
[138] See the *CS-Swanepoel* case para 73.
[139] See the *CS-Swanepoel* case para 72.
[140] See the *CS-Swanepoel* case para 73.

court assessed evidence to establish liability for the alleged wrongdoing and determine suitable damages. Notably, the court found the Western Cape Education Department responsible for Swanepoel's mismanagement.[141] The court referred to precedents, emphasising the employer's obligation to take prudent steps, including vetting a candidate before employment,[142] and ensuring a child's protection from potential harm within its premises.[143]

Drawing parallels to previous cases where employers were held vicariously liable for sexual abuse, the Constitutional Court's ruling in *Carmichele v Minister of Safety and Security* ("the *Carmichele* case")[144] exemplifies the duty to shield vulnerable community members. This thesis contends that the traditional employer-educator relationship exists under the employment contract. It only extends when a child is introduced, necessitating heightened diligence in managing educator conduct. The presence of a child does not alter the contractual relationship but merely introduces a condition of the execution of that relationship requiring judiciousness and diligence. Instances such as permitting male educators to transport learners alone or allowing unaccompanied children into educators' offices pose potential negligence by the employer, requiring judicious management.

[141] See the *CS-Swanepoel* case para 72.
[142] See the *CS-Swanepoel* case para 73.
[143] See the *CS-Swanepoel* case para 65, in which Sher J ruled: "As far as the remaining defendants are concerned, as opposed to the 1st defendant (who is liable by virtue of the positive commission of an act which amounts to a delict), their liability is predicated on an alleged omission which is phrased in the standard and generic terms of the wrongful and negligent breach of a legal duty which allegedly rested on them, to protect the plaintiff from harm." The court also considered the rulings in *Hawekwa Youth Camp and Another v Byrne* 2010 (6) SA 83 (SCA) para 22. The *CS-Swanepoel* case para 69 cited *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) ("the *Carmichele* case"), and pointed out that in *Carmichele*, "the Constitutional Court held that in our post-constitutional dispensation the test for the wrongfulness of omissions must be carried out with due regard for, and in accordance with, the spirit, purport and object of the Bill of Rights, in the context of a State founded on dignity, equality and freedom" (*Carmichele* paras 43-44). The Cape High Court added (*CS-Swanepoel* case para 71): "Subsequent to *Carmichele*, both the Constitutional Court and the Supreme Court of Appeal held in a number of instances that there was a legal duty on State organs to act positively to prevent harm to others [footnote 22 citing *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA), *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC)] and insofar as educators are concerned, in *Hawekwa* [para 25] the Supreme Court of Appeal endorsed the dictum of a full bench of this Court in [*Minister of Education and Another v Wynkwart NO* 2004 (3) SA 577 (C) 580A-C] that 'teachers owe young children in their care a legal duty to act positively to prevent physical harm being sustained by them'."
[144] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

5.2.4.3 Fragmented Roles of the Council for Educators, SGB, and the Employer

The employer, the SGB, and SACE were jointly sued for vicarious liability owing to concurrent jurisdiction. This overlapping authority has often blurred responsibilities, leading to role confusion among stakeholders. The SGB, though acknowledged as a school governing body, could not be implicated in managing educators in the *CS-Swanepoel* case besides the fact that CS did not prove the SGB's role in her claim,[145] aligning with the discussion in Chapter 4. The court noted attempts by the Western Cape Education Department to shift responsibility to SACE, exposing a fragmented system where parties encroach on each other's roles or deflect blame. This position conflicts with the concept of cooperative governance discussed in the *Scheepers* case. Even though CS did not succeed in holding SACE and the SGB liable in the lawsuit, it still underscores the challenges of multiple authorities exercising oversight over educators, creating confusion.

5.2.4.4 Failure of the Employer to Manage Educator Discipline

The court observed that Swanepoel evaded accountability because of an ineffective disciplinary hearing, highlighting a failure in the employer's discipline management.[146] The disciplinary process, marred by inadequacies and the educator's refusal to testify, failed to establish guilt, raising concerns about the dispute resolution system.[147] The court deemed the proceedings a travesty, emphasising the need for judicious implementation of laws to manage discipline effectively.[148] This finding echoes the concerns raised in the *Leeto* case discussed above, underscoring how inadequate preparation and prosecution can compromise justice, potentially allowing the guilty party to escape accountability.

5.2.4.5 Implications of Arbitrator and Presiding Officer Quality for Applying Laws

Linked to the issue above, this thesis asserts that educator dismissal disputes for sexual misconduct hinge on the quality of presiding officers. In the *CS-Swanepoel* case, the court criticised the presiding officer for failing to apply her mind and consider the evidence

[145] See the *CS-Swanepoel* case para 97, where the court discussed s 16(3) of the Schools Act.
[146] See the *CS-Swanepoel* case para 94.
[147] See the *CS-Swanepoel* case para 56. This thesis observes that the court was disappointed that the presiding officer did not find Swanepoel guilty after he refused to testify and, as a result, failed to refute CS's allegations against him. If the scales were to tilt judiciously, they would certainly tilt in favour of the testimony that was given – CS's evidence. Failing to testify could not save Swanepoel from an adverse finding being made against him.
[148] See the *CS-Swanepoel* case paras 72 and 73.

adequately.[149] She should have drawn an adverse inference against Swanepoel from his refusal to testify, which rendered CS's testimony against him unchallenged and valid. This thesis contends that signing collective agreements envisaged in section 188A of the LRA may not suffice if the system relies on subpar presiding officers. Sher J's observation underscores the need for skilled and competent arbitrators and presiding officers to resolve such disputes effectively and protect children's rights.[150]

In both the *Scheepers* and *CS-Swanepoel* cases, the Department of Education failed to initiate timely and effective disciplinary actions against the accused individuals. This lapse prompted the pursuit of civil remedies instead of relying on the provisions of the LRA.[151]

The *Scheepers* case showed the delay in commencing disciplinary proceedings against Scheepers, compelling the SGB to take illegal unilateral action.[152] However, the Constitutional Court deemed the SGB's actions erroneous, signalling the Department of Education's failure to manage the disciplinary process promptly and appropriately, and forcing the SGB to intervene in violation of proper procedures.[153]

Similarly, in the *CS-Swanepoel* case, the High Court censured the Department of Education for inadequately managing the disciplinary action against Swanepoel, accused of sexually abusing a 12-year-old.[154] The court emphasised the necessity for initiating the disciplinary process much earlier to prosecute Swanepoel for the alleged misconduct. The Department's failure implied a deficient approach to disciplinary matters, particularly in safeguarding children from sexual abuse.[155]

Consequently, the shortcomings in the employer's management of disciplinary processes led the affected individuals to seek redress through the civil legal system instead of relying on LRA remedies. This shift underscores a loss of confidence in the employer's ability to effectively address these sensitive matters internally.[156]

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[149] See the *CS-Swanepoel* case para 59.
[150] See the *CS-Swanepoel* case para 59.
[151] See the *CS-Swanepoel* case para 59. See also the *SGB-Scheepers* case paras 59, 72.
[152] This element is more elaborate in the *Scheepers-SACE* case to be discussed shortly.
[153] See the *SGB-Scheepers* case paras 17 and 71.
[154] See the *CS-Swanepoel* case para 62.
[155] See the *CS-Swanepoel* case para 62.
[156] To ensure the protection of children from sexual abuse, it is imperative that employers such as the Department of Education promptly and diligently address disciplinary actions against those accused of misconduct. Such proactive measures demonstrate a commitment to safeguarding students' well-being and maintaining a secure learning environment. Failure to address these issues effectively may compel victims to seek alternative justice through the civil courts, underscoring the importance of robust disciplinary measures to prevent such recourse.

Some of the critical observations that came from the *CS-Swanepoel* ruling are, first, the requirement for employers to judiciously vet educators who enter their schools in order to prevent criminal elements from preying on children. Secondly, the employer plays a key role as part of the state in managing educators judiciously and protecting children from errant educators; otherwise, the state risks being exposed to vicarious liability claims. Thirdly, the employer is responsible for selecting competent, qualified presiding officers who apply their minds to issues before them in disciplinary hearings. The risk is obtaining faulty rulings that expose the employer to vicarious liability lawsuits. The presiding officer failed to draw an adverse inference from the conduct of an educator who refused to testify and who failed to challenge the version of a sexually abused child. That failure to draw an appropriate adverse inference was inconsistent with the qualities of a competent presiding officer. Fourthly, it is essential to run disciplinary proceedings promptly and effectively. From these insights, the discussion now turns to the fragmented role of critical persons, including SACE, the SGB, and the employer. The analysis so far will be juxtaposed with a further analysis of the *Robertson* case, where the complexities are amplified in a High Court case.

5.3 The Fragmented Role of the Employer, the SGB, and SACE

The dynamics among the employer, the SGB, SACE, and the ELRC often create a scenario where their respective mandates clash while pursuing common goals, namely, managing educator discipline, upholding teachers' labour rights, and safeguarding children's rights to dignity, protection from sexual abuse, and education. This scenario is vividly illustrated in both the *Scheepers* case[157] and the *Robertson* case, demonstrating the fragmented approach to managing sexual misconduct cases involving educators.[158] Whereas *Scheepers* focused on the SGB, *Robertson* explores the role of SACE, yet both cases underscore the recurrent theme of fragmentation.

5.3.1 Analysis of the *Scheepers-SACE* Case

Faced with challenges in dealing with Scheepers through the employer, the SGB took an alternative route by reporting him to SACE in the hope of instigating charges against him.[159]

[157] It must be noted that the *Scheepers* case did not involve sexual misconduct. Yet it did highlight the fragmented nature of the role-players in all disciplinary cases, including cases that may involve sexual misconduct by educators.
[158] The *Robertson* case is discussed soon after the present discussion.
[159] See the *Scheepers-SACE HC* case para 10. The broader background of this dispute is provided below.

This section of the discussion investigates the role of SACE in regulating educator conduct, particularly in sexual misconduct cases.[160] The discussion emphasises SACE's authority to revoke teaching licences and its interactions with crucial stakeholders.[161] The subsequent analysis examines the effectiveness and challenges of SACE's role in managing sexual misconduct in the South African education sector. As discussed in the previous chapter, the employer is bound by SACE's decisions, especially in deemed dismissal cases, under section 15(2) of the Educators Act.[162] However, the reverse is not equally true.

5.3.2 Background to the *Scheepers-SACE* High Court Case

The SGB, frustrated by delays, reported the matter to SACE, which relied on a report from the HOD that had not been acted upon.[163] Scheepers contested this process in the High Court, arguing that SACE's reliance on the HOD's confidential report was arbitrary and unauthorised. The High Court ruled against SACE,[164] a decision upheld by the SCA[165] and later the Constitutional Court,[166] which directed SACE to conduct an independent investigation, affirming its regulatory mandate.[167]

The pivotal issue was whether SACE's actions qualified as an "investigation" under the SACE Act.[168] SACE summoned Scheepers to a disciplinary hearing based on the HOD's pending investigation.[169] The court found this step problematic, as the process involved overlapping

[160] See s 5(c) of the SACE Act. See also the SACE Code of Professional Ethics as discussed in Chapter 4 of this thesis.
[161] See s (5)(c)(ii) and (iii)(cc) of the SACE Act: "Subject to this Act and the National Education Policy Act, 1996 (Act No. 27 of 1996), the council …, with regard to professional ethics– (ii) must determine a fair hearing procedure; [and] (iii) subject to subparagraph (ii), may … *(cc)* remove from the register for a specified period or indefinitely, or subject to specific conditions, the name of, an educator found guilty of a breach of the code of professional ethics."
[162] See s 15(2) of the Educators Act.
[163] See the *Scheepers-SACE HC* case para 1.
[164] See the *Scheepers-SACE HC* case para 32(1).
[165] See the *SACE-Scheepers SCA* case. The SCA issued a one-page order rejecting the SACE application because there were no reasonable prospects of success in the application.
[166] See the *Council for Educators-Scheepers CC* case para 40.
[167] See the *Council for Educators-Scheepers CC* case para 38.
[168] See the *Scheepers-SACE HC* case para 10. See also s 14(2)(b) of the SACE Act. In the *Scheepers-SACE* case para 21, notably, Loubser J observed that the SACE Act itself does not furnish a specific definition of the term "investigate". Consulting the *Oxford Advanced Learner's Dictionary* online, one finds that the verb "investigate" is defined as "to carefully examine the facts of a situation, an event, a crime, etc. to find out the truth about it or how it happened" (see Oxford Advanced Learner's Dictionary "Investigate" (2024)). Within the confines of this definition, it is difficult to assert that SACE investigated the complaint against Scheepers in the way that the SACE Act envisioned.
[169] See the *Scheepers-SACE HC* case para 10.

investigations by different state entities,[170] breaching principles of cooperative governance under section 41 of the Constitution.[171]

Loubser J emphasised the need for independent investigations to fulfil statutory duties justly.[172] He noted that the SGB's impatience stemmed from delays by the HOD,[173] who had not processed complaints against Scheepers, thus leaving him to pursue civil remedies rather than LRA avenues, as Newaj observed,[174] which might have been more appropriate had the HOD acted promptly. Given the circumstances, the only available route was civil remedies at the High Court, discussed in this chapter and elsewhere throughout this thesis.

An independent task team ("ITT") recommended charging Scheepers with misconduct and suspending him.[175] However, the HOD delayed releasing the report, prompting the SGB to lodge a complaint with SACE's ethics manager.[176] This delay, according to the SGB, was contrary to the interests of the school community (its learners, educators, and stakeholders) and led to further legal actions.[177]

Scheepers, aware of the potential severity of the SACE process, sought to prevent potentially excessive disciplinary measures.[178] His case hinged on PAJA principles, with the High Court and SCA focusing on whether SACE's actions constituted administrative action. The court

[170] See the *Scheepers-SACE HC* case paras 10 and 23. The HOD opposed the SACE application not only because of the breach of confidentiality of the report it had shared in confidence to the SGB and which SACE used but also because SACE had undermined the mutual trust and coordination of actions between the authorities.
[171] See the *Scheepers-SACE HC* case para 10.
[172] See the *Scheepers-SACE* case para 22. S 41(1)(e) of the Constitution, 1996 was discussed by Loubser J regarding cooperative governance between various organs of state. S 41(1)(e) requires all spheres of government and all organs of state within each sphere to respect the constitutional status, institutions, powers, and functions of government in the other spheres. Although conflicts and overlapping authorities may arise, it is crucial for all stakeholders to collaborate and strive for a fair and transparent process that upholds the integrity of the teaching profession while respecting the rights of those involved.
[173] See the *Scheepers-SACE* case para 22. Furthermore, s 41(1)(h)(iv) of the Constitution, 1996 requires all spheres of government and all organs of state within each sphere to cooperate with one another in mutual trust and good faith by coordinating their actions and legislation with one another. This thesis also observes that SACE's obligation to investigate its own case instead of relying on the employer's investigation report speaks to the fragmentation debate discussed throughout this study. This fragmentation creates duplication and possibly increases the secondary trauma of children who have to be interviewed by numerous authorities to obtain evidence with which to charge teachers.
[174] See Newaj (2022) *ILJ* 2190. Had the HOD promptly processed the SGB's complaints against Scheepers, the latter would have pursued LRA remedies if aggrieved.
[175] See the *Scheepers-SACE* case para 6.
[176] See the *Scheepers-SACE* case para 7.
[177] See the *Scheepers-SACE* case para 7.
[178] See the *Scheepers-SACE* case para 14.

concluded that SACE had exercised public power in summoning Scheepers to a hearing, thus meeting PAJA's requirements for judicial review under section 6.[179]

Loubser J identified grounds for review, such as failure to follow mandatory procedures, procedural unfairness, legal errors, and irrelevant or improper considerations.[180] Scheepers argued that SACE's actions were premature,[181] lacking an initial investigation as mandated,[182] and that the ethics committee's decision was improperly withdrawn, only to be reinstated without due process,[183] indicating bias.[184]

The court sided with Scheepers, finding that SACE had breached its own procedural requirements and acted unlawfully without employer support,[185] as the HOD had not formally proceeded.[186] Scheepers, therefore, faced a dual disciplinary risk, as both SACE and the HOD

[179] See the *Scheepers-SACE* case para 31.
[180] See the *Scheepers-SACE* case para 7. Scheepers' reliance on s 6(2)(e)(iv) of the Promotion of Administrative Justice Act ("the PAJA") was significantly bolstered by the SGB's submission of the complaint to SACE, accompanied by the independent task team report, which had been obtained from the HOD in strict confidentiality. It is crucial to acknowledge, however, that the SGB's decision to share the confidential report with SACE can be considered unauthorised and unwarranted. Despite their perceived justification stemming from concerns regarding the HOD's alleged delay in disclosing the report and taking appropriate action, the SGB's actions in this regard lacked proper authorisation and might raise concerns over the preservation of confidentiality. S 20(1)(eA) of the Schools Act further stipulates that, subject to the Schools Act, the governing body of a public school must adhere to any actions taken by the HOD in terms of s 16 of the Educators Act to address the incapacity of a principal or educator to carry out his or her duties effectively. In the *Scheepers-SACE* case, the SGB did not meet the requirement to adhere to the HOD's actions regarding complaints that had been levelled against Scheepers, and so the SGB exceeded its statutory authority. The SGB's authority was limited in that regard. This is the same argument raised in the *SGB-Scheepers* case in the SCA discussed above.
[181] See the *Scheepers-SACE* case para 7. See also s 5(c)(iii)(cc) of the SACE Act read together with s 15(2) of the Educators Act. It might have been believed that SACE would be quicker than the HOD to remove the apparent obstacle blocking the way of the SGB. He argued that when making this withdrawal and announcement, SACE indicated that the disciplinary investigation would need to start again from the beginning (de novo).
[182] See para 4.5 of Chapter 4 of this thesis for a discussion of SACE's role. See also s 5(c)(iii)(cc) of the SACE Act read together with s 15(2) of the Educators Act.
[183] See s 5 of the SACE Act. All educators in South Africa, whether in private, independent, or public schools, are required to register with SACE before they are allowed to teach in South Africa. As directed by the SACE Act, SACE has the authority to develop and review a Code of Professional Ethics for Educators, which serves to enforce professional ethics in the teaching profession in South Africa. Teachers must therefore abide by that Code. Apart from developing that Code, SACE is required to develop a fair procedure for any proceedings, investigations, hearings, and sanctions against educators.
[184] See the *Scheepers-SACE* case para 30. See also s 16 of the Educators Act.
[185] According to Loubser J in the *Scheepers-SACE* case para 25, administrative action encompasses any decision made or failure to decide by an organ of state, where such a functionary is empowered by the Constitution, 1996 or a provincial constitution or prescribed by legislation, or a natural or juristic person that exercises a public power or public function as granted by an enabling provision.
[186] See the *Scheepers-SACE* case paras 13 and 31.

sought hearings on the same grounds.[187] This conflict, as Loubser J noted, compromised his constitutional rights to a fair process.[188]

Ultimately, the High Court ruled that the complaint from the SGB to SACE was unauthorised, and that SACE's disciplinary proceedings were irregular and invalid, leading to their annulment.

5.3.3 Fragmentation Challenge in the *Scheepers-SACE* High Court Case

Examining this saga reflects the complexity of the concurrent authority of the employer (the HOD) and the SGB as the governing body of a public school. The *Scheepers* case against SACE brought out three issues. First, the SGB's frustration with Scheepers was insufficient justification to usurp the power of the HOD in dealing with the allegations against Scheepers. Secondly, the HOD's failure in the *Scheepers* case clearly showed the employer's reluctance to implement the Schools Act and the Educators Act requirements to maintain school discipline among educators. Consequently, the employer had often faced vicarious liability claims because, at times, it degenerated into aiding the abuse of learners by the educators whom the employer failed to discipline. Thirdly, the use of an investigation report produced by the HOD against Scheepers to prosecute him for professional misconduct was the highest form of neglect of duty by SACE. It amounted to the equivalent of defying the SACE Act, especially its section 14(2)(c). The High Court criticised SACE for failing to investigate on the basis of its own legislation, the SACE Act. This criticism was confirmed by the SCA and, finally, the Constitutional Court. Fourthly, the SACE could not reply on the HOD's report and was required by its own legislation[189] to begin investigation: this requirement brings out the fragmented nature of the basic education legislation, especially in regard to managing educator misconduct. By failing to rely on a report produced by the employer, the legislation creates duplication where the same witnesses, who may be children, interviewed by the employer may have to be interviewed by SACE because the proceedings stem from the same allegations. This fragmented position requires reflection and possibly amending the legislation to express a streamlined, well-coordinated approach. These challenges are discussed as themes at the end of the case analysis in this chapter, in paragraph 5.7. This thesis examines the key themes emanating from the above case analysis at the end of the *Robertson* case before the chapter concludes.

[187] See the *Scheepers-SACE* case para 24.
[188] See the *Scheepers-SACE* case para 24.
[189] See s 14(2) of the SACE Act.

5.4 The *SACE-Scheepers* Supreme Court of Appeal Case

It is important to note that after Loubser J's ruling in the High Court, the aggrieved SACE approached the Supreme Court of Appeal. The matter came before Mocumie JA and Weiner AJA on 24 March 2022. Their ruling ran to a single page. Having considered the Notice of Motion and the other documents filed, the court ordered:[190]

> Condonation as applied for is granted, the applicant for condonation is to pay the costs of the application.
>
> The application for leave to appeal is dismissed with costs because there is no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard.[191]

The SCA may have endorsed Loubser J's decision. However, the dispute did not end there. SACE proceeded to the Constitutional Court, where the discussion resumed.

5.5 The *Council for Educators-Scheepers* Constitutional Court Case

The Constitutional Court gave judgment in *Council for Educators v Scheepers* on 23 July 2023.[192] This was the final opportunity for the apex court to resolve this matter. The case involved an application for leave to appeal the High Court's ruling, which declared the disciplinary procedures initiated by SACE against Scheepers irregular and unlawful.[193] Scheepers, a school principal, had engaged in several disputes with the SGB and was subjected to an investigation conducted by an independent task team (ITT).[194] The ITT report recommended serious misconduct charges against Scheepers.[195] SACE conducted its investigation, but the High Court considered that it was not independent and infringed Scheepers's right to a fair trial.[196] As a result, the High Court set aside SACE's decision and ordered SACE to bear the costs.[197] The Constitutional Court dismissed SACE's application for

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[190] See the *SACE-Scheepers SCA* case. See also the *Council for Educators v Scheepers CC* case para 32, where the Constitutional Court observed that "[a]ggrieved by the outcome, SACE applied for leave to appeal to the Supreme Court of Appeal. That Court dismissed the application with costs on the grounds that there were no reasonable prospects of success and no compelling reasons why an appeal should be heard".
[191] See the *SACE-Scheepers SCA* case.
[192] See the *Council for Educators v Scheepers CC* case para 1.
[193] See the *Council for Educators v Scheepers CC* case para 1.
[194] See the *Council for Educators v Scheepers CC* case paras 2, 3, and 15 to 18.
[195] See the *Council for Educators v Scheepers CC* case para 18.
[196] See the *Council for Educators v Scheepers CC* case paras 3 and 20. The Constitutional Court acknowledged and affirmed the ruling of the High Court in the case of *Scheepers v Council for Educators* para 3.
[197] See the *Council for Educators v Scheepers CC* case para 27.

leave to appeal, holding that the question of whether a proper investigation was conducted was factually intricate and should be addressed on a case-by-case basis.[198] The Constitutional Court also noted that its view on the merits would not establish definitive principles for consistently applying SACE's disciplinary processes.[199]

It is also important to note that the Constitutional Court ruling sets out the architecture of the legislative enactments to the extent that SACE is not bound by the employer's decisions regarding educators. SACE is bound by its own legislation, the SACE Act. Even if the employer furnishes records of educators' misconduct as required by section 26(1) and section 26(2) of the SACE Act and section 26 of the Educators Act, SACE must still initiate its own processes, including an investigation.[200] SACE's reliance on the HOD's investigation process did not accord with the SACE Act.

5.6 Analysis of the *Robertson* Case and the Fragmented Public Schools System

5.6.1 Background to the *Robertson* Case

Arnold Robertson, the educator, was previously employed by the Western Cape Department of Education. He faced charges of sexual misconduct by his employer after he had made sexually explicit remarks directly to a Grade 7 learner.[201] He was found guilty of the offence in

[198] In the *Council for Educators v Scheepers CC* case para 20, the Constitutional Court observed that in September 2019, the South African Council for Educators (SACE) appointed Mr John Eastes and Mr Pierre Homan as an investigating panel. The panel's investigation commenced on 8 October 2019 and involved interviews with three individuals: Mr Greg Titus, allegedly a NAPTOSA official, and Messrs Büchner and Grobbelaar, who were members of the School Governing Body (SGB). However, the Department of Education refused to grant the panel access to the school, a step which consequently prevented them from interviewing any of the educators or learners involved. The Department's stance was influenced by its ongoing investigation, which it deemed to be of higher priority. It is undisputed that the panel members did not interview Mr Scheepers.

[199] In the *Council for Educators v Scheepers CC* case paras 37-41, the Constitutional Court, in considering the application for leave to appeal, adhered to the requirements for granting such leave as stated in *General Council of the Bar of SA v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC). For leave to be granted, the matter must raise either a constitutional issue or an arguable point of law of general public importance that warrants consideration by the Constitutional Court. The Constitutional Court emphasised that the interests of justice are central to the decision, and a careful evaluation of various factors, including the reasonable prospects of success, is undertaken. However, the Constitutional Court opined that the question of whether SACE properly exercised its investigative power in Mr Scheepers's case was a factual inquiry and should be assessed on a case-by-case basis. As a result, the Constitutional Court's view on the merits would not establish definitive principles applicable to all similar matters. Ultimately, the Constitutional Court decided to dismiss the applicant's application for leave to appeal, and costs were awarded accordingly.

[200] See the *Council for Educators-Scheepers CC* para 20. See also s 14(2)(b) of the SACE Act; s 26(1) and s 26(2) of the SACE Act, and s 26 of the Educators Act.

[201] In the *Robertson* case para 1, Arnold Robertson, the educator, was previously employed by the Western Cape Department of Education. On 20 August 2010, he received a final written warning and a two-month suspension without pay from the second respondent, in accordance with s 18(3)(d) and s 18(3)(f) of the Educators Act, for making sexually explicit remarks directly to a Grade 7 learner. After

accordance with section 18(3)(d) and section 18(3)(f) of Chapter 5 of the Educators Act. On 20 August 2010, he received a final written warning and a two-month punitive suspension without pay.[202]

After Robertson served his suspension and returned to work, his employer referred the case to SACE under section 26 of the Educators Act[203] and section 26(2) of the SACE Act.[204] Subsequently, SACE found Robertson guilty of professional misconduct breaching the Code of Professional Ethics.[205] Consequently, Robertson's name was removed from the register of practising educators indefinitely,[206] prohibiting him from working with children under section 21 of the SACE Act.[207]

However, the High Court overturned SACE's decision, citing procedural irregularities and unfair treatment. First, the court established that the educator was not provided with reasons for the sanction, which constituted a procedural irregularity. The court emphasised that without reasons, it could not assess the reasonableness of the decision.[208] Secondly, the court found that the educator was not afforded a fair procedure, as there was no evidence to suggest that his mitigation submissions were considered when imposing the sanction.[209] Lastly, the court emphasised that the educator was not allowed to present his case, as section 23(3) of the SACE Act required.[210] These procedural deficiencies rendered the decision unreasonable and unfair.[211] As a result, the court ordered Robertson's reinstatement as an educator under

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he had served his suspension, the Western Cape Department of Education reported his conduct to SACE, as required by s 26(2) of the SACE Act. Subsequently, SACE found Robertson guilty and removed his name from the register of educators. However, the High Court overturned SACE's decision, citing procedural irregularities and unfair treatment. As a result, the court ordered Robertson's reinstatement as an educator under certain conditions, including undergoing remediation and sexual therapy and submitting a report to SACE for registration on a three-month basis.

[202] See the *Robertson* case para 3. See also ss 18(3)(d) and 18(3)(f) of the Educators Act.

[203] See the *Robertson* case para 2. It is worth noting that the provisions of s 26(2) of the SACE Act oblige the employer to notify SACE of any disciplinary action taken against an educator, short of dismissal. See also s 26 of the Educators Act.

[204] See s 26(2) of the SACE Act.

[205] In the *Robertson* case para 3, after being found guilty of the offence by SACE, Robertson was given an opportunity to submit written submissions for sentence mitigation by 4 July 2011. Following his submission, on 7 December 2011, SACE informed Robertson that the decision had been made to remove his name from the register of educators indefinitely. This is the same fate that would have befallen Scheepers had SACE successfully discharged its processes as reported by the SGB.

[206] See the *Robertson* case para 3. See also s 5(c)(iii)(cc) of the SACE Act.

[207] See s 21 of the SACE Act. See also s 15(2) of the Educators Act.

[208] See the *Robertson* case para 29.

[209] See the *Robertson* case para 23.

[210] See s 23(3) of the SACE Act.

[211] See the *Robertson* case para 24. S 23(3) of the SACE Act provides: "The name of an educator contemplated in subsection (1) *(a)*, *(b)*, *(c)* and *(e)* may not be removed from the register unless the educator was given a reasonable opportunity to make representations to the council." In a certain sense, the legislature curtailed the powers of the Council from acting arbitrarily towards educators found guilty of professional misconduct.

specific conditions, including undergoing remediation and sexual therapy and submitting a report to SACE for registration on a three-month basis.[212]

5.6.2 The Challenges of Forum Shopping in Educator Misconduct Cases

In the *Robertson* case, the court observed that Robertson, a former educator of the Western Cape Education Department, resorted to the High Court, a civil court, to deal with a professional and labour matter because the ELRC had declined to hear his case.[213] The ELRC stated that it lacked jurisdiction to entertain the matter, as his employer had not dismissed him. The relevant text from the case was this:

> The applicant was found guilty and asked to submit mitigation by 4 July 2011. On 7 December, SACE notified him of removal from the educator roll with no reasons given.[214]
>
> A letter on 10 February 2012 informed him of 'deemed resignation' under section 15(2) of the EEA. After failing to get union support, he sought assistance from Legal Solutions and later referred the matter to the ELRC, which declined due to 'undue delay' and concluded he was not dismissed.[215]

Paragraph 3 of the judgment shows the decision taken by SACE to remove Robertson from the register of practising educators; essentially, this decision indefinitely withdrew his licence to teach.[216] This is the harshest sanction that SACE can impose on any educator found guilty of professional misconduct under the SACE Act.[217] It permanently removes the educator from the teaching profession.

Paragraph 4 of the judgment shows that the employer decided to dismiss Robertson following the SACE decision to remove him from the SACE register indefinitely. One would argue that the employer's decision was non-consequential but rather a paper trail because the employer could not override the SACE decision. Even if the ELRC had heard the matter, as Robertson had referred it to the ELRC, this would still not make any difference, as neither the employer nor the ELRC has the power to overturn SACE decisions. Nonetheless, once again, the

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[212] In the *Robertson* case para 26. The court also reviewed the sanction imposed by SACE and judged it unfair, as the applicant was not provided with reasons for his removal from the register and was denied an opportunity to present his case to SACE, as required by s 23(3) of the SACE Act, explaining why he should not be removed from the register.
[213] See the *Robertson* case para 5.
[214] See the *Robertson* case para 3.
[215] See the *Robertson* case para 4.
[216] See the *Robertson* case para 4.
[217] See s 23(3) of the SACE Act. See also s 15(2) of the Educators Act.

withdrawal of the licence to teach has the same effect as and is even more severe than the decision by the employer to dismiss.

One gathers from the quoted paragraphs that Robertson laboured under the operation of law, particularly section 15(2) of the Educators Act discussed in the preceding chapter of this thesis. Under section 15(2), once an educator is struck off the register of practising educators by SACE, he is deemed to have resigned from his job. This is akin to a forced resignation. This outcome was clearly set out in the letter that Robertson received from the employer dated 10 February 2012, notifying him that he had been deemed to have resigned from his employment as of 12 February 2012 by operation of law under section 15(2) of the Educators Act.

He saw his doors bang shut. His employer shut his door to the classroom. Then his union, the South Africa Democratic Teachers Union (SADTU), declined to assist him. Next, the ELRC refused to take his dispute: he had filed his application late, and had not been dismissed, so the ELRC lacked jurisdiction to entertain his case. It is important to emphasise that the employer, the teacher union (SADTU), and the ELRC are all LRA institutions with the power to process an employment dispute.[218]

The differences between Robertson and *Itumeleng Sydney Motlhabane v Department of Education – Free State* ("the *Motlhabane* case")[219] are striking. In *Motlhabane* the employer conducted an internal disciplinary hearing leading to a dismissal. At the same time, SACE pursued its own inquiry, apparently in parallel proceedings. Motlhabane appeared before SACE on 24 June 2017 on similar charges levelled against him by the employer. It is recorded that the SACE process removed him from the register indefinitely.[220] However, by 24 June 2022, Motlhabane averred that he had not been informed about the SACE sanction, but the employer was aware of his indefinite removal from the register of practising teachers.[221] Motlhabane was on paid suspension from September 2016 until his dismissal on 18 March 2018.[222] Despite the outcome of his hearing, he remained employed until his employment was

[218] See s 37 of the LRA.
[219] See *Itumeleng Sydney Motlhabane v Department of Education – Free State* ELRC 190-20/21FS ("the *Motlhabane* case").
[220] See the *Motlhabane* case para 14. "An instruction was issued by SACE (South African Council for Educators), dated 20 March 2018, after a SACE disciplinary hearing was held on 24 June 2017 for the same or similar charges (paragraph 11), in terms of which the Respondent was informed that the Applicant was struck off the roll of educators and that his name was submitted to the Department of Social Development that he was to be listed on the register as a person unfit to work with children."
[221] See the *Motlhabane* case para 14.
[222] See the *Motlhabane* case para 21.

terminated.[223] This thesis surmises that the cases of SACE and the employer ran parallel, with the employer being fully aware of the SACE outcome, which effected termination by operation of law, but still afforded him an arbitration hearing, which Robertson was denied.[224]

Both *Robertson* and *Mothlabane* involved sexual misconduct by an educator against a learner. Motlhabane received a dismissal notice issued by his employer on 18 March 2018 following an internal disciplinary hearing[225] and also received this document:

> An instruction [which] was issued by SACE (South African Council for Educators), dated 20 March 2018, after a SACE disciplinary hearing was held on 24 June 2017 for the same or similar charges (paragraph 11), in terms of which the Respondent was informed that the Applicant was struck off the roll of educators and that his name was submitted to the Department of Social Development that he was to be listed on the register as a person unfit to work with children.[226]

There are glaring inconsistencies in managing *Robertson* and *Motlhabane*. The ELRC afforded Motlhabane an opportunity to be heard even though both cases were judged to be outside the forum's jurisdiction because neither educator was dismissed by the employer.[227] Instead, both Robertson and Motlhabane were dismissed by operation of law under section 15(2) of the Educators Act after being struck off the SACE register. These disparities are that ELRC heard the *Motlhabane* case instead of dismissing it for want of jurisdiction owing to the operation of law. By contrast, the *Robertson* case was thrown out by an LRA institution, the

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[223] See the *Motlhabane* case paras 17-20. "17. The only witness, Vuyisile Gubuza ('Gubuza'), testified that the Applicant's employment was terminated by operation of law, and he was not dismissed for misconduct. The dismissal of the Applicant, for misconduct, was not implemented, for reasons unknown, and he continued to be employed by the Respondent, and had received his salary until June 2020 ('A2'). 18. Subsequent to the failure to implement the dismissal, the Respondent received correspondence from SACE that it had concluded the Applicant's hearing under its own auspices for allegations of sexual misconduct, and that the finding was that the Applicant was to be removed from the roll of Educators and registered with the Department of Social Development as an individual considered unfit to work with children. 19. The Respondent received the aforementioned instruction from SACE, which document was dated 20 March 2018. Despite this instruction, the Applicant continued to be paid his salary until June 2020, but did not return to work as an Educator. The Applicant's services were ultimately terminated, and on [perusal] the date of termination was backdated to 14 May 2018. The Respondent only implemented the termination when it became aware of an administrative error that had the Applicant receive a salary until June 2020."

[224] The differences between *Robertson* and *Motlhabane* highlight an inconsistency. In the *Motlhabane* case, the employer conducted an internal disciplinary hearing leading to dismissal while a parallel inquiry by the Council for Educators was ongoing. Both Motlhabane and Robertson had their contracts terminated by operation of law. However, Motlhabane was afforded a full arbitration under the auspices of the ELRC, which Robertson was blatantly denied. Despite the ruling in Motlhabane's arbitration case that he was not entitled to an LRA remedy in a full hearing, it is inconsistent practice for the employer to have denied that opportunity to Robertson. The disparities in the treatment of cases with similar circumstances are concerning, and this thesis argues that this aspect should be streamlined.

[225] See the *Motlhabane* case para 12.

[226] See the *Motlhabane* case para 13.

[227] See the *Motlhabane* case para 13 and the *Robertson* case para 4.

ELRC, and by the Labour Court. This suggests that the ELRC saw its jurisdiction to manage Robertson's case only in instances where he had been dismissed. Yet Robertson was only suspended,[228] and the ELRC still heard the case and ruled that he had been dismissed by operation of law.[229]

However, it is also notable that, for lack of consistent application of the law, Robertson and other educators often wander in the dark, seeking a forum to ventilate their employment disputes, and end up in civil courts in what this thesis calls forum shopping.[230] The decisions of SACE in terms of section 15(2) of the Educators Act do not result in an employment dispute and cannot be resolved by LRA remedies. These disputes end up in civil courts, as happened in the *Robertson* case. In the final analysis, it is essential to consider the key themes emanating from the case analysis above, highlighting the emerging critical issues and themes and how they assist in effective dispute resolution of cases of educator sexual misconduct against learners in the public school sector.

5.6.3 Deemed Resignation Jurisdiction in the *Robertson* Case

The challenges of deemed resignation cases in terms of section 15 of the Educators Act have previously been discussed.[231] In *Robertson*, involving an educator from the Western Cape Education Department,[232] the court observed his resort to the High Court for managing a professional and labour matter after the ELRC declined jurisdiction owing to his deemed dismissal by the employer.[233]

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[228] See the *Robertson* case para 4.
[229] See the ELRC arbitrator's ruling in the *Motlhabane* case paras 34 and 35, where he stated: "34. The Applicant, Itumeleng Sydney Matlhabane, was unable to establish that he was dismissed by the Respondent on allegations of misconduct. 35. The Applicant's employment was terminated by operation of law, and the Applicant is deemed to have resigned." This thesis notes the glaring disparities in the ELRC's treatment of similar cases and suggests that these disparities need to be resolved for a more efficient dispute resolution system in the public schools' sector.
[230] In the *Robertson* case para 4, the court showed that prior to the SACE process, Robertson sought assistance from his trade union, SADTU, who failed to provide support for reasons unknown. He also attempted to approach the ELRC as a bargaining council but was informed by the ELRC that his case did not involve dismissal. The ELRC's refusal to grant his condonation application owing to a late lodging of the case further complicated the matter, but the reasons behind this decision remain unclear. As the ELRC and later the Labour Court did not find that dismissal had occurred, Robertson was barred from pursuing the LRA route and, like Scheepers in both the *Scheepers-SGB* case and the *Scheepers-SACE* case, he was compelled to seek common-law remedies under the PAJA.
[231] See para 3.5.3 of Chapter 3 for a discussion of deemed resignations. See also para 1.2.3.3 of Chapter 1 in which the *Robertson* case is discussed.
[232] See the *Robertson* case para 3.
[233] See the *Robertson* case para 3.

Regardless of whether SACE withdrew the teaching licence or the employer had deemed him dismissed by the actions of the regulator, the educator could not return to the classroom. The situation, rooted in the Educators Act, results in a professional regulatory cul-de-sac. Locked out of the LRA processes by section 15 of the Educators Act, Robertson's only recourse was to approach a civil court to address this fragmented situation. The actions of SACE and the employer contribute to disparities, leading to multiple forums dealing with a combination of employment and professional statutory regulatory disputes created by concurrent jurisdiction.

The *Robertson* case brought out three key issues important to this study. First, marked disparities between sanctions meted out to educators by the employer and the SACE reflect a fragmented public schools sector. The employer imposed a punitive sanction on Roberston. For the same offence, SACE struck him off the register of practising educators, which prevented his return to the classroom, tantamount to indirect dismissal. Secondly, SACE's reluctance to implement its legislation reoccurs in the *Scheepers* case regarding section 14(2) of the SACE Act, as it did in the *Robertson case* concerning section 23(3) of the SACE Act.[234] The courts in both situations criticised SACE's reluctance to afford procedural rights to educators. Thirdly, the decisions of the employer are not as binding on SACE as the decisions of SACE are on the employer, which creates the serious challenge of unevenness and fragmentation discussed throughout this chapter. This position reflects a fragmented public-school system. These themes are explored in paragraph 5.7 below.

5.7 Unravelling the Complexities of the Fragmented Landscape of Oversight

Building upon the preceding analysis, this section of the discussion examines the spectrum of cases considered, ranging from the *Scheepers-SGB HC* case, the *SGB-Scheepers SCA* case, the *Scheepers-SACE HC* case, the *SACE-Scheepers SCA* case, and the *SACE-Scheepers CC* case to the *CS-Swanepoel* case, the *Leeto* case, and the *Robertson* case. Through this exploration, myriad challenges within the education sector unfold, exposing the intricate dynamics of the disciplinary process involving educators charged with sexual misconduct towards children. Critical themes and challenges encompass a fragmented oversight structure, lackadaisical employer approaches to disciplinary processes, complex issues stemming from overlapping authority over public school teachers, clarification on disciplinary authority over educators, the principle of cooperative governance and meaningful engagement, negligence and tardiness contributing to the neglect of LRA remedies, the employer's role in cases of educator sexual misconduct, the extended traditional relationship

[234] See ss 14(2) and 23(3) of the SACE Act.

between educators and employers, and disparities in the treatment and sanctioning of educators for sexual misconduct cases between employers and SACE. Subsequent discussion comprehensively explores each of these intricate aspects.

5.7.1 Overlapping Authority over Public School Teachers

It is submitted that the Grey College saga highlights several pertinent legal issues in the domains of overlapping administrative law, labour law, and education law principles when discipline is meted out to public school teachers. Viewed from an employer-employee perspective, it became clear that the Department of Basic Education (DBE), the SGBs of public schools, and SACE exercise overlapping authority over public school teachers. Even though teachers are covered by the provisions of the LRA and the dispute resolution procedure of public service bargaining councils,[235] numerous cases end up being resolved in the High Court on administrative law grounds.[236]

In the *Scheepers* case, the employer again faltered by not initiating a disciplinary process against an educator and principal, despite a commissioned investigation confirming that Scheepers had a case to answer.[237] This lapse led to a series of lawsuits involving taxpayers' money and burdening the courts unnecessarily. Such cases often prompt forum shopping, with litigants seeking alternative avenues to pursue claims, thereby circumventing the appropriate forums, such as the processes and institutions outlined in the LRA.[238] The *Robertson* case exemplifies this struggle, as LRA institutions initially denied him an audience until he sought relief through a civil court, ultimately achieving success. This thesis argues that all role-players ought to appreciate the role of democratisation, cooperative governance, and meaningful engagements to discharge their respective duties effectively. This approach avoids encroaching on one another's roles or stepping on their toes. This aspect will soon be discussed.

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[235] See ss 35 to 38 of the LRA regarding the establishment and the dispute resolution functions of bargaining councils in the public service.
[236] Apart from the Grey College matters, see also *Arnold Z Robertson v South African Council for Educators, Western Cape Department of Education, and Department of Basic Education* 15547/2013 ("the *Robertson* case"); *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* (CCT33/18) [2019] ZACC 3 (7 February 2019); (2019) 40 ILJ 773 (CC); 2019 (4) BCLR 506; *Phenithi v Minister of Education and Others* 2008 (1) SA 420 (SCA).
[237] See the *Scheepers-SACE* case para 29: "[T]he SGB may justifiably have felt that the HOD was dragging its feet in disclosing the report and to take appropriate action [against Scheepers] in the wake thereof…."
[238] See the *Robertson* case para 4.

5.7.2 The Lack of Clarity on the Disciplinary Authority over Educators

Both the High Court and, subsequently, the SCA clarified that the principal, as an educator, was under the direct supervision of the HOD and not the SGB.[239] Instead, the principal's role towards the SGB was to assist. Specifically, section 16A(2)(d) of the Schools Act requires that the principal assist the governing body in managing disciplinary matters concerning learners.[240] The SGB's attempt to curtail the principal's role in discipline management exceeds its authority, as the Schools Act explicitly requires the principal to contribute in this regard. The lack of clarity on the SGB's definition of "management of discipline" further complicated the matter.[241] The SCA underscored the need for stakeholders to understand the principal's role in a school, as outlined in the Policy on the South African Standard for Principalship, which is central to creating and implementing a shared vision, mission, and strategic plan in collaboration with the SGB, the Senior Management Team (SMT), and the parents.[242] This task involves inspiring and motivating all stakeholders while providing direction for ongoing school development. The SGB's decision to strip the principal of management functions related to the vision, mission, and values, as mandated by the Schools Act, was an overreach.[243]

Although the SGB plays a crucial role in school governance, its authority regarding disciplinary actions against state-employed educators is limited. The power to discipline educators rests primarily with the employer, which is typically the provincial department of education.[244] The SGB's involvement in disciplinary matters is mainly advisory, and it may assist in the process when called upon to do so.[245] This distinction becomes particularly relevant in cases of educator sexual misconduct.

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[239] See the *SGB-Scheepers SCA* case para 72.
[240] See the *SGB-Scheepers SCA* case para 59. See also s 16A(2)(d) of the Schools Act.
[241] See the *SGB-Scheepers SCA* case para 72.
[242] See the *SGB-Scheepers SCA* case paras 58, 59, and 72.
[243] See the *SGB-Scheepers SCA* case paras 58, 59, and 72.
[244] S 16(A)(1) of the Schools Act accordingly provides: "The principal of a public school represents the Head of Department in the governing body when acting in an official capacity as contemplated in sections 23 (1) *(b)* and 24 (1) *(j)*." In terms of s 16(A)(2)(e) of the Schools Act, "[t]he principal must …assist the Head of Department in handling disciplinary matters pertaining to educators and support staff employed by the Head of Department".
[245] See the *SGB-Scheepers SCA* case. After the High Court ruling, the SGB appealed to the SCA, which concurred with the High Court's reasoning. The SCA emphasised cooperative governance, aligning the SGB's role with democratic principles and participatory democracy. This thesis reflects on stakeholders' failure to understand cooperative governance principles, emphasising the SGB's pivotal role in upholding learners' right to education. The SGB, epitomising grassroots democracy, facilitates meaningful participation in decisions affecting the right to education, echoing Constitutional Court sentiments.

5.7.3 Cooperative Governance and Meaningful Engagement

In the *Scheepers-SGB HC* case, the High Court emphasised the need for organs of state to engage in cooperative governance and meaningful engagement, essential to exhaust internal remedies before turning to the courts.[246] The SGB failed to engage meaningfully with Scheepers when he suggested that they deal with the dispute through amicable means. This case, however, did not end there. Musi AJP correctly observed that the SGB's decision on Scheepers "disturbs the delicate balance intended by the Act and in one foul swoop it created fertile ground for tension, strife, discontent and mismanagement of the school".[247]

The saga, including the *Scheepers v SGB HC* case, the *SGB-Scheepers SCA* case, the *Scheepers-SACE HC* case, the *SACE-Scheepers SCA* case, and the *SACE-Scheepers CC* case, highlights the challenges in understanding the democratisation of education in South Africa. The courts emphasised the necessity for cooperative governance and meaningful engagement among the HOD, SGB, educators, and SACE. In both the *Scheepers-SGB HC* case and the *Scheepers-SACE HC* case, the SGB adamantly resisted amicable dispute resolution and attempted to override the HOD's authority to discipline an educator, a stance rejected by the courts as unlawful.

5.7.3.1 Democratisation of Education

School governance now aligns with democratic principles, countering apartheid's legacy of authoritarianism.[248] The Schools Act mandates SGBs to make democratic decisions, involving consultations with affected stakeholders.[249] SGB members are elected democratically by parents, promoting participatory democracy to address past inequalities.[250]

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[246] See the *Scheepers-SGB HC* case para 43, where the court said that the first respondent (the SGB) "pointed out that in *Welkom* [para 162] … the Constitutional Court said the 'explicit provisions of s 41*(h)*(vi) of the Constitution, 1996 appear to require a form of exhaustion of internal remedies before organs of state within a sphere of government should turn to the courts'". The High Court further stated in the *Scheepers-SGB HC* case para 66: "The decision of the SGB in this case fantastically achieves the opposite. It deliberately minimised the role and input of one partner: the principal. It then inadvertently or by design created, at the same school, an additional principal, to not only manage some of its functions but also most of the functions that are reserved for the principal. The decision disturbs the delicate balance intended by the Act and in one foul swoop it created fertile ground for tension, strife, discontent and mismanagement of the school."
[247] See the *Scheepers-SGB HC* case para 66.
[248] See Sujee (2017) 94.
[249] See Sujee (2017) 94.
[250] See Sujee (2017) 94. See also s 54(3) of the Schools Act.

5.7.3.2 Cooperative Governance

Cooperative governance necessitates collaborative efforts among parties involved in school governance, supporting participatory democracy and the right to education. The Schools Act outlines how these parties must collaborate.[251] Constitutional Court cases, such as *Ermelo* and *Welkom*,[252] and now *Scheepers*, stress the partnership between the national government, provincial government, and parents in achieving educational objectives.[253] The stakeholders must collaborate in good faith, providing support, and consulting to prioritise learners' best interests.[254]

5.7.3.3 Meaningful Engagements

Meaningful engagements, integral to cooperative governance, involve constructive dialogue among parties to resolve issues.[255] The courts emphasised the practical and symbolic value of meaningful engagement, acknowledging that parties are better suited than courts to resolve governance issues.[256] In the *Welkom* case, the court ordered the SGB to meaningfully engage with the HOD when revising policies, emphasising collaborative efforts to create better policies aligned with constitutional and provincial guidelines.[257]

The matter of overlapping jurisdiction between the SGB and HOD persisted. Besides attempting to avoid the civil court remedy pursued by Scheepers in the High Court and SCA, the SGB sought to report the issue to the Council for Educators, as mentioned earlier.

5.7.4 Employer Delay Contributes to Neglect of LRA Remedies

This thesis also argues that had the employer, particularly the HOD, executed its responsibilities judiciously, the *Scheepers* case would not have been blown out of proportion.[258] This is the crux of the issue in the Scheepers case against SACE discussed above. More importantly, though, the SCA in the *SGB-Scheepers SCA* case held that the SGB

[251] See Sujee (2017) 94.
[252] See Sujee (2017) 81. See also the *Welkom* case para 39.
[253] See the *Scheepers v SGB HC* case, the *SGB-Scheepers SCA* case, the *Scheepers-SACE HC* case, the *SACE-Scheepers SCA* case, and the *SACE-Scheepers CC* case.
[254] See Sujee (2017) 95.
[255] See Sujee (2017) 95.
[256] See Sujee (2017) 95. See the *Welkom* case para 39.
[257] See the *Welkom* case para 39. See also Sujee (2017) 95, the *Scheepers v SGB HC* case, the *SGB-Scheepers SCA* case, the *Scheepers-SACE HC* case, the *SACE-Scheepers SCA* case, and the *SACE-Scheepers CC* case. See also the *Ermelo* case para 56.
[258] See the *Scheepers-SGB HC* case. See also the *SGB-Scheepers SCA* case.

was seen to be attempting to exercise disciplinary oversight over a principal despite lacking that legal authority.[259] In the process, the SGB violated Scheepers's procedural rights, creating an untenable situation. Generally, when the employer fails to execute its role either because of excessive delays,[260] failure to manage educators' behaviour, or failure to execute its responsibilities during disciplinary inquiries, the employer creates discord in the system. Many cases fall through the cracks, leaving children violated in the school system.

In some respects, the employer fails to discharge the duty to prosecute a case effectively, as reflected in the *CS-Swanepoel* case.[261] Here, the High Court criticised the Department of Education for failing to conduct effective disciplinary action against Swanepoel, who was accused of sexually abusing a minor. The court observed that the disciplinary process should have been initiated much earlier to prosecute Swanepoel for his alleged actions.[262] The employer's failure to do so suggests a lack of proper management of disciplinary matters, especially in protecting children from sexual abuse.

Because of the employer's shortcomings in managing disciplinary processes, individuals affected by sexual misconduct in these cases chose to pursue civil remedies through the courts.[263] Instead of relying on the remedies provided by the LRA, they sought justice through the civil legal system. This recourse indicates a loss of faith in the employer's ability to effectively address such sensitive and serious matters internally. Chapter 6 of this thesis firmly discusses these issues, showing that the employer has not executed its duty satisfactorily.

5.7.5 The Role of the Employer in Educator Sexual Misconduct Cases

The employer plays a pivotal role in executing legislative direction, implementing policies, and enforcing policies to actualise the broader objectives of international law and the constitutional mandate.[264] This responsibility encompasses safeguarding a child's rights to dignity, universal

[259] See also the *SGB-Scheepers SCA* case para 72.
[260] See *Mapyane v South African Police Service and Others* (JR 1948/19) [2023] ZALCJHB 344 (24 November 2023); (2024) 45 ILJ 564 (LC) ("the *Mapyane* case"). Mapyane contended that since the arbitrator found that the delay in instituting the disciplinary hearing was unreasonable, the arbitrator's conclusion that Mapyane's dismissal on charges four and five was fair was irrational. Mapyane alleged that the arbitrator failed to appreciate the negative impact of the delay, including the lapses in witnesses' memory with time, the death of Mapyane's main witness in respect of charge four, and difficulties in securing evidence to refute the allegations. This failure, Mapyane alleged, rendered his dismissal procedurally unfair, and also vitiated the decision to dismiss him. See also the Constitutional Court in the *Stokwe* case.
[261] See the *CS-Swanepoel* case para 97.
[262] See the *CS-Swanepoel* case para 72.
[263] See the *Robertson* case. See also the *CS-Swanepoel* case.
[264] See s 4 of the Educators Act.

education, and protection from various forms of abuse, particularly sexual misconduct by educators. The current legislative framework established by the employer comprises three enactments: the Schools Act, the Educators Act, and the SACE Act as previously discussed.[265] The *Scheepers* cases revealed that not all stakeholders in the school sector fully understand these statutes. As highlighted in preceding chapters, this thesis concentrates on evaluating the efficacy of this relevant legislation in achieving the constitutional and international law imperatives concerning the rights of children and educators' labour rights, specifically the right not to face unfair dismissal.

The chief duty to deal with the dismissal of educators charged with sexual misconduct falls squarely upon the employer, typically the school management, which includes principals and HODs. The Educators Act and related court cases outline the employer's responsibilities, which encompass investigating allegations,[266] initiating disciplinary proceedings,[267] and, if necessary, effecting dismissal where appropriate.[268] These multifaceted obligations are essential for upholding students' safety and well-being and the educational institution's integrity.

5.7.6 Extended Traditional Relationship between the Educator and the Employer

This thesis argues that the relationship between employers and educators is still traditional, emanating from the employment contract. The relationship extends beyond professional ties, incorporating a duty of protection towards children introduced as part of the employment conditions. It is an extended relationship because it introduces a child who is the responsibility of both the employer as the state and the educator as the parent. The contract of employment still controls this relationship. This argument is a departure from the view of De Villiers, who asserts that "it has to be recognised that schools are not traditional workplaces".[269] The Constitution, 1996 requires the state as the employer to safeguard children, and the employer *in loco parentis* is obliged to shield children from sexual abuse. This duty was underscored by the High Court in the *CS-Swanepoel* case, where the employer failed on multiple fronts,

[265] See the discussion of these statutes in Chapter 4 of this thesis.
[266] See item 7(10)(a), (b) of sch 2 to the Educators Act, which states: "For the purposes of the investigation and hearing, the representative of the employer may summon any person who– (a) may be able to give information of material importance concerning the subject of the investigation or hearing; or (b) has in his or her possession, custody or control, any book, document or object which may have a bearing on the matter."
[267] See item 7(1), (2) of sch 2 to the Educators Act, which states: "(1) The disciplinary hearing must be held within ten working days after the notice referred to in item 5 is delivered to the educator. (2) The presiding officer must be appointed by the employer."
[268] See ss 4, 17 and 18(3) of the Educators Act.
[269] See De Villiers (2021) 115.

leading to delictual claims for negligence.[270] First, the employer neglected to screen an educator with a prior criminal record, posing a potential threat to children and leading to subsequent sexual abuse.[271] Secondly, the employer fell short of executing its obligation to protect a child, as directed by the Constitutional Court in the *Carmichele* case,[272] from abuse by an errant educator and vice principal.[273] Thirdly, the employer's management of the disciplinary hearing in the *CS-Swanepoel* case was ineffective, with presiding officers failing to consider crucial factors and absolving Swanepoel of apparent sexual misconduct against a learner.[274]

5.7.7 Disparities in Treatment and Sanction of Educators

Nonetheless, for the same offence, Robertson's employer sanctioned him with a suspension,[275] but SACE meted out indefinite removal from the register of practising educators.[276] In practice, this step meant that Robertson would not return to work.[277] This outcome reflects the disparities in the system. This creates fragmentation even in the courts – either common law or LRA recourse. This position runs counter to Newaj's correct recommendation to cure the disparities by ensuring that all employment-related cases are confined to LRA remedies.[278] The disparity lies in the fact that owing to concurrent jurisdiction, an educator may be caught between the extremes of an employment or a professional regulatory sanction. The regulatory sanction still seems to carry more weight than the employer's sanction. Both the *Robertson* and the *Motlhabane* cases reveal the employer's content with SACE's removing the educators from the register so that the employers did not have to manage a disciplinary inquiry under the LRA. A few observations show that Robertson faced many challenges that blocked him from pursuing LRA recourse because, according to the ELRC and, subsequently, the Labour Court, his employer had not dismissed him. Hence, they had no jurisdiction to entertain his matter.[279]

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[270] See the *CS-Swanepoel* case para 97.
[271] See the *CS-Swanepoel* case para 96.
[272] See the *CS-Swanepoel* case para 69. See also the *Carmichele* case para 17.
[273] See the *CS-Swanepoel* case para 97.
[274] See the *CS-Swanepoel* case para 98.
[275] See the *Robertson* case para 2.
[276] See the *Robertson* case para 3.
[277] See s 15(2) of the Educators Act.
[278] Newaj (2022) *ILJ* 2217 correctly advised that the courts should not support the use of dual recourse, in this case, common-law and LRA recourse in employment disputes, save obviously for the regulatory professional disputes involving SACE. However, the entities, the employer and Council for Educators, should not arrive at sanctions that are far apart for the same offence.
[279] It is interesting for this thesis that Robertson attempted to approach both the ELRC and the Labour Court. The Labour Court dismissed his case on 7 June 2013: see the *Robertson* case para 5.

The *Mogola* case ruling reinforces the idea that if the Labour Court does not find jurisdiction within the LRA in an employment dispute, it may resort to legality principles rooted in the Constitution, 1996, ensuring fair treatment and the rule of law.[280] The *Robertson* case, however, faced challenges because of conflicting verdicts and sanctions from different regulators – the employer and SACE – both addressing the same set of facts.[281] This fragmented oversight system may lead to educators' being tried and penalised twice for the same misconduct, as seen in *Robertson's* case.[282] This thesis contends that legislative enactments, including the Schools Act, the Educators Act, and the SACE Act, need streamlining to establish a unified process, safeguarding educators' interests and right to fair labour practices. Yet the *Motlhabane* case reveals disparities because Motlhabane is said to have not been dismissed yet the ELRC entertained his case[283] – a privilege denied to Robertson.

5.8 Conclusion

This chapter extensively explores the role-players regulating educator dismissals for sexual misconduct and leads to a decisive conclusion. It is evident that the unwarranted appropriation of disciplinary power by SGBs over educators, particularly those employed under the Educators Act, should be categorically prohibited. Concurrently, the employer must discharge its responsibilities promptly and judiciously to ensure the protection of children from sexual abuse. Furthermore, educators must be treated equitably. The substantiation of these conclusions is firmly grounded in the following key findings.

First, the employer, the HOD, failed to discharge its duty to discipline an educator in terms of sections 4, 17, and 18 of the Educators Act, leading to a litany of cases in the High Courts, the SCA, and the Constitutional Court. The *Scheepers* saga reflected a fragmented system of managing teacher discipline in public schools.

Secondly, to ensure the protection of children from sexual abuse, it is crucial for employers, such as the Department of Education, to manage disciplinary actions promptly and diligently against educators accused of misconduct. [284] The employer failed dismally in the *Leeto*[285] and

[280] See the *Mogola* case para 33.
[281] See the *Robertson* case para 4.
[282] See the *Robertson* case para 4. This situation might be a double jeopardy.
[283] See the *Motlhabane* case paras 34 and 35.
[284] See s 28(1)(d) of the Constitution, 1996.
[285] See the *Leeto* case paras 27 and 28.

CS-Swanepoel cases,[286] exposing children to sexual abuse by errant educators. By prompt and diligent disciplinary actions, employers can demonstrate their commitment to safeguarding the well-being of students and maintaining a safe learning environment. Failure to effectively address these issues may result in victims' seeking alternative avenues for justice through the civil courts, which could have been avoided if proper disciplinary measures had been in place.

Thirdly, educators deserved to be treated similarly by the LRA institutions, especially the ELRC, as shown in the difference between how Robertson was treated compared to Motlhabane, where the former was denied an audience that was afforded the latter. Both had been deemed to have resigned in terms of section 15(2) of the Educators Act and not been dismissed, but the *Motlhabane* case[287] was heard by the ELRC and the *Robertson* case[288] was declined by the same forum.

Fourthly, education institutions' concurrent authority has often led to educators' being treated differently in terms of the sanctions meted out to them by the employer and SACE, as shown in *Robertson*. For the same offence, Robertson was suspended but also found guilty and subjected to indefinite removal from the register of practising educators.

The discussion now moves to critically evaluate the application of section 188A of the LRA and the role of the ELRC in educator dismissal disputes for sexual misconduct.

[286] See the *CS-Swanepoel* case para 97.
[287] See the *Motlhabane* case paras 34 and 35.
[288] See the *Robertson* case para 4.

Chapter 6: Evaluation of the Application of Section 188A of the LRA and the Role of the ELRC in Educator Dismissal Disputes

Page

6.1 Introduction 186
6.2 The Role of the ELRC in Educator Child Sexual Abuse Misconduct Disputes 186
6.3 Collective Agreement No. 3 of 2018 and Educator Sexual Misconduct Disputes 189
6.3.1 The Signing of the Collective Agreement 192
6.3.2 Insights from the Opening Sections of the Collective Agreement 195
6.3.3 The Scope Clause 1 of the ELRC Collective Agreement 198
6.3.4 Definitions and Interpretation 199
6.3.5 The Referral of Disputes and the Appointment of Arbitrators 200
6.3.6 The Procedures Applicable to Inquiries and Arbitrations 203
6.3.7 The Outcome, Judgment or Arbitration Award 207
6.3.8 The Dispute Resolution Procedure in Clause 6 208
6.4 Application of Section 188A in Educators' Child Sexual Misconduct Cases 209
6.5 Analysis of the ELRC's Role in the Application of Section 188A of the LRA 210
6.5.1 The Successes of the ELRC 211
6.5.2 Problems Securing Appropriate Venues 212
6.5.3 The ELRC's Role in Safeguarding Teachers' Labour Rights 213
6.5.4 The Appointment of Competent Arbitrators 214
6.5.5 Section 188A Process Can Prove Expensive 215
6.5.6 Lawyers Turning Arbitrations into Complex Litigious Processes 216
6.5.7 Frivolous Postponements of Arbitration Hearings 217
6.6 The Role of the Employer in the Application of Section 188A of the LRA 218
6.6.1 Failure to Implement Section 188A of the LRA Consistently 218
6.6.2 Misclassification of Misconduct Cases 221
6.6.3 Failure to Secure Witnesses and Corroborative Evidence in Arbitration Hearings 221
6.6.4 Parental Refusal to Have Children Testify in Sexual Misconduct Proceedings 223
6.6.5 Employer's Failure to Submit Closing Arguments in ELRC Proceedings 224
6.6.6 Employer's Failure to Prove Charges in Sexual Misconduct Cases 225
6.6.7 Employer's Short-Termism in Managing Sexual Misconduct Cases 226
6.6.8 Employer's Failure to Consider Learners' Plight in Non-Sexual Abuse Cases 227
6.6.9 Employer's Failure to Process Cases Timeously 227
6.7 Other Role-players in the Application of Section 188A of the LRA 228
6.7.1 Lack of a Collaborative Approach between the ELRC and SACE 228
6.7.2 ELRC Arbitration Awards Not Binding on SACE 228
6.7.3 SACE Exposing Children to Testifying Multiple Times 230
6.7.4 SACE Acquitting Educators Found Guilty by the Employer 231
6.8 The Role of Educators in Sexual Misconduct Cases 232

6.1 Introduction

The preceding chapter examined the dynamics of the role-players involved in adjudicating dismissal disputes of educators facing allegations of sexual misconduct against learners. The chapter illuminated the intricate interplay between the employer, the school governing body (SGB), and the Council for Educators (SACE), underscoring the resultant complexities and fragmentation in case management. The chapter emphasised the employer's negligence in vetting educators, managing disciplinary proceedings, and ensuring timely and judicious hearings, thereby exposing children to potential sexual abuse. The chapter highlighted the unequal treatment of educators within the fragmented public sector, subject to disparate sanctions by separate oversight authorities – the employer and SACE.

This chapter critically evaluates the application of section 188A of the LRA ("section 188A"), with a specific focus on its utilisation in implementing the ELRC Collective Agreement No. 3 of 2018 ("the ELRC Collective Agreement") to address sexual misconduct disputes. The assessment encompasses analysing the successes and challenges encountered in administering section 188A in sexual misconduct cases involving educators in public schools. The discussion draws insights from examining case law at the ELRC and in the courts. Additionally, this chapter builds upon the theoretical foundation established in Chapter 3 of the thesis, which explored employee dismissal and dispute resolution law, specifically emphasising the introduction of section 188A. Chapters 4 and 5 further provided frameworks for comprehending the legislative landscape governing teacher discipline and the roles played by various stakeholders, respectively.

6.2 The Role of the ELRC in Educator Child Sexual Abuse Misconduct Disputes

The mandate of the LRA encompasses delineating dispute resolution procedures and overseeing their implementation. Within the education sector, the ELRC assumes a role similar to that of the CCMA,[1] entering into collective agreements to address disputes specific to the sector.[2] This aspect is briefly discussed in this section of the discussion.

The enactment of the LRA and the subsequent establishment of institutions such as the CCMA were predicated on the idea that "the promotion of social dialogue [is] the most appropriate

[1] See s 115 of the LRA.
[2] See s 51(6) of the LRA, which states: "A [bargaining] council may enter into an agreement with the Commission or an accredited agency in terms of which the Commission or accredited agency is to perform, on behalf of the council, its dispute resolution functions in terms of this section."

way of managing not only the transition to democracy but also the changes which were unfolding in the workplace".[3] According to Benjamin, this emphasis on self-regulation is reflected in the composition and the processes of various bargaining structures.[4] Regarding the LRA, the bodies that engage in dispute arbitration are the CCMA and bargaining councils (BCs) or private agencies.[5] Under the new LRA, industrial councils have been renamed bargaining councils.[6] Renaming the councils was to provide for dispute settlement to be applied beyond the industry and private sector to include the public sector.[7] In terms of the LRA,[8] BCs may be specifically established by area or sector.[9] The private sector is viewed as an economic sector in which the government is not an employer, while the state is an employer in the public sector.[10] Bargaining councils are established when employers and employees' organisations converge and form a permanent forum for jointly regulating matters within their industry or area.[11]

The BCs and the CCMA, in the absence of these BCs, may arbitrate disputes related to unfair labour practices, interest disputes in essential services, and unfair dismissal matters.[12] The LRA[13] directs the establishment of a public sector bargaining structure called the Public Service Co-ordinating Bargaining Council (PSCBC), whose object is to perform functions in respect of those matters that

> *(a)* are regulated by uniform rules, norms and standards that apply across the public service; or
> *(b)* apply to terms and conditions of service that apply to two or more sectors; or
> *(c)* are assigned to the State as employer in respect of the public service that are not assigned to the State as employer in any sector.[14]

The PSCBC is a coordinating authority. Public service sectoral councils were also established under the LRA.[15] These include

> the Public Health and Social Development Sectoral Bargaining Council herein (the 'PHSDSBC') formerly known as the Public Health and Welfare Sectoral Bargaining Council

[3] See Benjamin (2013) *ILO* 7.
[4] See Benjamin (2013) *ILO* 7.
[5] See s 27 of the LRA. See also Anstey and Ngcukaitobi (2011) 26.
[6] See s 27(4) of the LRA. See also Van Niekerk and Smit (2019) 479.
[7] See s 27(4) of the LRA. See also Van Niekerk and Smit (2019) 479 and McGregor et al (2017) 259.
[8] See s 27(4) of the LRA.
[9] See Swanepoel et al (2008) 608.
[9] See Swanepoel et al (2008) 608.
[10] See McGregor et al (2017) 258.
[11] See McGregor et al (2017) 258.
[12] See s 28(1)(c) of the LRA.
[13] See s 36(1) of the LRA.
[14] See s 36(2) of the LRA.
[15] See s 37 of the LRA.

- PHWSBC,[16] the Education Labour Relations Council herein (the 'ELRC'), Safety and Security Sectoral Bargaining Council herein (the 'SSSBC') and the General Public Service Sectoral Bargaining Council herein (the 'GPSSBC').[17]

The scope of the SSSBC covers those employed in terms of the South African Police Service Act[18] and all support staff falling under the Public Service Act (PSA).[19] The scope of the ELRC covers all educators under the Educators Act.[20] The ELRC scope, however, does not cover support staff in the Department of Education and all those employed in terms of the PSA.[21] The scope of the GPSSBC comprises all employees not covered under the PHSDSBC, ELRC, and SSSBC sectors mentioned above.[22] The LRA also empowers the CCMA to accredit bargaining councils such as the ELRC to carry out the dispute resolution mandate within specialised sectors.[23]

The ELRC provides dispute resolution services in the education sector according to its Constitution. The ELRC Constitution provides for the use of negotiation and dispute resolution procedures, including negotiation, conciliation, and arbitration.[24] The council must resolve disputes following the LRA's object of providing for "the effective resolution of labour disputes".[25]

[16] See PHSDCBC (2022).
[17] See cl 1 of sch 2 to the LRA.
[18] See South African Police Service Act 68 of 1995.
[19] See the Public Service Act, 1994, published in Proc 103 in *GG* 15791 of 3 June 1994.
[20] See the Educators Act.
[21] See the Public Service Act, 1994.
[22] See cl 1 of sch 2 to the LRA. Notably, GPSSBC's scope covers uniformed soldiers; employees of the National Intelligence Agencies (the "NIA") and South African Secret Services (the "SASS") are exempted. One of the major roles of bargaining councils (BCs) is to engage in collective bargaining as a means of effective resolution of disputes. See also Bosch et al (2004) 231. The main goal of collective bargaining between an employer and a union is to reach consensus about certain matters and formalise their relationship by means of a collective agreement. A collective agreement regulates the rights and duties of the parties as well as the terms and conditions of employment of workers.
[23] See s 52(a) of the LRA. See also s 28(1)(a), (b), and (c) of the LRA. The powers and functions of bargaining councils are to conclude collective agreements; to enforce those collective agreements; and to prevent and resolve labour disputes. Following the accreditation of a bargaining council, the council may resolve disputes that are referred to it and that fall within its jurisdiction to handle. The bargaining council, once registered, can also apply for a subsidy to carry out the dispute resolution functions that it is mandated to perform in terms of the LRA and for training persons to perform those functions. See also cl 16 of the ELRC Constitution, the ELRC Collective Agreement No. 6, 2016. The conciliation procedures provide for the manner in which disputes may be lodged for conciliation, the period within which they ought to be lodged, and the period within which they must be conciliated. The disputes that may be conciliated are unfair labour practice disputes. When disputes are referred to the council, it must attempt to resolve these disputes through conciliation or arbitration if they remain unresolved.
[24] See cl 13 of the ELRC Constitution, the ELRC Collective Agreement No. 6, 2016.
[25] See s 1(d)(iv) of the LRA.

The ELRC Constitution also provides for arbitration processes to resolve disputes. Under clause 16, a dispute must be referred within 45 days of the aggrieved party's becoming aware of it, and the parties must agree on an arbitrator within ten days after that, or the General Secretary will appoint one.[26] With a promise of productive labour dispute resolution processes and outcomes, the ELRC is often buffeted by various challenges that derail the process.[27] These are discussed below after an appraisal of the ELRC Collective Agreement. The biggest challenge is handling sexual misconduct cases that require balancing the protection of children from sexual abuse by educators and the labour rights of educators not to be unfairly dismissed.

6.3 Collective Agreement No. 3 of 2018 and Educator Sexual Misconduct Disputes

This section of the discussion will briefly examine conceptual aspects of collective agreements and glean insights from the ELRC Collective Agreement. Then the discussion will touch on official statements from the principals involved in shaping the agreement. The LRA defines a collective agreement as

> a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand
> *(a)* one or more employers;
> *(b)* one or more registered employers' organisations; or
> *(c)* one or more employers and one or more registered employers' organisations.[28]

The first point to note in the definition is that the agreement must be in writing.[29] Secondly, it must pertain to the terms and conditions of employment or any other matter of mutual interest between the parties.[30] The definition then specifies which parties may enter into a collective

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[26] See cl 16(2)(f) and (j) of the ELRC Constitution, the ELRC Collective Agreement No. 6, 2016. The arbitration must be set down within 45 days after its registration, and the arbitrator must attempt to resolve the dispute. Parties to the arbitration may appear in person or through a legal representative. It is, therefore, important to emphasise that bargaining councils have the power to determine dispute resolution processes through collective agreements. See also s 51(9)(a) of the LRA, which explicitly permits bargaining councils to create procedures for resolving disputes. This implicitly acknowledges that procedures might vary between councils and between the CCMA and councils as long as they effectively, efficiently, and swiftly resolve disputes without compromising the rights enshrined in the LRA.

[27] See para 6.4 below.

[28] See s 213 of the LRA, the definitions section of the LRA, which defines a "collective agreement".

[29] The Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 69 explained that "collective bargaining is based on the need for individual workers to act in combination to provide them collectively with sufficient power to bargain effectively with employers. Individual employers, on the other hand, can engage in collective bargaining with their workers and often do so". See also Du Toit et al (2023) 354.

[30] See Du Toit et al (2023) 354, who observed that "terms and conditions of employment has been interpreted narrowly as referring only to express or implied terms of the contract of employment, in contrast to the physical conditions or circumstances of employment (See also *Godwin v Minister of*

agreement: a registered trade union, one or more employers, or one or more registered employer organisations. Thus, an agreement with an unregistered union, a group of employees, or a workplace forum cannot be a collective agreement.[31]

It is also important to affirm the nature and status of collective agreements as provided for in section 23 of the LRA. A collective agreement is legally binding on the parties to the agreement. The unreportable *Mthashana FET College v Education Labour Relations Council & others* ("the *Mthashana FET College* case")[32] is neither a sexual misconduct nor a basic education case but involves a Further Education and Training College (an FET College). Yet the principles laid out by the Labour Appeal Court in that case are critical to this thesis. The parties must appreciate not only the binding nature of collective agreements but also the supremacy of the bargaining council constitution over subordinate collective agreements.

The Labour Appeal Court stated a precedent on 14 July 2020 in the *Mthashana FET College* case.[33] The matter pertained to a dispute by Mr Cuthbert Thembinkosi Bhethelezi (Buthelezi), who was aggrieved by his suspension from duty by his employer, Mathashana FET College ("the College"), who accused him of alleged misconduct concerning absenteeism and maladministration. The Labour Appeal Court's landmark ruling bolsters the supremacy of collective agreements and, even more so, the constitution of a bargaining council.[34]

Buthelezi lodged the dispute with the ELRC for SDR (Selected Dispute Resolution) processes to resolve.[35] The College challenged the ELRC's jurisdiction because Buthelezi, as an

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Labour 1951 (2) SA 605 (N); *Wholesale Coal Supplies Ltd v Goodman* 1933 TDP 330)". See also *Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metalworkers of SA & others* (1995) 16 ILJ 349 (LAC); *Cresswell v Board of Inland Revenue* [1984] 2 All ER 713 (Ch) 720*b-d*) in which, in particular, the courts have consistently distinguished between "terms and conditions of employment" and mere "work practices" which are subject to the employer's discretion. See also *Transman (Pty) Ltd v Dick and Another* 2009 (4) SA 22 (SCA), where it was established that work practices, however, may evolve into tacit contractual terms. The standard test is whether an "officious bystander", asked whether the parties intended the term to be implied, would answer "of course".

[31] See Du Toit et al (2023) 353, who further assert in footnote 150 that such agreements, of course, bind the parties contractually.

[32] *Mthashana FET College v Education Labour Relations Council and Others* (DA2/2017) [2020] ZALAC 35 (14 July 2020); (2020) 41 ILJ 2594 (LAC); [2020] 11 BLLR 1116 (LAC).

[33] See the *Mthashana FET College* case.

[34] See the *Mthashana FET College* case para 19, where Phatshoane ADJP held: "I am of the view that the ELRC's constitution supersedes other collective agreements concluded in its chamber. Ordinarily, a collective agreement must be concluded in consonance with the constitution of a bargaining council and ought not to be in conflict with it. The various collective agreements referred to by Ms Naidoo cannot be construed as purporting to confer jurisdiction on the ELRC which it otherwise does not have. There is no provision in collective agreement no 1 of 2006 that extends the definition of an employee to other categories of employees other than educators. To hold differently may render the constitution of the ELRC an emasculate legal instrument. The ELRC could not act as a dispute-resolution forum in respect of parties that fell outside its constitutional registered scope as in this case."

[35] See the *Mthashana FET College* case paras 1-4.

assistant campus manager, did not fall within its registered scope.[36] Still, the ELRC ruled in Buthelezi's favour, a decision upheld by the Labour Court in a subsequent review.[37]

Specifically, Phatshoane ADJP in the Labour Appeal Court referred to sections 54(1) and 54(3) of the Continuing Education and Training Act ("the CET Act").[38] Buthelezi further argued that the PSCBC and the ELRC, as contemplated in section 54(3) of the CET Act, continued to be the bargaining council that determined salaries and conditions of employees until "such time as the parties would have agreed to establish a new structure relevant to the public colleges".[39] Unfortunately, the Labour Appeal Court did not see anything in section 54 of the CET Act that gave the ELRC or the PSCBC authority to determine Buthelezi's dispute, save only to determine salaries and conditions of service.[40]

As such, the collective agreements must be concluded in accordance with the constitution of the bargaining council and must not conflict with it. All the collective agreements[41] mentioned above, including the ELRC Collective Agreement No. 6 of 2016 ("the ELRC New Constitution") which replaced the lapsed ELRC Collective Agreement No. 1 of 2006, and the CET Act conflicted with the ELRC Constitutions, old and new.[42] Ultimately, the ELRC could not act as

[36] See the *Mthashana FET College* case para 4.
[37] See the *Mthashana FET College* case paras 2, 7, 8, 15 and 19. The ELRC Commission in ruling in favour of Buthelezi relied on several collective agreements (ELRC Collective Agreement No. 1 of 2006 (the ELRC Constitution); the ELRC Collective Agreement No. 5 of 2008; the ELRC Collective Agreement No. 1 of 2010; the ELRC Collective Agreement No. 5 of 2013 and the ELRC Collective Agreement No. 6 of 2016 (the ELRC new constitution) as well as the Continuing Education and Training Act 16 of 2006 (the "CET Act") and the Educators Act. The crux of the dispute centred on Collective Agreement No. 5, specifically cl 8.4 that provided for office-based specialists and campus managers beyond the general scope of the ELRC Constitution, which provides for educators employed in terms of the Educators Act, since Buthelezi was not an educator.
[38] See the *Mthashana FET College* case para 11.
[39] See the *Mthashana FET College* case para 7.
[40] See the *Mthashana FET College* case para 16. The LAC made a landmark observation which influenced its ruling that the constitution of the ELRC, as with any other bargaining council, was a supreme agreement which superseded any other collective agreement and it made no mention of the category of Buthelezi in its dispute resolution mandate. Instead, it provided for the state and those employees in respect of which the Educators Act applies. Further, sch 7, part D, item 16(2) of the Educators Act provides the registered scope of the ELRC, which comprises the state and those employees in respect of which the Employment of Educators Act, 1994 (Proclamation 138 of 1994) applies. The court further observed that the dispute resolution component of the CET Act is contained in s 21, which caters for college, lecturers, and support staff. If a dispute arises with respect to payment or employment conditions for a member of staff employed in terms of s 20(4), such a party ought to refer it to a relevant bargaining council in terms of the LRA, or, in the absence of such a bargaining council, to the CCMA.
[41] See the *Mthashana FET College* case para 13. See the ELRC Collective Agreement No. 5 of 2008; the ELRC Collective Agreement No. 1 of 2010; and the ELRC Collective Agreement No. 5 of 2013.
[42] See ELRC Collective Agreement No. 1 of 2006 (old) and ELRC Collective Agreement No. 6 of 2016 (new).

a dispute resolution forum for parties such as Buthelezi who fell outside its constitutional registered scope.[43]

This is the same rationale behind section 188A of the LRA and affirmed in the *Mchuba* case and *MSC Depots* case discussed in Chapter 3 of this thesis. Once an employee consents to pre-dismissal arbitration under section 188A, a binding tripartite agreement is formed among the employee, the employer, and the dispute resolution agency, such as the CCMA or ELRC, similar to a non-variation clause in contract law.[44] Some insights from the ELRC Collective Agreement will be explored before the discussion in this thesis turns to survey the official statements that came from the principals to the ELRC Collective Agreement. This section of the discussion analyses the ELRC Collective Agreement in nine sub-themes. The first theme pertains to the Preamble sections of the ELRC Collective Agreement. The second theme relates to signing the ELRC Collective Agreement (clause 8) and the effective date (clause 7) of the ELRC Collective Agreement. And the subsequent sub-themes will be based on clauses 1 to 6 of that agreement.[45]

6.3.1 The Signing of the ELRC Collective Agreement

Importantly, this ELRC Collective Agreement was signed in accordance with clause 8 and came into effect on 25 September 2018 when signed. The ELRC Collective Agreement is intended to provide "for compulsory inquiries by arbitrators in cases of disciplinary action against educators charged with sexual misconduct in respect of learners".[46] It establishes a comprehensive legal framework designed to protect the rights and well-being of learners and maintain the professionalism and accountability of educators in cases of alleged sexual misconduct. This Collective Agreement was signed by key representatives of the principals in

[43] See the *Mthashana FET College* case para 22. Phatshoane ADJP ruled that "[o]n the basis of the aforegoing analysis, it follows that the Labour Court was incorrect in holding that the ELRC had jurisdiction to determine Mr Buthelezi's unfair labour practice dispute as at 31 March 2014 when the ELRC adjudicated upon the dispute".
[44] See Chapter 3 para 3.7.5, where the *Mchuba* and *MSC Depots* cases are discussed. See also the *Mchuba* case para 6 and *MSC Depots* case para 15.
[45] The ELRC Collective Agreement assumes a structured format, encompassing eight distinct sections, each serving a unique purpose, which will be discussed subsequently. These sections encompass Scope, Definitions and Interpretation, Referral of Disputes and Appointment of Arbitrators, Procedures Applicable to Inquiries/Arbitrations, The Outcome/Judgment/Arbitration Award, Dispute Resolution Procedure, Date of Effect, and Signing of the ELRC Collective Agreement. Each of these sections assumes a pivotal role in delineating and governing the processes pertinent to cases of alleged sexual misconduct involving educators and learners. Collectively, these elements intrinsic to the ELRC Collective Agreement offer an indispensable foundation for comprehending its provisions. They collectively ensure a framework characterised by clarity, equity, and a judicious balance in addressing cases of alleged sexual misconduct involving educators and learners.
[46] See page 1 of the ELRC Collective Agreement.

the ELRC: HM Mweli, the Director General of Basic Education Department on behalf of the Department of Basic Education, and Mungwena Maluleke, the Secretary General of the South African Democratic Teachers' Union (SADTU) on behalf of the SADTU.[47]

The ELRC is composed of organised labour and the employer. Organised labour comprises seven teacher unions in the education sector weighted according to their votes in total membership.[48] The employer comprises the provincial education departments and the Department of Basic Education.[49] The total number of teachers represented in ELRC was 336 911 in 2019.[50] As such, the ELRC Collective Agreement is the agreement binding the employer and employer organisations and trade unions representing employees, being the educators in South Africa's public schools sector, as regards the date of the signing thereof. Soon after signing the ELRC Collective Agreement, the principals released official media statements confirming and affirming their commitment and intention to implement it.

The Department of Basic Education welcomed the ELRC Collective Agreement in an official statement on its website on 17 October 2018. The agreement was reached in collaboration with teacher unions and signifies a ground breaking development in South Africa's educational landscape.[51] This ELRC Collective Agreement was presented to the Portfolio Committee on Basic Education in Parliament.[52] During this presentation, the ELRC stressed the transformative potential of these agreements in establishing a secure learning environment for students while enhancing overall stability within schools.[53] This institutional support

[47] See item 8 of the ELRC Collective Agreement.
[48] See the ELRC Collective Agreement 1 of 2019. The nine provinces of South Africa comprise the Eastern Cape, Free State, Gauteng, Kwa-Zulu Natal, Limpopo, Mpumalanga, North West, Northern Cape, and Western Cape. The ELRC is composed of the following members: the Health & Other Services Personnel Trade Union of South Africa ("HOSPERSA") with 1 010 members; the South African Democratic Teachers Union ("SADTU") with 228 852 members; the National Professional Teachers' Organisation of South Africa ("NAPTOSA") with 36 699 members; the National Teachers' Union ("NATU") with 29 744 members; the South African Teachers' Union ("SAOU") with 26 775 members; the Professional Educators' Union ("the PEU") with 8 396 members; the Public Servants Association of South Africa ("the PSA") with 5 435 members; and the employer, comprising the Department of Basic Education ("the DBE") and the provincial education departments ("the PEDs").
[49] See ELRC Collective Agreement 1 of 2019 3.
[50] See ELRC Collective Agreement 1 of 2019 3.
[51] See South African Government (2018). In essence, the agreement introduces a one-stop arbitration process that replaces the internal disciplinary hearing within the Department of Basic Education. This innovative approach aims to minimise the trauma experienced by learners by sparing them from multiple testimonies. Consequently, it facilitates a more efficient and child-friendly mechanism for addressing cases of sexual misconduct by educators. By addressing these critical challenges, the ELRC Collective Agreement reaffirms the commitment to providing learners with a safer educational environment while bolstering the integrity and stability of South Africa's educational institutions.
[52] See the Parliament Portfolio Committee on Basic Education Committee meeting held on 17 October 2018 (The Parliament Portfolio Committee on Basic Education (2018)).
[53] See the Parliament Portfolio Committee on Basic Education Committee meeting held on 17 October 2018 (The Parliament Portfolio Committee on Basic Education (2018)).

underscores the significance of and commitment to these new measures, including the new regulation to prevent the re-employment of educators who are sexual offenders.[54]

One of the central issues that the agreement addresses is the reluctance of both children and parents to testify repeatedly in cases of sexual misconduct.[55] This reluctance may arise partly from the secondary trauma that learners often experience when recounting their traumatic experiences.[56] At the same time, the reluctance is also attributed to false accusations against educators and bribery by educator perpetrators.[57] This reluctance, in turn, led to a critical problem: a lack of witnesses and evidence for employers to act against the accused educators. This issue created a troubling gap in the previous system, allowing the possibility of sexual offenders re-entering the education sector.[58]

Mugwena Maluleke, the Secretary-General of the SADTU, one of the largest unions in the education sector, highlighted the significance of the collective agreements reached, particularly the ELRC Collective Agreement.[59] He emphasised that these agreements play a crucial role in ensuring the permanent employment of teachers while upholding children's right to quality education.[60]

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[54] See Schedule Prevention of Re-Employment of Former Educators Discharged or Deemed Discharged for Misconduct or Deemed Resigned GN 331 in *GG* 44433 of 9-04-2021 discussed in Chapter 1 para 1.1 of this thesis.

[55] See the Parliament Portfolio Committee on Basic Education Committee meeting held on 17 October 2018 (The Parliament Portfolio Committee on Basic Education (2018)), in which the Portfolio Committee "was, however, happy about the ELRC taking a good step in protecting young people from being exposed to secondary trauma" through the ELRC Collective Agreement.

[56] See South African Government (2018). See also the Parliament Portfolio Committee on Basic Education (2018).

[57] See South African Government (2018). See also the Parliament Portfolio Committee on Basic Education (2018): "In the same line of discussion, the issue of false accusations arose. A lot of cases were often taken as false accusations, whereas everyone knew they were not. However, bribes were rife, especially in rural and poor communities, and charges were dropped. Such cases were regarded as false, even though it was evident that a sexual violation had taken place. The Chairperson asked how such cases could be dealt with." Clearly, the Portfolio Committee wished to be realistic about the issue of false accusations. How could such cases be dealt with? This included cases where female teachers abused young boys. Essentially, if a case was dropped because of bribes but it was very evident that someone had committed a sexual crime, how should that person be dealt with by the law? In poor committees, an educator could just offer some amount of money to the parents of the abused child, and those parents would refuse to cooperate with investigators, leading to the closure of the file without a conviction.

[58] See Schedule Prevention of Re-Employment of Former Educators Discharged or Deemed Discharged for Misconduct or Deemed Resigned GN 331 in *GG* 44433 of 9-04-2021 discussed in Chapter 1 para 1.1 of this thesis.

[59] See SADTU Northern Cape (2018), where the SADTU official statement on the ELRC Collective Agreement is provided.

[60] One of the major achievements of these agreements is their direct alignment with the National Development Plan for Basic Education. This alignment not only aims to improve working conditions for educators but also prioritises the preservation of the constitutional rights of children, particularly under the provisions of the ELRC Collective Agreement. Additionally, these agreements address the

Furthermore, Advocate Luvuyo Bono, the President of the ELRC, pointed out a pressing issue that the agreements aim to rectify.[61] A significant challenge was educators leaving the system to access their pension benefits and then being reinstated. These cases have led to severe complications in the past.[62]

From these statements after the ELRC Collective Agreement was signed, it can be observed that it creates a binding agreement in terms of which its purpose and objects determine how sexual misconduct cases by educators against children will be processed.[63] The signing of the ELRC Collective Agreement was enthusiastically celebrated. However, the effectiveness of the ELRC Collective Agreement in achieving its intended purposes regarding the prosecution of educators facing charges of sexual misconduct is yet to be determined. The preamble to the ELRC Collective Agreement will now be examined.

6.3.2 Insights from the Opening Sections of the Collective Agreement

In the context of this legal analysis, the ELRC Collective Agreement offers significant insights into its provisions through seven salient elements, namely (1) the Signing of the ELRC Collective Agreement, (2) the Opening Sections, (3) Scope; (4) Definitions and Interpretation, (5) Referral of Disputes and the Appointment of Arbitrators, (6) Procedures Applicable to Inquiries and Arbitrations, (7) Outcome, Judgment or Arbitration Award, and (8) The Dispute Resolution Procedure. Initially, it underscores the agreement's core purpose, as articulated in

reintegration of teachers into the educational system and provide essential protection for learners against sexual predators.

[61] See the Parliament Portfolio Committee on Basic Education (2018).

[62] See the Parliament Portfolio Committee on Basic Education (2018). In summary, these collective agreements represent a significant step towards safeguarding the rights of both educators and learners, enhancing the quality of education, and streamlining the disciplinary process for educator misconduct cases. These agreements underscore the commitment of South Africa's education sector to providing a safe and supportive learning environment for all children. These agreements are designed to address these unfortunate situations and streamline the process. Specifically, the ELRC Collective Agreement introduces a unique arbitration procedure for cases related to educator misconduct involving learners. This innovative approach eliminates the need for internal disciplinary and appeal procedures, which are, however, still applicable to cases other than child sexual abuse, expediting the resolution process. This innovative approach ensures a more direct and efficient mechanism for addressing misconduct cases.

[63] See the Parliament Portfolio Committee on Basic Education (2018). Moreover, these agreements emphasise the protection of learners from any form of exploitation or harassment by educators. These agreements align with human rights principles and reflect the commitment of unions such as SADTU to safeguard learners from harm, particularly sexual harassment. The focus is on preserving the integrity of the teaching profession and preventing psychological trauma to learners who may have had to recount their experiences in multiple hearings.

the title: "ELRC Collective Agreement 3 of 2018 Inquiries by Arbitrators in cases of disciplinary action against educators charged with sexual misconduct in respect of learners".[64]

This title aligns partially with section 17(1)(b) and wholly with section 17(1)(c) of the Educators Act. Although section 17(1)(b) of the Educators Act relates to the dismissal of an educator found guilty of committing an act of sexual assault on a learner, student or other employee,[65] the ELRC Collective Agreement excludes sexual assault on other employees.[66] However, section 17(1)(c) of the Educators Act about the dismissal of an educator having a sexual relationship with a learner of the school where he is employed is wholly aligned with the ERLC Collective Agreement.

The title of the ELRC Collective Agreement resonates with the constitutional principles prioritising children's best interests, as stipulated in section 28 of the Constitution,1996,[67] and it also aligns with the LRA provisions facilitating inquiries by arbitrators instead of internal disciplinary proceedings, especially about allegations of sexual misconduct.[68] Nonetheless, this thesis argues that this Collective Agreement is a makeshift arrangement because it lacks longevity. Considering that collective agreements have expiry dates, as the *Mthashana FET College* case showed, it is more reasonable to develop legislation and regulations to deal with educators' serious misconduct.[69]

[64] See the ELRC Collective Agreement page 2. Note also that the provision in this agreement aligns with only parts of s 17(1)(b) of the Educators Act, which relates to sexual misconduct against learners. S 17(1)(b) and (c) of the Educators Act states: "(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; [or] *(c)* having a sexual relationship with a learner of the school where he or she is employed". S 17(1)(b) and (c) of the Educators Act excludes sexual misconduct committed against another employee.
[65] "(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; [or] *(c)* having a sexual relationship with a learner of the school where he or she is employed."
[66] See the Preamble to the ELRC Collective Agreement stating its purpose.
[67] See s 28(2) of the Constitution, 1996. The ELRC Collective Agreement, is a significant legal framework designed to address the intricate issue of inquiries conducted by arbitrators in cases involving disciplinary actions against educators accused of sexual misconduct with learners. This ELRC Collective Agreement is grounded in a comprehensive legal framework, including South Africa's Constitution, the LRA, the Educators Act, the Schools Act, and other pertinent legislation, international conventions, and codes of ethics.
[68] See s 188A of the LRA.
[69] See the *Mthashana FET College* case para 20. The Labour Appeal Court observed: "It is important to mention that the ELRC's Constitution, the ELRC Collective Agreement no 1 of 2006, lapsed on 23 August 2016. It was replaced by the ELRC Collective Agreement no 6 of 2016." This means that once the ELRC's Constitution expires, the ELRC Collective Agreement will automatically expire, as it is the primary or superior instrument, and the latter is a secondary or subordinate one. The question that arises is whether the public-school sector would be subject to such regulatory regimes.

Further, the following statement appears on page 2 of the ELRC Collective Agreement:

> **THE PARTIES NOTE AS FOLLOWS:**
>
> - Whereas the parties to this council are concerned that learners who are victims of alleged misconduct committed by educators, are often required to give the same evidence about the same events in several hearings in different forums exposing them to unnecessary mental trauma;
>
> - Whereas section 28 of the Constitution provides that the best interests of children are of paramount importance in all matters concerning the child;
>
> - Whereas section 188A of the Labour Relations Act provides for an enquiry by an arbitrator taking the place of an internal disciplinary enquiry.[70]

However, a notable absence in the agreement's initial sections pertains to explicitly mentioning and considering educators' rights. A closer examination of the ELRC Collective Agreement reveals that although it gives meaning to the right to basic education through legislation and upholds children's rights, it is imperative to concurrently uphold the rights of educators as employees.[71] This perspective rejects the view that a school environment departs from the conventional workplace paradigm. This is because cases such as *Leeto*[72] and *CS-Swanepoel*[73] secluded the employer and employee and held them accountable for an employment contract which bound them.[74] This thesis argues that the employer is held accountable by statute to protect children and anyone else in the school system from sexual abuse.[75] Educators, as employees, are entitled to a comprehensive array of employee rights, as enshrined in section 23 of the Constitution, 1996.[76] Consequently, any legislative regulation governing educator conduct must strive for a well-calibrated equilibrium that accommodates the imperatives of basic education, the rights of children, and the vested rights of employees, with particular emphasis on the principles of just cause and due process as codified in section 188A of the LRA.[77] It is essential to emphasise that educators accused of misconduct are

[70] See the ELRC Collective Agreement page 2 (original bolding). This opening statement within the ELRC Collective Agreement acknowledges the distress of learners who have experienced alleged misconduct by educators, reiterates the paramount importance of safeguarding children's best interests in accordance with s 28 of the Constitution, 1996, and expressly recognises s 188A of the LRA as the legal foundation for arbitrator-led inquiries. This means that the ELRC affirms the one-stop-shop provision of the LRA for the resolution of labour disputes.
[71] See s 23 of the Constitution, 1996 provides for the rights of workers.
[72] See Chapter 5 para 5.3. See also the *Leeto* case.
[73] See Chapter 5 para 5.3. See also the *CS-Swanepoel* case.
[74] See the *CS-Swanepoel* case paras 72 and 93.
[75] The introduction of children into the school environment just creates an environment in which both contractants must act responsibly to safeguard learners' vested interests. It is a collective responsibility.
[76] See s 23 of the Constitution, 1996.
[77] S 188 of the LRA provides for the principles of just cause and due process in conducting disciplinary proceedings against employees.

afforded the presumption of innocence until proven guilty, as stipulated in section 35(3)(h) of the Constitution, 1996.[78]

6.3.3 The Scope Clause 1 of the ELRC Collective Agreement

First, and specifically, in clause 1, the Scope clause delineates the parties and individuals governed by the agreement, encompassing employers, trade unions, and employees as expressly defined in the Educators Act.[79] Clause 1 states:

> **1. SCOPE**
> This agreement applies to and binds:
> 1.1 The Employer, as defined in the Employment of Educators Act 76 of 1998 as amended;
> 1.2 The Trade Unions in the Education Sector; and
> 1.3 All employees of the employer as defined in the Employment of Educators Act 76 of 1998, whether such employees are members of trade union parties to this agreement or not.[80]

Clause 1 fulfils all the requirements of section 213 of the LRA as it pertains to a collective agreement, which must consist of registered unions and employers.[81] Yet clause 1 also limits the educators covered by the ELRC Collective Agreement to educators employed in terms of the Educators Act.[82] This restriction excludes general employees and educators employed by the SGB. This means that if an educator who is not employed in terms of the Educators Act commits and is charged with sexual misconduct, his case may not be processed in terms of the ELRC Collective Agreement.[83] This possibility arose in *Mofokeng, Tosa Timpane Joseph v Free State Department of Education* ("the *Mofokeng* case").[84] The ELRC could not try an educator employed by the SGB for a case of alleged sexual misconduct against children.[85] This is also a case about the complexities of concurrent jurisdiction of numerous authorities

[78] S 35(3)(h) of the Constitution, 1996 provides: "Every accused person has a right to a fair trial, which includes the right- … *(h)* to be presumed innocent, to remain silent, and not to testify during the proceedings." All accused persons enjoy the presumption of innocence until the contrary is proven.
[79] See cl 1 of the ELRC Collective Agreement.
[80] See cl 1 of the ELRC Collective Agreement (original bolding).
[81] See cl 1 of the ELRC Collective Agreement.
[82] See cl 1 of the ELRC Collective Agreement.
[83] See cl 1 of the ELRC Collective Agreement. See ss 20(4), (5), (7A), (11) of the Schools Act, especially subsection (11), which excludes SGB-appointed educators from the jurisdiction of the Educators Act.
[84] See *Mofokeng, Tosa Timpane Joseph v Free State Department of Education* ELRC 36-20/21FS (the *Mofokeng* case").
[85] See the *Mofokeng* case para 71, where the arbitrator stated that "[t]herefore, by failing to establish the employment relations between the Applicant and the Respondent, the matter cannot be considered under the auspices of the ELRC". It should be remembered that this educator had been charged with serious child sexual abuse. This is why this thesis considers this ELRC Collective Agreement a makeshift arrangement poorly conceived.

over educators creating disparities within the system – dealt with fully in Chapter 5 of this thesis.

The further problem is the scope of the ELRC Collective Agreement. It limits the scope to sexual misconduct cases, as if to suggest that other serious misconduct cases may not subject children to secondary trauma, being the central ethos of the agreement. This thesis argues that differentiating cases between those termed sexual misconduct cases and other serious misconduct cases such as corporal punishment and assault, or even negligence placing children at risk, may equally pose the risk of traumatic experiences. This trauma does not arise only from sexual misconduct cases.[86] The decision to include sexual misconduct cases only was a missed opportunity and a makeshift arrangement.

6.3.4 Definitions and Interpretation

Clause 2 of the ELRC Collective Agreement clarifies essential terminology, thereby enhancing the agreement's precision and lucidity. Clause 2 specifically provides for five definitions: the general secretary;[87] dispute resolution procedures;[88] employer;[89] learner;[90] and SACE.[91] Most of these definitions and interpretations are reasonably clear. However, the last definition, of SACE, introduces the complex element of SACE's concurrent jurisdiction with the employer over educators as raised in Chapter 1 of this thesis and dealt with fully in Chapter 5. Most arbitration rulings that find educators guilty of sexual misconduct direct the employer to furnish SACE with the arbitration award.[92] This directive is not as simple as it looks when examined from the perspective of SACE's withdrawal of the licence to teach;[93] the SACE Act;[94] and the role-players in the dismissal of educators charged with sexual misconduct against children, as mentioned in Chapter 1 of this thesis.[95]

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[86] See cl 1 of the ELRC Collective Agreement.
[87] See cl 2.1 of the ELRC Collective Agreement, which provides: "General secretary means the General secretary of the ELRC."
[88] See cl 2.2 of the ELRC Collective Agreement, which provides that dispute resolution procedures "means the dispute resolution procedures of the ELRC as contained in Part C of the ELRC Constitution of 2016".
[89] See cl 2.3 of the ELRC Collective Agreement, which provides that the employer "means employer as defined in the Educators Act or any person with delegated authority from the employer to institute disciplinary proceedings against educators".
[90] See cl 2.4 of the ELRC Collective Agreement, which provides that the learner "means any person receiving education or obliged to receive education in terms of the Schools Act".
[91] See cl 2.5 of the ELRC Collective Agreement, which provides that the SACE "means the South African Council for Educators, as intended by the SACE Act".
[92] See para 6.7.2 below.
[93] See Chapter 1 para 1.3.3.1.
[94] See Chapter 1 para 1.3.4.4.
[95] See Chapter 1 para 1.3.5.

6.3.5 The Referral of Disputes and the Appointment of Arbitrators

Clause 3 of the ELRC Collective Agreement introduces provisions related to the referral of disputes and the appointment of arbitrators.[96] These provisions have various strengths and weaknesses. One significant strength of Clause 3 is the requirement of mandatory arbitration in cases of alleged sexual misconduct by educators.[97] This mandatory arbitration ensures a consistent, impartial approach to managing such serious allegations, reducing the potential for bias that could arise from internal disciplinary processes.[98]

Clause 3 also provides a clear, structured process for initiating disciplinary action. It outlines the steps, starting with the completion of the ELRC form E12 and referral to the ELRC.[99] This requirement promotes transparency and due process by ensuring that educators are aware of the charges that they face. Clause 3 on the referral of disputes and the appointment of arbitrators provides for mandatory arbitration.[100] In every matter in which the employer seeks to take disciplinary action against an educator for allegedly committing sexual misconduct against a learner, it is mandatory to institute an inquiry by an arbitrator as intended in section 188A of the LRA and clause 32 of the Dispute Resolution Procedures of the ELRC. The employer must commence the disciplinary process by completing ELRC Form E12 and referring the matter for the ELRC General Secretary to convene a disciplinary inquiry in the form of an arbitration, which replaces the internal disciplinary inquiry. Attached to the E12 Form must be the employer's written proof that the referral was served on the educator[101] as well as the educator's proof that the educator has been advised in writing of the misconduct allegations and, if applicable, possible mandatory sanctions of dismissal prescribed by law.[102]

The Referral of Disputes clause 3 requires the compulsory use of arbitrator-led inquiries in cases involving alleged sexual misconduct against learners. This requirement is underscored by the agreement's alignment with prevailing legal frameworks and child protection

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[96] See cl 3 of the ELRC Collective Agreement.
[97] See cl 3.1 to 3.4 of the ELRC Collective Agreement.
[98] See cl 3 of the ELRC Collective Agreement.
[99] See cl 3.1 to 3.4 of the ELRC Collective Agreement. This clarity helps streamline the initial stages of addressing allegations, reducing ambiguity and possible delays. Moreover, the clause requires that the employer must provide written proof that the educator has been informed in writing of the allegations against him.
[100] See cl 3.1 of the ELRC Collective Agreement.
[101] See cl 3.2 of the ELRC Collective Agreement.
[102] See cl 3.3 of the ELRC Collective Agreement. Cl 17.2.1 to 17.2.3 of the Dispute Resolution Procedures then apply.

imperatives.[103] At the same time, though, one notable weakness of these provisions of the ELRC Collective Agreement is the lack of any provision allowing for educator input or response at this initial stage in the context of the *audi alteram partem* rule.[104]

Clause 3.5 of the ELRC Collective Agreement provides for the appointment of arbitrators. The General Secretary must consider the age of the child who is the victim as well as the nature and complexity of the charges against the educator.[105] In addition, the General Secretary must appoint an arbitrator who meets various requirements. Thus the arbitrator must have the competency to deal with the case at hand,[106] and sufficient knowledge of the relevant legal principles.[107] In addition, he must have sufficient experience of hearings involving minor children as witnesses and victims;[108] in evaluating and assessing child witnesses' evidence;[109] in hearings where intermediaries are used (if one may perhaps be appointed in the present matter);[110] and in hearings involving charges of sexual misconduct against children.[111] Matching the requirements for appointment, the provisions on acceptance in clause 3.6 prevent the arbitrator from agreeing to act in these disciplinary proceedings unless in possession of all the clause 3.5 appointment attributes, considering the child victim's age and the nature of the educator's charges.[112]

These provisions specify several crucial requirements for arbitrators, taking into account the sensitive and complex nature of these cases.[113] The ELRC Collective Agreement

[103] The Procedures Applicable to Inquiries section provides comprehensive guidance about the legal processes and considerations germane to such inquiries. This guidance includes the use of intermediaries, protocols for handling child witnesses, and procedures for oath-taking.
[104] In *Mdwaba v Nonxuba* (A5051/2015) [2018] ZAGPJHC 44 (9 March 2018) para 1, the High Court held that "[t]he '*audi alteram partem*' rule is a fundamental principle of our law which is enshrined under the bill of rights in the Constitution of the Republic of South Africa, Act 108 of 1996. Every litigant is therefore entitled to be afforded a fair public hearing before a Court if such a litigant has a dispute which can be resolved by the application of the law". Although cl 3 of the ELRC Collective Agreement ensures that educators are informed of the allegations, it does not provide an opportunity for them to defend themselves or respond to the charges. This omission could be seen as limiting due process. Additionally, the mention of the possibility of a mandatory sanction of dismissal is unclear, as it does not specify the circumstances under which such a sanction would apply. This ambiguity may lead to confusion and uncertainty among educators about the potential consequences of the allegations that they face. Furthermore, the clause refers to other clauses (specifically, 17.2.1, 17.2.2, and 17.2.3) of the Dispute Resolution Procedures. This cross-referencing may require the parties involved to navigate multiple sections of the agreement, potentially leading to confusion and challenges in understanding and applying the correct procedures.
[105] See the main provision of cl 3.5 of the ELRC Collective Agreement.
[106] See cl 3.5.1 of the ELRC Collective Agreement.
[107] See cl 3.5.4 of the ELRC Collective Agreement.
[108] See cl 3.5.2 of the ELRC Collective Agreement.
[109] See cl 3.5.3 of the ELRC Collective Agreement.
[110] See cl 3.5.5 of the ELRC Collective Agreement.
[111] See cl 3.5.6 of the ELRC Collective Agreement.
[112] See cl 3.6 of the ELRC Collective Agreement.
[113] See cl 3.5 of the ELRC Collective Agreement.

acknowledges the importance of considering the age of the child involved and the nature and complexity of the charges when appointing an arbitrator, demonstrating an understanding of the unique challenges posed by cases of alleged sexual misconduct against minors.[114] The ELRC Collective Agreement also requires that arbitrators possess specific experience in hearings involving minor children as witnesses and victims, evaluating and assessing the evidence of child witnesses, and dealing with charges of sexual misconduct against children. The ELRC Collective Agreement thus emphasises experience and expertise in relevant areas for ensuring fair and effective proceedings.[115]

However, while the ELRC Collective Agreement specifies these requirements, the ultimate effectiveness of the appointment process will also depend on executing these provisions.[116] From an analysis standpoint, the ELRC Collective Agreement does appear to provide a reasonably clear and comprehensive framework for the appointment of arbitrators in cases involving alleged sexual misconduct by educators.[117]

The use of the term "sufficient" in the ELRC Collective Agreement, in phrases such as "sufficient experience" or "sufficient knowledge", is somewhat subjective and imprecise.[118] The term "sufficient" does not provide clear, quantifiable criteria for evaluating an arbitrator's

[114] See cl 3.5 of the ELRC Collective Agreement. In legal and regulatory contexts, it is often preferable to use more precise and objective language to establish criteria. For example, instead of "sufficient experience", the agreement could specify a minimum number of cases related to child witnesses, or it could require a certain number of years of experience in handling cases of sexual misconduct against children.
[115] See cl 3.5 of the ELRC Collective Agreement. Additionally, it addresses the potential vulnerability of child witnesses by allowing for the appointment of intermediaries and providing for flexible arrangements to put witnesses at ease. The agreement also underscores the importance of arbitrators' having sufficient knowledge of the legal principles relevant to the specific case, and it allows arbitrators to decline an appointment if they do not possess the necessary attributes, promoting the selection of arbitrators best suited to handle these cases.
[116] See cl 3.5 of the ELRC Collective Agreement.
[117] See cl 3.5 of the ELRC Collective Agreement. Additionally, the agreement does not detail the specific mechanisms for assessing an arbitrator's qualifications and experience, leaving some room for interpretation. Nevertheless, it represents a significant step towards ensuring that arbitrators in these sensitive cases are adequately qualified and sensitive to the unique needs of child witnesses and victims.
[118] See cl 3.5 of the ELRC Collective Agreement. As Chandler et al (1985) xiv wrote, "precise language is a basic requirement of every intellectual discipline. This is particularly true in the field of law. The political and social sciences suffer more than most disciplines from semantic confusion. This is attributable, inter alia, to the popularisation of the language, and to the focus on many diverse foreign and social systems". See also Budeli (2007) 31.

qualifications and experience.[119] What is considered "sufficient" may vary, depending on individual perspectives and circumstances, making it open to interpretation.[120]

6.3.6 The Procedures Applicable to Inquiries and Arbitrations

Clause 4 of the ELRC Collective Agreement outlines the procedures applicable to inquiries or arbitrations. Clause 4.1 states:

> Sections 138, 142 and 143 to 146 of the Labour Relations Act, with the necessary changes required by the context, apply to an inquiry in terms of this collective agreement. In the case of any conflict between the provisions of any section in the Labour Relations Act, and the Dispute Resolution Procedures, the relevant provision in the Dispute Resolution Procedures shall take preference.[121]

This clause incorporates sections 138, 142, and 143 to 146 of the LRA, with necessary contextual modifications.[122] One notable aspect of clause 4 of the ELRC Collective Agreement is that the relevant provisions of the Dispute Resolution Procedures take precedence in conflicts between the provisions of the LRA and the Dispute Resolution Procedures.[123]

Clause 4.2.3 allows co-employees to represent educators in arbitration proceedings. This provision promotes fairness and allows educators to have support during the process. Clause 4.2 states in full:

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[119] See cl 3.5 of the ELRC Collective Agreement. See also Budeli (2007) 31, who observed that "the legal discipline has been blamed and slighted by other social scientists and even by lawyers themselves, especially the proponents of the Critical Legal Studies School and positivists, for its lack of precision".

[120] See Budeli (2007) 31, who acknowledged that "even in natural or the so-called "exact" sciences, precision or exactitude is as impossible as the absolute truth". This thesis argues that absolute truth emerges when a Labour Court orders an arbitration to be reheard through a process *de novo* when an arbitrator has misapplied his mind. By using specific, measurable criteria, the agreement could enhance objectivity and clarity in the arbitrator selection process. This improvement would help ensure that all parties involved clearly understood the qualifications expected of arbitrators in these sensitive cases and it would reduce the potential for disputes or challenges related to arbitrator appointments.

[121] See cl 4.1 of the ELRC Collective Agreement. S 138 of the LRA deals with general provisions for arbitration proceedings. S 142 of the LRA provides for the powers of the commissioner when attempting to resolve disputes, and s 143 of the LRA with the effect of arbitration awards, s 144 with variation and rescission of arbitration awards and rulings, s 145 with the review of arbitration awards, and s 146 with the exclusion of the Arbitration Act. These sections provide for the arbitration process as discussed above in para 6.2 of this chapter.

[122] Ss 138, 142, and 143 to 146 of the LRA deal with provisions for arbitration proceedings.

[123] This is consistent with the decision of the Labour Appeal Court in the *Appels* case discussed in Chapter 3 of this thesis, where the court stated that the provisions of collective agreements take precedence over legislation (see para 3.7.7). The *Appels* case is also discussed briefly below.

> 4.2 The following provisions of the Dispute Resolution Procedures, with necessary changes required by the context, apply to an inquiry in terms of this collective agreement:
>
> 4.2.1 Clause 12, read with clause 18.3;
>
> 4.2.2 Clauses 17.3, 17.5, 17.6.2, 17.7;
>
> 4.2.3 Clause 17.4, with the qualification that the educator may also be represented in the arbitration proceedings by a co-employee;[124]

Additionally, clause 4.3 deals with various aspects of the arbitration process, particularly witnesses under the biological or mental age of eighteen years. Clause 4.3 states:

> The General Secretary shall in every arbitration in terms of this collective agreement where a witness or witnesses under the biological or mental age of eighteen years will testify, appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary and the arbitrator shall ensure that such witness (irrespective of whether the witness testifies on behalf of the employer party or the educator party), give his or her evidence through that intermediary. If however, a witness under the biological age of eighteen years states that he or she prefers to give evidence without the assistance of an intermediary and the arbitrator is satisfied that the witness understands the implications of that decision, an arbitrator may direct that the witness need not give evidence through an intermediary.[125]

In such cases, a competent person is appointed as an intermediary to assist these witnesses in providing their evidence. The arbitrator ensures that all such witnesses, regardless of which party they testify for, present their evidence through the intermediary. However, if a witness under the biological age of 18 expresses a preference to give evidence without an intermediary and the arbitrator is satisfied that the witness understands the implications of this decision, the arbitrator may permit the witness to do so.[126]

The arbitrator may direct that the witness can give evidence in a location that puts him at ease and away from anyone who might upset him.[127] This permission could include the use of closed-circuit television[128] or other means to shield the witness from any disturbing influences.

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[124] See cl 4.2 of the ELRC Collective Agreement, which provides for the representation of fellow employees. It does not seem to provide for legal representation, though the inclusion of the sections of the LRA that permit legal representation based on the discretion of commissioners suggests that legal representation may be permitted.
[125] See cl 4.3 of the ELRC Collective Agreement.
[126] See cl 4.3 of the ELRC Collective Agreement. See also item 7(10A) of sch 2 to the Educators Act.
[127] See cl 4.4 and 4.5 of the ELRC Collective Agreement. See also item 7(10A)(c) of sch 2 to the Educators Act.
[128] See the case of *The Superintendent-General Northern Cape Department of Education v Mr Hulepe Isaac Mogase* ELRC890-22/23NC ("the *Mogase* case") para 33, where children had to testify via closed-circuit television while an adult testified in court: "As stated previously, the employee pleaded not guilty to the charge levelled against him. The employer called three witnesses, two of whom were the 'victims'

So, for witnesses under the biological or mental age of 18, the arbitrator may direct that testimony be given in an informally arranged setting and out of sight of anyone who may upset the witness, using tools such as CCTV, screens, and one-way mirrors.

These provisions in the ELRC Collective Agreement are reminiscent of the provisions of section 158 of the Criminal Procedure Act. Section 158 allows a court to let a witness or accused testify via CCTV or similar media to prevent delays, save costs, or serve justice. This is permitted only if facilities are available and the court considers that it avoids prejudice or harm to anyone involved.[129]

Several reasons have been given for using closed-circuit television or electronic media. These include but are not limited to protecting vulnerable witnesses and their identities.[130] The Constitutional Court dealt with this matter in *Centre for Child Law and Others v Media 24 Limited and Others* ("the *Centre for Child Law-Media 24* case").[131] There the court affirmed the need to protect the identity of child witnesses below the age of 18[132] and to afford them the right to consent or withhold consent to their identity being published when they reach the

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and referred to as the Girl Child and Boy Child for ease of reference. The employee called six witnesses, two of whom were children. All four child witnesses testified through the court's closed-circuit television. The adult witnesses testified in court." See also *Mmaselaelo Ross Buthane v Department of Education (Limpopo Provincial Administration)* ELRC296-19/20LP ("the *Buthane* case") para 2 stating: "The proceedings of the inquiry were conducted through a closed television socket at Lephalale Magistrates' Court for the duration of the testimony of the employer's two witnesses who were learners at the time when the alleged two acts of misconduct preferred against the employee took place. The proceedings later took place at Waterberg District Office at Modimolle after the conclusion of the testimonies of the employer's learner witnesses."

[129] See s 158 of the Criminal Procedure Act 51 of 1977. See also s 153 of the Criminal Procedure Act, which protects vulnerable persons by giving the judge the discretion to prohibit people from being in the courtroom if the alleged offending involves a sexual offence or extortion. See also *Uramin Incorporated v Perie* 2017 (1) SA 236 (GJ).

[130] According to De Vos (2015): "And there are myriad measures available to protect witnesses. These range from: anonymity orders to protect vulnerable witnesses' identities and allowing witnesses to testify through intermediaries or with the help of a support person, to closing the courtroom so that only certain people are present, or even allowing witnesses to testify from a remote location via closed-circuit television. Other measures might include suppression orders such as that ordered in Multichoice when Judge Mlambo prohibited the media from photographing or broadcasting the testimony of Mr Pistorius or his witnesses, or even, as the United States has started experimenting with, allowing witnesses to wear disguises in court." See also *S v F* 1999 (1) SACR 571 (C). See also Wolhuter and Hamman (2010) *SAJC* 1 and De Vos (2015).

[131] See *Centre for Child Law and Others v Media 24 Limited and Others* 2020 (4) SA 319 (CC) ("the *Centre for Child Law-Media 24* case") para 18. The court said: "The main issues are:
(a) Whether section 154(3) of the CPA prevents the media from disclosing the identity of children who are victims of crimes but have not yet testified or been called to testify in criminal proceedings. If not, is this constitutionally valid?
(b) Whether the anonymity protection provided by section 154(3) to child accused, witnesses and (based on the answer to the above) victims ceases to operate once the child turns 18? If so, is this constitutionally valid?"

[132] See the *Centre for Child Law-Media 24* case para 128: "1. The declaration by the Supreme Court of Appeal, that s 154(3) of the Criminal Procedure Act 51 of 1977 is constitutionally invalid to the extent that it does not protect the identity of children as victims of crime in criminal proceedings, is confirmed."

age of 18.[133] Clause 4.4 of the ELRC Collective Agreement accords with the Constitutional Court's position on the need to protect child witnesses. This thesis confronts the question of whether this protection is being implemented in cases under section 188A of the LRA administered under the auspices of the ELRC. However, it appears from the record that since the ELRC Collective Agreement was signed, only two cases[134] under the ELRC section 188A process have had witnesses testify via closed-circuit television.

Examination of a witness if an intermediary is appointed must occur only through that intermediary, who may adapt questions to suit the witness's age or mental state.[135] This applies to examination, cross-examination, or re-examination of that witness, except examination by the arbitrator.[136] The intermediary conveys the general purport of any questions to the witness in a manner appropriate to the witness's age or mental condition.[137]

Furthermore, the ELRC must retain a panel of competent persons who can act as intermediaries.[138] The General Secretary assesses these persons' competence by experience and qualifications.[139] They may be, but need not be, intermediaries that the Department of Justice uses.[140] When appointing an intermediary, the arbitrator must appoint someone from this panel.[141]

In cases involving witnesses under the biological or mental age of 18, the arbitrator may allow the use of demonstrative devices, such as anatomical dolls, puppets, drawings, or mannequins, to assist the witness to testify, as the arbitrator considers appropriate.[142]

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[133] See the *Centre for Child Law-Media 24* case para 126. The Constitutional Court (per Mhlantla J) declared invalid the provisions of s 154(3) of the Criminal Procedure Act 51 of 1977 and read into the section its proposed amendment as follows: "I propose a declaration of invalidity that will be suspended for 24 months and an interim reading-in. This would entail reading into s 154 a provisional s 154 that reads:
'(3A) An accused person, a witness or victim referred to in subsection 3 does not forfeit the protections afforded by that subsection upon reaching the age of 18 years but may consent to the publication of their identity after reaching the age of 18 years, or if consent is refused their identity may be published at the discretion of a competent court.'".
[134] See the *Mogase* case para 33 and the *Buthane* case para 2. In my view, it may be that other arbitrators may not have recorded it or the use of it is minimal, raising the question of whether the vulnerability of child witnesses is not being compromised.
[135] See cl 4.5 of the ELRC Collective Agreement.
[136] See cl 4.5 of the ELRC Collective Agreement.
[137] See cl 4.5 of the ELRC Collective Agreement.
[138] See cl 4.6 of the ELRC Collective Agreement.
[139] See cl 4.6 of the ELRC Collective Agreement.
[140] See cl 4.6 of the ELRC Collective Agreement.
[141] See cl 4.6 of the ELRC Collective Agreement.
[142] See cl 4.7 of the ELRC Collective Agreement.

If it becomes evident to the arbitrator that a witness under the biological or mental age of 18 does not understand the nature of the oath, the arbitrator must refrain from asking the witness to take the oath.[143] However, the arbitrator may still receive the evidence of such a witness if satisfied that the latter is capable of providing a coherent account of events[144] and understands the difference between truth and lies, and the importance of telling the truth.[145] The laws of evidence are applied to the evidence of witnesses in these circumstances.[146]

Finally, besides all the powers under this ELRC Collective Agreement, the arbitrator has all those powers that arbitrators usually have to determine the procedures to be followed in arbitration proceedings.[147] The provisions mentioned above thus aim to ensure fair and effective arbitration processes, especially when involving young or vulnerable witnesses.

6.3.7 The Outcome, Judgment or Arbitration Award

Clause 5 is a comprehensive provision regarding the outcome, judgment, or arbitration award issuing from the ELRC Collective Agreement proceedings. The arbitrator must consider the evidence presented and then, by reference to seven specified aspects, direct whichever action (if any) must be taken against the educator.[148] Those seven aspects[149] are

- The concept of fairness under the LRA, as interpreted by the courts;
- The SACE Code of Professional Ethics for Educators;
- The UN Convention on the Rights of the Child (CRC);
- The African Charter on the Rights and Welfare of the Child;
- The child's best interests under section 28 of the Constitution, 1996;
- The Educators Act sanctions, including mandatory dismissal for certain forms of misconduct under that Act;
- Any other relevant factor.

[143] See cl 4.8 of the ELRC Collective Agreement.
[144] See cl 4.8.1 of the ELRC Collective Agreement.
[145] See cl 4.8.2 of the ELRC Collective Agreement.
[146] See cl 4.9 of the ELRC Collective Agreement.
[147] See cl 4.10 of the ELRC Collective Agreement.
[148] See the main clause of cl 5 of the ELRC Collective Agreement.
[149] See cl 5.1.1 to 5.1.7 of the ELRC Collective Agreement, respectively.

The arbitrator's judgment in this inquiry is final and binding, equivalent to an arbitration award under the LRA.[150] It may not be appealed against,[151] but may be taken on review by any disputant to the Labour Court under the LRA.[152] The award must suppress the name and surname of witnesses and victims under the biological or mental age of 18 at the time of testifying or of the commission of the relevant misconduct against the victim, respectively;[153] their privacy is thus emphasised. A copy of the award must be sent by the General Secretary to SACE within 14 days after service of the award on the parties.[154]

6.3.8 The Dispute Resolution Procedure in Clause 6

Clause 6.1 of the ELRC Collective Agreement stipulates that disputes related to the application or interpretation of this agreement should be referred to the Council (ELRC) under the dispute resolution procedure. In addition, if it is necessary to interpret the agreement during an inquiry under this agreement, the appointed panellist presiding has the jurisdiction to do so.[155]

In the *Diholo* case, even though the section 188A commissioner found Diholo guilty as charged and sanctioned the educator as she did, she made an important omission that was noticed by the court and was instrumental to the court's decision. Had Diholo not been found guilty in a section 188A process, the court would have criticised such an oversight that tends to put a spotlight on ELRC processes. This same omission made in the *CS-Swanepoel* case allowed an educator to get away with sexual misconduct against a minor child as he initially did at the instance of the employer.[156]

Even though the *Scheepers* case does not pertain to sexual misconduct, the parties must consider the cost of failing to investigate a case correctly as directed by the legal instruments. The discussion turns to evaluating the effectiveness and limitations of section 188A of the LRA vis-à-vis the ELRC Collective Agreement.

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[150] See cl 5.2 of the ELRC Collective Agreement. See s 143(1) of the LRA, which provides for the effect of arbitration awards: "(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award."
[151] See cl 5.2 of the ELRC Collective Agreement.
[152] See cl 5.2 of the ELRC Collective Agreement.
[153] See cl 5.3 of the ELRC Collective Agreement.
[154] See cl 5.4 of the ELRC Collective Agreement.
[155] See cl 6.1 of the ELRC Collective Agreement.
[156] See the *CS-Swanepoel* case discussed below.

6.4 Application of Section 188A in Educators' Child Sexual Misconduct Cases

The adoption of section 188A offers several advantages, such as preventing children from testifying multiple times and expediting dispute resolution through a single arbitration process. Yet some challenges impeding its efficacy include issues in securing witnesses, obtaining corroborative evidence, challenges in venue availability, the appointment of subpar arbitrators, the expensive nature of the section 188A process, and the employer's inconsistent implementation of section 188A. Other challenges involve misclassification of misconduct cases, frivolous postponements, parental resistance to their children's testifying, and the employer's failure to make closing arguments or to prove charges in sexual misconduct cases.[157] The thesis also explores the ELRC Collective Agreement's shortcomings, emphasising its role within a complex educational environment and its potential challenges in implementing effective dismissal procedures. The thesis critically examines the relationship between the ELRC and SACE, and addresses issues of securing witnesses, bribery, and false accusations. And the thesis evaluates the overall effectiveness of cases processed under section 188A of the LRA or the ELRC Collective Agreement.

The dismissal process involves various integrated stages. The ELRC's involvement occurs primarily from stages 6 to 10, highlighting its supportive role without replacing the employer's responsibility to manage educator discipline effectively. The dismissal process involves several key steps, commencing with (1) the reasonable suspicion that an educator may have engaged in misconduct, followed by (2) the notification of the alleged infraction by the responsible authority, initiating the *audi alteram partem* rule process.[158] Subsequently, (3) the educator may face suspension from duty, with or without pay,[159] leading to (4) a comprehensive investigation into the allegations.[160] Following the investigation, (5) charges are preferred against the educator, initiating the disciplinary process.[161] The subsequent steps encompass (6) the appointment of a presiding officer,[162] and (7) the conduct of a hearing, involving the prosecution,[163] securing of witnesses,[164] and ensuring secure processes for

[157] See para 6.6 below.
[158] See item 5 of sch 2 to the Educators Act.
[159] See item 6 of sch 2 to the Educators Act.
[160] See items 6(2) and 7(10) of sch 2 to the Educators Act.
[161] See item 5 of sch 2 to the Educators Act.
[162] See item 7(2) of sch 2 to the Educators Act.
[163] See item 7(17)(a) of sch 2 to the Educators Act.
[164] See item 7(10)(a) and (b) directing that "[f]or the purposes of the investigation and hearing, the representative of the employer may summon any person who– *(a)* may be able to give information of material importance concerning the subject of the investigation or hearing; or *(b)* has in his or her possession, custody or control, any book, document or object which may have a bearing on the matter". This thesis argues that the failure to secure witnesses for disciplinary inquiries constitutes the biggest

giving evidence with ease.[165] This process includes presenting evidence,[166] making closing arguments,[167] appointing interpreters,[168] and other relevant activities. (8) The proceedings are duly recorded,[169] and (9) findings are presented,[170] leading to (10) the final verdict of either acquittal or sanctioning.[171] The outlined steps provide a contextual framework for a standard disciplinary process, emphasising that an arbitrator's inquiry is not a comprehensive solution to educator sexual misconduct.[172]

6.5 Analysis of the ELRC's Role in the Application of Section 188A of the LRA

This thesis aims to assess the efficacy of applying section 188A, as manifested through the ELRC Collective Agreement.[173] The examination seeks to identify critical issues, recurring themes, and both successes and challenges stemming from the implementation of this agreement. Based on the preceding analysis, it is discerned that the ELRC assumes responsibility for overseeing the arbitration process, encompassing tasks such as processing and initiating cases filed by the employer, securing suitable venues, appointing presiding officers and support staff, conducting the arbitration hearing, recording proceedings, presenting findings, and issuing a binding arbitration award.[174]

Conversely, the employer is responsible for issuing notices to charged educators, conducting investigations, engaging the ELRC to process the case in alignment with the ELRC Collective Agreement, securing witnesses for case prosecution, appointing representatives for case prosecution, presenting evidence, cross-examining the educator's testimony, delivering

barrier to effectively processing sexual misconduct disputes involving educators and requires a concerted effort.

[165] See item 7(10A) of sch 2 to the Educators Act.
[166] See item 7(10)(a) and (b) of sch 2 to the Educators Act.
[167] See item 7(10)(a) and (b) of sch 2 to the Educators Act.
[168] See item 7(4) of sch 2 to the Educators Act.
[169] See item 7(7A) of sch 2 to the Educators Act.
[170] See item 8(1) of sch 2 to the Educators Act.
[171] See item 8(1) of sch 2 to the Educators Act.
[172] This thesis argues that although the s 188A process or the ELRC Collective Agreement is poised to expedite proceedings, many elements crucially rely on the parties involved, particularly the employer. It is essential to understand the stage at which a third party intervenes in the procedural steps. The ELRC is likely to be involved in stages 6 to 10 and, to a varying extent, in stage 9, where the arbitrator eventually issues a ruling in stages 9 and 10 based on the evidence presented by the employer and the educator. The ELRC Collective Agreement contributes to the benefits mentioned but does not supplant the employer's responsibility to manage educator discipline effectively. As elaborated in Chapter 3 and further discussed in this chapter of the thesis, the employer bears the duty of disciplining educators to prevent child sexual abuse and uphold educators' labour rights against unfair dismissal. An analysis of the roles of the ELRC and the employer in this process will be provided.
[173] See the ELRC Collective Agreement.
[174] See the ELRC Collective Agreement.

closing arguments if required, and implementing the award once issued by the ELRC.[175] The subsequent subparagraphs will examine how these roles have been executed by the respective parties. It is emphasised that the employer's shortcomings in managing educator discipline, as exemplified in the *CS-Swanepoel*[176] and *Leeto*[177] cases discussed in Chapter 5 of this thesis, persist and will be explored in the upcoming cases discussed.

6.5.1 The Successes of the ELRC

The ELRC has successfully executed the stipulations of the ELRC Collective Agreement in addressing numerous cases involving educators accused of sexual misconduct. These cases encompass a spectrum of offences, including rape, attempted rape,[178] sexual assault,[179] inappropriate touching of children and colleagues,[180] making sexual advances towards children,[181] engaging in sexual relationships with learners,[182] displaying pornographic material to children, soliciting learners' phone numbers, making inappropriate remarks, and engaging in inappropriate physical contact, such as hugging and squeezing children. All these instances occur within the educators' role as employees, where they bear the responsibility of ensuring the safety and well-being of children, mandated by the *in loco parentis* principle. Educators are effectively considered to stand in the position of parents concerning the children under their care.

Several observations emerge from the cases adjudicated by the ELRC under section 188A. Although the section 188A process may succeed in reducing the frequency of child witnesses testifying, it does not absolve educators' employers from the obligation to adhere to just cause

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[175] See item 7 of sch 2 to the Educators Act.
[176] See para 5.2.4 of Chapter 5 of this thesis for a discussion of the *CS-Swanepoel* case. See also the *CS-Swanepoel* case para 72.
[177] See para 5.2.4 of Chapter 5 of this thesis for a discussion of the *Leeto* case. See also the *Leeto* case paras 27 and 28.
[178] The *Shezi* case para 8(b) states: "b. A charge of attempted rape was laid against the Applicant, on the 22nd September 2016 at the Nkandla Police Station under Cas No.84/09/2016." See *Mzikayifani David Shezi v Department of Education (Kwazulu Natal)* PSES 714-18/19KZN.
[179] See *Gauteng Dept of Education v Lucky Baloyi* ELRC392-21/22GP ("the "*Baloyi* case") para 4, in which it is reported: "It is alleged that on 06 April 2021 while on duty at Kgomotso Comprehensive High School, you sexually assaulted a Grade 10 learner, lea[r]ner A, in that you spanked her on the buttocks."
[180] See *Sandile Ngubo v Department of Education – Kwa-Zulu Natal* PSES 109-17/18 ("the *Ngubo* case") para 6(f) stating that the accused educator "touched her private part" of a colleague.
[181] See *NUFBWSAW obo Irvine Jeftha v The Department of Education Western Cape v Reverend Betty Wanza and Patrick Minnaar* ELRC644-20/21EC ("the *Jeftha* case") para 6, which states: "The allegations against Jeftha had been about him supposedly bullying the children, victimizing them and that he had made inappropriate sexual advances to a girl child."
[182] See *Mtshali D v Department of Education – Kwa-Zulu Natal* PSES473-16/17KZN ("the *Mtshali* case") para 5, where the arbitrator stated: "Its case was that he had engaged in a sexual relationship with two learners from Ingula High School. The dismissal was effected following a disciplinary enquiry which was conducted in his absence on 28 March 2014 because he did not attend his disciplinary hearing."

and due process before, during, and after the arbitration process.[183] A few cases underscore intriguing aspects of the ELRC's administration of section 188A.

6.5.2 Problems Securing Appropriate Venues

The ELRC faces a significant challenge in ensuring appropriate venues and facilities for handling specialised proceedings involving child witnesses in cases of sexual misconduct by educators.[184] Though the Educators Act requires employers to secure suitable spaces, the ELRC, through the ELRC Collective Agreement, bears this responsibility.[185] The inadequacy of facilities emerges as a limiting factor in processing these sensitive cases, which requires protective measures such as *in camera* testimony or the use of closed-circuit television, particularly for witnesses who are minors.[186]

The COVID-19 pandemic further highlighted the need for virtual systems to manage cases efficiently.[187] During the pandemic, reliance on magistrates' courts for initial witness interviews added logistical complexities, creating resource constraints for the ELRC.[188] Annual reports from the ELRC express concerns about the lack of suitable venues for hearings involving child witnesses,[189] often resulting in the use of borrowed premises.[190] Notably, cases such as

[183] See s 188A of the LRA. See also the ELRC Collective Agreement. The first aspect of this critical evaluation necessitates an examination of the underlying purpose behind the introduction of s 188A or the ELRC Collective Agreement. S 188A was incorporated into the LRA with the primary aim of expediting the processing of disciplinary proceedings initiated by employers against their employees. The ELRC Collective Agreement was implemented to streamline the disciplinary proceedings concerning educators accused of sexual misconduct involving children. This streamlined approach serves the crucial purpose of reducing the frequency with which these child witnesses are required to testify, thereby mitigating the potential for subjecting them to secondary trauma.
[184] Item 7(10A)(c) of sch 2 to the Educators Act directs: "If the presiding officer appoints an intermediary under paragraph *(a)*, he or she may direct that the relevant witness must give his or her evidence at any place which- (i) is informally arranged to put that witness at ease; (ii) is arranged in a manner in which any person whose presence may upset that witness, is outside the sight and hearing of that witness; and (iii) enables the presiding officer and any person whose presence is necessary at the relevant proceedings to hear, through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony."
[185] See ELRC (2022) 12. See also the ELRC Collective Agreement.
[186] See item 7(10A) of the Educators Act.
[187] See ELRC (2022) 115. This can be an advantage since learners do not have to meet perpetrators face to face.
[188] See ELRC (2022) 115.
[189] See ELRC (2022) 10: "The ELRC aims to protect the rights of children by making provision for intermediaries and interpreters during arbitration proceedings. Furthermore, the Council has secured special venues, such as magistrate courts, for disputes where learners are either victims or witnesses".
[190] The Department of Basic Education or the ELRC do not have their own premises suitable to handle child witnesses in disciplinary proceedings against educators charged with sexual misconduct. See ELRC (2019) 21 and ELRC (2020) 21 in its Annual Reports stating that "the Council is continuously engaging with the Department of Justice and Constitutional Development to assist with the utilisation of the courts for these special cases (special cases where a child is a victim)". See also ELRC (2020) 111 and ELRC (2022) 82, where the ELRC states: "In hearings where a child is a victim or a witness,

Myabalala V.C v Department of Education Mpumalanga[191] were conducted at Carolina Magistrate's Court,[192] and *SADTU obo Neil Zackey v Department of Education Gauteng* case ("the *Zackey* case") spanned three separate venues, incurring logistical and social costs.[193]

6.5.3 The ELRC's Role in Safeguarding Teachers' Labour Rights

The ELRC is responsible for ensuring that educators accused of sexual misconduct are afforded just cause[194] and due process.[195] This includes the right to be heard, the right to a fair and impartial hearing, and the right to legal representation. Accused educators have the opportunity to present their side of the story, provide evidence, and defend themselves against the allegations. This thesis must also acknowledge that there are instances where learners may have fabricated evidence[196] to implicate certain educators. This thesis does not necessarily argue that the educator in *Musa Mdlalose v The Head of the Department of Education – Kwazulu-Natal* ("the *Mdlalose* case")[197] was guilty but that he was found not guilty

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the Council continues to ensure that appropriate venues are booked for these special hearings, e.g. Magistrate Court, Children's Court or Teddy Bear Clinic (Johannesburg) and [the Department of Social Development] in [Free State] and [Northern Cape]. The Council will also ensure intermediaries are appointed to protect the rights of the child, as stipulated in Section 28 of the Constitution, 1996. The Right of the child is of paramount importance in all matters concerning the child. The Council continues to recruit panellists, interpreters and intermediaries in order to improve in its efficiency." The issue of appropriate venues is a challenge especially because they have to be booked and negotiated for.

[191] See *Myabalala V.C v Department of Education Mpumalanga* PSES 816-18/19MP ("the *Myabalala* case").

[192] See the *Myabalala* case, which was conducted at a magistrate's court. The arbitrator recorded in para 1.2: "The hearing took place at Carolina Magistrate Court, Carolina, Mpumalanga Province, on 20 February 2019 at 9:00AM." See also *David Diholo and Department of Education GP* PSES933-18/19GP ("the *Diholo* case") para 1, stating that "[t]he proceedings were held on 11 March 2019 at the Palm Ridge Magistrate Court".

[193] See *SADTU obo Neil Zackey v Department of Education Gauteng* PSES974-18/19GP ("the *Zackey* case") para 2. The matter was set down for 17 May 2019, 17 July 2019, and 20 September 2019 at Pretoria North Magistrate's Court. It was again set down for 02 December 2019 at Tshwane South District Office and finalised on 18 February 2020 at the Council's Offices in Centurion.

[194] See s 188(1)(a)(i) of the LRA, which provides that a dismissal of an employee which is not automatically unfair will be unfair if the employer fails to prove that the reason for dismissal was a fair reason related to the employee's conduct or incapacity. Essentially, this is a provision for a just case in regard to the *justa causa* principle.

[195] See s 188(1)(b) of the LRA, which provides that a dismissal of an employee which is not automatically unfair will be unfair if the employer fails to prove that the dismissal was effected in accordance with a fair procedure. Essentially, this provides for the due process principle.

[196] See *Mvelase LS v Department of Education* – KZN ELRC74-20/21KZN ("the *Mvelase* case"), in which an educator was charged on the basis of fabricated sexual misconduct cases, and the arbitrator found him not guilty because the witnesses (the learners) were not credible. See also *Gauteng Department of Education v Mr. Freddy Masondo* ELRC 549-20/21GP ("the *Masondo* case"), where the fabrication seems to have emanated from a guardian of a child against an educator.

[197] See *Musa Mdlalose v The Head of the Department of Education – Kwazulu-Natal* ELRC62-20/21KZN ("the *Mdlalose* case"), in which an educator was accused of sexually assaulting a learner who became pregnant as a result. The results of a DNA test that was conducted as a result of the allegation against the applicant excluded him (Musa Mdlalose) as fathering the child born out of the allegation. The arbitrator found against the respondent and in favour of the applicant. I am of the view that the applicant could not be found guilty on the basis of DNA results alone. The apparent weakness in this case is the case of the employer. Paragraph 38 of the *Mdlalose* case states: "The Employer relies

precisely because the employer presented a weak case. The employer relied on a single witness, the learner, to attempt to substantiate the allegations.[198] Yet it may well be that the educator was implicated in a case where he did not commit these acts of sexual assault against a learner. If just cause and due process had not been followed, the educator could have been implicated in allegations for which he was not responsible.[199] The ELRC is required to balance the rights of educators with those of children. The Portfolio Committee has noted instances where educators are implicated in sexual misconduct based on false accusations and fabrications.[200]

6.5.4 The Appointment of Competent Arbitrators

This thesis argues that the effectiveness of section 188A in managing sexual misconduct by teachers in schools is contingent upon the quality of arbitrators appointed, introducing a critical variable into the arbitration process. The ELRC is responsible for appointing arbitrators to conduct the inquiry by arbitrator processes in educator sexual misconduct cases.

Moreover, section 188A reveals its limitations when the broader challenges associated with the arbitration process as a statutory mechanism for dispute resolution are considered. One pertinent concern pertains to selecting an arbitrator,[201] which can significantly impact the fairness of the proceedings. Instances of irregularities and missteps by commissioners in arbitration forums such as the CCMA and bargaining councils have arisen, potentially compromising the integrity of the process. A notable deficiency within ELRC Collective Agreement lies in its vagueness about the specific qualifications and prerequisites for individuals presiding over section 188A disciplinary proceedings.[202] The absence of specific competence screening criteria raises concerns, allowing arbitrators with a history of dismissed

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upon the evidence of a single witness, namely, the complainant. As a single witness, the evidence of the complainant needs to be reliable and trustworthy in all material respects." It is always important that the employer establishes its facts during the investigation phase to substantiate any allegations that it makes against an educator given the seriousness of the allegation.

[198] See the *Mdlalose* case para 38. The arbitrator observed in para 38 that "[t]he Employer relies upon the evidence of a single witness; namely, the complainant. As a single witness, the evidence of the complainant needs to be reliable and trustworthy in all material respects".

[199] See the *Mdlalose* case para 42. The arbitrator, J Kirby, ruled as follows: "FINDING 42. The Employee, Musa Mdlalose, is found not guilty."

[200] See the Parliament Portfolio Committee on Basic Education (2018), where it is recorded: "In the same line of discussion, the issue of false accusations arose. A lot of cases were often taken as false accusations, whereas everyone knew they were not."

[201] See cl 3.5 of the ELRC Collective Agreement, which specifies the criteria used to appoint commissioners to conduct s 188A processes.

[202] See the ELRC Collective Agreement. The minimum criteria for arbitrator appointment lack precision, leading to instances where arbitrators with questionable competence preside over cases, potentially affecting outcomes.

cases or even those subjected to a process *de novo* to continue presiding over subsequent cases, exemplified by the cases of *Muller v Public Investment Corporation (SOC) Limited (PIC)*,[203] *MEC for Education (North West Provincial Government) v Makubalo*,[204] *Department of Education: Gauteng v Education Labour Relations Council and Others*,[205] and *Valinor Trading 133 CC t/a Kings Castle v Commission for Conciliation, Mediation & Arbitration & others*.[206] These instances are significant.[207] Acknowledging section 188A as an arbitration process similar to other LRA arbitrations prompts an assessment of the challenges faced. The *CS-Swanepoel* case serves as a poignant illustration, revealing how an unsuccessful pursuit of a sexual predator can be attributed to misdirection and misapprehension of the issues by the arbitrator or presiding officer.[208] These complex cases demand a high level of judicial acumen to prevent unwarranted retrials owing to procedural errors, misconceptions of disputes, irregular allocation of outcomes, or other forms of professional misconduct by commissioners. Consequently, the cost implications for court reviews or subsequent proceedings can be substantial.

6.5.5 Section 188A Process Can Prove Expensive

The ELRC's provision of generally free services for its members accords with Article 3(2) of ILO Recommendation No. 92,[209] using straightforward conciliation procedures. However, the challenge arises in arbitrations, where the ELRC's Constitution,[210] as directed by the LRA,

[203] See *Muller v Public Investment Corporation (SOC) Limited (PIC)* (JR 3021/19) [2022] ZALCJHB 82 (18 February 2022); [2022] 5 BLLR 458 (LC). See also *Netshisaulu v Commission for Conciliation, Mediation and Arbitration and Others* (JR929/15) [2017] ZALCJHB 366 (28 September 2017) (the "*Netshisaulu* case").
[204] *MEC for Education (North West Provincial Government) v Makubalo* (JA37/2012) [2017] ZALAC 13 (3 February 2017).
[205] *Department of Education: Gauteng v Education Labour Relations Council and Others* (JR496/17) (JR496/17) [2021] ZALCJHB 392 (19 October 2021). In this case, the Labour Court stated that "the applicant submits that the arbitrator committed a material error of law by misinterpreting the ELRC Recruitment Guide, failed to observe that the final decision of the appointment of a suitable candidate is the prerogative of the DOE and that the recommendations of the SGB are merely recommendations subject to the scrutiny of the District Director". Sensitive cases such as those relating to the sexual abuse of children do not need arbitrators like the one who presided in this case.
[206] *Valinor Trading 133 CC t/a Kings Castle v Commission for Conciliation, Mediation & Arbitration & others* (2023) 44 ILJ 1106 (LC).
[207] These are examples of cases arbitrated by a single commissioner and ruled by the courts on review as irregularly conducted. If the court keeps making a certain finding on a commissioner, one has to assess the commissioner's credibility either in the technical skills to run a hearing or on other grounds that may make the commissioner fail to apply his mind to the facts.
[208] See the *CS-Swanepoel* case para 57. Instances where a commissioner's conduct necessitates proceedings *de novo* suggest either incompetence or ulterior motives, significantly burdening the system and resulting in substantial costs, particularly in specialised cases involving sexual misconduct by educators.
[209] See Art 3(2) of ILO Recommendation No. 92. See also ITC-ILO (2013) *ITC-ILO* 32.
[210] ELRC (2022) 12.

seeks to maintain simplicity but is contradicted by the involvement of legal representatives.[211] The ELRC itself has expressed discontent with the transformation of dispute resolution into a legalistic process led by lawyers, resulting in frequent and unnecessary postponements and adjournments.[212] Notably, a significant budget allocation is necessary for the section 188A process, involving potential fees for legal practitioners and presiding officers. According to the CCMA fees and costs schedule, resolving a dispute through arbitration under section 188A may incur fees ranging from R3 213.50 to R7 301.73 for a commissioner.[213] Considering the frequency of cases at the ELRC, a substantial budget is required to cover these fees. In South Africa, lawyers' legal fees can reach approximately R15 000 per day,[214] while arbitrators charge fees based on the proceedings' duration, contributing to the considerable financial burden associated with administering arbitration proceedings.[215]

6.5.6 Lawyers Turning Arbitrations into Complex Litigious Processes

Although the ELRC Constitution, as directed by the LRA, ought to ensure that SDR processes are free of complex processes reminiscent of a court, the use of legal representatives provides otherwise.[216] However, by its own admission, the ELRC bemoaned the whole process of converting the dispute resolution processes into a court of law dominated by lawyers.[217]

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[211] See s 138 of the LRA, in terms of which the arbitrator is required to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities, though expeditiously and fairly. See also the Labour Appeal Court's ruling on this requirement in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 943 (LAC) ("the *Gold Fields* case) paras 18-21.

[212] See ELRC (2022) 12. Over a decade, 1 120 cases were postponed, 1 067 adjourned, and 2 305 carried over to subsequent financial periods, indicating a substantial number of unresolved cases. The engagement of legal representatives by employees may escalate costs, as lawyers typically charge for their services.

[213] See CCMA "CCMA Fees and Costs Information Sheet" (2022).

[214] ELRC (2022) 12. Dispute Management Services commits to rendering expedited dispute resolution services to all parties to the Council. The use of legal representatives impacts the dispute resolution process as cases are not finalised speedily and efficiently but drag on for more than a year. Legal representatives equate the ELRC arbitration processes to a court of law, instead of conducting processing processes with minimum legal formalities. Legal representation in the ELRC arbitration processes for alleged misconduct and incapacity hearings are not automatically allowed. Applicants must apply for legal representation, and after considering the relevant factors associated with such applications, the commissioners either grant or refuse these applications. See also s 138 of the LRA, in terms of which the arbitrator is required to deal with the substantial merits of a labour dispute between the parties with the minimum of legal formalities, though expeditiously and fairly. See also the *Gold Fields* case paras 18-21; *Ramabulana v CCMA and Others* (JR1190/16) [2019] ZALCJHB 232 (3 September 2019) ("the *Ramabulana* case") paras 7-8, 11; and *Ndaa Food Manufacturing CC t/a Ndaa Bakery v Commission for Conciliation, Mediation and Arbitration and Others* (JR1986/20) [2022] ZALCJHB 54 (15 March 2022) ("the *Ndaa Food Manufacturing* case") para 14.

[215] See CCMA "CCMA Fees and Costs Information Sheet" (2022).

[216] See ELRC (2022) 12.

[217] See ELRC (2022) 12.

6.5.7 Frivolous Postponements of Arbitration Hearings

Frivolous postponements present a significant hurdle for the ELRC with adverse implications potentially impacting the application of section 188A in sexual misconduct cases.[218] The ELRC recognises that frivolous reasons, often breaching clause 45 of the ELRC Constitution, contribute substantially to the frequency of postponements.[219] The ELRC consistently articulates efforts to curb frivolous postponement requests and reduce adjournments through the enforcement of clause 45 of the ELRC Constitution.[220] The surge in postponement requests adversely affects the turnaround times for conciliation and arbitration processes, impacting the overall efficiency of the dispute management.[221] However, it is essential to note the perspective in *the National Police Service Union and Others v Minister of Safety and Security and Others*,[222] where the Constitutional Court clarified that postponement is not a right but an indulgence from the court, requiring justification in the interests of justice. Arbitrators' complaints about multiple postponements have been raised in section 188A processes, particularly in sexual misconduct cases against children. Cases such as *Wille, Peter v Free State Department of Education*[223] and the *Northern Cape Department of Education v Mr Themba Mtshawu*[224] exemplify instances where educators faced charges of sexual misconduct, with Wille experiencing multiple postponements before acquittal, and Mtshawu being charged and convicted for sexual misconduct against a learner. Due to postponement, some witnesses like learners exiting the school system become in-accessible, leading to errant educators getting retained to continue their shenanigans against learners.

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[218] See ELRC (2022) 114.
[219] Over the ten-year period examined, with a caseload of 9 753 cases, 22% experienced postponements and adjournments, and 31% were carried over to the next period, leaving 4 492 cases unresolved in the year they were initiated, either owing to a lack of resolution or as a consequence of postponements and adjournments. See the ELRC Annual Reports 2010 to 2022. See also ELRC (2022) 114.
[220] See ELRC (2022) 114, stating that "[t]he Council continues to minimise frivolous requests for postponements, as well as reduce the high number of adjournments by enforcing Clause 45 of the ELRC Constitution. The increase in requests for postponements negatively affects the turnaround times for conciliation and arbitration processes, thus affecting the performance of the dispute management section. The Council also encourages panellists to enforce Clause 54 of the ELRC Constitution in an effort to discourage inadequate preparation for hearings and requests for postponement".
[221] Furthermore, the Council encourages panellists to enforce cl 54 of the ELRC Constitution to discourage inadequate preparation for hearings and unwarranted postponement requests. See also cl 45.1.1 of the ELRC Constitution, which directs that under cl 45.1.2 of the ELRC Constitution, postponements necessitate a written agreement between the parties, adhering to stipulated rules, and in terms of cl 45.2.2 of the ELRC Constitution must reach the ELRC seven days before the scheduled arbitration date.
[222] See *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC).
[223] See *Wille, Peter v Free State Department of Education* ELRC69-19/20FS.
[224] See *Northern Cape Department of Education v Mr Themba Mtshawu* LRC179-19/20NC.

6.6 The Role of the Employer in the Application of Section 188A of the LRA

This thesis underscores the fact that the ELRC depends largely on other role-players for the effective application of section 188A to child sexual abuse cases against educators. The employer's role in managing educator discipline, as discussed in earlier sections of this discussion and Chapter 5 of this thesis, is integral and cannot be delegated. Chapter 5 highlighted instances where the employer was held liable in a delictual claim for sexual misconduct committed by an educator against a learner, emphasising the employer's responsibility to safeguard children from such abuse. Section 188A demonstrates both its effectiveness and its limitations, particularly in relation to the employer's role in the disciplinary system.

The employer bears various responsibilities throughout the disciplinary process. These responsibilities include formulating and communicating disciplinary regulations within the teacher community, diligently enforcing these regulations,[225] conducting thorough investigations into potential infractions, issuing charges against alleged offenders, ensuring that accused educators are well informed about impending disciplinary actions and charges, prosecuting cases during disciplinary hearings, and making final determinations when guilt and associated sanctions are proposed by presiding officers.[226]

However, the authority of an arbitrator, functioning as an impartial mediator, is confined within the arbitration proceeding itself. Before and after these proceedings, arbitrators lack jurisdiction or influence over educators charged with sexual misconduct. The case of *Mr. J Tlhakung v Department of Education – Free State* (the "*Tlhakung* case")[227] highlights the limitations faced by arbitrators when employers fail to submit closing arguments or adhere to the case management process. Crucially, substantial aspects of the disciplinary system, extending beyond arbitration, remain firmly under the control of educators' employers.

6.6.1 Failure to Implement Section 188A of the LRA Consistently

The employer's failure to implement section 188A consistently is evident in cases such as *Frederick Booyse v The Western Cape Department of Education* ("the *Booyse* case")[228] on 12

[225] See item 7 of sch 2 to the Educators Act.
[226] See item 7 of sch 2 to the Educators Act.
[227] See *Mr. J Tlhakung v Department of Education – Free State* ELRC854-20/21FS ("the *Tlhakung* case").
[228] See *Frederick Booyse v The Western Cape Department of Education* ELRC18-22/23WC ("the *Booyse* case"). This educator was charged with and found guilty of sexual misconduct, and the ELRC

December 2022 and *Motsamai Blondie Maake v Department of Education: North West Provincial Government* ("the *Maake* case") [229] on 23 February 2023, both being sexual misconduct cases against children. Despite occurring after 25th September 2018, these cases underwent internal hearings followed by arbitration at the ELRC, contrary to the ELRC Collective Agreement's intent.[230] By contrast, the case of *Zamani Edwin Nyaniso Diniso v Western Cape Education Department*,[231] heard on 17 January 2023 under section 188A, highlights the inconsistency.[232]

Consider also *NATU obo Buthelezi Qhawe v Dept of Education* ("the *Qhawe* case").[233] Termination occurred on 1 April 2020 after an internal disciplinary hearing[234] one year and seven months after the ELRC Collective Agreement had been signed.[235] This thesis argues that from a time frame perspective, the employer still falls short in managing educator discipline and prompt disciplinary proceedings.[236] This arbitration contested a dismissal that

arbitration upheld the dismissal by the employer. See also *SAOU obo G. van der Westhuizen v Gauteng Department of Education* ELRC 551-2223GP.

[229] See *Motsamai Blondie Maake v Department of Education: North West Provincial Government* ELRC274-22/23NW ("the *Maake* case") para 14, which states: "14. The Applicant's employment with the Respondent was terminated on 02 December 2021, consequent to an internal disciplinary hearing. The Applicant submitted an appeal against the outcome of the disciplinary process on 10 December 2021, and the outcome of the appeal was communicated to the Applicant on 21 June 2022, confirming the sanction of dismissal." This case was heard after the signing of the ELRC Collective Agreement on 25 September 2018 and, as a sexual misconduct dismissal, ought to have been heard through a s 188A process. It simply means this matter is null and void for want of jurisdiction. This is a case of an educator who was sexually harassing a learner to have a sexual relationship with him.

[230] See also *NS Nemukombane v Department of Education – Gauteng Province* ELRC334–22/23GP ("the *Nemukombane* case") in which an educator was charged and dismissed on 8 July 2022 as para 8 states: "8. He was dismissed on 8 July 2022, following a disciplinary hearing and unsuccessful appeal." He was charged with sexual misconduct because he "conducted himself in an improper, disgraceful and unacceptable manner by remarking to Grade 7 female learners that they have big breasts". It is highly likely that he was charged after 25 September 2018, and yet his matter was taken through an internal disciplinary hearing and subsequent appeal for reasons that do not immediately appear in the arbitration ruling.

[231] See *Zamani Edwin Nyaniso Diniso v Western Cape Education Department* ELRC593-22/23WC.

[232] See *Zamani Edwin Nyaniso Diniso v Western Cape Education Department* ELRC593-22/23WC.

[233] See *NATU obo Buthelezi Qhawe v Dept of Education* ELRC1094-19/20KZN ("the *Qhawe* case"). See also *SALIPSWU obo Xolani Madalane v The Department of Education Western Cape* ELRC 487-20/21WC, a case of the sexual abuse of a child which led to the educator's dismissal on 20 January 2020. In the absence of facts, the case might have been heard long after 25 September 2018 but it was processed through an internal hearing.

[234] See the *Qhawe* case paras 4 and 14, which state as follows, "On 01st April 2020 his services were terminated by the Respondent following a disciplinary hearing. The Applicant was a leader of NATU at the UBOMBO Branch. The relief the Applicant seeks is reinstatement". The arbitrator ruled (para 14) that "[t]he dismissal of the Applicant, Mr Qhawe Buthelezi was both procedurally and substantively fair". He was dismissed for sexually assaulting a learner.

[235] See the *Qhawe* case. Some of these cases might even have started earlier than 25 September 2018, and the time lapses would still defeat the effectiveness of the employer's actions in managing educator discipline.

[236] See ELRC (2022) 115. See also *NATU obo Somraba F v Department of Education Eastern Cape* PSES216-19/20EC ("the *Somraba* case"), a case of serious sexual abuse by an educator who was subsequently found guilty. It was arbitrated upon on 28th of November 2019 at the Department of Education, Mbizana, Eastern Cape, which might also suggest that it was not handled promptly. There

had already occurred, potentially violating the ELRC Collective Agreement and warranting review.[237] The recurrence of similar cases not being handled under section 188A raises questions about the employer's commitment to the ELRC Collective Agreement in addressing educator dismissal disputes related to sexual misconduct against children.[238]

The divergence in handling sexual misconduct cases under the same department despite the ELRC Collective Agreement's existence prompts inquiries into potential contraventions of rulings in the *Ramsammy*,[239] *Satawu*,[240] and *Mchuba*[241] cases. These decisions emphasised that employers cannot disregard the section 188A process once agreed upon. The *Appels* case emphasised that parties to a collective agreement must adhere to it consistently.[242]

Moreover, the ELRC Collective Agreement on dispute resolution, offering conciliation, arbitration, and con-arb, mirrors the CCMA's options, though differing in the manner of lodging disputes and prescription times. Most ELRC cases pertain to disputes of rights, enforcing existing rights under a contract of employment or collective agreement. This thesis contends

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is nothing in the arbitration award that provides details of how the case ended up in the hands of the arbitrator in terms of the date of the hearing. Based on the details in the four corners of the ruling, the only reasonable conclusion is that the case was not heard in terms of the ELRC Collective Agreement.

[237] See the *Somraba* case. See also *SALIPSWU obo Qagambile Nkosiyane v Department of Education Western Cape* PSES553-19/20WC ("the *Qagambile* case"), where an educator was charged with serious sexual misconduct, and the ERLC confirmed the dismissal as both substantively and procedurally fair. The record of the award (para 2) states as follows: "Misconduct in that you conducted yourself in an improper, disgraceful or unacceptable manner (during January 2019 and/or February 2019) in that you sexually harassed 'A', a learner at Wallacedene Secondary School by…." This means that the charges were expressed to the educator long after 25 September 2018, and the disciplinary hearing occurred, leading to a referral to the ELRC where the arbitration was held on 29 January 2020 and concluded on 11 November 2020. An attempt at and failure of conciliation occurred on 22 October 2019. In para 19, the award also records that three proceedings occurred: "This plea of guilt was entered into at his disciplinary hearing, his appeal and finally at arbitration". Clearly, for unknown reasons the employer is abdicating its responsibility to implement the ELRC Collective Agreement.

[238] See also *Namogane Jack Machengwana v Department of Education Limpopo* ELRC 184-21/22LP ("the *Machengwana* case"), where an employee was dismissed on 26 May 2021, long after the ELRC Collective Agreement had been signed. In para 1, the ruling states: "The matter was held virtually on 24 August, 26 October 2021 and face to face on 22 August 2022 respectively." The case appeared before an arbitrator to contest the dismissal. In para 7, the arbitrator stated: "He was dismissed on 26 May 2021 for allegedly failing to submit a report and bribing a parent/guardian and the sexually assaulted victim in order to silence them regarding the sexual assault case." Clearly, the ELRC Collective Agreement was negated in this case, as the dismissal occurred two years and five months after the ELRC Collective Agreement was signed. In *A L Damons v Department of Education – Western Cape* PSES 423-19/20WC, an educator was accused of child sexual abuse, and para 10 states that "he received a notification of a disciplinary hearing on 4 March 2019 to attend a disciplinary hearing in order to respond to three charges of alleged misconduct. The disciplinary hearing took place on 3 and 4 April 2019". By 4 March 2019, the education sector had already become aware of the signing of the ELRC Collective Agreement but still proceeded with a disciplinary hearing followed by an arbitration where children testified.

[239] The *Ramsammy* case.

[240] The *Satawu* case.

[241] The *Mchuba* case.

[242] See the *Appels* case paras 5 and 8.

that the cases mentioned violated the ELRC Collective Agreement, warranting review, and the employer should be held accountable for breaching the agreement. [243]

6.6.2 Misclassification of Misconduct Cases

Cases of sexual assault were, in some instances, erroneously categorised as assault, and vice versa, introducing critical errors with profound implications for educators and the entire dispute resolution mechanism. An illustrative example is *Kleinbooi v Department of Education Eastern Cape*,[244] where the educator was mistakenly charged under section 17(1)(b) of the Educators Act for sexual assault, instead of section 17(1)(d) for serious assault. Similarly, in *Baloyi v Department of Education Limpopo*,[245] the educator faced an incorrect charge under section 17(1)(d) of the Educators Act for serious assault instead of section 17(1)(b) for sexual assault. These inaccuracies underscore the need for precision in charging educators to ensure a fair and just resolution of disputes.[246]

6.6.3 Failure to Secure Witnesses and Corroborative Evidence in Arbitration Hearings

In a section 188A inquiry, both parties must present supporting witnesses for their claims. The employer, responsible for proving allegations against an educator, bears the onus of proving misconduct on a balance of probabilities, distinct from the higher standard in criminal cases.[247] The principle of the balance of probabilities guides the arbitrator, who weighs the consistency and credibility of the evidence. The "balance of probabilities" test, as affirmed in *Combined Transport Services (Pty) Ltd v Buhle Zamokwakhe Miya and Others* ("the *Combined Transport Services* case"),[248] underscores the importance of attaching more weight to the consistent and credible evidence. In *Marapula v Consteen (Pty) Ltd* ("the *Marapula* case"),[249] the Labour Appeal Court emphasised that the employer's onus is fulfilled by demonstrating its version as more probable and acceptable. Failure to testify or present available witnesses may lead to adverse inferences, as in *Tshishonga v/s Ministry of Justice and Constitutional*

[243] See art 5 of the ELRC Collective Agreement 6 of 2016 ("the ELRC Constitution"), which states that "any dispute arising from the application or interpretation of this ELRC Collective Agreement shall be referred to the Council for resolution in terms of its dispute resolution procedures".
[244] See *Kleinbooi v Department of Education Eastern Cape* PSES250-13/14EC.
[245] See *Baloyi v Department of Education Limpopo* PSES12-18/19.
[246] See De Villiers (2021) 341.
[247] See the principle of the balance of probabilities, as stated by the Labour Court in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration and Others* (JR782/05) [2006] ZALC 44 (14 March 2006); [2006] 9 BLLR 833 (LC); (2006) 27 ILJ 1644 (LC).
[248] See *Combined Transport Services (Pty) Ltd v Miya and Others* (DA15/2014) [2016] ZALAC 57 (25 November 2016).
[249] See *Marapula & others v Consteen (Pty) Ltd* (1999) 20 ILJ 1837 (LC).

Development.[250] Unchallenged evidence in cross-examination is typically accepted, as indicated in *Small v Smith*.[251] Corroboration of evidence is vital, especially in sexual misconduct cases, with caution advised for the evidence of a single witness or a minor.[252] The employer's failure to secure witnesses or provide corroborative evidence has resulted in several cases ruled in favour of accused educators during ELRC sexual misconduct arbitration hearings.[253] The ELRC Collective Agreement does not assume the responsibility of securing witnesses or facilitating closing arguments for the arbitrator. These tasks fall within the purview of the parties involved in a dispute.[254] The significance of closing arguments and the challenges associated with securing witnesses are thoroughly examined in this thesis, particularly concerning the efficacy of section 188A.

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[250] In *Tshishonga v Minister of Justice and Constitutional Development and Another* 2007 (4) SA 135 (LC) para 112, the court said that "an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him, or even damage his case".

[251] In *Small v Smith* 1954 (3) SA 434 (SWA) 438 Claassen J said: "It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character."

[252] The arbitrator, Malusi Mbuli, in *Ntokozo Tom v Department of Education – Eastern Cape* ELRC302-23/24EC observed in para 32 that "corroboration in the presentation of a case and leading of evidence is very important and the cautionary rules of evidence teaches us that the evidence of a single witness and that of a minor must be approached with caution. The employer witness is a minor and came to present her case or the case of the employer as a single [witness]". In *Department of Education – Gauteng Province v J Seerane* ELRC478 – 22/23GP para 54, the arbitrator observed that "Hoffman and Zeffert, *The South African Law of Evidence*, 4th Edition, Butterworths, 1992 [actually, 1988], [state] as follows: 'Corroboration is the most satisfactory indication that the Complainant is truthful, but false evidence by the accused or his failure to testify may also be taken into account, as may any other feature of the case which shows that the Complainant's evidence is reliable and that of the accused false'. This is a case where an educator was found guilty of sexual misconduct, as the arbitrator stated "that [the educator] asked a grade 11 female learner when she was going to have sex with him". In *Northern Cape Department of Education v Mr Themba Mtshawu* LRC179-19/20NC, the educator failed to corroborate his evidence when "[t]he Forensic Analyst testified that she compared the swab taken from the employee during the time of the investigation with semen found on the panty and *vulca* (some other biological word for a vagina) of the learner and the result is that the two are a match".

[253] See the *Leeto* case.

[254] An illustrative example is *Department of Education, KZN v Sugan Naidoo* ELRC325-20/21KZN ("the *Naidoo* case"), where the employer faced difficulties in securing the attendance of a crucial witness, leading to the submission of a subpoena as a final attempt to ensure her participation. See para 1, which states as follows: "Preethpaul submitted that he was experiencing difficulty in securing the attendance of S at the arbitration. He attempted to contact her on several occasions and when he eventually did, she was uncooperative. S had in the interim become a major. He would make a final attempt to secure her attendance by serving her with a subpoena." See para 19, which adds: "19. Mr. Makhooe confirmed that Preethpaul had since retired. Moreover, the department had been unable to secure the attendance of S at the hearing. Save to state that she remained uncooperative, he was unable to furnish any cogent reason why S would not testify." This was a serious case of an educator being charged for alleged sexual relationship with a child. The arbitrator in that case ruled as follows (para 79): "[I]n the premises, I find that the applicant has failed to discharge the onus on it to prove that the respondent contravened Section 17(1) (c) of the Employment of Educators Act."

6.6.4 Parental Refusal to Have Children Testify in Sexual Misconduct Proceedings

The Portfolio Committee on Basic Education has bemoaned as a travesty of justice the challenge of parents who refused to have their children testify in ELRC processes.[255] Yet there has been no commitment to resolve this problem directly. Because the state is the overall parent of the child, the provisions of the United Nations Convention on the Rights of the Child (CRC) and the Constitution, 1996 provide that the best interests of the child must be a primary consideration when it comes to the issues that affect the child. The state is reluctant to enact laws overriding parental consent to protect the best interests of the child.[256] Essentially, these enactments could happen through the Schools Act. Instead of invoking the doctrine of *parens patriae* to secure children's attendance and attendant safeguards, the Portfolio Committee on Basic Education spent a whole debate discussing how cases cannot be finalised because parents refuse to provide consent. This is an arm of the legislative government with the power to amend legislation to close the gap.[257] Invoking the doctrine of *parens patriae* could address this gap by empowering the state to act in the best interests of the child when parental consent is withheld.[258] This doctrine was notably canvassed in the case of *Christian Education South Africa v Minister of Education* ("*Christian Education South Africa*"),[259] where the South African Constitutional Court referred to the US Supreme Court's ruling in *Prince v Massachusetts*.[260]

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[255] See Media Statement: Basic Education Committee Receives Briefing on GBV Programmes and Interventions (2021). The Portfolio Committee on Basic Education received a briefing from the Department of Basic Education (DBE), part of which stated that "[t]he number[s] of finalised cases includes cases that were withdrawn due to insufficient evidence, implicated educators resigned and parents refused to give permission for their children to testify. Information on cases of sexual violence against learners and teachers resides with the PEDs, as the employer, and therefore the DBE relies on the information provided by the PEDs". This thesis argues that parents who disallow their children to testify must be prosecuted for aiding crime. Refusal of consent is an obstruction of justice.

[256] See *SALIPSWU obo Xolani Madalane v The Department of Education Western Cape* ELRC 487-20/21WC para 5, where an employer representative is recorded as saying that "Sishuba explained that these learners will not be testifying as they had not received the requisite parental consent". See also *SADTU obo Godfrey Maphosa v Department of Education - Gauteng* ELRC1051-19/20GP for a discussion of requisite parental consent and *L. L. Snyders v Department of Education – Western Cape* (WCED) ELRC251-20/21WC ("the *L. L. Snyders* case") para 189, where the arbitrator observed that "[t]estimony of this nature should alert one to questioning whether this witness was participating at the disciplinary hearing with parental consent". The educator had been prosecuted and charged with child sexual abuse against a learner.

[257] See the Parliament Portfolio Committee on Basic Education (2018), Debate on Legislative Gaps Regarding Parental Consent.

[258] Clark (2000) *MJGL* 381. The doctrine of *parens patriae* allows the state to act as a guardian for those unable to care for themselves, particularly when parental refusal hinders the pursuit of justice. See also Legal Information Institute "Parens Patriae" (2022). *Parens patriae*, Latin for "parent of the country," is a legal doctrine that allows the state to act as a guardian for individuals who are unable to care for themselves, such as minors and those deemed incompetent. This concept originated from the Roman title *pater patriae* ("father of the Fatherland"), first accorded to Romulus, the legendary founder of Rome, and later to Marcus Furius Camillus for his role in restoring the city after its capture by the Gauls around 390 BC.

[259] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 41.

[260] *Prince v Massachusetts* 321 US 158 (1944) 166-168.

The court noted that the state, in its role as *parens patriae*, has the authority to limit parental control over the welfare of children, thus highlighting the state's protective function in balancing individual rights and public interests.[261]

In South Africa, the Supreme Court of Appeal recently, on 9 April 2024, ruled that children have a right to participate in decisions that affect their lives. In *Centre for Child Law and Others v South African Council for Educators and Others*,[262] concerns were raised over the Council for Educators' sanctions imposed on two educators for assaulting learners in schools. The children had not been afforded an opportunity to testify or be consulted about the sanctions.

6.6.5 Employer's Failure to Submit Closing Arguments in ELRC Proceedings

The Labour Court in *SAMWU obo Makibinyane v SA Local Government Bargaining Council* ("the *Makibinyane* case")[263] affirmed the common practice of accepting written closing arguments electronically, and any claim of being denied an opportunity for oral presentations contradicts the agreed arbitration method.[264] The employer's failure to submit closing arguments in sexual misconduct proceedings poses a threat to the effectiveness of section 188A. In the *Leeto* case, discussed in Chapter 5 of this thesis, the court disapproved of the employer's negligence, resulting in the acquittal of an educator accused of sexual misconduct.[265] Similarly, in the *Tlhakung* case,[266] the employer's failure to submit closing

[261] See also Legal Information Institute "Parens Patriae" (2022). In its modern context, particularly in England and other common law jurisdictions, *parens patriae* enables a state or court to initiate legal action on behalf of its citizens when the suit implicates the state's quasi-sovereign interests, especially regarding the welfare of its citizens. This doctrine has evolved from its origins in managing the estates of minor heirs to a broader role involving direct state intervention in the care and protection of children. The transition from focusing primarily on property to a comprehensive duty of care has led to the establishment of juvenile courts, child custody laws, and adoption statutes. Today, *parens patriae* supports contemporary legal frameworks designed to protect child witnesses and ensure their effective participation in legal proceedings, reflecting the state's commitment to safeguarding children's rights and well-being.

[262] See *Centre for Child Law and Others v South African Council for Educators and Others* 2024 (4) SA 473 (SCA).

[263] *SAMWU obo Makibinyane and Others v SA Local Government Bargaining Council and Others* (JR1043/18) [2020] ZALCJHB 140 (11 August 2020).

[264] See the *Makibinyane* case para 72. Closing arguments are often agreed upon by the parties and are incidental to the ruling of the presiding officer or arbitrator. A party's failure to submit closing arguments becomes detrimental to his case. It can lead to inferences being made against his case.

[265] See para 5.2.3 of Chapter 5 of this thesis for a discussion of the *Leeto* case. The court disapproved of the employer's actions, resulting in the acquittal of an educator who could have otherwise been found guilty of sexual misconduct against a learner.

[266] *Mr. J Tlhakung v Department of Education – Free State* ELRC854-20/21FS ("the *Tlhakung* case") para 4 states: "You have contravened section 17 (1) (b) of the Educators Act, in that on or about September 2018, you committed an act of sexual assault on a learner (Ms. X) when you had sex with her without her consent."

arguments compromised a potentially favourable outcome in a sexual assault case.[267] This trend has been observed in various cases, impacting the balance in favour of the employer, and undermining the child's right to protection from sexual abuse.[268] The absence of closing arguments, agreed upon by the parties, may lead to adverse inferences against the non-compliant party, influencing the arbitrator's ruling.[269] Despite the promise of section 188A in streamlining processes and safeguarding children, these objectives are jeopardised when employers neglect to contribute closing arguments, potentially allowing cases to be decided on technicalities rather than the merits of child protection.

6.6.6 Employer's Failure to Prove Charges in Sexual Misconduct Cases

As explained above, it is important for the employer to discharge its onus in all sexual misconduct cases against educators. This requirement underscores the need to investigate cases adequately so that when lodged with the ELRC, they are ripe for prosecution and have prospects of success.[270] The critical observation in this thesis is that the section 188A process does not absolve the employer of the responsibility to discharge the burden of proof in dismissal cases. The ELRC arbitrator remains bound by the principles of just cause and due process, as discussed in Chapter 1 and in detail in Chapter 3 of this thesis. In *HOD, Department of Education, Western Cape v Edgar Dean Fortuin* ("the *Fortuin* case"),[271] a child

[267] See the *Tlhakung* case para 7.
[268] See the *Tlhakung* case paras 50, 51 and 52, in which the arbitrator observed and ruled as follows "50. The absence of the employer's submission has seriously impacted on the result of the case"; "51. Nonetheless, I must reluctantly make the above decision, with these brief reasons"; "52. The employee is found not guilty of Charge 1".
[269] *See Head of the Department of Education – KwaZulu-Natal v C T Gwamanda* ELRC20-22/23KZN paras 68 and 71, in which the arbitrator stated: "68. As already indicated the Employer did not make any closing arguments and similarly no submissions were made in respect of this Children's Act inquiry. … 71. I do not believe that I have sufficient evidence before me to consider declaring the Employee to be unfit to work with children and I accordingly make no order in this regard." This is a case where an educator was found guilty of a serious offence of sexual misconduct against a learner. See also *Head of the Department of Education – Kwazulu-Natal v S Nkabinde* ELRC697-21/22KZN.
[270] For an employer to enter a s 188A process unprepared and lose a case negatively impacts its own integrity and generates unnecessary lawsuits, either by the victims, as in the *CS-Swanepoel* case, or by the educators themselves.
[271] In *HOD, Department of Education, Western Cape v Edgar Dean Fortuin* ELRC831-2122WC ("the *Fortuin* case") para 68, the arbitrator in a case involving serious charges of child sexual abuse stated that "[f]or the reasons contained in this award, my finding is that the employer has not succeeded to prove the guilt of Mr Fortuin on any of these allegations as contained in the charge sheet on a balance of probabilities. Mr Fortuin is therefore acquitted on all charges". See also *Mmaselaelo Ross Buthane v Department of Education (Limpopo Provincial Administration)* ELRC296-19/20LP ("the *Buthane* case") para 41, which involved a child sexual abuse case in which an educator was alleged to have had sexual intercourse with a Grade 10 learner, and the arbitrator stated that "after having considered the oral testimonies of the employer's witnesses in this matter, I find that none of them presented clear and logical connection between proving the fact in issue as well as the fact in dispute as explained under Paragraph 35 of the current Arbitration Award". The employer relies on the services of an employee relations practitioner, as in *Gauteng Department of Education v Mr. P. Phiri* ELRC 274-20/21GP ("the *Phiri* case") para 2, which states: "Mr. T. Moloto, a labour relations official, represented the employer."

sexual abuse case against an educator, the arbitrator noted the employer's failure to substantiate charges against the accused educator.[272] The charges were serious, involving a Grade 4 learner, with allegations ranging from inappropriate touching to more serious offences.[273] The prolonged tribunal proceedings and the involvement of a young child in such serious allegations raise questions about the impact on the educator's reputation if the accusations are untrue. This case prompts consideration of whether the employer could have prepared better to prove the charges if the child was indeed subjected to abuse, a responsibility that the employer failed to fulfil.

In other instances, such as *Department of Education: Eastern Cape v Mpompi Phumza*,[274] the employer failed to establish its case of sexual misconduct, as a forced hug did not align with the defined misconduct. Numerous other cases illustrate the employer's failure to handle such matters judiciously, potentially leading educators to perceive false accusations against them.[275]

6.6.7 Employer's Short-Termism in Managing Sexual Misconduct Cases

The ELRC Collective Agreement appears to lack a long-term perspective.[276] Unlike legislative enactments with enduring validity until amended or repealed, collective agreements have limited duration and scope.[277] Considering the persistent occurrence of child sexual abuse in

[272] See the *Fortuin* case para 6.
[273] See "Mr Fortuin was accused of having performed the following acts on the complainant namely: (a) Inserting his penis into her vagina; and/ or (b) Touching her thigh and/or buttocks; and/or (c) Rubbing her vagina and breasts with his hands".
[274] See *Department of Education: Eastern Cape v Mpompi Phumza* ELRC938-21/22EC ("the *Phumza* case") para 96.
[275] See *Department of Education-KZN v SADTU obo Kwanda Frank Khanyile* ELRC 124-21-22KZN para 58, in which the arbitrator ruled that "[t]he employer/applicant failed to discharge the onus that there was sufficient to find the educator guilty. The educator had submitted sufficient evidence that the allegations against him was not properly founded and as such should be found not guilty and exonerated". This case raised serious accusations about an educator having a sexual relationship with a child. See also *Ntokozo Tom v Department of Education – Eastern Cape* ELRC302-23/24EC, where in paras 1, 36, 37, 42 and 47 the arbitrator, Malusi Mbuli, observed that the employer failed to discharge its onus by failing to challenge the educator's version, leading an adverse inference against the employer. See also the *L. L. Snyders* case para 188, where a child admitted to lying in a disciplinary hearing leading to the conviction of an educator: "She testified that she had lied at the disciplinary hearing when she said that she had been so upset because she was telling the truth and her mother would not believe her."
[276] See the *Mthashana FET College* case. See also para 6.3 of this chapter above. The ELRC Collective Agreement No. 6 of 2016 (the ELRC new constitution) replaced the lapsed ELRC Collective Agreement No. 1 of 2006 and the CET Act, which was in conflict with the ELRC Constitutions, old and new.
[277] The ELRC Collective Agreement is as valid as the Constitution of the ELRC. Once the Constitution of the ELRC expires, all collective agreements under it also expire. This thesis argues that aspects such as disciplinary action should not be processed through collective agreements but by legislation. The ELRC Collective Agreement should only be considered for procedural aspects, not the substantive

public schools, evident in ELRC records throughout the history of public education, addressing such a critical issue requires a comprehensive policy approach through legislative enactments and regulations rather than a time-limited collective agreement.[278] The gravity of the matter demands enforcement rather than prolonged debate.

6.6.8 Employer's Failure to Consider Learners' Plight in Non-Sexual Abuse Cases

Additionally, the employer's failure to extend consideration beyond sexual misconduct cases raises concerns. A case in point is *Ngoako Reuben Masipa v Department of Education: Limpopo* ("the *Masipa* case").[279] The learner was victimised in addition to suffering serious bodily harm caused to her. She testified twice, in the internal disciplinary hearing as well as the arbitration referral under the ELRC.[280] Learners may undergo severe distress when educators face dismissal for reasons other than sexual misconduct, involving serious misconduct cases. The process of prosecuting such cases may expose these children to secondary trauma, in addition to the trauma caused by sexual misconduct. This oversight, coupled with the short-term focus, constitutes a significant drawback of the ELRC Collective Agreement.[281]

6.6.9 Employer's Failure to Process Cases Timeously

A highlighted concern raised by the Portfolio Committee on Basic Education regarding the resolution of sexual misconduct cases was the extended duration of a case presented to the Member of the Executive Council (MEC), spanning three years.[282] This concern raises the imperative of setting a clear timeline for case resolution to facilitate accountability, as extended delays may result in the disappearance of witnesses from the system. It is suggested that an optimal time frame for case resolution should ideally be within six months.[283]

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aspects. S 4 of the Educators Act should be used to regulate the position, not allow the employer to abdicate the responsibility to discipline educators.

[278] See para 1.3.1 of Chapter 1 of this thesis for a discussion of the prevalence of sexual misconduct cases.

[279] See *Ngoako Reuben Masipa v Department of Education: Limpopo* PSES905-19/20LP. This case involved an educator who threatened the learner. His dismissal was confirmed by the ELRC. Such a case ought to have been processed through a single process. In para 5 it is recorded that "he [the educator] threatened to kill the said learner using sign language thereby intimidating or victimising her". To testify in multiple processes is traumatising.

[280] See the *Masipa* case para 5.

[281] See the ELRC Collective Agreement.

[282] See the Parliament Portfolio Committee on Basic Education (2018).

[283] See the Parliament Portfolio Committee on Basic Education (2018). This issue was also discussed in the *CS-Swanepoel* case and the *Leeto* case. The ELRC will only process cases brought before it. If the employer delays in lodging cases, it threatens the safety of children who may continue to be exposed to sexual offenders.

6.7 Other Role-players in the Application of Section 188A of the LRA

Despite its pivotal role, the ELRC faces several challenges in handling sexual misconduct cases. One significant challenge is the potential fragmentation of processes owing to concurrent jurisdiction with other entities such as the Council for Educators and the Department of Social Development. This challenge can lead to confusion, inefficiencies, and multiple testifying by child victims.

6.7.1 Lack of a Collaborative Approach between the ELRC and SACE

One prominent issue that presents challenges in the processing of sexual misconduct cases against educators pertains to the lack of coordination between the ELRC and SACE in disciplinary proceedings. This misgiving has been noted by the Portfolio Committee on Basic Education, but no policy direction has been provided to rescue the situation.[284] For effective management of hearings, there should be a harmonious collaboration involving the ELRC, SACE, and the school concerned. This collaborative approach would ensure that both the ELRC and SACE actively participate in the decision-making process, fostering a unified outcome.[285]

6.7.2 ELRC Arbitration Awards Not Binding on SACE

Moreover, the ELRC's decisions and sanctions are not binding on SACE. This complication can lead to disparities in the treatment of educators found guilty of misconduct. SACE is required to begin its own independent process afresh when the employer furnishes it with a notification that an educator has been dismissed.[286] This lack of alignment between institutions raises questions about consistency and fairness in disciplinary outcomes.[287]

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[284] See the minutes of the meeting of the Portfolio Committee of Basic Education on 17 October 2018, where it was stated that "[t]he second issue which came to the fore was the fact that there was a lack of synergy between the ELRC and the South African Council for Educators (SACE). Members asked what the relationship between the two entities was and suggested that a special session be held, with both entities present, to clarify the role of each and to create better synergy between them". See the Parliament Portfolio Committee on Basic Education (2018). This meeting of the Portfolio Committee on Basic Education in Parliament was set to discuss the ELRC Collective Agreement pertaining to the use of s 188A of the LRA in dealing with sexual misconduct disputes against educators. Yet there is no direction on what would be done to close the gap identified above.

[285] See the Parliament Portfolio Committee on Basic Education (2018).

[286] See the *Council for Educators-Scheepers CC* case para 20. See also s 14(2)(b) of the SACE Act.

[287] See the *Scheepers* cases discussed in Chapter 5 of this thesis.

Although clause 5.4 of the ELRC Collective Agreement provides that "within 14 days after the award of the arbitrator has been served on the parties, the General Secretary shall send a copy of the award to SACE",[288] it does not state the purpose for doing so. It does not state whether the award is binding on the SACE processes or otherwise and what SACE must do with this copy of the award once it has been received. The language adopted by the arbitrator in *Mr L J Davids v Department of Education – Western Cape* ("the *L J Davids* case") is telling. He said that the award must be sent to SACE to consider revoking Mr Davids's SACE certificate and declaring him unsuitable to work with children.[289] In *Department of Education KZN v A.P. Baboolall* ("the *Baboolall* case"), the arbitrator ruled that:

> [t]he ELRC General Secretary must forward this award to the Department of Social Development for Baboolall's name to be included in the National Child Protection Register as unsuitable to work with children and to the Council for Educators for appropriate action.[290]

The statements in the *L J Davids* case and the *Baboolall* case are not directive, but almost persuasive except the part of the *Baboolall* case which directs the name of the educator to be sent to the National Child Protection Register. This is consistent with the gazetted protocol and regulation that restrict the re-employment of educators through the operation of law.[291]

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[288] See cl 5 of the ELRC Collective Agreement. A few examples will be given to show how these awards deal with the role of SACE vis-à-vis the employer of educators.

[289] Several cases reviewed in this thesis where educators are found guilty by the arbitrator often end with a statement that the ruling must be sent to SACE. A few will be mentioned to demonstrate the point. See *Mr L J Davids v Department of Education – Western Cape* ELRC767-21/22WC sub para 4 in which the Arbitrator held as follows: "[t]he ELRC is directed to send a copy of this award to the South African Council for Educators (SACE) to consider revoking Mr. Davids SACE certificate and declaring him unsuitable, in terms of the Children's Act to work with children". See the interesting framing of the award by an arbitrator in *Department of Education - Free State v Mr. T Mokoena* ELRC276-23/24FS para 40 bullet point 2, stating: "[t]o send a copy of this arbitration award to the South African Council for Educators (SACE), for the revoking of Mr. J Mokoena's, SACE certificate, though they indeed have their own processes before they do same". This is clearly a hesitant statement which is also contradictory. It begins as a directive "send a copy of this arbitration award to the South African Council for Educators (SACE), for the revoking of Mr. J Mokoena's, SACE certificate", and then ends with an acknowledgement that SACE has its own processes. What is certain is that SACE is not empowered to revoke its certificate as a consequence of an employer-initiated arbitration award. In *Gerhard Strydom v The Department of Education Western Cape* ELRC469-20/21WC, the arbitrator used a directive approach pertaining to SACE after he found the educator guilty of sexual misconduct as follows: "the ELRC is kindly requested to send a copy of this award to SACE (South African Council for Educators) so that his Certificate as an Educator may be revoked." It is as though these directives will be followed but it is highly unlikely.

[290] See *Department of Education KZN v A.P. Baboolall* ELRC421-22/23KZN para 60.3.

[291] See GN 331 in *GG* 44433 of 9-04-2021. See also para 1.1 of Chapter 1 of this thesis for a discussion of the Regulations for Prevention of Re-Employment of Former Educators Discharged or Deemed Discharged for Misconduct or Deemed Resigned.

The aspect of sending a dismissal award to SACE for appropriate action is imprecise. Where there is imprecision there is a possibility of making assumptions, leading to conjecture and uncertainty. The only clear direction readable from the legislation is in section 26(2) of the SACE Act. This directs the employer of educators to furnish the record of sanctions above a mere reprimand to SACE. An instructive precedent in this regard, though, is the Constitutional Court's ruling in the *Scheepers* case.[292] The ruling by the Constitutional Court in *Council for Educators-Scheepers CC* discussed in Chapter 5 of this thesis directed SACE to conduct its own investigations and not rely on the investigation conducted by the employer.[293] Consequently, any reliance on investigations conducted by another entity, such as the educator's employer, was categorically prohibited.

6.7.3 SACE Exposing Children to Testifying Multiple Times

This situation above, in which the ELRC awards do not bind SACE, gives rise to several significant implications. First, this situation necessitates that the same children who are being shielded from the ordeal of testifying multiple times will now be compelled to provide testimony anew within the framework of the SACE inquiry into an educator's professional misconduct.[294]

A second implication stems from the fact that SACE is not bound by the sanctions imposed by the ELRC or the employer.[295] Conversely, the SACE decision binds the employer and the educators struck off the register of practising educators in terms of section 15(2) of the Educators Act.[296] SACE imposed a more severe penalty: indefinite removal from the register of practising educators. Though SACE's actions may not be precisely analogous to an LRA

[292] See the *Council for Educators v Scheepers CC* case. The Constitutional Court decided this case on 23 July 2023. The Constitutional Court ruled that SACE had failed to investigate and that relying on the investigation report provided by the SGB was not an investigation as defined by s 14 of the SACE Act. This case is dealt with in Chapter 5 of this thesis. I wish to indicate that the Council for Educators is not bound by the submission of s 188A rulings and may initiate its own processes independently. This suggests that the same purposes sought under the ELRC Collective Agreement may be defeated, as SACE may require children who have testified in the ELRC process to do so again under the SACE process.
[293] See para 5.5 of Chapter 5 of this thesis. See also the *Council for Educators-Scheepers CC* case para 20. Here, SACE had attempted to rely on an investigation report provided by the employer to discharge its regulatory statutory responsibilities. However, the Constitutional Court refused to uphold this approach. SACE was censured for its failure to adhere to s 14(2) of the SACE Act, which expressly directs SACE to conduct independent investigations into cases of professional misconduct involving educators.
[294] See the *Council for Educators v Scheepers CC* case. See also s 14(2)(c) of the Educators Act.
[295] See the *Robertson* case para 4, where the employer imposed a suspension as a consequence of the educator's uttering unsavoury statements of a sexual nature to a Grade 7 learner but SACE struck him off its register of practising educators.
[296] See s 15(2) of the Educators Act.

equity-based dismissal, they still amount to an indirect dismissal.[297] This thesis argues that the processes must be streamlined through a possible joint approach that accords with the cooperative governance principle discussed in the *Scheepers* cases.[298] This thesis further argues that, in the interest of securing evidence from children in disciplinary proceedings against teachers for child sexual abuse (CSA), legislation should be amended to establish a single central deposition centre. A deposition is the process by which a witness provides sworn testimony outside of court, which is subject to cross-examination by legal representatives from all parties involved.[299] By creating a multiparty committee to conduct a deposition with full cross-examination of a child complainant or witness, a pre-recorded testimony can be produced for use by all interested parties, such as the employer of educators, the South African Council for Educators (SACE), the Education Labour Relations Council (ELRC), and civic and criminal courts. This approach ensures that a child does not have to attend multiple forums to give the same testimony, thus reducing the emotional and psychological burden on the child while maintaining the integrity and thoroughness of the evidence.[300]

6.7.4 SACE Acquitting Educators Found Guilty by the Employer

A third implication materialises when an educator found guilty of sexual misconduct is subsequently entered in the Department of Social Development (DSD) register of sexual offenders deemed unsuitable to work with children.[301] This step places an indelible mark on the educator's professional status. If, by contrast, the educator is not found guilty of the same offence by SACE, he retains his teaching licence, introducing a new layer of complexity into the teaching profession.[302] Such educators may seek employment in the private sector or other provinces where they can still legally practise their profession.[303]

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[297] Owing to the professional regulatory authority exercised by SACE, even if the employer had wished for Robertson's return to the classroom, his status as unemployable would persist. S 21 of the SACE Act explicitly prohibits the employment of individuals not listed in the register of practising educators.
[298] See para 5.7.3 of Chapter 5 of this thesis.
[299] See Strom (2023).
[300] See Norfolk Local Safeguarding Children Partnership (2023).
[301] See the *L J Davids* case and the *Baboolall* case discussed above, where the ELRC rulings direct educators to be placed on the DSD register, despite such rulings not binding SACE.
[302] See the Parliament Portfolio Committee on Basic Education (2018). The Portfolio Committee of Basic Education observed: "On the powers of SACE, if they conducted an investigation, witnesses were required, but there would be a lack of witnesses. So, despite the ELRC issuing an award to say a person was guilty of a sexual violation, SACE would have no choice but to say the person was not guilty, due to the lack of witnesses." If witnesses decline to testify under SACE process, having been found guilty by the employer, educators retain their licences to teach.
[303] See s 14(1)(d)(ii) of the Educators Act.

6.8 The Role of Educators in Sexual Misconduct Cases

It is critical that this thesis also consider the role of educators in the section 188A process. It must be taken into account that they are the subject of attention and some of them have committed despicable acts. The educators have two roles to play in section 188A process: to take up the *in loco parentis* responsibility and to protect children from their colleagues through reporting. Several ELRC arbitration rulings under section 188A have emphasised the need for educators to act in *loco parentis* regarding their focus on children. See *Department of Education-Free State v Mr. M Ngcobondwana* ("the *Ngcobondwana* case"),[304] where the arbitrator Shiraz Mahomed Osman ruled: "I am persuaded … that the educator had abused his relationship as *parentis in loco*". This case pertained to an educator dismissed for having had a sexual relationship with a learner. See also *Fawcus J V v Department of Education – Gauteng* ("the *Fawcus* case"),[305] where "[t]he employer argued amongst others that the employee as *loco parentis* is expected to protect learners and not to take advantage of them as they are minors". This is the position in several other cases too.[306]

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[304] See *Department of Education - Free State v Mr. M Ngcobondwana* ELRC965-22/23FS ("the *Ngcobondwana* case") para 72. This educator was charged with, among other things, the following (para 30): "You have contravened section 18 (1) (q) of the Educators Act in that on 21 October 2022 while on duty, you conducted yourself in an improper, disgraceful or unacceptable manner when you asked a grade 12 learner Ms. X to go to the school fence and bend over so that "*ke khone ho e kenya ka matla, be k fufulelwa*" (I can be able to penetrate you with power and then I can sweat)".

[305] *Fawcus J V v Department of Education – Gauteng* PSES934-18/19GP ("the *Fawcus* case") para 30. This case pertained to an educator who had sexually assaulted a child.

[306] See *Zola Sajini v Department of Education–Eastern Cape* PSES 914-18/19EC para 25, in which the arbitrator, Hadley Saayman, correctly observed that "[t]he Children's Act, 2005 and the Children's [Amendment] Act 2007, codifies the common law [principle] 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, wellbeing 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 is also a case of a teacher who had sexually abused a child. See also *NATU obo TR Ndlovu v Department of Education KwaZulu-Natal* PSES377-18/19KZN para 50, in which the arbitrator, Vuyokazi Ngwenya, stated that "[t]he cold and almost clinical application of contract law cannot be viewed in isolation. Two of the cornerstones of the basic education sector/environment are that an educator is in loco parentis and also the principle of the best interest of the child. This basically means that the teacher/educator is on the place of a parent/ must behave as a parent would towards a child. Best interest of the child means the actions taken by anyone in authority must be favourable or to the child's advantage". This thesis argues that it is not as if educators are not aware of their responsibility towards children. It is most likely that they lack the discipline to keep their hands off these children. The normal approach is to weed out such elements and keep sending a deterrence message to errant educators through criminal prosecution. See also *HOD, Department of Eastern Cape v S Qubuda* PSES-757-18/19EC; *David Skippers v Western Cape Education Department* ELRC 1048-19/20WC. For instance, in *Gino Carl Collin Rhoda v Respondent: Department of Education Western Cape* ELRC814-19/20WC ("the *Rhoda* case"), an educator kept sending WhatsApp messages to a learner with pictures of his genitalia. This could be a borderline mental disorder. See also *Head of the Department of Education – KwaZulu-Natal v D Gyanishwar* ELRC433-21/22KZN ("the *Gyanishwar* case"). All these educators were found guilty of abusing their position as educators instead of protecting children.

A report to the SA Human Rights Commission (SAHRC) in Limpopo 2021 revealed that the majority of cases (273) involved improper or sexual relationships with learners: 191 instances of sexual harassment, and 119 cases of sexual assault, abuse, and rape.[307] The report uncovered instances where teachers leveraged their authority to coerce pupils into engaging in sexual acts, either for academic marks or to advance to the next grade. All this misconduct undermines efforts to curb teachers' sexual abuse in public schools.

The findings also highlighted cultural resolutions, where teachers implicated in misconduct were compelled by parents to pay damages.[308] In some cases, parents accepted these payments because of financial constraints, leading the council to express concern about the apparent commodification of children's well-being.[309] Additionally, this thesis identified cases where educator perpetrators resorted to bribery to evade prosecution.[310] This practice was noted as more prevalent in independent schools and public schools with high matriculation pass rates.[311]

During Limpopo hearings, Mashudu Ramulumo of the SA Principals Association acknowledged that some school principals concealed incidents of sexual misconduct.[312] Fear of victimisation by perpetrators and concerns about the protracted resolution of cases were cited as reasons for not reporting these incidents to the provincial education department.[313]

6.9 Conclusion

Given the discussion above, the conclusion that can be drawn is that the utilisation of section 188A of the LRA should be incorporated into the body of the Educators Act rather than proceeding from a collective agreement, especially in educator sexual misconduct dismissal disputes involving children. The thesis also argues that the relationship between the employer and SACE should be streamlined into a joint partnership to deal with errant educators. The

[307] See Macupe *City Press* (2021).
[308] The cases of *Gauteng Dept of Education Employer v S Rasekhula* ELRC 990-21/22GP ("the *Rasekhula* case") para 12; *Mpumalanga Department of Education v Sboniso Gumede* ELRC156-22/23MP ("the *Gumede* case") para 32; and *Gauteng Department of Education v SADTU obo Kgadi Elliot Mofokeng* ELRC1027-21/22GP paras 13 and 14 reveal the attitude of educators who had sexually abused children: these educators invoked cultural practices of attempting to pay damages and then promising marriage.
[309] See Macupe *City Press* (2021).
[310] See the *Machengwana* case para 11, where it is recorded that "she [Millicent Ntshieng Mathladisa – the child's guardian] was surprised why the principal would bribe her because he was not the one who raped the child. She ended up taking the matter to the media".
[311] See Macupe *City Press* (2021).
[312] See Macupe *City Press* (2021).
[313] See Macupe *City Press* (2021).

employer must lose no time in improving its performance in managing educator misconduct and prosecuting and presenting in disciplinary hearings. Such a conclusion is supported by the following findings.

First, this chapter concludes that section 188A, though effective in its role within the South African educational disciplinary system, has inherent limitations. These extend from the role and responsibilities of employers to the complexities associated with the arbitration process, the selection of arbitrators, and the adequacy of facilities for specialised proceedings.[314] The employer has often failed to implement the ELRC Collective Agreement, secure witnesses, present closing arguments, and discharge the required onus, leaving cases to tilt in the educator's favour even when the educator may have abused a child.[315]

Secondly, the challenge of fragmentation arising from concurrent jurisdiction and oversight by both employers and SACE remains unresolved.[316] This fragmentation perpetuates duplicated processes and introduces the potential for educators to face double jeopardy, while also subjecting children to secondary trauma through the requirement of testifying in multiple proceedings. The legislature needs to revise the legislation to streamline the role of actors such as the HOD, SACE, and the ELRC. The relationship between SACE and the HOD needs to be streamlined.

Thirdly, the legislature needs to be amended or repealed to include the contents of the ELRC Collective Agreement in a broader legislative framework rather than a temporary, negotiable collective agreement.

Fourthly, the management of educator discipline requires further strengthening. The employer must take its role seriously in charging offending educators promptly, presenting closing arguments in disciplinary proceedings when required to do so, securing witnesses for disciplinary inquiries, investigating cases to ensure that they are ripe for prosecution when lodged with the ELRC, and placing safeguards in schools to manage the discipline of educators adequately.

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[314] See cl 3.5 of the ELRC Collective Agreement.
[315] See the Labour Court's reasoning in the *Leeto* case paras 27 and 28. Acknowledging and addressing these limitations is vital for maintaining fairness, efficiency, and effectiveness within the disciplinary system, particularly in cases of sexual misconduct involving educators. The employer needs to take the ELRC Collective Agreement seriously and implement it as required by law.
[316] See s 15(2) of the Educators Act. See also s 20(11) of the Schools Act juxtaposed with s 4 of the Educators Act.

Fifthly, the employer of educators must act without fail to review the management of educators to avert the abuse of children. This is a constitutional requirement rather than a progressive realisation. The discussion now moves to a comparative analysis of educator discipline systems in the two comparator countries, Nigeria and England.

Chapter 7: Comparative Analysis of Educator Discipline Systems

Page

7.1 Introduction 236
7.2 Educator Dismissal Procedures in Nigeria 237
7.2.1 Introduction 237
7.2.2 Prevalence of Child Sexual Abuse by Teachers in Nigerian Public Schools 241
7.2.3 Key Legislation on Dismissal Disputes in Nigeria 243
7.2.3.1 The Child's Rights Act and the Violence Against Persons (Prohibition) Act 243
7.2.3.2 The Violence Against Persons (Prohibition) Act 245
7.2.3.3 The National Policy on Education 247
7.2.3.4 The Teachers Registration Council of Nigeria Act 249
7.2.3.5 Nigerian Law Regulating Teacher Dismissal for Sexual Misconduct 253
7.2.4 Role-players in Dismissing Teachers Charged with Child Sexual Abuse 256
7.2.4.1 The Teachers Registration Council of Nigeria 257
7.2.5 The Comparative Lessons for South Africa 259
7.3 Educator Dismissal Procedures in England 260
7.3.1 Introduction 260
7.4 Prevalence of Child Sexual Abuse by Teachers in UK State Schools 265
7.4.1 Key Legislation on Educator Dismissal Disputes in the UK 266
7.4.1.1 The Education Act 1944 and the Regulation of Education in the UK 266
7.4.2 The Role-players in Dismissing Teachers Charged with Child Sexual Abuse 268
7.4.2.1 The Role of Governing Bodies and the Local Authority 268
7.4.2.2 The Abolition of the General Teaching Council for England (GTCE) 270
7.4.2.3 Regulating Teacher Sexual Misconduct against Learners in England 271
7.4.3 The Teachers' Disciplinary (England) Regulations 2012 272
7.4.4 Balancing Children's Rights and Teachers' Labour Rights 277
7.4.5 Protection of Teachers' Labour Rights in England 278
7.5 The Comparative Lessons for South Africa 282

7.1 Introduction

The previous chapter discussed the application of section 188A of the LRA in dealing with educator dismissal disputes for sexual misconduct committed against learners in South African public schools. The chapter recognised the significance of collective agreements in creating harmonious industrial relations. It analysed the ELRC Collective Agreement signed by the ELRC to give expression to section 188A in dealing with sexual misconduct cases. It also highlighted the benefits of section 188A in the education sector. By removing disciplinary

hearings and possible appeals and instituting a single process for sexual misconduct cases, section 188A helps children not to testify in multiple forums. The ELRC awards arising from the section 188A process, which is an arbitration, are only reviewable in the Labour Court. Chapter 6 of this thesis also noted with concern some factors that militate against the effective realisation of the objectives of section 188A. These challenges include the employer's reluctance to implement the ELRC Collective Agreement and, in several cases, the employer's failure to secure witnesses, to present closing arguments during proceedings, to secure appropriate facilities because of reliance on borrowed premises, and to prove cases because cases are prosecuted before they are ripe.

This chapter conducts a comparative analysis of educator discipline systems in South Africa, England, and Nigeria. It identifies differences and similarities, providing insights into the strengths and weaknesses of each system. It contributes to a broader understanding of South Africa's educator discipline framework, specifically for sexual misconduct cases committed by educators against learners. The areas of focus in this comparative inquiry include the prevalence of sexual misconduct in state schools in Nigeria and England; exploring the critical legislation in the context of educator dismissal disputes related to sexual misconduct in Nigeria and England; exploring the role-players in the dismissal of educators charged with sexual misconduct and the status of educator dismissal actions for sexual misconduct in Nigeria and England; and the extent to which the Nigerian and English systems balance the rights of children to basic education and protection against the labour rights of educators, including the role of just cause and due process in educator dismissal for sexual misconduct. The brief history of the United Kingdom (UK) in paragraph 7.3.1 sketches the creation of the separate Republic of Ireland in 1921, enabling the subsequent discussion of the article about teacher-perpetrated sexual misconduct in Irish and UK secondary schools in paragraph 7.4.

7.2 Educator Dismissal Procedures in Nigeria

7.2.1 Introduction

Nigeria, officially the Federal Republic of Nigeria, is a West African country with its capital city in Abuja.[1] Covering a total area of 923 768.00 km^2, Nigeria shares borders with the Republic of Benin to the west, the Republic of Chad and the Republic of Cameroon to the east, and the

[1] See WorldAtlas "Nigeria" (2023).

Republic of the Niger to the north.[2] To the south, Nigeria's coastline stretches approximately 853 kilometres (530 miles) along the Gulf of Guinea in the Atlantic Ocean.[3]

Nigeria operates as a federation, a union of self-governing states or regions united under a central government.[4] The central government has limitations[5] in a federalised system compared to more centralised states such as South Africa.[6] Certain functions that a centralised government typically performs are delegated to the individual states or regions within the federation.[7] With its 36 federal states[8] and the Federal Capital Territory where the capital, Abuja, is situated,[9] Nigeria occupies a significant position on the African continent. Its estimated population is 206.1 million, with a growth rate of 2.5% per annum and a life expectancy of 54.7 years. The country's GDP stands at US$428 billion, making it the largest economy in Africa.[10]

Nigeria gained independence from the United Kingdom in 1960. Nigeria's post-colonial history has been marked by intermittent periods of civilian government, particularly between 1960 and

[2] See WorldAtlas "Nigeria" (2023). See also Central Intelligence Agency (2024).
[3] See WorldAtlas "Nigeria" (2023).
[4] Drawing parallels, the United States of America (USA) is a federation where the federal (central) government holds the highest executive role. However, state governments retain the authority to exercise powers not specifically assigned to the federal government by the United States Constitution and not prohibited by the states themselves. Australia transitioned into a federation in 1901, establishing a federalised structure. Pakistan, after the 1971 civil war, adopted a federal framework in its 1973 Constitution. Additional examples of federal states include Austria, Belgium (since 1993), Canada, Germany, Russia, and Switzerland. In these systems, the distribution of powers and responsibilities between the central and regional entities defines the federalised structure.
[5] See Cambridge Dictionary "Federation" (2024).
[6] See South African Government "Government System" (2024).
[7] This means each of the 36 States is capable of making decisions independent of the central government and any other state, including about education policy.
[8] The 36 states in Nigeria are Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Federal Capital Territory, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe, and Zamfara. Under the constitution, the three tiers of the federal system – federal, state and local government – offer a differentiated administrative structure with the federal government and the two chambers of the National Assembly, 36 governors and state assemblies, and 768 local governments and six councils in the Federal Capital Territory Abuja. In addition, the statutory revenue allocation aims to finance the three tiers of government according to certain criteria, but, in fact, legally sustains the system of distributing the wealth among the elites. Though the federal government, the National Assembly, and the state governors execute real political power and have access to state funds, most of the other administrative institutions and the local tier suffer from very low political skills. The serious crisis in the entire north, considerable parts of the Middle Belt, and in the Niger Delta is, to a large extent, due to the breakdown of the local government structure.
[9] See WorldAtlas "Nigeria" (2024) Major cities in Nigeria include Lagos (15 945 912), Kano (4 348 481), Ibadan (3 874 908), Abuja (3 839 646), Port Harcourt (3 480 101), Benin City (1 904 631), Onitsha (1 623 382), Uyo (1 329 284), Nnewi (1 239 186), and Aba (1 188 803). The currency used is the Naira (NGN), and the GDP is $448.12 billion, with a GDP per capita of $2 229.86.
[10] See WorldAtlas "Nigeria" (2023).

1966 and 1979 and 1983.[11] The democratic dispensation since 1999 constitutes a concerted effort to establish a stable democratic political system after years of coups and military dictatorships.[12] Besides facing a challenging security situation in various regions, democratic institutions such as the presidency, the two chambers of the national assembly, and state-level structures (governorship and state assemblies) have remained reasonably unstable and unsafe, underscoring the need for a commitment to the rule of law.[13]

Nigeria's education system follows the 1-6-3-3-4 formula, encompassing one year of pre-primary education, six years of primary education, three years of junior secondary education, three years of senior secondary education, and at least four years of tertiary education.[14] This thesis focuses on the public school system, which, according to the Nigeria Education Management Information System ("NEMIS"),[15] comprises approximately 220 460 basic education public schools.[16] The student population includes approximately 40 518 098 learners.[17] The teaching staff in basic education public schools numbers about 1 030 408.[18]

[11] Nigeria shares with South Africa a history of colonial and apartheid oppression from Great Britain which has since been overcome.
[12] See Central Intelligence Agency (2024). In ancient and pre-colonial eras, the region now known as Nigeria was inhabited by diverse ethnic groups, each with distinct languages and traditions. Islamic kingdoms such as Borno, Kano, and the Sokoto Caliphate dominated the north, while the Benin and Oyo Empires held sway in western Nigeria. The south and southeast comprised more decentralised political entities and city-states. The British amalgamated the northern and southern territories into the Colony and Protectorate of Nigeria in 1914. Independence was achieved in 1960, transitioning to a federal republic in 1963. However, regional and ethnic tensions heightened, leading to a coup in 1966 and subsequent civil war, resulting in significant casualties. The war strengthened the Nigerian state but fostered lasting mistrust in the southeast. Yakubu Gowon led Nigeria until a 1975 coup, with subsequent leaders such as Olusegun Obasanjo, Ibrahim Babangida, and Muhammadu Buhari shaping the nation. Military rule persisted until the first civilian government in 1999. The 2007 elections marked the first civilian-to-civilian power transfer, and subsequent elections in 2011, 2015, 2019, and 2023 faced challenges but were generally deemed credible. Nigeria grapples with democratisation, economic reforms, and security issues, including terrorism, banditry, secessionist violence, and resource-related conflicts.
[13] See Bertelsmann Stiftung (2022) 9.
[14] See National Policy on Education 4th Edition (2004). See also Ekundayo (2019). Although based on successful models from China, Germany, and Ghana, the implementation of this formula in Nigeria has faced challenges, with successive governments theoretically supporting its objectives but struggling to achieve full implementation.
[15] The Nigeria Education Management Information System (NEMIS) is a system for the collection, storage, integration, processing, maintenance and dissemination of data and information to support decision-making, policy analysis and formulation, planning, monitoring and management of all levels of the education sector. See Federal Ministry of Education (2020).
[16] See Federal Ministry of Education (Statistics and NEMIS) (2021), which states that the 220 460 basic education public schools comprise 26 723 pre-primary schools, 169 636 primary schools, 13 634 junior secondary schools, and 10 467 senior secondary schools as of the 2020/2021 annual year period.
[17] See Federal Ministry of Education (Statistics and NEMIS) (2021), which states that the 40 518 098 learners enrolled in basic education public schools are composed of 2 915 210 learners in pre-primary schools, 27 488 390 primary school learners, 5 637 064 junior secondary school learners, and 4 477 434 learners in senior secondary schools.
[18] See Federal Ministry of Education (Statistics and NEMIS) (2021), which states that the 1 030 408 teachers in basic education public schools include 128 495 pre-primary school teachers, 526 495

Nigeria has implemented legislation to address children's welfare and safeguard teachers' rights, including protection against unfair dismissal, to a negligible extent.[19] Critical enactments include the Violence Against Persons (Prohibition) Act ("the VAPP Act"),[20] the Child's Rights Act ("the CRA"),[21] the Constitution of the Federal Republic of Nigeria 1979,[22] and the National Policy on Education in its revised 1981, 1998, 2004 and 2013 editions.[23]

The Universal Basic Education (UBE) Commission, established in 2004, further formalised the commitment to education. The Teachers Registration Council of Nigeria Act ("the TRCN Act")[24] and the Nigerian Labour Act Cap L1 LFN 2004 ("the Labour Act, 2004")[25] also contribute to the legal framework dealing with teacher regulation and rights.

Protecting children's rights in Nigeria is reinforced through the Constitution of the Federal Republic of Nigeria 1999, the CRA, and other laws such as the VAPP Act. The country aligns with international norms, including the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child. This alignment demonstrates a commitment discussed in Chapter 2 of this thesis.

Nigeria predominantly follows the common-law approach to employment termination, allowing employers and employees to terminate contracts without justification, as recognised in the Labour Act, 2004.[26] Although international conventions are slowly being embraced, the power to interpret and apply them rests with the courts, particularly the National Industrial Court of Nigeria, a perspective that positivist legal scholars criticise.[27]

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primary school teachers, 202 206 junior secondary school teachers, and 173 212 senior secondary school teachers.

[19] See Aderibigbe (2014) *JCLA* 29, who asserted: "Labour disputes in Nigeria are resolved, in large measure, by the judiciary and the lawyer inevitably plays a pivotal role in this process."

[20] See the Violence Against Persons (Prohibition) Act, 2015.

[21] See the Child's Rights Act, 2003 (Act No. 26 of 2003). There are various spellings of the name of this statute, but the citation at s 278 of the Act itself states: "This Act may be cited as the Child's Rights Act, 2003."

[22] See the Constitution of the Federal Republic of Nigeria 1999.

[23] See Educate to Lead "Federal Republic of Nigeria, National Policy on Education 2013". See also Federal Republic of Nigeria "National Policy on Education" 6th ed (2014).

[24] See the Teachers Registration Council of Nigeria Act No. 31 of 1993, now the Teachers Registration Council of Nigeria Act, CAP T3, 2004.

[25] See the Labour Act (Cap L1 LFN 2004).

[26] See s 11 of the Labour Act. See also Aderibigbe (2014) *JCLA* 29.

[27] Adejugbe and Adejugbe (2020) SSRN 12: "The legal positivists have criticised this theory of law [judge-made-rules] based on their tenet and perspective in which they see the law. The legal positivist sees law as a system of rules socially constructed, enacted, written and recognised by legal authority; written decisions made by governmental bodies that are endowed with the legal power to regulate particular areas of society and human conduct." See also Hampton (1986) 107; Finnis (2011) 266-273; Finnis (1999) 204.

Various entities, including the Federal Ministry of Education, the Regional Ministries of Education, the Teaching Service Commissions,[28] and the National Industrial Court of Nigeria, all play crucial roles in the teacher disciplinary framework.[29] The discussion now sheds light on Nigeria's continuing struggle against the sexual abuse of learners by teachers.

7.2.2 Prevalence of Child Sexual Abuse by Teachers in Nigerian Public Schools

Nigeria, like South Africa,[30] grapples with the pervasive scourge of sexual abuse perpetrated by educators against children. IIEP-UNESCO reports that gender-based violence (GBV) is a crisis in Nigeria, with 30% of women and girls aged 15 to 49 having experienced sexual abuse, based on 2018 DHS estimates.[31] Limited studies address the extent and correlation of violence in schools, and there is no comprehensive system for tracking and addressing violence at the federal or state level.[32] According to the World Bank Health Nutrition and Population Statistics Database (2014 Population Data), both girls and boys face alarmingly high rates of violence, with 44% of females and 35% of males having experienced physical and sexual violence from teachers and/or classmates.[33] Male teachers are noticeably more often the perpetrators of violence, particularly sexual violence against female learners, although both male and female students experience similar rates of sexual violence from

[28] See, for instance, Lagos State Teaching Service Commission Law No. 3 of 2018 (Nigeria), "A law to provide for the establishment of the Lagos State Teaching Service Commission for the control and management of teaching service matters in Lagos State and for connected purposes" (see Lagos State Government Notice No. 9; a Supplement to the Lagos State of Nigeria Official Gazette Extraordinary No. 8 Vol. 51 of 16th March 2018; and Lagos State Government Notice (2018)). Law No. 3 of 2018 was assented to by Mr Akinwunmi Ambode, Governor of Lagos State. S 4 of Law No. 3 of 2018 provides for "the Powers of the Commission", and ss 4(a) and 4(d) read as follows: "The Commission shall have powers to – (a) employ all categories of teaching and non-teaching staff for placement in all Educational Districts, subject to the approval of the Governor. … (d) dismiss and exercise disciplinary control over any person employed by the Commission." These laws are specific to each state.
[29] See the National Policy on Education 2013.
[30] See para 1.3.1 of Chapter 1 of this thesis for a discussion of the prevalence of sexual abuse of children perpetrated by teachers in the South Africa public school system.
[31] See IIEP-UNESCO Dakar (2021) 166.
[32] See Fawole et al (2018) *GMJ* 66, who observed that "[a] growing number of studies on adolescents suggests that violent behaviour or the intention to use violence is associated with a number of contextual, individual, and situational factors. Most of these studies were in high income countries, however there is [a] dearth of information on the factors promoting and militating against violence among … young persons in low income countries". See also IIEP-UNESCO Dakar (2021) 166.
[33] See IIEP-UNESCO Dakar (2021) 166.

classmates.[34] Data reveals that many students who undergo violence at school do not disclose their experiences, and only a tiny fraction receive assistance.[35]

In July 2019, the Federal Capital Territory Administration dismissed two male teachers from a secondary school in Jabi, Abuja, for allegedly molesting visually impaired female students.[36] It was reported that the teachers drugged the students, lured them to hotels, and committed these reprehensible acts. And a High Court in Abuja issued a warrant for the arrest of a dismissed teacher, Igoche Ada, accused of sexually molesting a 14-year-old girl at Destiny Christian Academy, Airport Road, Abuja.[37]

Research conducted by Chime and others, entitled "Prevalence, Pattern, and Predictors of Child Sexual Abuse Among Senior Secondary School Students in Enugu Metropolis",[38] indicates that teachers account for 7% of identified child sexual abusers in schools.[39] And a thesis by Agbo, focusing on "Child Rape in Nigeria and Its Implications on the Education of the Child", highlights the severe insecurity that female children face about child rape, leading to school phobia as teachers defile them instead of protecting them.[40]

The exact prevalence of child sexual abuse in Nigerian schools remains undisclosed, owing to various factors. According to David and others, the actual burden of child sexual abuse in

[34] See Together for Girls (2020): "Unfortunately, our data shows that across the globe students do not always attend school in a safe setting, and many experience unacceptably high rates of school-related gender-based violence. UNESCO and UN Women's Global Guidance to Address SRGBV define school-related gender-based violence as 'any act or threat of sexual, physical, or psychological violence occurring in and around schools, perpetrated as a result of gender norms.' This can include teacher-perpetrated abuse, such as corporal punishment or sexual coercion. It can also include peer-perpetrated abuse, including physical violence, bullying, or discrimination." See also IIEP-UNESCO Dakar (2021) 166.
[35] See IIEP-UNESCO Dakar (2021) 166.
[36] See Adepegba (2019), stating: "Permanent Secretary of the FCTA, Mr Chinyeaka Ohaa, who made an unscheduled visit to the school on Wednesday, following reports of molestation of some female students by teachers, directed the immediate suspension of Mr. Ilo Chukwuma and Ebenezer Olateju pending the conclusion of investigations on the matter. … On why the teachers were suspended instead of being dismissed immediately, Ohaa noted, 'We want to be fair and follow due process. So, we will allow the committee [to] do its work and report by next week'".
[37] See Ogunlowo (2022).
[38] See Chime et al (2021) *MJMS* 128.
[39] See Chime et al (2021) *MJMS* 128. Other child sexual abusers identified were a parent, family member, boyfriend or girlfriend, neighbour, stranger, and others.
[40] See Agbo (2019) *CT* 22, who further observed that "[i]f the rape involves school environment or a male teacher, the child may develop school phobia and lack of trust in her male". On recommendations, Agbo asserted that "on no account should female children be left under the care of private male teachers, family drivers, male neighbours, or security guards alone".

Nigeria is obscured,[41] with institutional reports indicating various perpetrators, including class teachers, schoolmates, and domestic helpers.[42]

7.2.3 Key Legislation on Dismissal Disputes in Nigeria

A survey of the Nigerian legislative environment reveals several laws enacted to curb sexual abuse of children and safeguard teachers' rights to fair labour practices. These laws include the CRA, 2003, which provides for the protection of children from child sexual abuse and carries a sentence of life imprisonment if the sexual offender is convicted.[43]

More recently, the Violence Against Persons (Prohibition) Act, 2015 provided for various levels of punishment ranging from life imprisonment to a minimum sentence of 12 years' imprisonment, depending on the type of sexual violence.[44] The TRCN Act establishes guidelines and regulations for the registration, deregistration, and professional conduct of teachers in Nigeria.[45]

7.2.3.1 The Child's Rights Act and the Violence Against Persons (Prohibition) Act

Nigeria has enacted legal instruments aimed at safeguarding children from sexual abuse, such as the VAPP Act[46] and the CRA.[47]

In Nigeria, the administration of child justice was historically governed by the Children and Young Persons Act and other related criminal laws, which were often uncoordinated and

[41] See David et al (2018) *AHS* 199-200, who observed that "[a]lthough the true burden of CSA [child sexual abuse] in Nigeria is unknown, it is estimated to vary between 5% and 38% across different parts of the country. The true magnitude of the problem however remains difficult to determine. This is as a result of the culture of silence around the issue of child sexual abuse, especially in the African setting where sexual matters are not discussed in public. Non-disclosure of abuse by the victims, especially the very young, arising from fear of further harm from the perpetrator or of being blamed; feelings of shame, and cultural inhibitions also help to mask the true burden of CSA. Ineffectual prosecution of offenders in reported cases also contributes to non-disclosure of abuse".
[42] See David et al (2018) *AHS* 203.
[43] See s 31 of the CRA: "Unlawful sexual intercourse with a child, etc. (1) No person shall have sexual intercourse with a child. (2) A person who contravenes the provision of subsection (1) of this section commits an offence of rape and is liable on conviction to imprisonment for life."
[44] See LawPavilion Blog (2016)
[45] See the TRCN Act, Decree 31 of 1993. This TRCN Act commenced on 4th May, 1993. It is now the TRCN Act CAP T3, 2004. See TRCN Grounds for De-registration (2024): "Grounds For De-Registration: TRCN Act CAP T3 of 2004 stipulates that a registered teacher may be deregistered on several grounds which include: forgery of registration documents and process; conviction by the Teachers Tribunal for the breach of professional conduct and related offences; conviction by court of law for criminal offence; and death."
[46] See the VAPP Act.
[47] See the Child's Rights Act, 2003.

inadequate and left many children outside their protective scope.[48] According to Abdulraheem-Mustapha, these deficiencies led to the enactment of the Nigerian CRA in 2003 to address injustices faced by children either in conflict with the law or in need of care and protection.[49]

The CRA was adopted to domesticate the United Nations Convention on the Rights of the Child (CRC), extending the human rights guaranteed in Nigeria's 1999 Constitution to children.[50] Despite its federal enactment, the law only becomes effective if state assemblies also codify it. The bill faced initial opposition from the Supreme Council for Shari'a but was eventually passed because of media pressure and advocacy from national and international organisations.[51] Former President Chief Olusegun Obasanjo signed it into law as the Child's Rights Act, 2003.[52] According to the National Human Rights Commission, the CRA guarantees the rights of all children in Nigeria.[53]

The CRA is comprehensive, comprising 230 pages and 278 sections detailing various protections and provisions for children. The CRA defines a child as any person under the age of 18.[54] As relevant to this thesis, sections 1, 2, 11, 21, 22, 23, 31, and 32 specifically address the federation's commitment to protect children against sexual abuse.[55] Notably, section 31 criminalises sexual misconduct involving children, highlighting the CRA's dedication to safeguarding children's rights and well-being.[56] Section 31(1) explicitly prohibits sexual intercourse with a child, prescribing life imprisonment upon conviction.[57] This prohibition applies regardless of the offender's belief in the child's age or whether the sexual intercourse

[48] See Abdulraheem-Mustapha (2016) *AHRLJ* 435.
[49] See Abdulraheem-Mustapha (2016) *AHRLJ* 435.
[50] See Ogunniyi (2018) *JAL* 447.
[51] See Opeloye (2016) 184.
[52] See Ogunniyi (2018) *JAL* 447.
[53] See National Human Rights Commission (2019).
[54] See s 277 of the CRA.
[55] See the structure of the CRA. Key parts of the Act include the following: Part I: Emphasises the best interests of the child and mandates parental or guardian duties to provide basic protection; Part II: Incorporates the rights, freedoms, and responsibilities of children, including rights to survival, family life, dignity, recreation, health services, and education; Part III: Details protections against child marriage, harm, sexual violence, exploitative labour, and military enlistment; Parts IV to X: Outline procedures for child protection, assessment, court proceedings, custody decisions, and foster care; Part XI: Specifies the process for fostering and the responsibilities of foster parents; Part XII: Requires states to establish adoption services and details the adoption process; Part XIII: Establishes family courts and ensures legal counsel for children; Part XIV: Mandates state registries to track children and caregivers; Part XV to XIX: Discusses government responsibilities, housing for children, and inspection of children's homes; Part XX: Grants children the right to privacy in the court system and mandates specialised training for handling child cases within the police force; Part XXI to XXIV: Details the appointment of supervision officers, creation of child-specific institutions, and the establishment of the National Child Rights Implementation Committee.
[56] See s 31 of the CRA.
[57] See s 31(1) of the CRA, which directs that "no person, shall have sexual intercourse with a child".

was consensual.[58] However, only 24 out of 36 states have adopted the CRA as state law, leaving twelve states yet to do so.[59]

7.2.3.2 The Violence Against Persons (Prohibition) Act

The Violence Against Persons (Prohibition) Act 2015, commonly referred to as the VAPP Act, was established to address and eliminate various forms of violence in Nigeria. Enacted by the National Assembly and signed into law by President Goodluck Jonathan, the Act aims to provide protection and effective remedies for victims while ensuring the punishment of offenders. The VAPP Act was created in response to numerous gender-based violence (GBV) and human rights abuses occurring in the country, such as rape, spousal maiming, forced ejection from homes, acid attacks, and killings.

The VAPP Act delineates its provisions into six parts, addressing various offences and legal procedures.[60] Part I outlines offences such as rape, physical injury, coercion, female genital mutilation, and forced isolation, among others. Part II details the jurisdiction of the court, including the application and issuance of protection orders and the powers of the police. Part III focuses on the confidentiality of information and the roles of service providers, while Part IV designates the National Agency for the Prohibition of Trafficking in Persons as the regulatory body. Part V addresses consequential amendments, and Part VI provides interpretations for terms used within the VAPP Act.[61]

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[58] See s 31(1) of the CRA.
[59] See ICIR (2021) and David et al (2018) *AHS* 131. However, the Act has been criticised for its implementation issues. See also Opeloye (2016) 184. By 2016, the CRA was codified into law in 24 of Nigeria's 36 states, with Enugu being the most recent. Despite being in force for six years, the CRA appears inefficient and ineffective in addressing recent child abuse reports. Its faults have prompted scholars and international organisations to question its efficacy. See also Leão (2019). The National Child Rights Implementation Committee, along with committees in ratifying states, was created to enforce the act, prioritising issues such as safe water supply, sanitation, HIV/AIDS, job opportunities for women, universal basic education, and primary health care. However, monitoring and implementation capacity is low, and the CRA conflicts with other national laws, such as the Children and Young Persons Act 1945 (chapter 44), which defines a child as anyone under 14, creating interpretation issues. Religious groups have two main approaches to human rights: as divinely granted or as an imposition of Western values. Although many Islamic teachings align with the CRA, several clauses conflict with Islamic law, particularly those regarding child marriage, adoption, custody of children born out of wedlock, guardianship, and corporal punishment. Teenage girls in Nigeria, part of the group "It's Never Your Fault," campaign against child marriage, advocating for the legal age of consent to be raised to 18, and have gathered over 150 000 signatures for a petition demanding this change, highlighting ongoing efforts to align practice with the stipulations of the CRA. This thesis is more interested in provisions for dismissal disputes if teachers are dismissed for child sexual abuse, which this statute is silent about. As such, the statute will not be discussed further than highlighting the country's efforts at protecting children against sexual abuse in general.
[60] See the VAPP Act.
[61] See the VAPP Act.

Despite its comprehensive framework, the domestication of the VAPP Act across Nigeria has been uneven.[62] By March 2022, only 19 out of 36 states, along with the Federal Capital Territory, had fully domesticated the VAPP Act.[63] Several states have passed the Act but await executive assent, while others have yet to pass it at all.[64] The disparity in adoption has led to concerns from feminist groups and non-government organisations (NGOs), who argue that women and children remain vulnerable in states where the VAPP Act is not enforced.[65] Cultural practices and resistance to legislative changes, particularly in northern states, have been significant barriers to the full implementation of the VAPP Act nationwide.[66]

Whereas the VAPP Act addresses sexual violence generally, the CRA focuses specifically on children.[67]

Besides these statutes, Nigeria has long-standing Criminal and Penal Codes prohibiting rape. However, the Constitution of the Federal Republic of Nigeria 1999, though guaranteeing certain fundamental rights to children, does not clearly differentiate between children's rights and adults' rights, except in section 17(3), which safeguards children against exploitation.[68]

The VAPP and the CRA offer more clarity on defining rape, addressing gaps in older legislation. Despite their existence, many states in Nigeria have yet to domesticate these laws.[69] By November 2021, only 28 out of 36 states had domesticated the CRA and 18 states had domesticated the VAPP Act, undermining the effectiveness of these legal safeguards.[70]

The CRA recognises the freedom of a girl child from discrimination and emphasises respect for a child's dignity.[71] The CRA guarantees a child's right to rest, leisure, and optimal physical, mental, and spiritual health, among other things.[72] And the CRA obliges governments to reduce infant mortality and to provide healthcare, nutrition, and a hygienic environment.[73] The

[62] See RefWorld (2015).
[63] See Partners West Africa Nigeria (2024).
[64] See Ogundepo (2021).
[65] See Durojaiye (2020).
[66] See Anarado (2015). See also Durojaiye (2020).
[67] See ICIR (2021).
[68] See s 17(3) of the Constitution of the Federal Republic of Nigeria 1999.
[69] See ICIR (2021).
[70] See ICIR (2021).
[71] See s 10 of the CRA.
[72] See s 12 of the CRA.
[73] See s 13(3)(a) of the CRA, which provides that "[e]very Government in Nigeria shall—(a) endeavour to reduce infant and child mortality rate".

CRA also recognises a child's right to basic education,[74] as does the South African Constitution.[75]

Nigeria, as a signatory to international treaties such as the Convention on the Rights of the Child (CRC), is expected to uphold children's rights.[76] However, the slow enactment of the CRA in various Nigerian states limits its enforcement, leaving many children without legal protection.[77]

The federal structure of Nigeria, with its autonomous states, creates challenges in uniformly implementing national legislation.[78] The reluctance of some states to ratify the CRA is often attributed to cultural and religious diversity, raising debates around early marriages and interpretations of Islamic teachings.[79] Yet the statutes mentioned above reveal the commitment of the Federation Republic of Nigeria to recognising the rights of children, especially to protect them from sexual abuse. The discussion now turns to the National Policy on Education, which speaks to the education rights of children in Nigeria.

7.2.3.3 The National Policy on Education

The National Policy on Education (NPE) provides Nigeria's guiding framework for the efficient management, administration, and implementation of education across government tiers.[80] Over the years, the education sector has witnessed substantial transformation, necessitating ongoing policy reforms to align with contemporary trends and ensure the effective execution of education guidelines and regulations set by the Board of Education.[81]

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[74] See s 15 of the CRA. The right to education is infringed when a child is sexually violated by teachers.
[75] See s 29(1) of the South African Constitution, 1996.
[76] See ICIR (2021). See also David et al (2018) *AHS* 131.
[77] See ICIR (2021). See also David et al (2018) *AHS* 131.
[78] See ICIR (2021).
[79] See ICIR (2021). By comparison with South Africa, Nigeria's federal system allows states to retain autonomy, potentially hindering the uniform adoption of national legislation. This thesis highlights the need for concerted efforts to bridge gaps in implementing and enforcing child protection laws in Nigeria.
[80] See the Preface to the National Policy on Education 2013. "See also s 3 of the National Policy on Education. Sections 2(12), and 3 of the policy also provide for the tiers in the basic education system, basic education, primary education, secondary education and mass literacy, adult and non-formal education, respectively. The outcome of the seminar was a draft document which, after due comments were received from the states and other interest groups, led to the final document, the National Policy on Education, first published in 1977. Since the publication of the first edition in 1977, the 2nd and 3rd editions were published in 1981 and 1998 respectively in keeping with the dynamics of social change and the demands on education. This 4th edition was necessitated by some policy innovations and changes, and the need to update the 3rd edition (1998) accordingly." The current National Policy on Education is the 6th edition, published in 2013.
[81] See NF (2019).

Undergoing rapid economic, social, and political reforms, Nigeria's education sector has evolved from manually driven to electronic or automatically driven.[82] Technological advancements and policy reforms, including the last iteration of the NPE, introduced innovations such as the resumption of the Open and Distance Learning Programme, the expansion and revitalisation of the National Mathematical Centre, and the establishment of the Teachers Registration Council of Nigeria (TRCN).[83]

Fundamental changes in the national policy on education encompassed the incorporation of Information and Communication Technology (ICT) into the school curriculum,[84] the inclusion of basic education in Quranic schools to ensure balanced opportunities, and the simultaneous teaching of science, technical, and vocational education for comprehensive student capacity and optimal performance.[85]

The overarching philosophy and goals of the NPE align with the nation's broader objectives.[86] Education remains pivotal to the nation's development plans, serving as a primary instrument of change.[87] The NPE emphasises continuous adjustments in response to social needs, ensuring education's accessibility and affordability. Focused on student-centric approaches, the NPE promotes self-development and self-fulfilment.[88]

Universal Basic Education (UBE) is required in various forms for all citizens, based on needs and possibilities.[89] Educational evaluation adopts a liberalised approach, incorporating continuous assessment of individual progress. Modern education techniques are increasingly employed and improved at all levels, with a heightened emphasis on physical and health education.[90] The national education system is structured to cultivate self-learning practices, with government support for initiatives such as the Young Readers Club.[91] The absence of an NPE would impede significant evolution and hinder growth in the country's educational

[82] See ss 1(7)(f) and 1(8)(b) of the National Policy on Education.
[83] See item (c) of the introduction to the National Policy on Education, which provided for changes and innovations which included the establishment of the Teachers Registration Council. See also NF (2019) and s 6 of the National Policy on Education.
[84] See ss 1(7)(f) and 51(308)(fb) of the National Policy on Education for the provision of ICT.
[85] See ss 1(7)(f) and 51(308)(fb) of the National Policy on Education. See also NF (2019).
[86] See s 1(1) of the National Policy on Education.
[87] See s 1(3)(a) of the National Policy on Education.
[88] See the Preface to the National Policy on Education 2013.
[89] See item 11 of s 2 of the National Policy on Education 2013. See also the Preface to the National Policy on Education.
[90] See ss 2(20) and 2(23) of the National Policy on Education.
[91] See s 1(9)(i) of the National Policy on Education 2004.

sector.[92] Policy reforms and strategic adjustments are integral, enabling the policy to adapt and reshape to meet current expectations, demands, and technological trends.[93]

7.2.3.4 The Teachers Registration Council of Nigeria Act

The Teachers Registration Council of Nigeria (TCRN) was established in 1993 by the TRCN Decree 31 of 1993 (now the TRCN Act), testimony to the National Policy on Education.[94] The TRCN was established after teachers and other stakeholders had agitated long and hard for the establishment of a regulatory agency for the teaching profession in Nigeria.[95] The TRCN is a juristic personality[96] and an agency of the Federal Ministry of Education responsible for the effective registration and licensing of teachers;[97] approval and accreditation of teachers; monitoring and supervision of teachers through training programmes;[98] organising

[92] See Federal Republic of Nigeria "National Policy on Education" (2013). See also NF (2019).
[93] See Federal Republic of Nigeria "National Policy on Education" (2013). See also NF (2019).
[94] See the preamble to the TRCN Act. See also s 1(1) of the TRCN Act, which directs as follows: "Establishment of the Teachers Registration Council of Nigeria. (1) There is hereby established a body to be known as the Teachers Registration Council of Nigeria (in this Act referred to as "the Council") which shall be a body corporate under that name and be charged with the general duty of- …." See also s 19 of the TRCN Act, which provides the short title of the Act as follows: "This Act may be cited as the Teachers Registration Council of Nigeria Act." The TRCN Act is organised into nineteen sections and two schedules. The sections are arranged as follows: 1. Establishment of the Teachers Registration Council of Nigeria. 2. Membership of the Council 3. Establishment and management of the fund. 4. Appointment of the registrar, other staff and preparation of the register. 5. Publication of register and lists of corrections. 6. Registration of teachers 7. Approval of qualifications, etc. 8. Supervision of instructions and examination leading to approved qualifications. 9. Establishment of the Disciplinary Committee and Investigating Panel. 10. Penalties for unprofessional conduct, etc. 11. Duty to report. 12. When person is deemed registered member. 13. Rules as to practising fees, etc. 14. Honorary membership. 15 Provision of library facilities, etc. 16 Regulations and rules. 17. Offences. 18. Interpretation. 19. Short title.
[95] See s 1(1)(a)-(f) of the TRCN Act, which provides that the Teachers Registration Council was established with the general duty of "(a) determining who are teachers for the purpose of this Act; (b) determining what standards of knowledge and skill are to be attained by persons seeking to become registered as teachers under this Act and raising those standards, from time to time, as circumstances may permit; (c) securing in accordance with the provisions of this Act the establishment and maintenance of a register of teachers and the publication from time to time of the lists of those persons; (d) regulating and controlling the teaching profession (in this Act retired to as 'the profession') in all its aspects and ramifications; (e) classifying from time to time members of the teaching profession according to their level of training and qualification; (f) performing through the Council established under this Act the functions conferred on it by this Act". See also NF (2019).
[96] In terms of s 1(3) of the TRCN Act, "[t]he Council may sue and be sued in its corporate name and may, subject to the Land Use Act, hold, acquire and dispose of any property, movable or immovable".
[97] See s 1(3)(b) and (d) of the TRCN Act. The TRCN functions as an agency established to control and standardise the teaching profession in Nigeria. The legal foundation of the TRCN holds significant implications for the teaching profession, aligning with the regulatory practices of other professions such as law, medicine, engineering, and pharmacy. The TRCN Act establishing the TRCN mirrors those statutes that created councils for other professions, indicating a standardised process for registration and approval. This requirement distinguishes aspiring teachers as professionals rather than amateurs. Whether one is an aspiring teacher or already in the profession, gaining insights into the TRCN becomes essential.
[98] See s 7(1) of the TRCN Act.

professional development programmes[99] and maintaining discipline among teachers at all levels of the education system.[100] In Nigeria, teachers must renew their teaching licences every three years.[101] This position differs from the one in South Africa, where a teacher registers only once, and for a lifetime.[102] The TRCN Act established a regulatory structure comprising, first, the Council,[103] secondly, the registrar,[104] and then the disciplinary committee, the investigation panel and the appeal process to the court.[105] The comparison with South Africa is intriguing, particularly with SACE, comprising a 30-member council with 18 from teacher unions. Teacher unions have a sufficient quorum to make decisions that affect the

[99] See s 7(1)(b) of the TRCN Act.
[100] See NF (2019).
[101] See TRCN (2024). See also TRCN "License Renewal" (2023): "To renew their license every three (3) years, a teacher must ensure consecutive payment of annual dues for the specified period. License renewal is contingent upon meeting the following conditions: a. Maintaining good conduct. b. Accumulating the required credit units as outlined in the TRCN Mandatory Continuing Professional Development (MCPD) Manual for professional development. c. Actively participating in TRCN membership activities on a regular basis."
[102] Neither the SACE Act nor the Code of Professional Ethics provides for competence examinations for the registration of teachers or the renewal of teaching certificates in South Africa.
[103] See ss 1 and 2 of the TRCN Act. In terms of s 2(1) of the TRCN Act on Membership of the Council, "(1) The Council shall consist of a Chairman to be appointed by the President and the following other members, that is (a) a representative each of the Committee of: (i) Deans of Education and of Directors of Education in Nigerian universities; (ii) Provosts of colleges of education; (iii) Rectors of polytechnics; (b) one person to represent each of the following bodies, that is– (i) the National Universities Commission; (ii) the National Commission for Colleges of Education; (iii) the National Board for Technical Education; (iv) the National Teachers, Institute; (c) A representative of the Federal Ministry of Education; (d) Six persons to represent the State Ministries of Education to be elected in rotation among the States of the Federation to be appointed by the Federal Ministry of Education every two years; (e) Two persons to represent the Nigerian Academy of Education; (f) five persons elected by the Nigeria Union of Teachers in the manner for the time being provided by the Nigerian Constitution or that Association; and (g) the registrar". TRCN (2013) 3 confirms that the TRCN is a 23-member council composed of a chairperson appointed by the President of the Federal Republic of Nigeria; a representative of the Honourable Minister of Education, a representative of each of the Committees of Deans of Education and Directors of Education in Nigerian Universities; a representative of the Committee of Provosts of Colleges of Education of Education in Nigeria; a representative of the Rectors of Polytechnics of Nigeria; the Executive Secretary of the National Universities Commission; Executive Secretary of the National Commission for Colleges of Education; the Executive Secretary of the National Board for Technical Education; the Director General of the National Teachers Institute; six Honourable Commissioners of Education representing the six geo-political zones of Nigeria; the National President and four other officials of the Nigeria Union of Teachers; the President and one other official of the Nigeria Academy of Education; and a Registrar or Chief Executive appointed by the President of the Federal Republic of Nigeria.
[104] See s 4(1) of the TRCN Act, which provides for the appointment of a registrar.
[105] See s 10(5) of the TRCN Act, which provides that a person who has been struck off the register through the direction of the Disciplinary Committee may appeal the decision to the Court of Appeal and that the Teacher Registration Council of Nigeria shall appear as a respondent to such proceedings. Moreover, s 10(5) of the TRCN Act provides: "The person to whom such a direction relates may, at any time within 28 days from the date of service on him of notice of the direction, appeal against the direction to the Court of Appeal; and the Committee may appear as respondent to the appeal and, for the purpose of enabling directions to be given as to the costs of the appeal and of proceedings before the Committee, the Committee shall be deemed to be a party thereto whether or not it appears on the hearing of the appeal."

entire teaching profession without the involvement of other members of the Council.[106] This position potentially leads to a polarisation of two conflicting ideological positions – union interests and professionalism.[107] South Africa should contemplate restructuring SACE by fostering greater inclusivity from industry and the academic community while diminishing union representation to address this polarisation.[108]

The TRCN Act directs that "[t]he Council may make rules not inconsistent with this Act as to acts which constitute professional misconduct". Teachers in Nigeria must write a competency examination approved by the TRCN to be registered as teachers.[109] It is also important to note that in some states, such as Kaduna in the northwest, teachers write competence examinations before they are employed as well as intermittently during their in-service employment relationship. This requirement has seen, at some point, 22 000 teachers dismissed for failing the examination.[110] The TRCN Act does not define unprofessional conduct, but in section 10 provides for the possible penalties for teachers convicted of such misconduct, the highest being "ordering the Registrar to strike his name off the relevant part of the register".[111]

The TRCN disciplinary process for teacher misconduct in Nigeria involves mandatory reporting of any misbehaviour by teachers.[112] This process includes conducting a preliminary

[106] Considering the decisive role of the quorum in board decision-making, it becomes crucial to have representation from non-polarised cadres, avoiding domination by unions as is the case with SACE in South Africa. A quorum is the minimum number of officers or members required for a body to transact business (Merriam-Webster Dictionary "Quorum" (2024)). The legal requirement stipulates that fifty per cent plus one of the constituted members must be present for a meeting to make a legally binding decision. Currently, in South Africa, only 15 union representatives plus one are needed for a SACE decision to be approved, posing an unnecessary risk if a particular group forms a cartel to sway decisions. To mitigate this risk, the number of unions represented in the SACE Act should be reduced to a minimum of five, with vacant slots filled by non-conflicted members from academia, industry, and potentially a representative from the student body.

[107] This thesis argues that the teacher unions, being membership-driven and concurrently serving as representatives of teachers in disciplinary proceedings, may encounter polarisation when involved in Council structures making decisions on disciplinary outcomes. This dual role puts them in the predicament of safeguarding union interests, ensuring member protection, and upholding the professionalism of the teaching community. This thesis contends that adopting a more impartial composition of the board of governors, similar to the Teaching Registration Council of Nigeria, would benefit the South African education sector.

[108] See s 6 of the SACE Act.

[109] See s 6(1)(a) of the TRCN Act, which provides that "[s]ubject to rules made under section 4(6) of this Act, a person shall be entitled to be registered as a member of the profession if– (a) he passes a qualifying examination accepted by the Council and completes the practical teaching prescribed by the Council under this Act".

[110] See Igwe (2021). See also Nwafor (2021).

[111] See s 10(1)(c) of the TRCN Act.

[112] See the Foreword to the Teachers Code of Conduct where it is stated: "The Panels are to serve as a watch dogs over teachers' professional conducts and to report substantive misconducts to the Teachers Tribunal for prosecution." See also item 39 of Chapter 5 of the Teachers Code of Conduct on examination malpractice. Item 11 of Chapter 2 of the Teachers Code of Conduct also provides for the

investigation into alleged misconduct,[113] deciding on referral to the Teachers Disciplinary Committee (TDC),[114] and implementing penalties for unprofessional conduct.[115] The Teachers Investigation Panel (TIP) is established in each state and the Federal Capital Territory and comprises five members appointed by TRCN, including a legal practitioner.[116] The TDC, established by section 9 of the TRCN Act, comprises the TRCN chairman and ten members appointed by the TRCN.[117]

After conducting a proper trial, the TDC has the authority[118] to punish a member for infamous conduct, convictions, or fraudulent registration, with penalties ranging from advice and reprimand to suspension and deletion from the Teachers Register.[119] These provisions align with those of the SACE Code of Professional Conduct for Educators in South Africa. The TRCN has established a Code of Conduct for Teachers,[120] which is discussed below.

process to be followed by the disciplinary committee in the event of professional misconduct. Item 11(iii) of Chapter 5 specifically states: "A proper trial must be conducted by the Teachers Disciplinary Committee (TDC) in which they [that is, the teachers accused of misconduct] are given all opportunities to defend their actions and conducts. Penalties shall be imposed in any of the ways prescribed by Teachers Registration Council of Nigeria Act 31 of 1993." Yet s 11 of the TRCN Act is somewhat confusing, as it refers to reporting misconduct by a member of the panel and not of a member. It states: "11. Duty to report (1) It shall be the duty of the head of an educational institution to report any misconduct by a registered member to the panel."

[113] See s 9(3)(a) of the TRCN Act for a provision on preliminary investigations of teacher misconduct.

[114] See s 9(3)(b) of the TRCN Act on the discretion to refer a matter to the committee. However, this provision does not provide guidelines about which matters may be reported and which ones will be kept unreported.

[115] See s 10(1) of the TRCN Act, which provides for the imposition of penalties for members found guilty of infamous conduct in any professional respect. See also TRCN Grounds for De-registration (2024), stating that "the TRCN Act CAP T3 of 2004 specifies grounds for the deregistration of a registered teacher, encompassing: a. Forgery of registration documents and processes, b. Conviction by the Teachers Tribunal for the violation of professional conduct and associated offences, c. Conviction by a court of law for criminal offences, and d. Death." See also TRCN "Registration: Registration Procedure" (2023).

[116] See s 9(4) of the TRCN Act.

[117] See s 9(3) of the TRCN Act.

[118] See item 11(i), (ii), (iii) of Chapter 5 of the TRCN Code of Conduct for Teachers, which provides in relevant part: "Teachers shall be guilty of professional misconduct if the Teachers Disciplinary Committee (TDC) which is set-up by the Teachers Registration Council of Nigeria rules that they have contravened any or all of the rules in the Teachers Code of Conduct. This shall be subject to the following conditions: i. An allegation of misconduct must have been made against such teachers. ii. An investigation into such an allegation involving the persons in question must be carried out by the Teachers Investigation Panel (TIP). iii. A proper trial must be conducted by the Teachers Disciplinary Committee (TDC) in which they are given all opportunities to defend their actions and conduct. Penalties shall be imposed in any of the ways prescribed by the Teachers Registration Council of Nigeria Act 31 of 1993."

[119] See s 10(1)(b) of the TRCN Act.

[120] See the TRCN Code of Conduct for Teachers.

7.2.3.5 Nigerian Law Regulating Teacher Dismissal for Sexual Misconduct

Common-law principles govern employment termination in Nigeria, and employers and employees have the authority to terminate contracts based on agreed-upon terms.[121] The case of *Akinfe v UBA Plc*[122] shows that failure to adhere to contractual conditions exposes the employer to charges of wrongful termination. Neither party is obliged to provide a reason for termination, as demonstrated in *Osianya v Afribank Nigeria Plc*,[123] emphasising compliance with the contract.[124] This position contrasts starkly with South African law, particularly sections 188 and 191 of the LRA, which oblige the employer to terminate employment for a fair reason.[125]

The Labour Act, 2004 in Nigeria outlines methods of termination, including expiration of the employment period, death of the employee, or termination by notice in accordance with section 11.[126] The Act dictates specific notice periods, ranging from one day to one month,[127] with the option for parties to waive notice through payment in lieu.[128] Section 11(6) permits such waiver, but employers can reject it in specific circumstances.[129] Clarity and unambiguity in the notice, as established in *Honica Samwill Nigeria Ltd v Hoff*,[130] are essential, and written

[121] See s 11(1) of the Labour Act, 2004, which directs: "Either party to a contract of employment may terminate the contract on the expiration of notice given by him to the other party of his intention to do so." Historically, Nigerian law and practice have not interfered in contract terminations, allowing contracts to be terminated through a notice issued by either party. This practice extends across various employment relationships. Courts in Nigeria have consistently held that if an employer provides termination benefits upon ending a contract of employment, the employee's acceptance implies agreement to the termination. Contesting the notice would, by implication, lead to a legal dispute. See also *Mr. Patrick Joseph Akpan v Federal Road Safety Commission and Boboye O. Oyeyemi* NICN/CA/14/2021 para 1(1). See further Rimi and Uka (2021).
[122] See *Akinfe v Uba Plc*. (2007) 10 NWLR PT. 1031, 565 (SC), where the Court of Appeal stated: "He who hires can fire; nevertheless, an employer must observe and adhere to the conditions under which an employee is hired before such an employee can be fired, otherwise the employer can *ipso facto* be held liable for wrongful termination of the services of employee."
[123] See *Mr. Kunle Osisanya v Afribank Nigeria Plc* (2007) LLJR-SC, where the court held: "An employer though not bound to give reasons terminating the appointment of his employee: where the employer gives reason for the termination, the onus lies on the employer to establish that cause of reason. *Professor Dupe Olatunbosun v. Nigerian Institute of Social and Economic Research Council* (1988) 1 NSCC p. 1025; (1988) 3 NWLR (Pt. 80) 25."
[124] See also Law Nigeria Admin (2018).
[125] See para 3.2.2 of Chapter 3 of this thesis for a discussion of fair reason in termination of employment cases.
[126] See s 11(2) of the Labour Act, 2004.
[127] See s 11(2) of the Labour Act, 2004.
[128] See s 11(6) of the Labour Act, 2004. In South Africa, a notice is inadequate in termination of employment. Fair reason is required in terms of s 188 of the LRA. See also Van Niekerk and Smit (2019) 236.
[129] See s 11(6) of the Labour Act, 2004.
[130] See *Honica Sawmill Nigeria Ltd v Hoff* (1992) 4 NWLR 238, 673 ("the *Honica Sawmill* case").

notice is mandatory under section 11(3).[131] However, existing laws and policies inadequately cover fair dismissal, with the Labour Act, 2004 not explicitly requiring a valid reason for termination.[132]

The evolving jurisprudence on unfair dismissal in Nigerian labour law stems from the National Industrial Court's exclusive jurisdiction.[133] The Nigerian legislatures empowered the Regulatory Authority of Nigeria to determine the fairness and unfairness in dismissal law by adopting international best practices, explicitly referencing ILO Convention 158.[134] This adoption emphasises the necessity of fair reasons in dismissal decisions. The court has the authority to ascertain the fairness of a dismissal, a point that has sparked debate regarding potential encroachment on legislative powers.[135] Nigeria's acknowledgement of the fair reason principle in dismissals still represents a positive step.[136] This legal framework, grounded in judge-made laws, aligns with the legal realism school of thought.[137]

The Nigerian labour statute, dating back to 1900, is considered outdated, prompting a reassessment through the Third Alteration of the 1999 Constitution, which introduced exclusive jurisdiction for the National Industrial Court.[138] The court's equitable jurisdiction, as

[131] See s 11(3) of the Labour Act, 2004, which provides that "[a]ny notice for a period of one week or more shall be in writing". The termination of an employee's employment, as established in the *Honica Sawmill* case, must be clear, either explicitly stated or inferred from the employer's conduct. S 11(3) of the Act requires that the notice of termination be in writing. The case of *Ogunsanmi v V.C.F Furniture* (1961) ALL NLR 862, (Ikeja Suit No. HK/33/61) [1961] NGHC 47 (20 December 1961) emphasised that the written notice must also be reasonable, considering factors such as the nature of employment, the length of service, and the regularity of wage payments. Upon termination, an employee is entitled to all benefits accrued during his service, including pension, gratuity, and other eligible entitlements. See also Edokwe (2020).

[132] The Labour Act, 2004, in its limited references to dismissal, primarily addresses the prohibition of dismissing a worker based on union membership. S 9(6)(b) explicitly prohibits contracts from causing dismissal or prejudice to a worker because of trade union membership or activities. S 40(1)(l) stipulates that foreign contracts must include terms outlining the procedure for dismissal for inefficiency arising from sickness or for any other reason, along with the worker's rights in that procedure. S 54(1) and s 54(4)(b) pertain to the employment of women, ensuring that no notice of dismissal is given during a woman's certified illness arising from pregnancy or confinement until a prescribed period has elapsed.

[133] See Adejugbe and Adejugbe (2020) *SSRN* 8. See also s 254C(1)(f) of the Constitution of the Federal Republic of Nigeria 1999 as amended by the Third Alteration Act which directs that "[t]he National Industrial Court shall have and exercise jurisdiction to the exclusion of any other Court in civil cases and matters relating to or connected with unfair labour practice or international best practice in labour, employment and industrial relations matters". The Third Alteration Act is officially known as the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010.

[134] See ILO Convention 158. See also Adejugbe and Adejugbe (2020) *SSRN* 8.

[135] See Adejugbe and Adejugbe (2020) *SSRN* 8.

[136] See Adejugbe and Adejugbe (2020) *SSRN* 3.

[137] See Adejugbe and Adejugbe (2020) *SSRN* 10. This approach is rejected by the legal positivists as it usurps the authority of parliament to make the law. It is not the role of judges to make the laws. Their role is to interpret the laws.

[138] See s 254C(1)(f) of the Constitution of the Federal Republic of Nigeria 1999 as amended by the Third Alteration Act. See also Adejugbe and Adejugbe (2020) *SSRN* 8.

emphasised by Kanyip J, aims to provide remedies for unfair labour practices.[139] The need for proactive legislation is underscored to enhance labour and industrial relations, balancing employer and employee interests.[140]

Dismissal under Nigerian law, often prompted by employee misconduct, is outlined in employment contracts or manuals. Instant dismissal follows stipulated contract terms, although other cases adhere to disciplinary procedures provided by the employer.[141] Dismissal is solely within the employer's purview, constituting the maximum penalty for contract breaches.[142] A fair hearing and natural justice must be upheld, as *Yaroe v Nigeria Stock Exchange* affirmed.[143] Dismissal applies when an employee's actions severely undermine the employer-employee relationship, as seen in *UBN Ltd. v Ogoh*[144] and *Ajayi v Texaco Nigeria Ltd.*[145] Employers must establish clear rules, with disputes being resolved through alternative dispute resolution (ADR) mechanisms or the National Industrial Court, offering remedies such as damages, compensation, or reinstatement.[146]

Cases such as *COB Eche v State Education Commission* ("the *Eche* case")[147] exemplify instances in which employees face unfair dismissal for participating in trade union activities. In the *Eche* case, the court invalidated the dismissal, deeming it ill-motivated or based on an invalid reason.[148] The lack of explicit statutory rights for employees against unfair dismissal in Nigerian labour law is highlighted, emphasising the need for legislative action to codify and advance the jurisprudence on protection against unfair dismissal.[149] Further, the Labour Act, 2004 does not provide for dispute resolution such as arbitration or mediation as the South African labour legislation does. Most labour disputes about dismissal or termination of

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[139] See Adejugbe and Adejugbe (2020) *SSRN* 12, stating that Kanyip J, quoting Lord Neuberger, said: "The common law does not stand still, and in some cases where application of the law appears to produce an unmeritorious result, it is possible for a judge to develop the law so as to produce the meritorious result. But before a judge takes such a course, he must admit to himself and explain in his judgment that he is developing the law, and how and why he is doing it. Otherwise, he is not acting in accordance with his duty. A judge has to be, and has to be seen to be, intellectually honest." See also Lord Neuberger (2016).
[140] The influence of international law has introduced concepts such as unfair dismissal and unfair labour practices. However, the Nigerian Constitution does not explicitly mention these concepts.
[141] See Adejugbe and Adejugbe (2020) *SSRN* 12. See also Onuekwa and Dike (2019) *AJIEEL* 221.
[142] See Adejugbe and Adejugbe (2020) *SSRN* 12. See also Onuekwa and Dike (2019) *AJIEEL* 222.
[143] *Yaroe v Nigeria Stock Exchange* [2014] 46 NLLR PT. 149.
[144] *UBN Ltd. v Ogoh* [1995] 2 NWLR (Pt 380) 647.
[145] *Ajayi v Texaco Nigeria Ltd* [1987] 3 NWLR (Pt. 62) 577, 593 (SC, Nigeria).
[146] See Edokwe (2020).
[147] *COB Eche v State Education Commission* [1983] 1 FNR 386, 391 (HC). See also Abuza (2023) *SDCLR* 2.
[148] See also Abuza (2023) *SDCLR* 2. See also the *Eche* case.
[149] See also Abuza (2023) *SDCLR* 2. See also Adejugbe and Adejugbe (2020) *SSRN* 12 and Onuekwa and Dike (2019) *AJIEEL* 222.

employment are referred to the National Industrial Court exercising exclusive jurisdiction over such matters.[150] Though Nigeria also has the Trade Disputes Act, 2004, the alternative dispute resolution (ADR) system, including mediation and arbitration, remains within the purview of the National Industrial Court.[151] Most dismissal cases are directed to that court for adjudication. The Labour Act, 2004 does not provide for such statutory dispute resolution.[152]

7.2.4 Role-players in Dismissing Teachers Charged with Child Sexual Abuse

Exploring the role-players in dismissing educators charged with sexual misconduct reveals the prominent involvement of the TRCN and the Teaching Service Commission, a division of the Ministry of Education.[153] Unlike South Africa, Nigeria employs teachers under both federal and state ministries, education boards, and Teaching Service Commissions, each state having its own legislative and executive authority.[154] The Teaching Service Commission, which arose from the Teachers' State Board, is empowered to recruit, register, confirm, promote, transfer, and discipline teachers in government-owned secondary schools. This commission functions as the employer, allowing it the authority to dismiss teachers, as witnessed in the case of two teachers accused of sexual misconduct.[155]

The Teaching Service Commission, Oyo State TESCOM, established in 1992, exemplifies its objectives to enhance teaching standards, build a globally competitive education system, and provide qualified teachers.[156] The dismissal of educators accused of sexual misconduct aligns with this Commission's commitment to maintaining teaching and learning standards.[157]

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[150] See Adejugbe and Adejugbe (2020) *SSRN* 8. See also s 254C(1)(f) of the Constitution of the Federal Republic of Nigeria 1999 as amended by the Third Alteration Act. All labour disputes must still be filed with the court. Under the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017, a judge of the National Industrial Court of Nigeria may refer a claim filed in the court to the Alternative Dispute Resolution Centre within the court premises for conciliation and mediation. But where conciliation and mediation fail, the judge must adjudicate the labour dispute. See Abuza et al (2022) *BJLP* 72.

[151] See Aderibigbe (2014) *JCLA* 31, who observes that though labour cases were initially required to go through arbitration under the Trade Disputes Act, the position has changed under the National Industrial Court Act, 2006 (NICA). "The provision of law has been altered by section 7(5) of NICA, 2006. Under this section the parties have the right to apply directly to the Court. One may therefore ask, is there no conflict arising from this provision of the law? The answer is that section 53 of NICA provides that other provisions of the Trade Disputes Act shall be construed with such modifications as may be necessary to bring it into conformity with the provisions of the Act."

[152] ADR as a labour dispute settlement mechanism is provided for in s 254C(3) of the 1999 Constitution (as amended by the Third Alteration Act, 2010) as being within the purview of the National Industrial Court.

[153] See Law No. 3 of 2018 of Lagos State.

[154] See Plateau State Government Website (2021). Plateau State enacted its own law, the Plateau State Teachers Service Commission (Law No. 3 of 1980), which commenced on 1 January, 1980, thereby establishing its own education authority.

[155] See Adepegba (2019).

[156] See Oyo State Government (2024). See also AbdulWahab (2020).

[157] See Ani (2020).

In a press statement, Mr Chinyeaka Ohaa, Permanent Secretary of the Federal Capital Territory Administration (FCTA), justified the non-dismissal of an educator by citing an ongoing investigation adhering to principles of natural justice.[158] This matter underscores the Teaching Service Commission's jurisdiction in dismissing educators for sexual misconduct, guided by due process and just cause principles.[159] This thesis establishes the presence of references to natural justice in the discourse surrounding educator dismissal for sexual misconduct against children in the Nigerian system.[160]

7.2.4.1 The Teachers Registration Council of Nigeria

The TRCN is the statutory regulatory authority responsible for teacher registration and can strike teachers off its register for professional misconduct.[161] Since 2005, the TRCN Act has outlined the Teacher's Code of Conduct, defining ethical values, practices, and legal instruments for enforcement.[162] In 2013, the TRCN introduced a new Teachers Code of Conduct.[163] The objectives of this new code are to provide clear guidelines for teachers' behaviour, regulate their interactions with students, colleagues, school administration, parents, and the general public, and uphold the profession's core values.[164] The document has been highly regarded for its role in training teachers and maintaining high ethical standards in the teaching profession.[165] The new code continues the tradition of the 2005 and 2013 editions, emphasising the importance of an ethical framework that fosters a trustworthy and effective teaching-learning environment.[166] The TRCN is committed to distributing this essential document to all registered teachers, ensuring that it remains a cornerstone of professional conduct in education.[167] Teachers may face deregistration for misconduct, and, unlike the SACE Act[168] and the Educators Act in South Africa, the TRCN Act does not refer to the employer. The Teacher's Code of Conduct comprises nine chapters.[169]

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[158] See Adepegba (2019).
[159] See Adepegba (2019).
[160] See Adepegba (2019).
[161] See s 10 of the TRCN Act.
[162] See TRCN (2024). See also the Teachers Code of Conduct.
[163] See TeacherPediaNG (2020). See also Muhammad (2021).
[164] See TeacherPediaNG (2020).
[165] See TeacherPediaNG (2020).
[166] See TeacherPediaNG (2020).
[167] See TeacherPediaNG (2020).
[168] See s 26(2) of the SACE Act. See also Chapter 4 of this thesis for a discussion of the SACE Act.
[169] See TRCN (2024). The structure of the Teachers Code of Conduct begins with an introductory Chapter 1 that includes a preamble and outlines the purpose of the code. Chapter 2 focuses on the principles of teachers' professionalisation in Nigeria. Chapter 3 deals with relationships with colleagues, covering aspects such as respect, the symbiotic relationship, responsibilities of junior and senior colleagues, integrity, loyalty, discrimination, and defamation of colleagues. Chapter 4 addresses the

The structure of the Teachers Code of Conduct in Nigeria mirrors that of the SACE Code of Professional Ethics in South Africa. However, concerning the specific focus of this thesis, item 38 in Chapter 5 of the Teachers Code of Conduct explicitly states:

> Sexual misconduct and related abuse of office: …Teachers should not use their position to humiliate, threaten, intimidate, harass, or blackmail any learner to submit to selfish motives or to engage in sexual misconduct, drug addiction and trafficking, cultism, human trafficking and other related offences.[170]

The TRCN also instituted the *Nigerian Journal of Professional Teachers* (*NJPT*) to promote the exchange of ideas or best practices and to lead the development of knowledge, skills, and orientation in the teaching profession.[171]

Nigeria's commitment to safeguarding children's and teachers' rights is also evident through legislative measures, such as the CRA, similar to South Africa's Children's Act.[172] Criminalising child sexual abuse reflects a clear stance, although some Nigerian states have not ratified the CRA. As in South Africa, sexual misconduct cases are underreported.[173] As for educators' labour rights, dismissal can occur through contract termination or for misconduct under section 11 of the Labour Act.[174] Notably, the 1999 Nigerian Constitution and the Labour Act, 2004, do not explicitly protect workers from unfair dismissal. Unlike South Africa's LRA, the Labour Act, 2004 lacks a straightforward mandatory dispute resolution process.[175] Although the Trade Disputes Act, 2004 provides for mediation and arbitration, cases must be lodged with the National Industrial Court, which may exercise its discretion in directing cases to dispute resolution.[176] Court rulings indicate some protection, emphasising just cause and

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role of a teacher in administrative and academic capacities. Chapter 5 explores the relationship with learners, encompassing child rights and dignity, responsibility for education programmes, empathy, confidentiality, fair remuneration, and specific issues such as sexual misconduct, related abuse of office, examination malpractice, patronage of illegal learner groups, being a role model, corrupt practices, corporal punishment, discipline, and ideological influence. Chapter 6 deals with relationships with parents and guardians, and Chapter 7 focuses on relationships with employers. Chapter 8 addresses relationships with society, emphasising the role of a teacher in society, offering advice to the government and society, promoting obedience to the law, tolerance, and personal habits. Finally, Chapter 9 covers general issues, including the liability of the teacher, constructive criticism, open-mindedness, incentives for good behaviour, and the interpretation of the Teachers Code of Conduct (TCC).

[170] See item 28 of the Teachers Code of Conduct (TCC) on the personality of the teacher.

[171] See TRCN (2024).

[172] See the Children's Act 38 of 2005. See also the provisions of s 28 of the Constitution, 1996 on children.

[173] See Macupe *City Press* (2021).

[174] See s 11 of the Labour Act, 2004 on termination of contracts by notice.

[175] See s 191(1)(a) of the LRA.

[176] See Abuza et al (2022) *BJLP* 72. See also s 254C(1)(f) of the Constitution of the Federal Republic of Nigeria 1999 as amended by the Third Alteration Act, and Adejugbe and Adejugbe (2020) *SSRN* 8.

due process in dismissals.[177] It is crucial to highlight that under the TRCN Act, the TRCN's decisions can be appealed only to the Court of Appeal.[178]

7.2.5 The Comparative Lessons for South Africa

This chapter answers research question 3 of this thesis about comparative lessons from the selected comparator countries. The following comparative lessons are thus drawn from Nigeria.

First, both Nigeria and South Africa recognise children's rights through legislative enactments. Still, Nigeria lacks constitutional provisions for children's protection, unlike South Africa, which explicitly safeguards children's rights, including the right to basic education.[179] Both countries have legislation protecting children's rights, with Nigeria criminalising sexual abuse against children. Yet Nigeria's federal structure has led to variations in adopting the CRA across states, whereas South Africa's centralised authority ensures uniform national laws for all provinces.

Secondly, regarding labour rights, both Nigeria and South Africa acknowledge workers' rights, but Nigeria lacks specific provisions protecting workers, including teachers, from unfair dismissal. Nigeria follows common-law practices, allowing contract termination with notice, and authorises courts to determine fairness in contested dismissals. By contrast, South Africa requires that employee dismissal must be for a fair reason and follow a fair procedure.

Thirdly, Nigeria's board of governors in the TRCN exhibits diversity.[180] This diversity contrasts with the situation in SACE in South Africa, where teacher unions hold a majority[181] and polarisation may result.

Fourthly, in Nigeria, two authorities oversee teachers – the state-based employer and the TRCN – without the complexities seen in South Africa's struggles between school governing bodies and Heads of Department.[182]

[177] See the *UBN Ltd. v Ogoh* case. See also the *Ajayi v Texaco Nigeria Ltd* case and the *Eche* case.
[178] See s 10(5) of the TRCN Act.
[179] See ss 28(2) and 29 of the Constitution, 1996.
[180] See s 6(1) of the TRCN Act.
[181] See s 6 of the SACE Act.
[182] See ss 3, 4, and 15(2) of the Educators Act. See also s 20(11) of the Schools Act.

Fifthly, although both countries have statutory regulatory bodies for teachers, the TRCN Act lacks references to employers, unlike South Africa's SACE Act and Educators Act.[183] The TRCN Act criminalises teaching without a licence, providing grounds for removing educators charged with serious offences, including sexual misconduct, from the register.[184] Once educators have been removed, teaching in Nigeria would constitute a criminal offence. Labour cases, except professional regulations under the TRCN, are typically appealed to the Industrial Court of Nigeria.[185] In Nigeria, teachers write a qualifying examination to be registered as teachers,[186] a requirement absent from South Africa.

Sixthly, Nigeria's Labour Act, 2004 does not explicitly provide for statutory dispute resolution outside the court. Court systems are preferred for dispute resolution. Accordingly, the National Industrial Court has exclusive jurisdiction over such matters.[187] By contrast, the LRA in South Africa provides for the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils (BCs) to attend to labour disputes before they are referred to the labour courts.[188]

7.3 Educator Dismissal Procedures in England

7.3.1 Introduction

England, a country comprising the central and southern parts of the United Kingdom (the UK), is located on the island of Great Britain and shares its northern border with Scotland and its western border with Wales.[189] The North Sea and the English Channel lie to the east and south, respectively, while the Irish Sea lies to the west between England and Ireland. Spanning an area of approximately 51 330 square miles, England is the largest nation in the United Kingdom.[190] The current population of the UK in 2024 is 67 961 439, a 0.33% increase from 2023.[191] From mid-2018 to mid-2019, the UK population grew by 0.5%, more slowly than any

[183] See ss 3, 4, and 15(2) of the Educators Act. See also s 20(11) of the Schools Act.
[184] See P.M.News (2021).
[185] See s 10(5) of the TRCN Act.
[186] See 6(1)(a) of the TRCN Act, which provides for the registration of teachers: "(1) Subject to rules made under section 4(6) of this Act, a person shall be entitled to be registered as a member of the profession if– (a) he passes a qualifying examination accepted by the Council and completes the practical teaching prescribed by the Council under this Act." This provision helps to control the quality of teachers.
[187] See Adejugbe and Adejugbe (2020) *SSRN* 8. See also s 254C(1)(f) of the Constitution of the Federal Republic of Nigeria 1999 as amended by the Third Alteration Act.
[188] See para 1.1 of Chapter 1 of this thesis for a discussion of the provision for statutory dispute resolution in the LRA.
[189] See WorldAtlas "England" (2023).
[190] See WorldAtlas "England" (2023).
[191] See Macrotrends "U.K. Population 1950-2024" (2024).

year since mid-2004.[192] The latest life expectancy figures reflect the slowdown in improvements since 2011; life expectancy at birth was 79.4 years for males and 83.1 years for females from 2017 to 2019.[193] The current life expectancy in 2024 is 81.92 years, a 0.18% increase from 2023.[194] The GDP of England, chained volume measures seasonally adjusted in million pounds, was £570 694 million in the first quarter of 2024.[195]

The United Kingdom, consisting of England, Wales, Scotland, and Northern Ireland, has played a historic role in shaping the Westminster system of parliamentary democracy and beginning the First Industrial Revolution (which lasted from about 1760 to 1840).[196] Although the UK's influence diminished after two world wars and the end of its empire in the twentieth century, it remains a significant economic and military power with global political and cultural impact.[197] And while this thesis may occasionally refer to Wales, Scotland, and Northern Ireland, to which education powers for those respective countries have been devolved, thus leading to significant regional variations,[198] the main research focus is England.

The UK is led by King Charles III, who ascended to the throne in September 2022. As a constitutional monarch, his role in the legislative process is mainly ceremonial.[199] Sir Keir Starmer serves as the new Prime Minister after leading the Labour Party to a landslide victory over the Conservative Party in the national election on 5 July 2024.[200] He faces the challenges of tackling failing public services, addressing high taxes, and managing the cost of living crisis that is squeezing household budgets. He has promised to bring change and restore stability to public life, aiming to provide Britain with "the sunlight of hope" after 14 years under the Conservative government.

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[192] See Office for National Statistics "Overview of the UK population: January 2021" (2021).
[193] See Office for National Statistics "Overview of the UK population: January 2021" (2021).
[194] See Macrotrends "U.K. Population 1950-2024" (2024).
[195] See Gross Domestic Product team (2024).
[196] See Macquire (2024).
[197] See Martel (1991) *TIHR* 693. See also Marshall (1979) *IICQ* 29.
[198] Education powers have been devolved by the UK Parliament in Westminster to the Scottish Parliament in Edinburgh, the Welsh Parliament in Cardiff, and the Northern Ireland Assembly in Belfast. See, respectively, the Scotland Act 1998 and the Scotland Act 2016; the Government of Wales Act 1998 and the Government of Wales Act 2006; and the Northern Ireland Act 1998. See also UK Parliament "Devolved Parliaments and Assemblies" (2020). According to the Sewel Convention, the UK Parliament retains authority to legislate on any issue, whether or not devolved, but will usually not do so on devolved matters without the devolved legislature's consent. See Northern Ireland Assembly "Assembly Explained" (2024); "Devolution of Powers to Scotland, Wales and Northern Ireland" (GOV.UK, 18 February 2013) https://www.gov.uk/guidance/devolution-of-powers-to-scotland-wales-and-northern-ireland. Devolving education powers has created significant differences in the curriculum, assessment, and general approach to education throughout the UK. See Atkins and Dalton (2021); "Devolution of Powers to Scotland, Wales and Northern Ireland" (GOV.UK, 18 February 2013) https://www.gov.uk/guidance/devolution-of-powers-to-scotland-wales-and-northern-ireland.
[199] See News (2022).
[200] See Lawless (2024).

The United Kingdom has evolved over centuries. England, with a rich history, became a unified state in the 10th century and has had a profound cultural and legal impact on the world.[201] The Acts of Union in 1707 merged England and Scotland into the Kingdom of Great Britain.[202] The Union of Great Britain and Ireland was formalised in 1801 through the Act of Union, which merged the Kingdom of Great Britain and the Kingdom of Ireland to create the United Kingdom of Great Britain and Ireland.[203] A little over a century later, the Anglo-Irish Treaty of 1921[204] established the Irish Free State as a self-governing dominion and allowed the six counties of Northern Ireland (Antrim, Armagh, Down, Fermanagh, Londonderry, and Tyrone) to choose to remain part of the United Kingdom,[205] as they continue to do. The Republic of Ireland (*Éire* in Irish Gaelic)[206] is a separate state, outside the Commonwealth since 1948,[207] and inside the European Union since 1973,[208] its Prime Minister (*Taoiseach*) being Simon Harris of the Fine Gael party and its President being Michael D Higgins.

England's many contributions include the English language, the system of the common law, soccer, and the Church of England.[209] The University of Oxford (founded in 1096) and the University of Cambridge (founded in 1209) rank among the oldest and most prestigious universities in the world.[210]

The introduction of compulsory education in England dates back to 1870, with subsequent increases in the school-leaving age.[211] The age for leaving school was raised from 15 to 16 in 1972 and is maintained with certain conditions in the latest legislation, which was passed in

[201] See Smith et al (2024).
[202] See Munro (1998) *IJMGR* 97 and 104. Historically, Scotland was a separate nation state before 1707. After the Union, as part of the United Kingdom, Scotland retained its own legal system and was treated differently in several ways. See also UK Parliament "Act of Union 1707" (2024).
[203] See Wallenfeldt (2018).
[204] See Electronic Irish Statute Book "Constitution of the Irish Free State (Saorstát Eireann) Act, 1922" (2024).
[205] Government of Ireland Act 1920.
[206] See Boland and others "Ireland" (2024). The Republic of Ireland comprises 26 counties.
[207] See the Republic of Ireland Act 1948.
[208] See European Union "EU Country Profiles: Ireland" (2023).
[209] See New World Encyclopedia "England" (2022).
[210] See Gillard (2015).
[211] See Auerbach (2009) *TH* 759, who observed that "[t]he London School Board established in 1937 have reported that 'the elected officials of the LSB had been responsible for managing the elementary schools of the metropolis since the passing of the Education Act of 1870 (also known as 'The Forster Act'), which had established the foundations of England's first public elementary education system". It was also noted (759) that "much of the opposition to compulsory education was linked to broader political concerns over the intrusion of the state into private life and the threat to the ideal of liberty that such intrusion represented".

2013.[212] Compulsory education in the UK is divided into four key stages based on age, spanning 5 to 16 years of age.[213]

Most schools in the United Kingdom are situated in England, totalling 24 453 schools.[214] According to the current statistics, there are 9 092 073 full-time and part-time pupils in UK schools.[215] The teaching workforce comprises 468 693 full-time teachers in the UK.[216]

This thesis focuses on dismissal disputes related to sexual misconduct by teachers against learners in South African public schools. A comparative analysis with the UK is crucial, particularly examining laws and stakeholders safeguarding children and preserving educators' labour rights against unfair dismissal.

In the UK, laws protecting children from sexual abuse by teachers are rooted in the Children Act 1989, with subsequent amendments.[217] The statutory guidance by the government, "Working Together to Safeguard Children", provides detailed insights into the essential legal

[212] See Oxford Reference (2024).
[213] See UK Government "Education System in the UK" (2012). The UK education system is globally renowned for its quality and standards. It comprises five stages: Early Years, Primary Years, Secondary Education, Further Education (FE), and Higher Education (HE). Although there are similarities across the UK, each zone of administration (England, Scotland, and Wales) exhibits some differences, particularly in higher education. See also Bright World (2019). The stages include various subjects and curricula, with testing occurring at the end of each key stage to assess students' knowledge development. The fourth and final key stage, lasting from 14 to 16 years, is a crucial period for students undertaking national assessment tests leading to the General Certificate of Secondary Education (GCSE) or other national qualifications. See also Besart (2023).
[214] See Explore Education Statistics "Schools, Pupils and Their Characteristics, Academic Year 2023/24" (2024): "Number of open schools in England at January 2024. Includes all state-funded nursery, primary, secondary and special schools, non-maintained special schools, pupil referral units, general hospital schools and independent schools."
[215] See Explore Education Statistics "Schools, Pupils and Their Characteristics, Academic Year 2023/24" (2024): "Headcount of all pupils in state-funded nursery, primary, secondary and special schools, non-maintained special schools, pupil referral units, general hospital schools and independent schools at January 2024. The number of pupils in schools in England has increased. There has been an increase of 18,200 pupils across all school types from the previous year, to nearly 9.1 million pupils. This includes all state-funded and independent schools. The number of schools has increased slightly, by 11 to 24,453."
[216] See Explore Education Statistics "School Workforce in England, Reporting Year 2023" (2024): "FTE = Full-time equivalent. There are 468,700 FTE teachers, which is an increase of 300 since last year and an increase of 27,300 since 2010 when the school workforce census began. There are 282,900 FTE teaching assistants, which is an increase of 1,800 since last year and an increase of 61,400 since 2011 when the census began collecting support staff information. Pupil to teacher ratios are similar to last year: 20.8 pupils per teacher in nurseries and primary schools (up 0.1 on last year), 16.8 in secondary schools (no change) and 6.5 in special and PRU schools (up 0.1). The number of teachers entering and leaving service both fell though the number of entrants continues to be higher than for leavers. This, combined with changes in working patterns and an increase in unqualified teachers, resulted in a marginal increase to the number of teachers in England. Almost 9 in 10 teachers remain teaching in state-funded schools in England one year after qualification."
[217] See the Department for Education (2021). See also NSPCC Learning (2024) and Ofsted "Review of Sexual Abuse in Schools and Colleges" (2021).

requirements of the child protection system.[218] The Children Act 2004,[219] an extension of the 1989 Act, reinforces the duty of individuals and organisations working with children to contribute to their safeguarding and welfare, ultimately aiming to enhance children's safety in Britain.[220] The Children and Families Act 2014 introduces significant reforms in the UK aimed at enhancing services for vulnerable children and their families.[221] The Children and Families Act primarily targets key groups of vulnerable children, including those within the adoption and care systems, those impacted by family court decisions, and those with special educational needs and disabilities.[222] Additionally, the Children and Families Act seeks to support families in balancing home and work life, especially during the early years of their children's lives. These reforms reflect a comprehensive approach to addressing the diverse needs of vulnerable children and their families, ensuring better outcomes and support systems.[223]

Addressing child sex offences and abuses of trust towards children, the Sexual Offences Act 2003[224] plays a crucial role in the legal framework. It covers familial child sex offences, offences involving adult relatives, and provisions designed to protect individuals with a mental disorder.[225]

In the context of basic education and teachers' discipline, critical legislative enactments include the Education Act 1944.[226] The Education Act 1944 was repealed on 1 November 1996.[227] The current legal framework has been consolidated in the Education Act 1996.

As regards the employer-employee relationship across the UK, the Employment Rights Act 1996 delineates the rights of employees in various situations, including dismissal, unfair dismissal, parental leave, and redundancy.[228] This comprehensive legislation covers a spectrum of aspects, from safeguards against unfair dismissal to rights related to maternity or

[218] See Department for Education "Working Together to Safeguard Children" (2024).
[219] See the Children Act 2004. See also Legislation.gov.uk "Children Act 2004" (2024).
[220] See Legislation.gov.uk "Children Act 2004" (2024).
[221] See Children and Families Act 2014. See also Brader (2023).
[222] See Children and Families Act 2014. See also Brader (2023).
[223] See Brader (2023).
[224] See Sexual Offences Act 2003. See also Legislation.gov.uk "Sexual Offences Act 2003" (2024).
[225] See Legislation.gov.uk "Sexual Offences Act 2003" (2024).
[226] See the Education Act 1944. See also UK Parliament "The Education Act of 1944" (2024).
[227] See Legislation.gov.uk "Education Act 1944 (Repealed 1.11.1996)" (2024). This Act introduced significant changes in England and Wales but did not apply to Scotland. In Scotland, the main features of the 1944 Act were incorporated into the Education (Scotland) Act 1945, with appropriate adjustments to suit the Scottish context. For Northern Ireland, see the Education (Northern Ireland) Act 1947.
[228] See the Employment Rights Act 1996. See also Legislation.gov.uk "Employment Rights Act 1996" (2024).

paternity, holiday entitlement periods, and the conclusion of an employee's contract.[229] Additionally, the Employment Rights (Dispute Resolution) Act 1998 empowers the Advisory, Conciliation and Arbitration Service (ACAS) to establish arbitration hearings as an alternative dispute resolution mechanism to employment tribunals,[230] similar to the LRA provision for the CCMA in South Africa.[231] These aspects will be further addressed in the subsequent sections of the discussion.

7.4 Prevalence of Child Sexual Abuse by Teachers in UK State Schools

Acknowledging that the UK and the Republic of Ireland are separate states,[232] it is still worth mentioning that Dawson and others investigated teacher-perpetrated sexual misconduct in Irish and UK secondary schools. Based on the retrospective accounts of 593 adults who were victims during their secondary school years, 369 respondents attended school in the UK, and 224 in the Republic of Ireland.

Predominantly, young women reported instances of sexual harassment by male teachers, with the majority of incidents occurring on school grounds.[233] Sexist harassment was the most frequently experienced form of misconduct by both Irish (86%) and UK (95%) respondents, followed by sexual harassment (72% and 85% in Ireland and the UK, respectively).[234] Approximately 10% of Irish and 27% of UK respondents faced unwanted sexual attention, and 7% of Irish and 18% of UK respondents encountered some form of online sexual harassment.[235]

In another thesis cited by Freel,[236] the National Society for the Prevention of Cruelty to Children (NSPCC) examined the prevalence of child abuse prevalence in the UK and surveyed 2 869 young people aged 18 to 24. The results indicated that 0.3% reported sexual abuse by professionals, primarily teachers.[237]

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[229] See the Employment Rights Act 1996. See also Legislation.gov.uk "Employment Rights Act 1996" (2024).
[230] See s 7 of the Employment Rights (Dispute Resolution) Act 1998. See also Legislation.gov.uk "s 7 of the Employment Rights (Dispute Resolution) Act 1998" (2024).
[231] See ss 112 and 115 of the LRA.
[232] See para 7.3.1 above.
[233] See Dawson et al (2023) 4.
[234] See Dawson et al (2023) 4. See also Home Office Independent Panel "The Report of the Independent Inquiry into Child Sexual Abuse, Section 1 and Section 2 Parts A to J (Accessible)" (2023).
[235] See Dawson et al (2023) 4.
[236] See Freel (2003) *TBJSW* 486.
[237] See Freel (2003) *TBJSW* 486. See also Cawson et al (2000).

Sharman's investigation for the *Independent* newspaper in 2017 uncovered alarming figures from the NSPCC, with 42 teachers receiving prohibition orders for sexual misconduct in 2016-17, an increase from previous years.[238] One case involved a Wiltshire teacher, 34-year-old Nathan Jones, who asked a child to send explicit images over Skype and suggested engaging in sexual activity.[239]

Briere and Elliott's thesis highlighted the lasting impacts of childhood sexual abuse on psychological functioning and the potential for developing behaviours with long-term self-injurious consequences.[240] Numerous reports have fuelled public outrage over child sexual abuse perpetrated by teachers in UK schools.[241] This reporting underscores that the issue of child sexual abuse by teachers is prevalent in the UK, mirroring the challenges faced in South Africa[242] and Nigeria.[243] Consequently, as discussed below, an examination of legislative and regulatory actions taken by authorities to tackle this issue and ensure the protection of teachers' labour rights becomes imperative.

7.4.1 Key Legislation on Educator Dismissal Disputes in the UK

7.4.1.1 The Education Act 1944 and the Regulation of Education in the UK

The Education Act 1944 marked a significant overhaul of the educational system in England and Wales. It replaced the Board of Education with a minister responsible for directing local education authorities.[244] This revision aimed to ensure a more consistent standard of educational opportunity. Under the statute, every local education authority had to submit development plans for primary and secondary education and plans for further education to the minister for approval. The statute also reduced the number of education authorities from 315 to 146.[245]

Key reforms included the mandate for secondary education for all, prohibiting school fees in state-maintained schools, and replacing the distinction between elementary and higher

[238] See Sharman (2017).
[239] See Sharman (2017).
[240] Briere and Elliott (1994) *TFC* 64.
[241] See Baxter (2014), revealing: "At least 959 teachers and school staff have been accused of having a relationship with a pupil in the past five years, the BBC has learned. In at least 254 cases, there were police charges but it is not clear how many of these led to a prosecution or a conviction." See also Steely Smith (2023) *DAJAEV* 1 and Independent Inquiry into Child Sexual Abuse (2022).
[242] See Chapter 1 para 1.2.1.
[243] See para 7.2.2 above.
[244] See Browning and Thomas "Education Act of 1944" (2024).
[245] See Browning and Thomas "Education Act of 1944" (2024).

education with a classification of three stages: primary education, secondary education, and further education.[246] The tripartite system comprising grammar schools, secondary modern schools, and technical schools was introduced. At the age of 11, children are directed to the appropriate school through selection tests.[247]

However, the tripartite system faced challenges and did not fully succeed.[248] The relevance of the Human Rights Act 1998 in this context lies in its emphasis on the right to education and the principle of non-discrimination.[249] Under the Human Rights Act, public authorities, including schools and educational bodies, are required to act in a manner compatible with the rights protected by the European Convention on Human Rights.[250] This includes ensuring that no student is unfairly disadvantaged or discriminated against in accessing education. The Human Rights Act thus provides a legal framework to challenge and address any discriminatory practices or policies arising from the tripartite system, reinforcing the need for an inclusive and equitable educational environment.[251] The Education Act 2002, influenced by the 2001 White Paper "Schools Achieving Success", aimed at increasing educational standards in England.[252] Adopted in line with the Human Rights Act 1998, the Education Act 2002 focused on innovation, modernisation, and education quality.[253]

The Education Act 2011, the most recent legislation, prioritises raising education standards, focusing on pupil discipline.[254] Teachers are empowered to search learners for banned items and issue detentions. The Education Act 2011 also extends free "early years" education, recognising children's right to basic education, similar to South Africa and Nigeria. This thesis seeks to explore legislative enactments regulating teacher sexual misconduct against learners in the UK, particularly in the context of this right being compromised by sexual abuse.

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[246] See Browning and Thomas "Education Act of 1944" (2024).
[247] See Trueman (2015).
[248] See the Human Rights Act 1998. See also Browning and Thomas "Education Act of 1944" (2024). The tripartite system faced challenges and did not fully succeed, raising significant concerns about educational inequality and the fairness of selective education. See also Limon (2020).
[249] See Limon (2020). See also Culhane and McGeough (2020). The Human Rights Act 1998 incorporates the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the European Convention on Human Rights; ECHR) into UK law, including the right to education stated in art 2 of the First Protocol in sch 1 to the Human Rights Act 1998. The ECHR also expresses the principle of non-discrimination in art 14.
[250] See especially s 6 of the Human Rights Act 1998 read together with s 1. See also Limon (2020).
[251] See Limon (2020).
[252] See Department for Education and Skills (2002). See also Emerson (2023).
[253] See the Human Rights Act 1998.
[254] See Department for Education (2011). See also the Education Act 2011.

7.4.2 The Role-players in Dismissing Teachers Charged with Child Sexual Abuse

7.4.2.1 The Role of Governing Bodies and the Local Authority

The role of governing bodies and the local authority is delineated by section 19(1) of the Education Act 2002, stipulating that each maintained school must possess a governing body.[255] The constitution of governing bodies in England is governed by regulation 13 of the School Governance (Constitution) (England) Regulations 2012.[256] The governing body composition requires at least seven governors, including two parents, one staff governor, and one local authority governor.[257] Notably, the employer of teachers and staff varies with the school type.[258] According to section 35 of the Education Act 2002, the local authority is the employer for community schools, voluntary controlled schools, community special schools, and maintained nursery schools.[259] By contrast, section 36 designates the governing body as the employer for foundation schools, voluntary-aided schools, and foundation special schools.[260] In South Africa, school governing bodies (SGBs) are required in public schools and have limited authority when it comes to educators employed in terms of the Educators Act.[261] For instance, these SGBs have no power to dismiss educators.[262] Yet they have the authority to employ and dismiss extra educators not controlled by the state.[263]

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[255] See s 19(1) of the Education Act 2002.
[256] See reg 13 of the School Governance (Constitution) (England) Regulations 2012.
[257] See reg 13(1) and (2) of the School Governance (Constitution) (England) Regulations 2012. See also Legislation.gov.uk "The School Governance (Constitution) (England) Regulations 2012" (2024).
[258] See s 35 of the Education Act 2002.
[259] See s 35(1), (2), and (3) of the Education Act 2002. See also "s 35 Staffing of community, voluntary controlled, community special and maintained nursery schools" in Legislation.gov.uk "Education Act 2002" (2024).
[260] See s 36(1) and (2) of the Education Act 2002: "(1) This section applies to– (a) foundation schools, (b) voluntary aided schools, and (c) foundation special schools. (2) Except as provided by regulations under subsection (4), any teacher or other member of staff who is appointed to work under a contract of employment at a school to which this section applies is to be employed by the governing body of the school." By contrast, the school governing body (SGB) in South Africa is responsible for policy direction, finance and the administration of a school, but cannot discipline the educators employed in terms of the Educators Act (the majority). They can only discipline extra educators employed in terms of the Schools Act. This sparked five court cases involving Scheepers against the SGB and SACE, reflecting a fragmented school system. In the UK, the governing body can discipline the principal, who is basically the head teacher. See also reg 5 of the School Staffing (England) Regulations 2009 on the head teacher's duties and entitlements: "(1) The governing body must ensure that the head teacher at the school– (a) complies with the duties imposed upon the head teacher; and (b) benefits from any entitlement conferred upon the head teacher, by any order under section 122 of the EA 2002 (teachers' pay and conditions). (2) In discharging its duty under paragraph (1)(a), the governing body must have regard to the desirability of the head teacher being able to achieve a satisfactory balance between the time spent discharging the professional duties of a head teacher and the time spent by the head teacher pursuing personal interests outside work." The governing body of the school can appoint and dismiss a head teacher in terms of reg 38(3)(b) of the School Staffing (England) Regulations 2009.
[261] See s 20(4), (5), (7A), and (11) of the Schools Act.
[262] See ss 3, 4, 17, and 18 of the Educators Act.
[263] See s 20(11) of the Schools Act.

The School Staffing (England) Regulations 2009 provide further specifications on school staff employment in England.[264] Even in instances when the local authority is the employer, Part II of these regulations involves the governing body in appointing[265] or dismissing teachers.[266] The local authority collaborates with the governing body in these instances. Under Part III, the Staffing Regulations delineate similar provisions for schools where the governing body is the employer. Delegation of the power to appoint[267] or dismiss teachers to the head teacher is permissible.[268] The governing body can also appoint and dismiss head teachers and their deputies.[269] The Department for Education (DfE) offers guidance through "Staffing and Employment Advice for Schools", elucidating the legal duties and functions of governing bodies.[270]

Governing bodies are tasked with developing discipline and grievance procedures in alignment with the "Code of Practice on Disciplinary and Grievance Procedures" ("ACAS code") issued by the Advisory Conciliation and Arbitration Service.[271] Additionally, the Staffing Regulations furnish necessary procedures for disciplinary issues and the suspension or dismissal of teachers for misconduct, empowering governing bodies and head teachers to impose suspensions when necessary.[272] The governing body plays a pivotal role in addressing complaints of teacher misconduct, and the Teaching Regulatory Agency ("TRA") investigates serious cases of teacher misconduct, contributing to a comprehensive framework regulating teachers' practice and conduct.[273]

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[264] See s 35 of the Education Act 2002.
[265] See reg 15(7) of the School Staffing (England) Regulations 2009.
[266] See reg 20 of the School Staffing (England) Regulations 2009. It is interesting that this provision allows a school to terminate a contract with or without notice, and that the latter case involves reasons of misconduct. This is similar to the position in Nigeria except that England provides for recourse for unfair dismissal cases as discussed below. In South Africa, the school principal and the SGB lack the power to dismiss teachers except SGB appointees.
[267] See reg 27(7) of the School Staffing (England) Regulations 2009.
[268] See reg 38(3)(b) of the School Staffing (England) Regulations 2009. See also "reg 38 Dismissal of staff" in Legislation.gov.uk "The School Staffing (England) Regulations 2009" (2024).
[269] See reg 38(3)(b) of the School Staffing (England) Regulations 2009.
[270] See Department for Education "Staffing and Employment Advice for Schools Departmental Advice for School Leaders, Governing Bodies, Academy Trusts and Local Authorities" (2021). See also The Key (2024), though, where it is recorded: "The DfE has withdrawn the Governance Handbook and replaced it with new guidance. Get up to speed on the changes, which include a change of format and a more streamlined approach."
[271] See paras 5.8 to 5.21 of Department for Education "Staffing and Employment Advice for Schools Departmental Advice for School Leaders, Governing Bodies, Academy Trusts and Local Authorities" (2021).
[272] See paras 5.8 to 5.21 of Department for Education "Staffing and Employment Advice for Schools Departmental Advice for School Leaders, Governing Bodies, Academy Trusts and Local Authorities" (2021).
[273] The TRA's role will be discussed shortly. So, whereas the governing body may deal with minor misconducts, serious misconducts are a priority of the TRA.

7.4.2.2 The Abolition of the General Teaching Council for England (GTCE)

According to the Explanatory Memorandum to the Education Act 2011 (Abolition of The GTCE Consequential Amendments and Revocations) Order 2012, the overarching Impact Assessment for the Education Act 2011 included the abolition of the General Teaching Council for England (GTCE). The GTCE, which was established to regulate the teaching profession and ensure high standards of teaching in England, was deemed redundant, leading to its dissolution. The responsibilities previously held by the GTCE were transferred to other bodies, streamlining the regulatory framework and reducing bureaucratic overhead within the education system. It was to enable the Secretary of State for Education to carry out his functions relating to serious professional misconduct and barring more efficiently and effectively.[274]

The rationale provided for the intervention was that the GTCE, responsible for regulating the teaching profession in England, operated as an arm's length body, lacking direct accountability to ministers.[275] This setup led to less effective scrutiny of its performance efficiency and effectiveness.[276] The registration and regulation processes for teachers, along with barring practices, were deemed overly complex and bureaucratic.[277] These complexities hindered head teachers from promptly and effectively addressing teacher misconduct and incompetence.[278] The Education Act aimed to enhance accountability by abolishing the GTCE and bringing the regulation of teachers directly under Ministers and Parliament.[279] The intervention scaled back government involvement, allowing employers to exercise judgment

[274] See the "Rationale for Intervention" in the Explanatory Memorandum to the Education Act 2011 (Abolition of The GTCE Consequential Amendments and Revocations) Order 2012 No. 1153 ("Explanatory Memorandum 2011").
[275] See s 7.1 of the Explanatory Memorandum 2011 pertaining to the Policy background. See also Tes Magazine (2011); Paton (2010); and Shepherd (2010). The decision to abolish the General Teaching Council for England (GTCE) was primarily motivated by Education Secretary Michael Gove's scepticism about its effectiveness in improving teaching standards and professionalism. Gove criticised the GTCE for extracting annual fees from teachers without providing commensurate benefits, contributing to the coalition government's broader plan to cut public sector bureaucracy. The move was welcomed by teachers' unions, emphasising the GTCE's failure to add value to teachers' professional lives and its tendency to duplicate the work of other bodies. Gove's decision aligned with the government's trust in teachers, aiming to avoid unnecessary oversight and patronage. The abolition was part of a larger initiative to decentralise power and reduce public expenditure. Concurrently, the implementation of the TRA as the GTCE's replacement, working under the Department for Education, signalled a shift in responsibilities, with the agency taking on roles related to teacher supply, quality, and regulation. The TRA's confirmation that it would not demand the controversial registration fees further supported the rationale for the GTCE's abolition, addressing long-standing grievances among teachers about the fee's lack of value.
[276] See the Rationale for Intervention in the Explanatory Memorandum 2011.
[277] See para 2 of the Rationale for Intervention in the Explanatory Memorandum 2011. In South Africa, the same problem of bureaucratic inefficiencies exists but there is no political will to confront it.
[278] See paras 2 and 3 of the Rationale for Intervention in the Explanatory Memorandum 2011.
[279] See para 1 of the Rationale for Intervention in the Explanatory Memorandum 2011.

in referring cases, with only the most severe misconduct cases falling within the purview of the national regulator.[280] The previous extensive teacher register will no longer be maintained, replaced by a list solely comprising teachers barred from the profession and a database documenting qualified teacher status and completion of the statutory induction period.[281]

7.4.2.3 Regulating Teacher Sexual Misconduct against Learners in England

The TRA, established by the Department for Education (DfE) as an executive agency, lacks a separate legal personality from the DfE.[282] Its purpose, outlined in sections 141B and 141C of the Education Act 2002, is to support employers, schools, and head teachers with safeguarding responsibilities.[283]

The TRA regulates the teaching profession, manages misconduct hearings, and maintains records of teachers, trainee teachers, and those with a teacher reference number.[284] As an executive agency sponsored by the Department for Education, the GTCE, which was similar to the Council for Educators in South Africa (SACE) and the Teacher Registration Council of Nigeria (TRCN), ceased to exist in 2012. The TRA, although operating under the Department for Education, performs functions similar to those of the councils mentioned above. Yet its autonomy level, being a non-juristic body, remains unclear within the executive government.[285]

The TRA consists of two operational units: the Teaching Qualification Unit (TQU) and the Teacher Misconduct Unit (TMU). The TQU, acting on behalf of the Secretary of State, exercises authority over education in England.[286] This unit grants teachers Qualified Teacher Status (QTS) and awards Early Years Teacher Status (EYTS) to individuals teaching children up to age 5 in England. It also handles the professional recognition of Overseas Trained Teachers (OTTs), providing them with QTS.[287]

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[280] See para 3 of the Rationale for Intervention in the Explanatory Memorandum 2011.
[281] See para 3 of the Rationale for Intervention in the Explanatory Memorandum 2011. In South Africa there is no provision for SACE's induction of teachers before they can be certified as qualified teachers.
[282] See TRA (2022) 3, which states: "These arrangements are operated by the Teaching Regulation Agency (the TRA), an executive agency of the Department for Education, which acts on behalf of the Secretary of State for Education as regulator of the teaching profession." See also Carney-Jones (2018).
[283] See ss 141B and 141C of the Education Act 2002. See page 6, para 4.2 of Teaching Regulation Agency "Framework Document" (September 2022).
[284] See TRA (2023) 3. See Teaching Regulation Agency "Framework Document" (September 2022).
[285] See TRA (2023) 3. See page 8, which states that "[t]his annual report and accounts (ARA) covers the operation of the Teaching Regulation Agency (TRA or the Agency), as an executive agency of the Department for Education (DfE or the Department), for the year ending 31 March 2023".
[286] See TRA (2023) 12.
[287] See TRA (2023) 12.

The TMU is responsible for assessing all referrals related to teacher misconduct, investigating cases within its jurisdiction, and meeting the threshold for serious misconduct. It has the authority to impose Interim Prohibition Orders (IPOs) and manage professional conduct panel meetings and hearings.[288] TRA Directors, acting on behalf of the Secretary of State, review panel recommendations, decide on imposing prohibition orders, and agree on appropriate review periods. In certain situations, the Senior Sponsor may serve as the decision-maker on behalf of the Secretary of State.[289]

The TMU engages with stakeholders and collaborates closely with Departmental policy, media relations, legal teams, trade unions, contracted legal firms, and panellists.[290] Additionally, the TMU oversees the management and enhancement of performance reporting, IT systems, and quality to streamline the teacher misconduct process.[291] TRA central services, including the Programme Management Office (PMO), the Information, Compliance, and Assurance Team, and the finance function, are housed within the Teaching Qualification Unit (TQU).[292]

7.4.3 The Teachers' Disciplinary (England) Regulations 2012

The procedures and process of regulating teacher misconduct in the state schools of England are pertinent to this thesis. This engenders a consideration of the Staffing Regulations, the Teachers' Disciplinary (England) Regulations 2012 ("the Teachers Disciplinary Regulations 2012"), which came into force on 1st April 2012,[293] and the disciplinary procedure of the TRA.[294] The Teachers Disciplinary Regulations outline several procedural steps, encompassing informal and formal reporting, TRA intervention for serious allegations,

[288] See TRA (2023) 12.
[289] See TRA (2023) 12.
[290] See TRA (2023) 12.
[291] See TRA (2023) 8.
[292] See TRA (2023) 8.
[293] See reg 1 on citation and commencement of the Teachers Disciplinary Regulations. Reg 1 states that "[t]hese Regulations may be cited as the Teachers Disciplinary Regulations 2012 and come into force on 1st April 2012".
[294] See TRA (2021) 3. In terms of para 4.1 of the Explanatory Memorandum to the Teachers Disciplinary Regulations 2012, "These Regulations support the implementation of the new system of teacher regulation under sections 141A to 141E of the Education Act 2002, inserted by the Education Act 2011, which set out the Secretary of State's powers in relation to the regulation of the teaching profession. These Regulations provide for the procedures to be followed by the Secretary of State when deciding whether a prohibition order should be made in relation to a teacher. A prohibition order will ban the person from carrying out teaching work for life. The teacher may appeal against the prohibition order to the Queen's Bench of the High Court within 28 days from the date the notice of the order was served on them. In most cases, the person can apply to the Secretary of State for the prohibition order to be reviewed and set aside after a specified period. The Regulations also provide for the Secretary of State to make interim prohibition orders to prevent a person from teaching whilst their case is considered if it is in the public interest to do so".

investigation of the allegation with the potential imposition of an interim prohibition order, the establishment and composition of a professional conduct panel, the conduct of proceedings by the professional conduct panel, the Secretary of State's decision, determinations on teaching prohibition orders, and the appeal process, all of which will be further discussed below.[295]

First, the disciplinary process for serious teacher misconduct begins with an informal complaint to the school, governing body, or local authority.[296] If the complainant is dissatisfied, the next step involves filing a formal complaint with the TRA.[297] The TRA provides various avenues for reporting serious misconduct, accessible to the public and employers, even in cases of resignation or dismissal.[298] The TRA requires that contact details and relevant information about the teacher be provided before the reporting process commences.[299] Additionally, the reporter may need to submit evidence, such as signed witness statements, prior complaints, or communications with the school.[300]

When there is a reasonable apprehension of immediate danger to a child, initiating contact with the police is crucial.[301] Serious misconduct, potentially leading to a "prohibition order" preventing a teacher from teaching,[302] requires a mandatory referral to the Disclosure and Barring Service (DBS) when it poses a risk to a child.

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[295] The Teachers Disciplinary Regulations 2012 comprise 20 regulations organised as follows: Introductory Text; 1. Citation and commencement; 2. Interpretation; 3. Teaching work; 4. Teachers' standards; 5. Consideration of cases; 6. Appointment and membership of a professional conduct panel; 7. Proceedings of a professional conduct panel; 8. Decision of the Secretary of State; 9. Entitlement to appear and be represented at hearings; 10. Attendance of witnesses; 11. Requirement for hearings to be held in public; 12. Administration of oaths and affirmations; 13. Prohibition orders; 14. Interim prohibition orders; 15. Publication of prohibition orders; 16. Review of prohibition orders; 17. Appeals; 18. Persons prohibited from teaching in Wales, Scotland, or Northern Ireland; 19. Service of notices and orders; 20. Provision of information by the employer; Signature; and Explanatory Note.

[296] See Government Digital Service (2014).

[297] See Government Digital Service (2014).

[298] See Government Digital Service (2014).

[299] See Government Digital Service (2014). Duncan (2001) *CV* 16 advised that "[r]eporting child abuse involves a complex array of dynamics. Individual subjectivity, personal perceptions, education, training, and life experiences affect everyone involved in the reporting and investigation process".

[300] See Government Digital Service (2014). Duncan (2001) *CV* 16 further advised that "[t]o maintain objectivity, getting as many facts as possible is essential. … Before calling, the reporter should have all the important information, including the child's name, date of birth, address, and telephone number; details of the suspected abuse; and information about the perpetrator. Are there bruises or marks? Is the child at risk if he returns home? Callers should be clear about what they are reporting. Vague statements of concern limit the screener's ability when determining whether to assign a case for investigation".

[301] See Government Digital Service (2014).

[302] See Government Digital Service (2014). See also reg 13 of the Teachers Disciplinary Regulations 2012, stating: "Serious misconduct is any behaviour that could result in a teacher being stopped from teaching. This is known as a 'prohibition order.'"

Online reporting of serious teacher misconduct is facilitated through the TRA website[303] or by email.[304] Processing time depends on the information provided. Postal reporting is also an option.[305] Significantly, the Teachers Disciplinary Regulations, similar to the SACE Code of Professional Ethics in South Africa, do not specify reporting procedures. Similarly, the Council for Educators (SACE) in South Africa provides these reporting options on its website,[306] mirroring the TRA in the UK. Reporting is followed by an assessment of the seriousness of the allegations complained of.

Secondly, after this reporting, the TRA intervenes when the misconduct is sufficiently serious.[307] The Education Act 2002 and the Disciplinary Regulations do not define "serious misconduct" or "misconduct".[308] However, the TRA's policy, "Teacher Misconduct: The Prohibition of Teachers", offers guidance on conduct considered serious by the TRA in three broad categories: "unacceptable professional conduct", "conduct that may bring the profession into disrepute", or a "conviction, at any time, of a relevant offence".[309]

Regulation 5 of the Teachers Disciplinary Regulations 2012 outlines the consideration of cases. The Secretary of State informs the teacher of the allegation, provides an opportunity to submit evidence, and decides whether the case should be discontinued or considered by a professional conduct panel.[310] If the case is discontinued, a statement is published upon the teacher's request.[311]

The TRA provides further guidance on serious misconduct by a teacher, focusing on "unacceptable professional conduct", "conduct that may bring the profession into disrepute", and "conviction, at any time, of a relevant offence".[312] The guidance explains the types of behaviours falling under these categories, such as conditional or absolute discharge for

[303] See Government Digital Service (2014).
[304] See Government Digital Service (2014). Alternatively, reports can be submitted via email by completing the teacher misconduct referral form and sending it to the Teaching Regulation Agency (TRA) at misconduct.teacher@education.gov.uk.
[305] See Government Digital Service (2014).
[306] See South African Council for Educators "How to Lodge a Complaint" (2019).
[307] See Department for Education "Keeping Children Safe in Education" (*GOV.UK*, 24 May 2024) https://www.gov.uk/government/publications/keeping-children-safe-in-education--2. The Department for Education's "Keeping Children Safe in Education: Statutory guidance for schools and colleges on safeguarding children and safer recruitment" provides further clarification to employers of teachers about the duty to consider referring serious cases of misconduct to the TRA.
[308] See Teaching Regulation Agency "Teacher Misconduct: The Prohibition of Teachers" (2022).
[309] See Teaching Regulation Agency "Teacher Misconduct: The Prohibition of Teachers" (2022).
[310] See reg 5 of the Teachers Disciplinary Regulations 2012.
[311] See reg 5(2)(a) and (b) of the Teachers Disciplinary Regulations 2012. See also Teaching Regulation Agency "Teacher Misconduct: The Prohibition of Teachers" (2022).
[312] See Teaching Regulation Agency "Teacher Misconduct: The Prohibition of Teachers" (2022).

relevant offences. It clarifies that the list of offences is not exhaustive and that each case should be considered on its merits.[313] Consequently, for "conduct that may bring the profession into disrepute", the TRA considers behaviours associated with the offence types listed. It emphasises that the list is not exhaustive, and other behaviours beyond those listed may be considered. Regarding "conviction, at any time, of a relevant offence", the TRA explains the effect of a conditional or absolute discharge. Six new offence types have been introduced, reflecting changes in the law since 2015.[314]

The third phase envisaged in the TRA disciplinary process involves the investigation of the allegation.[315] It may lead to the imposition of an interim prohibition order.[316] Notably, there is no explicit mention of the TRA conducting the investigation. The interim prohibition order functions as a directive barring the teacher from engaging in the teaching profession.[317] This order can be enforced at any point during the investigation, particularly when supplementary evidence emerges.[318] Regulation 20 of the Teachers Disciplinary Regulations addresses the provision of information by the employer, indicating that the employer may be required to furnish information about its investigations that led to the teacher's dismissal.[319]

The fourth phase outlined by the Teachers Disciplinary Regulations 2012 involves the hearing,[320] decision,[321] and review process.[322] This phase applies when the matter is referred

[313] See Teaching Regulation Agency "Teacher Misconduct: The Prohibition of Teachers" (2022).
[314] See Teaching Regulation Agency "Teacher Misconduct: The Prohibition of Teachers" (2022). The list includes offences related to violence, terrorism, sexual activity, voyeurism, revenge pornography, sexual communication with a child, indecent images, child cruelty, controlling or coercive behaviour, harassment, stalking, intolerance, hatred, drug offences, fraud, serious dishonesty, theft, arson, and possession of prohibited weapons.
[315] See reg 20 of the Teachers Disciplinary Regulations 2012.
[316] See Teaching Regulation Agency "Teacher Misconduct: The Prohibition of Teachers" (2022).
[317] See reg 14 of the Teachers Disciplinary Regulations 2012.
[318] See Edapt "Teaching Prohibition Order" (2024). See also reg 14 of the Teachers Disciplinary Regulations 2012.
[319] See reg 20 of the Teachers Disciplinary Regulations 2012. See also ss 141D(3) and 141E(3)(14) of the Education Act 2002 and Legislation.gov.uk "The Teachers' Disciplinary (England) Regulations 2012" https://www.legislation.gov.uk/uksi/2012/560/made. S 20 of the Teachers Disciplinary Regulations stipulates the information prescribed for the purposes of ss 141D(3) and 141E(3) and 141E(14) of the Education Act 2002. This information includes details of the teacher and the teacher's conduct, along with information (including copies of relevant documents) pertaining to any investigation into the teacher's conduct. This encompasses details of any disciplinary proceedings and the outcome of such proceedings. The focus is on gathering comprehensive information related to the teacher's conduct and the investigative process carried out by the employer. Yet it is unclear what the information to be furnished by employers will be used for.
[320] See reg 7 of the Teachers Disciplinary Regulations 2012 for the proceedings of a professional conduct panel. See also Legislation.gov.uk "The Teachers' Disciplinary (England) Regulations 2012" https://www.legislation.gov.uk/uksi/2012/560/made.
[321] See reg 8 of the Teachers Disciplinary Regulations 2012 for the provision about the Secretary of State's decision.
[322] See reg 16 of the Teachers Disciplinary Regulations 2012.

to a professional conduct panel under regulations 6 and 7 of the Teachers Disciplinary Regulations 2012.[323] The professional conduct panel, comprising three members, is a disciplinary body of the TRA.[324] It includes one or more teachers with at least five years of teaching experience and one or more lay panellists.[325] The TRA appoints an independent legal advisor to guide the panel on legal matters, policy interpretation, and relevant decisions.[326]

Proceedings of a professional conduct panel involve considering cases referred by the Secretary of State.[327] The panel determines all cases following a hearing unless the teacher in question requests a case determination without a hearing.[328] In cases where the panel does not find the allegations proved, the Secretary of State must publish a statement to that effect at the teacher's request.[329]

If the panel finds the teacher guilty of unacceptable professional conduct, conduct bringing the teaching profession into disrepute, or conviction of a relevant offence, it must recommend to the Secretary of State whether a prohibition order should be imposed.[330] This critical phase emphasises the panel's role in assessing the severity of the misconduct and shaping the subsequent recommendation about issuing a prohibition order.[331]

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[323] See regs 6 and 7 of the Teachers Disciplinary Regulations 2012 for appointment and membership of a professional conduct panel and Proceedings of a professional conduct panel, respectively. See also Legislation.gov.uk "The Teachers' Disciplinary (England) Regulations 2012" https://www.legislation.gov.uk/uksi/2012/560/made.
[324] See reg 6(1) of the Teachers Disciplinary Regulations 2012.
[325] See reg 6(2) of the Teachers Disciplinary Regulations 2012. See also Teaching Regulation Agency "Teacher Misconduct: Information for Teachers" (2022), which states that "during the hearing, the participants include three panel members, with one designated as the panel chair responsible for directing and managing the proceedings. A presenting officer, a lawyer appointed by the TRA, is tasked with preparing and presenting the case. A legal adviser, an independent lawyer not affiliated with the TRA, provides guidance to the panel on legal matters and TRA procedures but is not involved in the decision-making process. Additionally, the hearing involves you, the subject of the allegations, your representative, witnesses, and TRA staff".
[326] See Teaching Regulation Agency "Teacher Misconduct: Information for Teachers" (2022). The TRA designates a representative to present the disciplinary case, who may be a DfE official or an external lawyer. The teacher has the option to represent himself or choose a legal representative. The panel invites both the referrer and the teacher to present additional evidence. The procedure may involve a hearing or be determined without one, based on the teacher's preference.
[327] See reg 7(1) of the Teachers Disciplinary Regulations 2012.
[328] See reg 7(3) of the Teachers Disciplinary Regulations 2012, which states that "[a] professional conduct panel may determine a case without a hearing at the written request of the teacher who is the subject of the case". See also Legislation.gov.uk "The Teachers' Disciplinary (England) Regulations 2012" https://www.legislation.gov.uk/uksi/2012/560/made.
[329] See reg 7(4) of the Teachers Disciplinary Regulations 2012.
[330] See reg 7(5) of the Teachers Disciplinary Regulations 2012.
[331] See reg 13 of the Teachers Disciplinary Regulations 2012. If the panel finds the teacher guilty, it recommends to the Secretary of State for Education (represented by the TRA) whether a prohibition order should be issued. A prohibition order, constituting a lifelong ban, prevents the teacher from doing unsupervised teaching work.

The Secretary of State's representative considers the recommendation and specifies the time frame (not less than two years) within which the teacher may apply for a review if a prohibition order is issued.[332] The prohibition order is served on the teacher[333] and the employer[334] and published.[335] The regulations also outline an appeal process, allowing a teacher to appeal a prohibition order within 28 days of service by applying to the High Court.[336] This comprehensive discussion illustrates the structured legal framework governing the professional conduct of teachers in England.[337] It is essential to consider the processing of sexual misconduct cases against teachers.

7.4.4 Balancing Children's Rights and Teachers' Labour Rights

The analysis of three cases within the education system in England illustrates the effective balance between children's rights to basic education and protection and educators' labour rights, particularly in instances of dismissal for sexual misconduct. Transparency and information symmetry are upheld, because all cases resulting in prohibition orders are publicly disclosed online.[338]

In the case of Mr Michael Bright, convicted of distributing indecent photographs, the Professional Conduct Panel (PCP) considered public interest, the severity of the behaviour, and any mitigation offered.[339] The PCP emphasised that prohibition orders are not punitive but are issued to safeguard students, even in cases where direct sexual abuse may not be proven.[340]

The case of Mr Khan, who appeared before the PCP, further exemplifies the UK system's commitment to addressing unacceptable professional conduct. [341] Despite not facing criminal charges, Mr Khan admitted to inappropriate behaviour with a pupil, leading to his indefinite

[332] See reg 8(3) of the Teachers Disciplinary Regulations 2012.
[333] See reg 13(4)(a) of the Teachers Disciplinary Regulations 2012.
[334] See reg 13(4)(b) of the Teachers Disciplinary Regulations 2012. South Africa lacks robust regulations for managing teacher misconduct. There are piecemeal disciplinary provisions such as the ELRC Collective Agreement.
[335] See regs 8(5) and 15(1) of the Teachers Disciplinary Regulations 2012.
[336] See reg 17 of the Teachers Disciplinary Regulations 2012.
[337] See the Teachers Disciplinary Regulations 2012.
[338] See regs 8(5) and 15(1) of the Teachers Disciplinary Regulations 2012.
[339] See Teaching Regulation Agency "Mr Michael Bright: Professional conduct panel meeting outcome" (2023).
[340] See Teaching Regulation Agency "Mr Michael Bright: Professional conduct panel meeting outcome" (2023).
[341] See Teaching Regulation Agency "Mr Ezar Khan: Professional conduct panel meeting outcome" (2023).

prohibition from teaching. The decision was made considering the seriousness of the proven allegations.[342]

Mr John Lane's case, involving a conviction for sexual communication with a child, underscores the coordinated efforts among the police, schools, and the Teaching Regulation Agency (TRA) to eliminate sexual abuse.[343] The TRA's pursuit of cases, even after court sentencing, ensures the complete and permanent removal of teachers guilty of sexual misconduct from the education system.[344]

This stringent approach contrasts with challenges in South Africa, where it happens that dismissed public school teachers are not reported to the Council for Educators (SACE), allowing them to retain their teaching licences and potentially pose risks in different provinces or in private schools.[345] This thesis highlights the need for a more comprehensive and coordinated approach to address educator dismissal and safeguard students in South African schools.

7.4.5 Protection of Teachers' Labour Rights in England

In England, labour law disputes can be broadly categorised into two distinct realms. The first pertains to claims arising from a breach of contract, and the second originates from statutory claims, notably those concerning unfair dismissals.[346] This means that any employees, as well as teachers accused of sexual misconduct against pupils, are protected against unfair dismissal as well.[347] Court cases such as *Clark v Nomura International Plc*,[348] *Reinhard v Ondra*,[349] and *Cantor Fitzgerald International v Horkulak*[350] exemplify the contractual aspect. Statutory protection against unfair dismissals is explicitly outlined in section 94(1) of the Employment Rights Act.[351] The cases of *Fuller v Lloyds Bank Plc*[352] and *Whitbread plc v Hall*[353]

[342] See Teaching Regulation Agency "Mr Ezar Khan: Professional conduct panel meeting outcome" (2023).
[343] See page 14 of the ruling in Teaching Regulation Agency "Mr John Lane: Professional conduct panel meeting outcome" (2022).
[344] See page 14 of the ruling in Teaching Regulation Agency "Mr John Lane: Professional conduct panel meeting outcome" (2022).
[345] See Macupe *City Press* (2021).
[346] See s 94 of the Employment Rights Act 1996.
[347] See s 94 of the Employment Rights Act 1996.
[348] See *Clark v Nomura International plc* [2000] WL1213073; [2000] IRLR 766.
[349] See *Reinhard v Ondra LLP* [2015] EWHC 26 (Ch); [2016] 2 BCLC 571.
[350] See *Cantor Fitzgerald International v Horkulak* [2004] EWCA Civ 1287.
[351] S 94(1) of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by the employer.
[352] See *Fuller v Lloyds Bank plc* [1991] IRLR 336.
[353] See *Whitbread plc (t/a Whitbread Medway Inns) v Hall* [2001] IRLR 275; [2001] ICR 699.

demonstrate the protection against unfair dismissal afforded employees in England. This dual protection mechanism ensures that unfairly dismissed teachers, including those facing allegations of sexual misconduct, have avenues to address their grievances.[354]

In the UK, the Employment Tribunal established by the Employment Rights Act is responsible for resolving unfair dismissal disputes.[355] Previously, the Industrial Tribunal handled such matters before it was succeeded by the Employment Tribunal.[356] Breach of contract claims are directed to the County Court or High Court as stipulated by the Employment Rights (Dispute Resolution) Act, with the High Court comprising divisions such as the Queen's Bench, Family, and Chancery Divisions.[357] Appeals ascend to the Court of Appeal and the Supreme Court of the United Kingdom, the latter having replaced the Appellate Committee of the House of Lords in October 2009 and exclusively offering statutory protection against unfair dismissals, as outlined in section 94(1) of the Employment Rights Act.[358]

In the context of safeguarding educators accused of sexual misconduct towards students, this thesis scrutinises two pivotal cases: *Mr Jonathan Hawker v Devonport High School for Girls* ("the *Hawker* case")[359] and *X County School & Anor v D & Anor* ("the *X County School* case").[360] These cases illustrate the application of the foundational principles of labour rights protection, emphasising the legal safeguards available to teachers facing allegations of sexual misconduct against learners.[361] This thesis explores how these cases navigate the terrain of educator dismissal disputes within the broader legal framework of the United Kingdom.

[354] See s 94 of the Employment Rights Act 1996 on the right not to be unfairly dismissed.
[355] See the Employment Tribunals Act 1996.
[356] See s 1 of the Employment Tribunals Act 1996 on employment tribunals, which states: "(1) The Secretary of State may by regulations make provision for the establishment of tribunals to be known as [employment tribunals]. (2) Regulations made wholly or partly under section 128(1) of the Employment Protection (Consolidation) Act 1978 and in force immediately before this Act comes into force shall, so far as made under that provision, continue to have effect (until revoked) as if made under subsection (1)."
[357] See the Employment Rights (Dispute Resolution) Act 1998.
[358] See s 94(1) of the Employment Rights Act 1996.
[359] *Mr Jonathan Hawker v Devenport High School for Girls* case no. 1402048/2022 ("the *Hawker* case") https://assets.publishing.service.gov.uk/media/648c6eeb103ca6000c03a061/Mr_Jonathan_Hawker_V_Devonport_High_School_for_Girls_-_1402048.2022_-_Written_Reasons.pdf.
[360] See *X County School & Anor v D & Anor* UKEAT/0155/12/RN ("the *X County School* case").
[361] See the *X County School* case.

The *Hawker* case[362] involving Plymouth teacher Mr Jonathan Hawker illustrates the gravity of flawed investigations in educator dismissal disputes.[363] Accused of sexual assault based on dubious claims from female students at Devonport High School for Girls, Hawker faced severe consequences, including arrest and a damaged reputation.[364] The subsequent flawed investigation, however, led to his unfair dismissal for gross misconduct.

Despite police and crown prosecutors dropping charges because of insufficient evidence for conviction, Hawker's career suffered irreparable damage.[365] The Employment Tribunal found the investigation fundamentally flawed and unfair. Crucial evidence undermining the accusations had not been sufficiently considered.[366] The tribunal awarded Hawker £44 868, highlighting the school's failure to provide a safe working environment, especially for male staff.[367]

The case of the *X County School* centred on two drama teachers who were dismissed for permitting GCSE students to stage a performance depicting sexual abuse, including rape, sexual intercourse, sexual assault, oral sex, masturbation, and group sex.[368] Following this controversial play, the dismissal was influenced by the local authority's safeguarding officer, and the Employment Tribunal considered the dismissals unfair.[369] However, the Employment Tribunal's decision was overturned on appeal, with the Employment Appeal Tribunal (EAT)

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[362] See the *Hawker* case. See also *Mr Jonathan Hawker v Devenport High School for Girls* case no. 1402048/2022 ("the *Hawker* case") https://assets.publishing.service.gov.uk/media/648c6eeb103ca6000c03a061/Mr_Jonathan_Hawker_V_Devonport_High_School_for_Girls_-_1402048.2022_-_Written_Reasons.pdf.

[363] See the *Hawker* case para 2.1.

[364] See the *Hawker* case para 6.30, where it was directed: "Section 11 of the Employment Tribunals Act 1996, provides for the restriction of publicity in cases involving sexual misconduct. Subsection (1)(a) provides for documents or decisions to be effected so as to prevent the identification of any person affected by or making the allegation. The publication of identifying matter is a criminal offence and any person found guilty of that is liable on summary conviction to a fine not exceeding level 5 on the standard scale. Identifying matter, in relation to a person, means any matter likely to lead members of the public to identify him as a person affected by, or as the person making, the allegation." See also Redmans Solicitors "ET Awards £45K to Teacher Accused of Sexual Assault 'For Fun' by Highschool Girls" https://redmans.co.uk/insights/et-awards-45k-to-teacher-accused-of-sexual-assault-for-fun-by-highschool-girls.

[365] See the *Hawker* case para 5.261.

[366] See the *Hawker* case para 9.16. The investigation's inadequacies included a narrow focus, the lack of exploring contrary evidence, and a failure to assess the reliability of the accusers. The tribunal emphasised that a comprehensive investigation is essential in career-ending cases, and the school's acceptance of the younger pupils' evidence without proper challenge or exploration led to a decision based on inadequate information.

[367] See the *Hawker* case para 9.211, where the Employment Tribunal ruled that "[t]his was an unfair dismissal". Employment Judge Street further ruled (para 9.212): "I make no finding on whether Mr Hawker committed the misconduct alleged. What I can say is that if he is innocent, and a playground plot can end a career and destroy a reputation, the school is not providing a safe working environment for its staff, in particular for its male staff."

[368] See *X County School & Anor v D & Anor* UKEAT/0155/12/RN ("the *X County School* case").

[369] See the *X County School* case.

identifying flaws in the judgment, emphasising the neglect of the safeguarding officer's expertise and a substitution mindset. The case was remitted to a new Employment Tribunal for reconsideration.[370]

The Honourable Lady Smith chaired the appeal, where schoolteachers faced dismissals for gross misconduct. Despite the schoolteachers' representing themselves, the employer challenged the Tribunal's judgment.[371] The drama teachers played pivotal roles in GCSE student preparation but permitting sexually explicit content led to dismissals for gross misconduct.[372] The appeal involved procedural concerns, bias issues, and the impact of explicit material on the students' psychological well-being.[373]

The Tribunal's judgment investigated explicit content interpretation, procedural issues, and the importance of comprehensive investigations.[374] The appeal, presented by Mr Hignett, challenged the reasonableness of the investigation and the acceptance of advice. Procedural failings were contested, emphasising that not every flaw must result in unfair dismissal. Mr Hyams, for the claimants, cautioned against substituting views, advocated for additional investigation, and addressed procedural fairness.[375] Relevant laws were also applied, highlighting the employer's genuine belief, reasonableness of the investigation, and overall fairness. The Tribunal's decision was critiqued, leading to the appeal's justification and the need for a fresh hearing before a reconstituted Employment Tribunal to address legal misapplications and procedural flaws.[376]

The *Hawker* case underscores the critical importance of fair and thorough investigations in handling educator dismissal disputes, ensuring justice and maintaining a safe working environment for all staff members.[377] The *X County School* case, on the other hand, serves as a reminder of the importance of thorough investigations, consideration of expertise, avoidance of a substitution mindset, adherence to procedural fairness, and awareness of the potential career impact on employees.[378] These lessons contribute to the broader

[370] See the *X County School* case.
[371] See the *X County School* case.
[372] See the *X County School* case.
[373] See the *X County School* case.
[374] See the *X County School* case.
[375] See the *X County School* case.
[376] See the *X County School* case.
[377] See the *Hawker* case para 9.211. South Africa also experiences challenges with conducting robust investigations, leading to cases being lost to educators who may well have abused children sexually as in the *Leeto* and *CS-Swanepoel* cases discussed in Chapter 5 of this thesis.
[378] See the *X County School* case.

understanding of handling dismissal disputes, particularly in the context of sensitive issues within educational institutions.

7.5 The Comparative Lessons for South Africa

This chapter provides answers to the fourth research question of this thesis, about identifying lessons that could be drawn from international comparative analyses regarding the efficient resolution of educator dismissal disputes arising from sexual misconduct against children in state schools. In England, a unified legislative, institutional, and procedural approach governs cases of sexual misconduct involving educators. The coordinated system involves various stakeholders, including the government through the TRA agency, police, school governing bodies, Local Education Authorities (LEAs), and others, showcasing a symbiotic relationship.[379] By contrast, South Africa grapples with an uncoordinated process[380] leading to varied sanctions imposed by SACE and employers.[381]

The Council for Educators in South Africa (SACE), despite its legal personality, shares executive authority with the educators' employer.[382] Unlike England, where the General Teaching Council for England (GTCE) was dissolved and brought under the Department for Education (DfE),[383] the Council for Educators in South Africa operates somewhat independently, raising questions about parallel and conflicting processes. Even with a collective agreement to streamline proceedings, SACE's decisions bind the employer, but the reverse does not apply, creating disparities in serious misconduct cases.[384]

The prerogative to determine and enforce disciplinary procedures for teachers in England originates from the Teachers' Disciplinary Regulations (England) 2012, developed by the TRA under the auspices of the Secretary of State for Education.[385] No teacher union is involved in determining such disciplinary measures. By contrast, in South Africa, the regulations for

[379] See UK Parliament "The Education Act of 1944" (2024) on the Education Act of 1944 and Local Education Authorities (LEAs).
[380] See the *Scheepers* cases.
[381] See the *Robertson* case.
[382] The Minister of Education is the employer of educators in terms of s 4 of the Educators Act and is also the Executive Authority of the Council for Educators (SACE).
[383] See s 7(1) of the Education Act 2011 on the abolition of the General Teaching Council for England (GTCE). This thesis argues that in South Africa, the Minister of Education ought to consider dissolving the Council for Educators (SACE) and bringing SACE within the Minister's purview for streamlining processes and putting an end to disparities and fragmentations that come with concurrent jurisdiction over educators by too many authorities.
[384] See s 15(2) of the Educators Act and s 14(2) of the SACE Act. See also the Constitutional Court ruling in the *Council for Educators v Scheepers CC* case.
[385] See the Teachers Disciplinary Regulations 2012.

handling disciplinary cases related to child sexual abuse by teachers are partly established through a collective agreement between the employer and teacher unions.[386] In the UK, the TRA operates as a unit in the Department for Education, overseeing teacher registration and discipline.[387] This thesis contends that even if section 188A of the LRA is applied, this does not absolve the South African government from determining disciplinary procedures; it simply does not require a negotiated solution with multiple parties or authorities.[388] The UK government's decision to abolish the GTCE was driven by the need to eliminate multiple authorities with concurrent jurisdiction over teachers, preventing unnecessary disparities, confusion, and bureaucracy in enforcing teaching standards.[389] The UK government's decision also alleviated a significant financial burden that offered no tangible value or benefit to teachers.[390] This consideration must be taken seriously in order to address current challenges in South Africa.[391]

Within South Africa's educator discipline system, two processes exist for serious misconduct, contributing to disparities. Contrastingly, the UK follows a single process for serious misconduct cases, including child sexual abuse, promoting efficiency. The UK issues interim prohibition orders during investigations,[392] whereas in South Africa, educators can resign and seek employment elsewhere before the disciplinary process concludes.[393]

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[386] See ELRC Collective Agreement No. 3 of 2018. This is discouraged, as it creates unnecessary fragmentation and inefficient bureaucracies.
[387] See the Teachers Disciplinary Regulations 2012.
[388] See s 188A of the LRA.
[389] See the Rationale for Intervention in the Explanatory Memorandum 2011.
[390] See the Rationale for Intervention in the Explanatory Memorandum 2011. The financial burden was through annual subscriptions.
[391] South Africa has challenges of concurrent jurisdiction and inefficiencies in dealing child sexual abuse cases against educators, making some of these cases fall through the cracks. This leaves children without constitutional protection.
[392] See Edapt "Teaching Prohibition Order" (2024). The TRA explains that an interim prohibition order prevents a person from teaching until his case has been fully considered and concluded. The interim prohibition order may be made only if the Secretary of State considers that it is necessary in the public interest. Decisions about whether to make an interim prohibition order will be taken on a case-by-case basis, taking account of the nature and severity of the allegation and the available evidence, including any information about the likelihood of further incidents. Action by the Crown Prosecution Service (CPS) and/or the police should be considered. If a teacher has been charged with an offence, an assumption may be made that there is reliable evidence that the offence has been committed.
[393] See s 14(1) of the Educators Act on certain educators deemed to be discharged: "(1) An educator appointed in a permanent capacity who– … (d) while disciplinary steps taken against the educator have not yet been disposed of, resigns or without permission of the employer assumes employment in another position, shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where– (i) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work; or (ii) paragraph (c) or (d) is applicable, with effect from the day on which the educator resigns or assumes employment in another position, as the case may be." See para 6.3.3 of Chapter 6 of this thesis for a discussion of the *Mofokeng* case. He could not be tried under the ELRC because he was an SGB educator and was retained in the system despite having a record of child sexual abuse against him. If the UK process is to be followed, once an educator resigns pending a serious misconduct

Both countries allow employers to report serious misconduct cases, but the UK's Secretary of State can issue a prohibition order promptly, whereas the South African Council for Educators waits for case resolution.[394] In South Africa, recent regulations prevent the re-employment of educators convicted of sexual misconduct, addressing concerns about these individuals re-entering the system. Both the UK and South Africa protect educators' labour rights through unfair dismissal laws in specialised tribunals such as the Employment Tribunal in the UK and institutions such as the CCMA and the Labour Courts in South Africa.

In the UK, a transparent approach is followed in handling cases of serious misconduct against educators. Once concluded, these cases, along with issued prohibition orders, are publicly disclosed on the government website.[395] This open publication contrasts sharply with the South African practice, which prioritises confidentiality. In South Africa, both the employer and the Council for Educators (SACE) release only statistical information on the frequency of offenders, without disclosing their identities.[396]

Access to information about individuals involved in misconduct cases in South Africa is limited. Those seeking such details may need to make requests through the Department of Social Development (DSD) or obtain information through reference checks. Although arguments for protecting privacy under the Protection of Personal Information Act (the POPIA) exist,[397] proponents of transparency argue that invoking the Promotion of Access to Information Act (the PAIA) is crucial.[398] The PAIA could allow for the publication of information in the public interest, particularly about cases of serious misconduct against educators, publication that would be in the best interests of children.

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enquiry, an interim prohibition order should be issued to prevent this educator from practising the teaching profession elsewhere.

[394] See s 5(c)(iii)(cc) of the SACE Act.

[395] See ss 8(5) and 15(1) of the Teachers Disciplinary Regulations 2012.

[396] See ELRC 2020/2021 Annual Report (2021) 21. See also SACE 2020/2021 Annual Report (2021) 48.

[397] See the Protection of Personal Information Act 4 of 2013 ("the POPIA") read together with s 14 of the Constitution, 1996.

[398] See the Promotion of Access to Information Act 2 of 2000 ("the PAIA"), which aims to enforce the constitutional right of access to information held by the state and other entities necessary for the exercise or protection of any rights. S 28(2) of the Constitution, 1996 underscores the paramount importance of protecting children's rights against sexual abuse. In alignment with this constitutional imperative, the UK's practice of publicly disclosing details of sexual offenders could serve as a deterrent factor if the practice were adopted in South Africa. This approach promotes transparency and aligns with the commitment to safeguarding the rights and well-being of children.

In the UK, teacher unions play a limited role in the disciplinary process of educators, primarily when representing a member.[399] By contrast, South Africa's teacher unions exercise a more substantial influence, actively shaping disciplinary procedures through collective agreements.[400] This involvement introduces additional complexities. Ideally, the management of educator discipline should fall within the employer's purview. According to section 188A of the LRA, teacher unions should consent to an arbitrator's inquiry rather than dictating the specifics of the disciplinary process.[401] This thesis contends that ELRC Collective Agreement should be dissolved and integrated into the Educators Act.[402] The revised Collective Agreement should primarily involve a statement of consent to section 188A of the LRA.

Notable cases, such as *Leeto*, *CS-Swanepoel*, and *Scheepers*, highlighted criticisms of the employer's failure to effectively manage educator discipline.[403] There is a reluctance to address and pursue offenders, in contrast to the proactive approach in the UK. In the UK, when serious misconduct is reported, all stakeholders collaborate to investigate and resolve issues, demonstrating a more concerted effort to address root causes.

Rounding off this thesis, the discussion now moves to the conclusion and recommendations.

[399] See Teaching Regulation Agency "Teacher Misconduct: Information for Teachers" (2022).
[400] See ELRC Collective Agreement.
[401] See s 188A of the LRA.
[402] This will assist the sector in streamlining issues and ending its fragmented system of managing educator misconduct.
[403] See Chapter 5 of this thesis for discussion of the *Leeto*, *CS-Swanepoel*, and *Scheepers* cases.

Chapter 8: Conclusion and Recommendations

Page

8.1 Introduction 286
8.2 Conclusions regarding Question One 287
8.3 Conclusions regarding Question Two 298
8.4 Conclusions regarding Question Three 299
8.5 Conclusions regarding Question Four 301
8.6 Conclusions regarding Question Five 303
8.7 Overall Conclusions 304
8.7.1 Overall Conclusions on the First Hypothesis 305
8.7.2 Overall Conclusions on the Second Hypothesis 306
8.8 Recommendations 306
8.9 Suggestions for Future Studies 309

8.1 Introduction

Dealing with educator dismissal disputes for child sexual abuse in public schools remains a contentious challenge in South Africa.[1] Despite various initiatives by authorities – the SGBs, the employers of educators, and the Council for Educators – coupled with extensive academic literature[2] and legal judgments,[3] recurrent weaknesses and unanswered questions persist in this dispute resolution mechanism. This challenge arises from the delicate balance required to protect children from sexual abuse perpetrated by errant educators while safeguarding the labour rights of accused educators.

This thesis sought to resolve these challenges by answering five vexed research questions.

The first research question in this thesis assesses the ELRC's effective use of section 188A of the LRA to resolve cases of sexual misconduct against children in South African public schools. This use is crucial for providing an efficient dispute resolution system aligned with the LRA's objectives and ensuring children's right to constitutional protection from sexual abuse by educators.

[1] See Chapter 1 para 1.2.1.
[2] See Joubert et al (2015) 79. See also Deacon (2015) 21.
[3] See cases such as *Robertson* para 4; *CS-Swanepoel* para 1; and *Leeto* paras 27 and 28.

The second research question explores insights and guidance from the ILO and scholarly discourse on the optimal approach to resolving labour disputes and safeguarding educators from unfair dismissals.

The third research question focuses on measures recommended to enhance the efficacy of section 188A in addressing educator dismissal disputes related to sexual misconduct in South African public schools. Solutions to the challenges in this area are vital to instil public confidence in schools as safe spaces for children.

The fourth research question examines lessons drawn from international comparative analyses regarding the efficient resolution of educator dismissal disputes arising from sexual misconduct against children in state schools. This examination involves benchmarking best practices from international comparisons to enhance the effectiveness of current systems in South Africa.

The fifth research question provides proposals and reforms to improve the effectiveness of resolving educator dismissal disputes involving sexual misconduct against children in South African public schools. This critical question focuses on enhancing the overall process of resolving educator dismissal disputes in these public schools.

8.2 Conclusions regarding Question One

- To what extent does the ELRC's use of section 188A of the LRA by the ELRC effectively resolve cases of sexual misconduct against children within the public education sector?

After providing the background in Chapters 1 and 2, this thesis disentangled the related issues in Chapters 3 to 7 to give answers to the five research questions. In line with the first question, the process under section 188A of the LRA is a great help. It bolsters the handling of educator child sexual abuse cases in the arbitration hearing only, replacing an internal disciplinary proceeding and possible appeal process.[4] The idea of persisting with internal disciplinary hearings was to prioritise exhausting internal disciplinary procedures, which, according to court rulings,[5] prompted a sense of amicable dispute resolution between the employer of

[4] See Chapter 6 para 6.3.1.
[5] See the case of *Davids-Paulse v MEC: Department of Education : NC and Others* (825/15) [2015] ZANCHC 37 (4 December 2015), in which the court ruled that the matter was improperly before the court for want of exhausting the internal procedures. The rules are that an aggrieved party ought to go through the sectoral bargaining process and if the party fails to exhaust internal procedures or approach the ELRC and go straight to the Labour Court, the party's matter is dismissed. The court stated: "In

educators and the educators before SDR systems[6] were factored into the disciplinary dispute process.[7]

However, the introduction of section 188A of the LRA pre-dismissal arbitration innovation into the LRA in 2002 and its subsequent development in 2014 into an inquiry by the arbitrator was designed to shorten the disciplinary processes for both employers and employees.[8] The section 188A process became a good idea for the public education sector in educator sexual misconduct cases involving children.[9]

As pointed out in Chapter 6, disciplinary proceedings of any nature underscore the need to dispense with evidence. Evidence means that the testimonies of children who would have been sexually abused and others who may have witnessed it are required to prove the educators' guilt or innocence.[10] Substituting the internal processes with an inquiry by an arbitrator in terms of section 188A of the LRA provides several advantages. First, the number of forums where learners must testify is reduced to a single disciplinary proceeding before the arbitrator.[11] Secondly, this step reduces the possibility of secondary trauma associated with learners testifying in multiple forums.[12] Thirdly, the ELRC Collective Agreement was couched to align with the Educators Act, which provides children with an intermediary when they testify to ensure that they are at ease.[13] Fourthly, the process requires the use of specialised venues which allow children to testify without coming face to face with the perpetrators. Fifthly, the process also reduces the costs of arranging multiple forums to conduct a single disciplinary

terms of the above grievance procedure, educators must lodge their grievances departmentally, and should the Department be unable to resolve their grievance, they should lodge a dispute with the ELRC. In view of the prescribed procedures for Educators, Ms Davids-Paulse should have exhausted the internal procedures as provided for in the PAM and the dispute resolution mechanism in terms of the provisions of the Constitution of the ELRC. Her matter was thus not properly before the Public Services Commission and could not be dealt with." See also art 8 of the ELRC Constitution, 2016, which provides for exhausting internal procedures in dispute resolution systems. The ELRC Collective Agreement is a departure from art 8 of the ELRC Constitution, 2016.

[6] See Zack (1997) 1. See also Mahomed et al (1997) 13; Love (2011) 2; Bhorat et al (2007) 51; White (2010) 2; Block (2017) 7; and Bushe (2019) 69.

[7] The previous approach involved exhausting internal processes. These involved an internal investigation, disciplinary hearing, and possible appeal, and they subjected children to secondary trauma or what may be termed secondary rape. Having to face the same alleged sexual offender means that children relive their prior ordeal. By eliminating multiple platforms or forums and remaining with only one, the inquiry by an arbitrator benefits children's welfare and mental health. Reducing the inquiry to one arbitration proceeding is a commendable step.

[8] See Chapter 6 para 6.3.1. See also s 188A of the LRA.

[9] See Chapter 6 para 6.3.1.

[10] See Chapter 6 para 6.3.3. See also the *Combined Transport Services* case.

[11] See Chapter 6 para 6.3.3.

[12] See Chapter 6 para 6.3.3.

[13] See item 7(10A) of sch 2 to the Educators Act.

proceeding against an educator.[14] Sixthly, the process also aligns with the LRA objective to provide fast, economical, accessible dispute resolution for employers and educators.[15] As an arbitration proceeding, section 188A may not take the same time as a court proceeding, so will deliver a fast outcome.[16]

Seventhly, the fact that an arbitration ruling leads to a final award means that it is not appealable, and children will be saved from having to testify again.[17] The ruling is reviewable by the Labour Court based on the record of the arbitration proceeding.[18] Arbitration still has known disadvantages: the parties lose control of the process to the arbitrator, and arbitrations may not lead to an amicable settlement.[19] Even so, an amicable settlement approach is not suitable for child sexual abuse cases anyway, especially where a child may be subjected to further trauma.[20]

Eighthly, the section 188A process presents the education sector with further advantages. It advances the protection of children. It also observes due process (fair procedure) and causes (fair reason) in favour of the educators' right not to be unfairly dismissed.[21] Using section 188A of the LRA clearly carries benefits, as this thesis has revealed. Still, it also has its challenges in practice.

This thesis observed several problems associated with using section 188A in child sexual abuse teacher disputes that militate against its success in South African public schools. First, whereas the prerogative to determine and enforce disciplinary procedures for teachers in England originates from the Teacher Disciplinary Regulations 2012, developed by the TRA under the auspices of the Secretary for Education,[22] section 4 of the Educators Act gives the employer of educators in South Africa the power and authority to determine terms and conditions of work[23] and is not a responsibility shared with teacher unions.[24] Although the democratisation of education in South Africa is acknowledged in line with the spirit of the

[14] See Chapter 6 para 6.6.6. See also *Gauteng Department of Education vs Peter Williams* ELRC 924-21/22GP para 80, where the arbitrator ruled: "I find that the employee did not commit misconduct in respect of count 1 because there is insufficient reliable evidence led by the employer that he acted in an improper, disgraceful and unacceptable manner." Yet the serious allegations in this case ought to have been thoroughly investigated and prosecuted by the employer.
[15] See s 1(d)(iv) of the LRA.
[16] See Chapter 3 para 3.7.4.
[17] See Chapter 3 para 3.7.4. See also s 145 of the LRA.
[18] See s 145 of the LRA.
[19] See Chapter 3 para 3.7.4. See also Wiese (2016) 7.
[20] See Chapter 6 para 6.3.3.
[21] See Chapter 3 paras 3.4.1 and 3.4.2.
[22] See the Teacher Disciplinary Regulations 2012.
[23] See ss 3 and 4 of the Educators Act.
[24] See cl 1 of the ELRC Collective Agreement.

Constitution, 1996, the power to discipline an employee remains the employer's prerogative.[25] The over-involvement of teacher unions in determining disciplinary processes weakens the employer's authority in managing disciplinary cases.[26] This thesis therefore argues that the actions by employers of educators to defer to teacher unions through the ELRC Collective Agreement constitute a form of abdication of responsibility.

By contrast, in the comparator countries, Nigeria and England, teacher unions do not have a role in determining disciplinary processes such as using a collective agreement to do so, as in South Africa through the ELRC Collective Agreement.[27] This thesis further argues that teacher unions ought to play two roles in the section 188A process.[28] First, the ELRC Collective Agreement should have been limited to providing consent for the employer or teacher unions to use section 188A. This aligns with the architecture of enacting section 188A, as determined by the courts in the *Mchuba* and *MSC Despots* cases.[29] Secondly, unions should have represented member educators during disciplinary proceedings, here the inquiry by arbitrator proceedings against errant teachers.[30]

The employer's deferment to a negotiated solution with unions has turned the whole process into a makeshift arrangement. Moreover, it unfairly excludes other serious cases against educators, focusing only on sexual misconduct.[31] Several cases that would traumatise children would require a section 188A process: examples would be the severe use of corporal punishment leading to injuries and removal of children's limbs, and throwing children into a pit latrine to retrieve a phone.[32] These cases could harm children as forms of serious misconduct by educators. Because of short-termism, the authorities in the public-school sector did not ponder their decision to limit the use of the inquiry by an arbitrator to sexual misconduct cases only.[33]

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[25] See Chapter 5 para 5.7.3.1.
[26] See the ELRC Collective Agreement. See also ss 3 and 4 of the Educators Act. This thesis argues that the employer also leaves the discipline of educators to a negotiated solution with the unions, negating the fact that the employer has the prerogative to discipline the employers' teachers.
[27] See Chapter 7 paras 7.2.3.3 and 7.3.3.2.
[28] See Chapter 3 para 3.7.5, where the *Mchuba* and *MSC Depots* cases are discussed. See also the *Mchuba* case para 6 and *MSC Depots* case para 15.
[29] See Chapter 3 para 3.7.5, where the *Mchuba* and *MSC Depots* cases are discussed. See also the *Mchuba* case para 6 and the *MSC Depots* case para 15. S 188A of the LRA only factors the unions into the picture when it pertains to providing consent to its use in disciplinary proceedings, not determining the process of disciplinary action against an employee, including an educator.
[30] See Chapter 6 para 6.3.6. See also cl 4.2 of the ELRC Collective Agreement.
[31] See cl 1 of the ELRC Collective Agreement, the scope of which is only child sexual abuse case committed by educators.
[32] See Shange (2021). See also BBC (2021) and Dayimani (2021).
[33] See cl 1 of the ELRC Collective Agreement.

Cases such as *CS-Swanepoel* and *Leeto*, which involved vicarious liability and severe criticism in sexual misconduct cases, respectively, did not bring unions together.[34] The employer was charged and criticised profusely by the High Court for failing to manage and discipline an errant educator, leading to child sexual abuse.[35] The ELRC Collective Agreement should be incorporated into the Educators Act to give it a legislative and long-term focus. This improvement would allow the ELRC Collective Agreement to be used for all serious misconduct cases, punishment[36] and throwing children into pit latrines. This thesis argues that subjecting disciplinary processes to a negotiated settlement with unions reflects the employer's abrogation of responsibility.

Secondly, this thesis concludes that the negligent actions of the employer of educators in administering discipline against errant educators create an environment of abuse of children, rendering the application of section 188A ineffective.[37] This conclusion then aligns with the arguments of this thesis that adoption or promulgating laws is inadequate if they will not be followed through with judicious application. Consequently, the section 188A process is brilliant in theory but complex in practice in public schools when applied to dealing with child sexual abuse cases against educators. This is so for several reasons that emerged from Chapter 6 of this thesis. The employer, for instance, has been reluctant to implement the ELRC Collective Agreement consistently, as shown by several cases that have been processed through internal disciplinary hearings and appeals long after the ELRC Collective Agreement was signed on 25 September 2018.[38] This failure violates the provisions of section 188A. In the *Mchuba* and *MSC Depots* cases, the Labour Courts ruled that once the employer or union had consented to the use of a section 188A process, it was impermissible for the employer to unilaterally negate its use and opt for an internal disciplinary process.[39] Those cases led to the employer being criticised by the courts to the extent that the outcomes of such disciplinary

[34] See Chapter 5 para 5.2.4. See also the *CS-Swanepoel* case para 72. On several occasions, including the *CS-Swanepoel* case and the *Leeto* case, the employer has faced vicarious liability lawsuits and fines for failing to create an environment safe for children from child sexual abuse, especially when perpetrated by educators. The employer has also been excoriated by the court for failing to protect children.
[35] See Chapter 5 para 5.2.4. See also the *CS-Swanepoel* case para 72.
[36] Corporal punishment of schoolchildren is illegal and a criminal offence attracting the penalties for assault. See ss 12 and 28 of the Constitution, 1996; s 10 of the Schools Act. See also the Abolition of Corporal Punishment Act 33 of 1997; *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11 (18 August 2000); 2000 (4) SA 757; 2000 (10) BCLR 1051; *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* (CCT320/17) [2019] ZACC 34 (18 September 2019); 2019 (11) BCLR 1321 (CC); 2020 (1) SA 1 (CC); 2020 (1) SACR 113 (CC). It is still the commonest form of teacher violence experienced by schoolchildren (Statistics South Africa "Corporal Punishment Still in Schools despite Ban" (1 March 2023) https://www.statssa.gov.za/?p=16128).
[37] See s 188A of the LRA.
[38] See Chapter 6 para 6.6.1. See also cases such as *Nemukombane* and *Maake*.
[39] See Chapter 3 para 3.5.1 See also the *MSC Depots* case para 12.

proceedings were reversed.[40] The further requirement is that the CCMA must accredit the forum for it to be used to conduct a process under section 188A of the LRA.[41] These provisions invalidate all cases handled outside section 188A and could lead to unending court reviews.

The third problem that undermines the effectiveness of the inquiry by an arbitrator in child sexual abuse cases against educators is the conduct of the employer before and during the arbitration proceedings. I will deal with the aftermath last. First, failing to investigate cases adequately has led to these cases going before the arbitrator prematurely, before they are ready for prosecution. During arbitration proceedings, the employer has been unable to perform its responsibilities properly, such as securing witnesses,[42] adequately proving cases,[43] providing ripened evidence,[44] and furnishing closing arguments.[45] This sequence of failures has resulted in educators' winning cases even in instances where they would have committed child sexual abuse.[46] The court observed this result in the *Leeto* case.[47] When the employer fails to secure a witness, it undermines the objective of safeguarding the rights of children not to be sexually abused by teachers. Furthermore, when the employer is negligent in failing to furnish closing arguments, this failure is an indictment of the employer's constitutional duty to protect children.[48] The second issue within the third problem is the employer's failure to manage educators. In the *CS-Swanepoel* case it became clear that the state, as the employer, owes a duty to children to protect them from errant educators, which the employer failed to perform.[49] This also includes the employer's failure to create a safe

[40] See Chapter 3 para 3.5.1 See also the *MSC Depots* case para 12.
[41] See s 188A(1) and s 188A(4) of the LRA. See also Du Toit et al (2023) 196.
[42] See Chapter 6 para 6.6.3. Several inquiry-by-arbitrator proceedings have already taken place and reflected on the employers' neglect of responsibilities. See the *Naidoo* case para 79, where an educator was acquitted of serious charges of having a sexual relationship with a learner for want of the employer's diligence in securing a witness in the s 188A process. These are instances where the employer's failure to secure witnesses causes the case to tilt in favour of an educator who may well have sexually abused a child.
[43] See Chapter 6 para 6.6.3. See also the *Naidoo* case para 79, the *Fortuin* case para 68, and the *Buthane* case paras 41 and 45. The allegations of acts of misconduct preferred against the employee (Mr Mmaselaelo Ross Buthane) were not supported by any material and factual evidentiary material and were dismissed forthwith. These cases involved serious child sexual abuse cases, and the educators were acquitted.
[44] See Chapter 6 para 6.6.3. See also the *Buthane* case para 45. In these instances, the employer failed to prove charges because the evidence was insufficient to justify a conviction.
[45] See the *Tlhakung* case paras 50, 51, and 52, in which the lack of the employer's submission jeopardised the employer's case in favour of the accused educator. Every time the employer fails to present closing arguments in proceedings, this weakens its case in favour of the accused educator's case.
[46] See Chapter 6 para 6.6.3. See also the cases of *Kleinbooi v Department of Education Eastern Cape* PSES250-13/14EC and *Baloyi v Department of Education Limpopo* PSES12-18/19.
[47] See Chapter 5 para 5.3.2. See also the *Leeto* case paras 27 and 28.
[48] See Chapter 5 para 6.6.5. See the *Tlhakung* case paras 50, 51 and 52.
[49] See the *CS-Swanepoel* case para 72. This led to a delictual liability claims against the employer of an educator costing the fiscus an enormous amount of taxpayers' money.

environment for children.[50] Some cases of child sexual abuse occur after excursions and school trips when educators are alone with children, providing them with transport to their homes.[51] The responsibility to provide transport should be the employer's responsibility. If educators act as agents of the employer, there should be certain safeguards on how this duty is executed, rather than a single educator being left with children.[52]

Fourthly, the process creates several challenges for the ELRC. First, the ELRC lacks appropriate venues across the country to conduct proceedings relating to child sexual abuse cases against educators.[53] Instead, the ELRC relies on premises borrowed from the magistrate's court and the Department of Social Development (DSD).[54] This situation presents the ELRC with a temporary solution but no guarantees that the venues will always be available for its purposes when requested. This uncertainty then leaves cases vulnerable to competing priorities of owners of those premises or venues, possible postponements, time inefficiencies, delays, and attendant financial costs.[55] Thirdly, the ELRC annual reports complained that these processes are often reduced to litigious ones by the involvement of legal practitioners, which defeats the purpose of arbitration.[56] Arbitration is a Selected Dispute Resolution (SDR) process that must run with minimum legal formalities.[57] The litigious nature of these arbitrations sometimes may also subject children to brutal cross-examination by lawyers if the arbitrators are not well trained to handle them. Fourthly, the ELRC has complained of multiple requests for postponements. The ELRC battles to enforce item 45 of the ELRC Constitution, which prohibits unreasonable postponements.[58] The ELRC has reported that most of the main reasons for postponements are frivolous and contravene clause 45 of the ELRC Constitution.[59] Postponement can become problematic when dealing with final-year learners who may leave the school system, making it difficult to secure them as witnesses.[60]

The further crucial fifth ELRC issue undermining the effectiveness of section 188A is that the ELRC may choose incompetent or inexperienced, unskilled and corrupt arbitrators to preside

[50] See the *CS-Swanepoel* case para 72.
[51] See *Free State Provincial Department of Education vs NAPTOSA obo D. Khongoana* ELRC 1030-21/22FS para 7. The teacher conceded that he gave the learners a lift and took one to his house where she was sexually abused.
[52] See the *CS-Swanepoel* case para 5.
[53] See Chapter 6 para 6.5.2.
[54] See Chapter 6 para 6.5.2. See also the cases of *Myabalala* para 1.2 and *Diholo* para 1.
[55] See the *Myabalala* case para 1.2 and the *Diholo* case para 1.
[56] See Chapter 6 para 6.5.6. See ELRC (2022) 12.
[57] See Chapter 6 para 6.5.7. See also the *Gold Fields* case paras 18-21; the *Ramabulana* case paras 7-8, 11; and the *Ndaa Food Manufacturing* case para 14.
[58] See ELRC (2022) 114.
[59] See ELRC (2022) 114.
[60] See Chapter 6 para 6.5.7.

over arbitration proceedings.[61] Several cases taken on review at the Labour Court showed that the arbitrator did not apply his mind.[62] This has been the case with the CCMA cases and other bargaining council proceedings: cases have been reviewed or sent back for hearing afresh (*de novo*).[63] This could be a clear case of professional incompetence by such arbitrators, or corruption. Corruption is possible because educators have been bribing witnesses, officials, and others, such as parents, to evade prosecution and conviction for serious misconduct.[64] These allegations are difficult to prove, but evidence has sometimes unearthed these issues.

In the *CS-Swanepoel* case, the court was disappointed that a presiding officer failed to apply her mind to the case.[65] The presiding officer ruled that the employer had failed to prove its case when, in fact, it was the accused educator who refused to testify. The testimony of the sexually abused child went unchallenged.[66] This was a clear case of the educator's landing himself with the difficulty of an adverse inference which was never drawn against him, and yet he escaped scot-free.[67] If arbitrators in section 188A processes fail to apply their minds, children's sexual abusers will be retained in the system and threaten the international and constitutional rights of children to protection.[68]

Sixthly, the accused educators have also undermined the process of an arbitrator's inquiry. Often, educators have used the power of money to bribe parents, leading them to refuse to give their consent for their children to testify in the proceedings.[69] Without the proof of the witnesses and victims of child sexual abuse, cases cannot be won, and abusers may not be flushed out of the system.[70] In other instances, educators use threats of violence and intimidation to threaten victims and witnesses not to testify against them in hearings to evade prosecution.[71]

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[61] See Chapter 6 para 6.5.4.
[62] See Chapter 6 para 6.5.4.
[63] See Chapter 6 para 6.5.4.
[64] See the case of *Oudrew Samuel Bezent vs Department of Education Gauteng* ELRC456-21/22GP. There was an attempt to bribe a parent to drop charges of child sexual abuse against the educator. Paragraph 70 states: "But he first asks her about the bribe KD's father asked for to drop the charges. This statement is congruent with the version of the learner and the principal that the employee and KD's father had discussed [a] bribe in order to drop the charges." The educator was found guilty of child sexual abuse and sanctioned with a mandatory dismissal with immediate effect.
[65] See Chapter 5 para 5.2.4.5. See also the *CS-Swanepoel* case para 59.
[66] See the *CS-Swanepoel* case para 59.
[67] See the *CS-Swanepoel* case para 59.
[68] See the *CS-Swanepoel* case paras 59 and 72.
[69] See Chapter 6 para 6.6.4.
[70] See Chapter 6 para 6.6.3.
[71] See Chapter 6 para 6.8.

In worst-case scenarios, educators have used money in poverty-stricken situations to invoke the African cultural practice of offering to pay damages to parents of sexually abused children who may have become pregnant and given birth to children as a result of the sexual abuse of the child.[72] This outcome might contribute to the decline of witnesses testifying, and it might also be such that there are no safeguards in the country to protect witnesses. In the same vein, some educators take advantage of children from poverty-stricken environments, such as child-headed homes where both parents have died of various causes. These educators use money to offer these children support and then lure them into child sexual abuse.[73]

Educators have also used technology, including phones, as well as social media outlets, such as Facebook (now Meta), Instagram and WhatsApp, to achieve contact with children to sexually abuse them.[74] Unfortunately, the employer of educators has not developed legislation and regulations to factor in such outcomes of technological developments to secure the protection of children from sexual abuse. The Electronic Communications and Transactions Act 2002 can be relied on by arbitrators who know it to accept any transmissions from such media into evidence.[75] Unfortunately, the courts have specific requirements for using such technology that must be met before electronic records can be admitted into evidence.[76] Some cases have been lost to potential abusers because employers neglect to develop disciplinary regulations to move with the trends of technology and modernity.[77]

Seventhly, an important conclusion to be drawn in this thesis is that the practical application of section 188A is undermined by multiple authorities exercising concurrent jurisdiction over the disciplining of educators.[78] The employer of educators has the power to discipline educators in terms of the Educators Act.[79] The SGB also has the power to discipline educators employed under the Schools Act, but this authority does not apply to those employed under the Educators Act, and the reverse is also true.[80] This implies that SGB educators require a separate disciplinary regulation and process in cases of child sexual abuse because the ELRC

[72] See Chapter 2 para 2.3.1.4. See also Chapter 6 para 6.8 and the *Rasekhula* case para 12 as well as the *Gumede* case para 32.
[73] See Chapter 6 para 6.8.
[74] See Chapter 6 para 6.8. See also the *Rhoda* case as well as the *Gyanishwar* case.
[75] See Chapter 4 para 4.7. See also the ECTA.
[76] See Chapter 4 para 4.7. See also the ECTA.
[77] See Chapter 4 para 4.7. See also the ECTA and the *Naidoo* case paras 32 and 33. The arbitrator observed in the *Naidoo* case para 33: "The office manager and a colleague printed the messages. They were not dealt with by Mohamed in her report. In the premises, Mohamed was unable to testify to the authenticity of the messages nor the truthfulness of their contents. At para 39 he further ruled that 'for the reasons set out above the applicant failed to prove the authenticity and veracity of the WhatsApp messages'. I am accordingly unable to attach any weight to this evidence."
[78] See Chapter 5 para 5.3.2. See also the *Scheepers-SACE* case para 7.
[79] See ss 4, 17, and 18 of the Educator Act.
[80] The employer of educators in terms of the Educator Act may not discipline SGB educators.

Collective Agreement does not apply to them. This disconnection would create a jurisdictional challenge if the ELRC presided over such cases. The *Mofokeng* case is problematic because it involves an SGB educator,[81] and if challenged, the employer will not escape scrutiny and a possible ruling of negligence and vicarious liability as in the *CS-Swanepoel* case.[82]

The Council for Educators (SACE) is also required to open an investigation and conduct proceedings with a disciplinary hearing once a teacher has been handed over to SACE by the employer because of dismissal.[83] It all begins with the architecture of the legislation that provides for the SACE mandate, the SACE Act.[84] Section 26(1) of the SACE Act requires the employer of educators to furnish SACE with records of disciplinary actions taken against educators.[85] This is also supported by section 26(2) of the Educators Act, which says the same thing. Furthermore, the employer's decisions to dismiss educators for child sexual abuse are not binding on SACE. Still, the SACE decisions to withdraw the teacher's licence are binding on the employer of educators in terms of section 15(2) of the Educators Act read together with section 26(2) of the Education Act and section 26(1) and section 26(2) of the SACE Act.[86]

Section 14(2) of the SACE Act requires SACE to investigate misconduct perpetrated by educators against children and conduct hearings.[87] Chapters 5 and 6 of this thesis examined several cases, particularly the *Scheepers* saga.[88] The Constitutional Court confirmed the decisions of the High Court in the *Scheepers* cases discussed in Chapter 5 that an investigation report of the employer of educators does not bind SACE.[89] SACE ought to conduct an independent investigation into allegations of misconduct by educators as a statutory regulatory authority. In the *Council for Educators v Scheepers CC* case, the Constitutional Court, South Africa's apex court, emphasised that SACE had failed in this duty because SACE sought to use the investigation report of the employer instead of following its

[81] See Chapter 6 para 6.3.3. See also the *Mofokeng* case para 71, where the arbitrator failed to establish the employment relations between the applicant and the respondent, and the matter could not be considered under the auspices of the ELRC or in terms of the ELRC Collective Agreement.
[82] See the *CS-Swanepoel* case para 72.
[83] See Chapter 5 para 5.5. See also s 14(2) of the SACE Act and *Council for Educators-Scheepers CC* para 20.
[84] See s 14(2) of the SACE Act.
[85] See s 26(1) and s 26(2) of the SACE Act.
[86] See Chapter 6 para 6.7.2.
[87] See Chapter 5 para 5.5. See also s 14(2) of the SACE Act and *Council for Educators-Scheepers CC* para 20.
[88] See Chapter 5 paras 5.2 to 5.6.
[89] See Chapter 5 para 5.5. See also s 14(2) of the SACE Act and *Council for Educators-Scheepers CC* para 20.

own legislative responsibilities to conduct its independent investigation.[90] This has its problems.

On receipt of the employer's record on a child sexual abuse case against an educator, SACE is required to conduct its processes. These include a fresh investigation from the beginning and a disciplinary hearing. The employer record does not bind SACE, so children are forced to testify again in a second forum after the ELRC's section 188A process.[91] The effect of this situation is that the concurrent jurisdiction continues to subject children to secondary trauma in child sexual abuse cases against educators. This result is counterproductive.

It is also disturbing that the outcomes and sanctions of the employer may differ from those of SACE, creating disparities in the public-school educators' disciplinary system. The *Robertson* case showed that a teacher who used unsavoury language of a sexual nature, termed Non-Contact Child Sexual Abuse in England, was found guilty by the employer and sanctioned with punitive suspension.[92] When the same offence was brought to SACE's attention, Robertson was found guilty and punished with an indefinite removal from the register of practising educators,[93] akin to the English prohibition order.[94] This is tantamount to double punishment or double jeopardy.[95] Different sanctions are meted out to educators by various authorities for the same offence.[96] This is because section 15(2) of the Educators Act renders SACE decisions binding on the employer of educators, not vice versa.[97] In England, when the employer reports a case to the TRA, there is an option of proceeding on the employer's evidence without going through the entire disciplinary proceeding afresh.[98] Furthermore, the parallel processes to deal with cases of child sexual abuse by educators in South Africa lead to sometimes terrifying conflicts. Although it did not involve sexual misconduct against learners, the *Scheepers* matter illustrates the conflicts between the different authorities: the HOD, the principal, the SGB, and the SACE. These conflicts undermine the principle of cooperative governance and meaningful dialogue or engagement.[99]

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[90] See Chapter 5 para 5.5. See also s 14(2) of the SACE Act and the *Council for Educators-Scheepers CC* case para 20.
[91] See Chapter 5 para 5.5.
[92] See Chapter 5 para 5.6. See also the *Robertson* case para 3.
[93] See Chapter 5 para 5.6. See also the *Robertson* case para 3.
[94] See Chapter 7 paras 7.3.2 and 7.3.4.3.
[95] See Chapter para 5.7.7.
[96] See Chapter para 5.7.7.
[97] See s 15(2) of the Educators Act.
[98] See reg 7(3) of the Teachers Disciplinary Regulations 2012, which states that "[a] professional conduct panel may determine a case without a hearing at the written request of the teacher who is the subject of the case". See also Legislation.gov.uk "The Teachers' Disciplinary (England) Regulations 2012" https://www.legislation.gov.uk/uksi/2012/560/made.
[99] See Chapter 5 paras 5.2, 5.4, and 5.5.

The other issue is the lack of symbiosis between South African authorities in dealing with child sexual abuse cases. The desired symbiosis is evident in the English system of prosecuting teachers for sexual misconduct.[100] Police involvement in South Africa's public-school system to curb acts of criminality against children is scant. The lack of an interim prohibition order against educators arraigned for sexual misconduct in the South African regulatory space, as is the case in England, is also concerning.[101]

Eighthly and finally, sometimes the children themselves do not help the process. They become untruthful so that even if the educator may be a sexual abuser or predator, he will be acquitted of charges in the proceedings.[102] The most crucial ones are the possibility of false pretences and framing educators by children, especially when children frame false charges against educators.[103] The same issue also emerged in *Hawker* in England,[104] showing that this is more than just a South African problem. In the *Mdlalose* case,[105] an educator was charged with impregnating a child. In evidence in chief and under cross-examination, she stated that she had never slept or had sexual intercourse with any other person except the accused educator. However, when the DNA results of the born child emerged, they excluded the accused educator. Such instances undermine the integrity of the system. At times, it is difficult to distinguish genuine cases from false ones. However, the credibility of a witness in the *Mdlalose* case[106] is such that an educator may have sexually abused that child but escaped because she failed to be truthful. However, both countries have the advantage of review mechanisms to safeguard the labour rights of innocent educators.[107] This thesis concludes that the section 188A process in South Africa is promising but that the conditions under which it is implemented require significant changes and improvements, especially from the employer's position.

8.3 Conclusions regarding Question Two

- What insights and guidance can be derived from the ILO and scholarly discourse concerning the optimal approach to resolving labour disputes?

[100] See the United Kingdom Government Report Serious Teacher Misconduct - GOV.UK (www.gov.uk).
[101] See TRA (2022) 12. See also Chapter 7 para 7.3.3.2.
[102] See Chapter 6 para 6.5.3. See also the *Mdlalose* case.
[103] See Chapter 7 para 7.3.6. See also the *Hawker* case para 9.211.
[104] See the *Hawker* case https://assets.publishing.service.gov.uk/media/648c6eeb103ca6000c03a061/Mr_Jonathan_Hawker_V_Devonport_High_School_for_Girls_-_1402048.2022_-_Written_Reasons.pdf.
[105] See the *Mdlalose* case para 38.
[106] See the *Mdlalose* case para 38.
[107] See Chapter 7 para 7.3.6. See also the *Hawker* case para 9.211. See also s 188 of the LRA.

This thesis examined international norms both to safeguard children from child sexual abuse and to protect the labour rights of teachers.[108] Regarding teacher rights, the ILO conventions have been significant in developing the South African Constitution and legislation.[109] Several ILO conventions have contributed to developing South African jurisprudence on teachers' labour rights.[110] The Constitution of the Republic of South Africa, 1996 provides the right to fair labour practices for all workers, including educators.[111] The LRA also borrowed from ILO Convention 158, which provides for the right not to be unfairly dismissed. In terms of Article 4 of Convention 158, every worker has a right to fair reasons for the dismissal to be fair,[112] and Article 7 entitles workers to fair procedure.[113] Convention 158 has also influenced the development of the LRA as the legislature included just cause or fair reasons and due process or fair procedure before an employee can be dismissed.[114] The legal systems of South Africa[115] and England[116] protect employees against unfair dismissal. Unfortunately, the Nigerian Labour Act, 2004 does not provide fair dismissal safeguards, though court cases have demonstrated a general recognition of this.[117] The National Industrial Court of Nigeria has the discretion to invoke ILO norms and standards in adjudicating unfair dismissal cases. However, the lack of a provision for this in Nigerian legislation is problematic.

8.4 Conclusions regarding Question Three

- What measures can be recommended to enhance the efficacy of section 188A of the LRA in addressing educator dismissal disputes related to sexual misconduct in the public education sector?

This thesis has already highlighted the challenges associated with implementing section 188A of the LRA in child sexual abuse cases against educators. This thesis proposes several measures to enhance the efficiency of the system.

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[108] See Chapter 2.
[109] See s 23 of the Constitution, 1996 and ILO Convention 158. See also Chapter 1 para 1.2.3.2 and Chapter 2 para 2.6.
[110] See ILO Convention 158.
[111] See s 23 of the Constitution, 1996.
[112] See Art 4 of ILO Convention 158.
[113] See Art 7 of ILO Convention 158.
[114] See Chapter 3 para 3.4. See also s 188 of the LRA.
[115] See Chapter 3 para 3.4. See also s 188 of the LRA.
[116] See Chapter 7 para 7.3.7. See also s 94 of the Employment Rights Act 1996.
[117] See Chapter 7 para 7.2.3.4. See also Adejugbe and Adejugbe (2020) *SSRN* 8 and s 254C(1)(f) of the Constitution of the Federal Republic of Nigeria 1999 as amended by the Third Alteration Act.

First, the employer needs to take responsibility for the system's effectiveness. The cases of *Leeto*, *CS-Swanepoel*, and *Scheepers* revealed the employer's reluctance to take responsibility for educator misconduct.[118] The first measure is for the employer to take responsibility, or else the litigants, such as those in *Scheepers*[119] and *CS-Swanepoel*,[120] will force the employer of educators to take responsibility.

Secondly, the legislation in the public education space needs to be amended to provide for a single process to manage child sexual abuse cases committed by teachers.[121] The UK government dissolved the General Teaching Council for England (GTCE) to create a single process for dealing with sexual misconduct cases against educators.[122] The current parallel process in South Africa cannot assist the public education sector.

Thirdly, the employer must demonstrate seriousness in handling the disciplinary process by ensuring that cases are adequately investigated to ensure that section 188A process cases are ripe and winnable when they go to trial.[123] In several cases, arbitrators have stated that the employer failed to prove its case, either because it brought a single witness and failed to corroborate the evidence led, failed to secure a witness at all, or failed to present closing arguments.[124] The role of the LRA is to afford employees, including educators, the right to just cause and fair reason in all disciplinary proceedings so that whoever presents a winnable case will have a ruling in their favour.

Fourthly, ELRC Collective Agreement needs to be incorporated into the Educators Act and applied to all cases of serious misconduct by educators, not only those related to child sexual abuse.[125] The employer would then exercise its authority in determining the disciplinary procedure, and unions would be left to consent to using section 188A of the LRA and represent their members in the disciplinary proceedings.[126]

Fifthly, the public-school sector needs to streamline the legislation to remove the role of employing educators from the SGB and stop what occurred in several cases. If educators

[118] See Chapter 5 for a discussion of the *Leeto*, *CS-Swanepoel*, and *Scheepers* cases.
[119] See Chapter 5 para 5.2 for a discussion of the *Scheepers* cases.
[120] See the *CS-Swanepoel* case para 72.
[121] See Chapter 7 para 7.3.4.
[122] See Chapter 7 para 7.3.4. See also the Rationale for Intervention in the Explanatory Memorandum 2011.
[123] See para 8.3 above.
[124] See para 8.3 above.
[125] See Chapter 6 para 6.3.
[126] See s 188A(2) and s 188A(4) of the LRA.

commit child sexual abuse and are used by the SGB,[127] the ELRC lacks jurisdiction over them because they are not employed in terms of the Educators Act.[128]

Sixthly, invoking the doctrine of *parens patriae* could effectively close this gap by empowering the state to act in the best interests of the child when parental consent is withheld from children providing evidence against errant educators. In its recent ruling on 9 April 2024, the Supreme Court of Appeal affirmed that children have the right to participate and testify in matters that concern them, a right that parents cannot take away. The case of C*entre for Child Law and Others v Council for Educators and Others* in the Supreme Court of Appeal highlighted concerns over the sanctions imposed by the Council for Educators on two educators for assaulting learners in schools.[129]

8.5 Conclusions regarding Question Four

- What lessons can be drawn from international comparative analyses regarding the efficient resolution of educator dismissal disputes arising from sexual misconduct against children in public schools?

Chapter 7 of this thesis conducted a comparative analysis of educator dismissal disputes for child sexual abuse in Nigeria and England. Several observations have been made concerning this subject in other countries from which South Africa can learn.

First, England discontinued the General Teaching Council for England (GTCE), a move that Nigeria and South Africa must emulate.[130] This step probably streamlined disciplinary cases and brought them under the authority of the teacher's employer.[131] Both the Teachers Regulator Council of Nigeria (TRCN)[132] and the South African Council for Educators (SACE)[133] operate as agents of the respective Departments of Education. While some autonomy exists, these institutions have created possible duplication and disparities associated with several authorities exercising concurrent jurisdiction over educators. The UK government's approach has merit. The duties of the former General Teaching Council for England (GTCE) have been

[127] See s 20(4), (5), (7A), and (11) of the Schools Act.
[128] See s 20(11) of the Schools Act.
[129] *Centre for Child Law and Others v South African Council for Educators and Others* (1289/2022) [2024] ZASCA 45 (9 April 2024); 2024 (4) SA 473 (SCA).
[130] See Chapter 7 para 7.3.4. See also the Rationale for Intervention in the Explanatory Memorandum 2011.
[131] See Chapter 7 para 7.3.4. See also para 7.2.3.3.
[132] See Chapter 7 para 7.2.3.3.
[133] See ss 1 and 6 of the SACE Act.

transferred to the Teaching Regulatory Agency (TRA), which still operates under the auspices of the Department for Education, removing duplication and fragmentation.[134]

Secondly, the TRA in England does not need to conduct a disciplinary proceeding if the educator opts not to do so.[135] This might be because if the employer had conducted the disciplinary process inadequately, there would have been no need to duplicate it, as in South Africa.[136]

Thirdly, England has embraced the principle that the educator disciplinary procedure for serious misconduct is a multi-stakeholder responsibility, though each player must play their part in the procedure.[137] The employer, through the TRA, deals with all serious cases of misconduct,[138] and the police become involved in cases which veer into criminal ones, especially against children. Local authorities are also on the alert and do all they can to protect children.[139]

In South Africa, educators can resign when a case resumes against them and go to work elsewhere.[140] In England, once a complaint of serious misconduct is raised against teachers, an interim prohibition order is issued to facilitate investigations and prevent further possible

[134] See Chapter 7 para 7.3.4. See also the Rationale for Intervention in the Explanatory Memorandum 2011.
[135] See reg 7(3) of the Teachers Disciplinary Regulations 2012.
[136] See reg 7(3) of the Teachers Disciplinary Regulations 2012, which states that "[a] professional conduct panel may determine a case without a hearing at the written request of the teacher who is the subject of the case". See also Legislation.gov.uk "The Teachers' Disciplinary (England) Regulations 2012" https://www.legislation.gov.uk/uksi/2012/560/made.
[137] See Chapter 7 para 7.3.5. See also the United Kingdom Government Report Serious Teacher Misconduct - GOV.UK (www.gov.uk).
[138] See Chapter 7 paras 7.3.4 and 7.3.5.
[139] See the United Kingdom Government Report Serious Teacher Misconduct - GOV.UK (www.gov.uk).
[140] See *Sello Giyose vs Department of Education: Eastern Cape* ELRC263-21/22EC ("the *Giyose* case"), where an educator was accused of serious allegations of child sexual abuse for which he was found guilty. The arbitrator observed (para 10) that "what is important to note [is that] as from [the] date when MD's mother reported the incident to the principal, the employee was never suspended or removed from the school pending finalisation of the investigation and pending disciplinary hearing". In *NATU obo TR Ndlovu vs Department of Education KwaZulu-Natal* PSES377-18/19KZN ("the *Ndlovu* case"), an educator dismissed for sexual misconduct resigned while awaiting the outcome of his appeal. He later reapplied for an SGB post and was employed, only for him to commit more cases of child sexual abuse. See also the *Mofokeng* case in Chapter 6 para 6.3.3 and the *Mofokeng* case para 27, where the arbitrator observed that "[t]he recommendation was based on the cv and the performance at the interview. She confirmed that had she looked at the z83 she would have seen that the Applicant had indicated that he was dismissed on the form. She confirmed that an SGB post gets advertised by the SGB and the successful person was remunerated by the SGB. She maintained that the Applicant was on an SGB post for February 2020 and March 2020 hence he was paid by the SGB as no appointment was made by the Respondent".

infractions by these accused teachers.[141] South Africa needs to consider introducing interim prohibition orders against accused educators where there is a reasonable apprehension that an offence may have occurred.

England does not operate on the basis of a statutory instrument or an Act of Parliament but on well-developed regulations. The regulations provide more current information and are adjusted to reflect current reality.[142] In South Africa, the SACE Act is implemented directly without regulations except the disciplinary procedure and the code of conduct.[143] While the code of professional ethics for educators deals with the disciplinary process, regulations would provide depth to assist in implementing the entire SACE Act.

8.6 Conclusions regarding Question Five

- What proposals and reforms could improve the effectiveness of resolving educator dismissal disputes involving sexual misconduct against children in public schools?

After a careful examination of the discourse surrounding sexual misconduct cases against educators, several proposals can be made.

First, South Africa needs to implement a single process for dealing with disciplinary matters rather than maintaining the current fragmented process.[144]

Secondly, a unified legislative system is needed to govern the management of educators. The conflicts between the Schools Act, Educators Act, and SACE Act do not help the system.[145] Even the Schools Act contains challenges that have created conflicting processes, where educators are employed by employers under the Educators Act and the SGB under the Schools Act.[146] This makes it challenging to handle cases involving SGB educators when they commit child sexual abuse.

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[141] See the United Kingdom Government Report Serious Teacher Misconduct - GOV.UK (www.gov.uk), where it is stated: "Serious misconduct is any behaviour that could result in a teacher being stopped from teaching. This is known as a 'prohibition order.'" See also the *Ndlovu* case in South Africa.
[142] See the Teachers Disciplinary Regulations 2012.
[143] See the SACE Code of Professional Ethics.
[144] See Chapter 7 para 7.3.4.
[145] See Chapters 4 and 5 of this thesis. See also s 20(4), (5), (7A) and (11) of the Schools Act, s 15(2) of the Educators Act, and s 14(2) of the SACE Act.
[146] See s 20(4), (5), (7A), and (11) of the Schools Act. S 20(11) of the Schools Act actually distances the Department of Education from responsibility for SGB educators.

Thirdly, disciplining educators should be the prerogative of the employer, not multiple other authorities.[147] The discipline of teachers in England is in the hands of the UK government through the TRA as its agent.[148] A single system and process are required in South Africa as well.

Fourthly, South Africa needs to publish the details of sexual offenders on public sites, as in England, to enhance the deterrence of child sexual abuse by teachers.[149]

Fifthly, mechanisms must be imposed to enforce actions against parents who prevent their children from testifying. In line with international norms such as the United Nations Convention on the Rights of the Child (CRC),[150] the African Union's African Children's Charter,[151] the South African Constitution, 1996 and the Children's Act, refusing to have children testify will only perpetuate sexual abuse, as the abuser will not be found guilty and will be retained in the system.[152] Parental consent should be obtained or enforced through legislative amendments and regulations.

Sixthly, it is necessary to have well-trained, incorruptible arbitrators to ensure that their processes are robust, perpetrator educators are made to account, and equally that specious charges are rooted out of the system to uphold its integrity.[153]

8.7 Overall Conclusions

The overall conclusions are based on the hypothesis of this thesis. This thesis addresses two hypotheses and responds to four key research questions. The first hypothesis explores the commendable initiative of the ELRC's incorporating section 188A of the LRA to expedite the resolution of sexual misconduct disputes in public schools. This analysis critically examines the benefits of using section 188A of the LRA in handling educator dismissal disputes for sexual misconduct against children.

[147] See s 20(4), (5), (7A), and (11) of the Schools Act, permitting the SGB to employ educators. See also the *Mofokeng* case, where a teacher charged for child sexual abuse could not be tried by the ELRC because he was not employed in terms of the Educators Act.
[148] See TRA (2022) 3. See also Carney-Jones (2018).
[149] See regs 8(5) and 15(1) of the Teachers Disciplinary Regulations 2012.
[150] See Chapter 2 para 2.3.
[151] See Chapter 2 para 2.4.
[152] See s 28(2) of the Constitution, 1996.
[153] See para 8.3 above.

The second hypothesis addresses the inherent problems associated with the ELRC's application of section 188A of the LRA, which necessitates resolution. This discussion involves examining challenges that hinder the effectiveness of applying section 188A of the LRA in handling sexual misconduct cases against educators. The discussion aims to enhance the protection of children and assist educators, some of whom may be victims of specious charges.

8.7.1 Overall Conclusions on the First Hypothesis

- Hypothesis 1: The incorporation of section 188A of the LRA by the ELRC constitutes a commendable initiative for expediting the resolution of sexual misconduct disputes within the public-school sector.

Determining whether the adoption of section 188A of the LRA is a commendable achievement is based on two factors in response to the first hypothesis of this thesis. The first is the objective of the LRA to provide cheap, fast, accessible labour dispute resolution.[154]

Secondly, the specific objective of the section 188A innovation was to shorten the disciplinary inquiry process. In the context of the first hypothesis, this thesis confirmed that adopting section 188A of the LRA in dealing with child sexual abuse cases has several benefits.[155] The ones already highlighted include protecting children from secondary trauma by avoiding their testifying in multiple forums,[156] providing a safe place for children to testify while at their ease,[157] and also providing intermediaries to child witnesses in disciplinary proceedings against errant educators.[158] The benefit to educators is that the process enables the observance of just cause and due process in line with the ILO conventions[159] and the LRA.[160] This discussion concludes that the hypothesis is somewhat confirmed regarding the single process eliminating multiple disciplinary hearings.

[154] See s 1(d)(iv) of the LRA, which provides that the "purpose of this Act [is] to promote the effective resolution of labour disputes".
[155] See para 8.2 above.
[156] See para 8.2 above.
[157] See item 7(10A) of sch 2 to the Educators Act.
[158] See item 7(10A)(c) of sch 2 to the Educators Act.
[159] See ILO Convention 158.
[160] See s 188 of the LRA.

8.7.2 Overall Conclusions on the Second Hypothesis

- Hypothesis 2: The application of section 188A of the LRA, as adopted by the ELRC, manifests certain inherent problems that warrant resolution.

The second overall conclusion is based on the second hypothesis, which pertains to the challenges undermining the practical application of section 188A in child sexual abuse cases against educators. Several challenges have already been identified. These include the employer's reluctance to take the lead and develop disciplinary measures against errant educators as well as the employer's failure to take responsibility by securing the attendance of witnesses to hearings, the failure to prove charges, the failure to provide closing arguments, and the failure to investigate cases adequately, among others discussed above[161] and in Chapter 6 of this thesis. The employer also fails to create a safe environment for children not to be sexually abused in schools.[162] Moreover, the employer fails to take charge of the disciplinary procedures and abrogates the responsibility to the ELRC and the teacher unions.[163] This thesis confirms the second hypothesis and concludes that several barriers discussed above undermine its effectiveness despite the advantages that section 188A of the LRA proposes for the public school sector in advancing the protection of children against child abuse and balancing it with educators' labour rights not to be unfairly dismissed.

8.8 Recommendations

In the context of the conclusions drawn above, it is fitting to make the following recommendations:

In line with the first question of this thesis, the employer of educators must take responsibility and incorporate the ELRC Collective Agreement into the Educators Act rather than maintaining the current piecemeal standard, which only provides for child sexual abuse cases by educators.[164] Children subjected to serious misconduct cases need protection from secondary trauma. Unions must be allowed to provide consent and to represent their members

[161] See para 8.2 above. See also Chapter 6 para 6.4.
[162] See the *CS-Swanepoel* case para 72.
[163] See the ELRC Collective Agreement.
[164] See s 4 of the Educators Act for the employer's mandate to determine disciplinary procedures for educators. See the *CS-Swanepoel* case para 72 and the *Leeto* case paras 27 and 28, where the courts criticised the employer for failing to take charge of the discipline of educators, leaving children vulnerable.

in disciplinary proceedings before the ELRC, but not to determine the disciplinary rules.[165] Secondly, the employer must dissolve the South African Council for Educators (SACE) to align with the English model of a single process of disciplining educators. This set of amendments will go a long way to removing the current disparities, confusion, and bureaucratic inefficiencies and the financial burden on educators[166] that arise from a fragmented system of multiple authorities' concurrent jurisdiction over educators.[167]

Thirdly, this thesis recommends that the employer urgently replace section 15(2) of the Educators Act,[168] which provides for deemed resignations of educators who may be undergoing disciplinary action. Instead, the employer must enact the provision of an interim prohibition order once there is a reasonable apprehension that an educator has committed serious misconduct against a child.[169] This amendment would prevent educators from abruptly pivoting to take up employment elsewhere to buy time and possibly evade prosecution.[170] The enactment must be supported by a heavy fine for the relevant employer, as the Nigeria Teachers Regulatory Council imposes, which criminalises employing such a teacher facing serious charges.[171]

Fourthly, this thesis recommends that the ELRC and the employer should invest in building or acquiring infrastructure with adequate facilities in every province and big city to accommodate the processing of child sexual abuse cases against educators rather than relying on borrowed facilities.[172] This improvement would give the process some sense of permanence and stability rather than the current piecemeal workaround.

Fifthly, in line with international norms and practices, the employer needs to capacitate educators for their responsibility as being *in loco parentis* to safeguard the rights of children to dignity, education, and protection from child sexual abuse or any other form of abuse rather than these educators being the abusers.[173] Teachers must also be capacitated to understand

[165] See Chapter 3 para 3.7.2. S 188A(5) of the LRA directs: "(5) In any inquiry in terms of this section a party to the dispute may appear in person or be represented only by- *(a)* a co-employee; *(b)* a director or employee, if the party is a juristic person; *(c)* an office bearer or official of that party's registered trade union or registered employers' organisation; or *(d)* a legal practitioner, on agreement between the parties or if permitted by the arbitrator in accordance with the rules regulating representation at an arbitration before the Commission."
[166] Educators pay a regular subscription to SACE for being its members.
[167] See s 7(1) of the Education Act 2011 on the abolition of the General Teaching Council for England.
[168] See s 15(2) of the Educators Act.
[169] See TRA (2022) 12. See also Chapter 7 para 7.3.3.2.
[170] See the *Ndlovu* case discussed in Chapter 6 and para 8.2 above.
[171] See ss 9(3) and 11(1) and 11(2) of the TRCN Act.
[172] See ELRC (2022) 12.
[173] See Chapter 2 para 2.5.1.1.

the African Children's Charter, especially the parts dealing with children's right not to be subject to abusive cultural practices and traditions that harm their well-being.[174]

Sixthly, the employer of educators must implement regulations ensuring that individual children are not left alone with educators, whether in classrooms, excursion transport, extracurricular activities, or extra classes.[175] This improvement would remove the temptation to abuse children. Teachers must therefore always deal with children in groups. The current headmaster of St Andrew's College in Makhanda, Mr Tom Hamilton, explains that one of the remedial steps taken in the wake of the abuse at that school is the imposition of a ban on teachers' contacting learners on WhatsApp. This measure underscores the school's commitment to safeguarding students and preventing inappropriate interactions outside official channels.[176]

Seventhly, the employer must amend its legislation to remove the provision for SGB educators.[177] This improvement would create a single authority for public school educators.[178]

Eighthly, the Portfolio Committee on Basic Education must enact laws that compel parents to give their consent for their children to testify in child sexual abuse cases. This improvement would curb bribery and other forms of abuse of children, even by recalcitrant parents and guardians who may succumb to bribery. This thesis underscores the critical need for legislative reform to better secure and protect the evidence of children in disciplinary proceedings against teachers for child sexual abuse (CSA). By advocating for the establishment of a central deposition centre, it proposes a streamlined process that minimises the trauma that children face when testifying in multiple forums, while ensuring that their testimony is rigorously examined and preserved. The recommended approach seeks to balance the integrity of the legal process with the well-being of the child, thereby advancing justice in a more child-centred manner.

Ninthly, Parliament must hold the employer of educators liable for failing to vet educators before they are allowed to teach and work with children.[179] Furthermore, the employer should face a cost order payable from the educator's own funds. This measure would ensure that

[174] See Chapter 2 para 2.4.
[175] See s 4 of the Educators Act on the Minister of Education's obligation to create regulations.
[176] See Showmax (2024); Dipa (2024). The wisdom of this WhatsApp ban has since been confirmed by an incident at a Western Cape school (see Govender (2024); Duba (2024)).
[177] See s 20(4), (5), (7A), and (11) of the Schools Act.
[178] See s 7(1) of the Education Act 2011 on the abolition of the General Teaching Council for England.
[179] See the *CS-Swanepoel* case para 72. See also the *Leeto* case paras 27 and 28.

educators are acutely aware that they cannot pass the costs of such an award on to the taxpayer or the parents, and it would thus emphasise the gravity of proper vetting.

Tenthly, Parliament must hold the employer of educators liable for failure to discipline errant educators promptly.[180] This is important because the education system is not helped by employers who cost the fiscus through vicarious liability lawsuits for simple neglect of duty.[181] There needs to be an urgent stop to the employer's failure to present closing arguments in disciplinary hearings of child sexual abuse, the failure to secure witnesses and investigate the cases to ensure they are ripe for successful prosecution, and the failure to prove cases.[182]

Eleventhly, the principal must be given more responsibility to charge educators.[183] This is because disciplinary processes must be conducted in the context in which the misconduct occurs. Granting more authority to the HODs and circuit managers, yet starving the person defined by the Schools Act as the Head of a School, is inadequate and feeble.[184]

Finally, the ELRC must refine its selection and appointment process for arbitrators conducting the relevant inquiry under section 188A. This process could be enhanced by special training for arbitrators to sensitise them to the demands of hearing and deciding cases involving teachers' sexual misconduct against learners.[185] This improvement would help presiding arbitrators appreciate the importance of properly conducting such disciplinary proceedings. Incompetent, corrupt, or unqualified arbitrators undermine the efficacy of the section 188A process in child sexual abuse cases against educators.[186]

8.9 Suggestions for Future Studies

Given the specific parameters delineated in this thesis,[187] future research in this domain could explore several avenues to enrich our understanding of educator dismissal disputes and sexual misconduct cases within the South African public school system. Potential areas of investigation might include a thorough analysis of broader educator misconduct, extending the focus to cases involving colleagues, staff, or clients. In addition, examining the intricacies of

[180] See the *Scheepers* cases. See also Chapter 5 para 5.2.
[181] See the *CS-Swanepoel* case para 72.
[182] See Chapter 6 para 6.4.
[183] See reg 38(3)(b) of the School Staffing (England) Regulations 2009. See also "reg 38 Dismissal of staff" in Legislation.gov.uk "The School Staffing (England) Regulations 2009" (2024).
[184] See s 16 of the Schools Act. See also s 1 of the Schools Act.
[185] See para 8.2 above.
[186] See para 8.2 above.
[187] See Chapter 1 para 1.3.1.1.

educator employment and discipline outside the defined scope of child victims could provide valuable insights. Exploring the implications of section 188A for disputes beyond sexual misconduct cases against child victims and its effectiveness in the broader LRA dispute resolution processes could be a worthwhile avenue for further inquiry. Moreover, future research might explore the impact of the concurrent jurisdiction of the SACE on various forms of professional misconduct, expanding beyond sexual misconduct cases. Finally, a comparative analysis with further international contexts beyond Nigeria and England could offer a more comprehensive understanding of global approaches to addressing educator dismissal disputes and misconduct in diverse educational settings.

BIBLIOGRAPHY

ARTICLES

NAME	CITATION MODE
A	
Abdulraheem-Mustapha MA "Child Justice Administration in the Nigerian Child's Rights Act: Lessons from South Africa" (2016) 16 *African Human Rights Law Journal*	(2016) *AHRLJ*
Abuza AE "Curbing Unfair-Dismissal of Workers in Nigeria: What Lessons from Other Countries?" (2023) 1 *Society, Development and Commercial Law Review*	Abuza (2023) *SDCLR*
Abuza AE, Omote MK and Odhe KO "A Reflection on the Socio-Legal Conundrum of Unfair Termination of Employment in Nigeria" (2022) 15 *Baltic Journal of Law & Politics*	Abuza et al (2022) *BJLP*
Adejugbe A and Adejugbe A "The Philosophy of Unfair Dismissal Law in Nigeria" (May 23, 2020) https://ssrn.com/abstract=3697696	Adejugbe and Adejugbe (2020) *SSRN*
Aderibigbe OI "Labour Dispute Resolution in Nigeria" (2014) *Journal of the Commonwealth Lawyers' Association*	Aderibigbe (2014) *JCLA*
Agbo MC "Child Rape in Nigeria, Implications on the Education of the Child" (2019) 2 *Children and Teenagers*	Agbo (2019) *CT*
Akinwumi OS "Legal Impediments on the Practical Implementation of the Child Right Act 2003" (2009) 37 *International Journal of Legal Information*	Akinwumi (2009) *IJLI*
Askari L "The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages" (1998) 5 *ILSA Journal of International and Comparative Law*	Askari (1998) *ILSAJICL*
Auerbach S "'Some Punishment Should Be Devised': Parents, Children, and the State in Victorian London" (2009) 71 *The Historian* (Kingston)	Auerbach (2009) *TH*

B	
Beckmann J and Füssel H-P "The Labour Rights of Educators in South Africa and Germany and Quality Education: An Exploratory Comparison" (2013) 46 *De Jure*	Beckmann, and Füssel (2013) *DJ*
Beigbeder Y "The United States' Withdrawal from the International Labour Organisation" (1979) 34 *Relations Industrielles/Industrial Relations*	Beigbeder (1979) *IR*
Bendeman H "Alternative Dispute Resolution (ADR) in the Workplace – The South African Experience" (2007) 7 *African Journal on Conflict Resolution*	Bendeman (2007) *AJCR*
Bhaghamma G "A Comparative Analysis of Doctrinal and Non-Doctrinal Legal Research" (2023) 1 *ILE Journal of Governance and Policy Review*	Bhaghamma (2023) *IJGPR*
Bilyeu AS "Trokosi - The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs. Human Rights" (1999) 9 *Indiana International & Comparative Law Review*	Bilyeu (1999) *IICLR*
Block MJ "The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes" (2017) 44 *The Rutgers Law Record*	Block (2017) *RLR*
Bornu L and Akani N "Protection of the Rights of Children in Nigeria: A Comparative Analysis" (2019) 10 *The Journal of Property Law and Comparative Issues*	Bornu and Akani (2019) *JPLCI*
Briere JN and Elliott DM "Immediate and Long-Term Impacts of Child Sexual Abuse" (1994) 4 *The Future of Children*	Briere and Elliott (1994) *TFC*
C	
Chime OH, Orji CJ, Aneke TJ and Nwoke IN "Prevalence, Pattern and Predictors of Child Sexual Abuse among Senior Secondary School Students in Enugu Metropolis" (2021) 28 *Malaysian Journal of Medical Sciences*	Chime et al (2021) *MJMS*
Clark NL "*Parens Patriae* and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare" (2000) 6 *Michigan Journal of Gender & Law*	Clark (2000) *MJGL*
Chürr C "Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany" (2015) 18 *Potchefstroom Electronic Law Journal* (*PER/PELJ*)	Chürr (2015) *PER/PELJ*

D	
David N, Ezechi O, Wapmuk A, Gbajabiamila T, Ohihoin A, Herbertson E and Odeyemi K "Child Sexual Abuse and Disclosure in South Western Nigeria: A Community Based Study" (2018) 18 *African Health Sciences*	David et al (2018) *AHS*
De Waal E and Mawdsley RD "Student/Learner Allegations of Teacher Sexual Misconduct: A Teacher's Right to Privacy and Due Process" (2011) 44 *De Jure*	De Waal and Mawdsley (2011) *DJ*
Deacon HJ "The Balancing Act between the Constitutional Right to Strike and the Constitutional Right to Education" (2015) 34 *South African Journal of Education*	Deacon (2015) *SAJE*
Department of Basic Education "Basic Education Sector Introduces Tough Measures to Deal with Sexual Offenders" (October 2018) 208 *Thuto*	Department of Basic Education (2018) *Thuto*
Diala AC "Legal Pluralism and the Future of Personal Family Laws in Africa" (2021) 35 *International Journal of Law, Policy and the Family*	Diala (2021) *IJLPF*
Duncan N "When Should Teachers Report Abuse? A Child Abuse Investigator Offers Tips for Educators" (2001) 10 *Children's Voice*	Duncan (2001) *CV*
E	
Engelbrecht P "Inclusive Education: Developments and Challenges in South Africa" (2020) 49 *Prospects: Quarterly Review of Comparative Education*	Engelbrecht (2020) *Prospects*
F	
Fawole OI, Balogun OD and Olaleye O "Experience of Gender-based Violence to Students in Public and Private Secondary Schools in Ilorin, Nigeria" (2018) 52 *Ghana Medical Journal*	Fawole et al (2018) *GMJ*
Freel M "Child Sexual Abuse and the Male Monopoly: An Empirical Exploration of Gender and a Sexual Interest in Children" (2003) 33 *The British Journal of Social Work*	Freel (2003) *TBJSW*
H	
Hart SN "From Property to Person Status: Historical Perspective on Children's Rights" (1991) 46 *American Psychologist*	Hart (1991) *AP*
Hepple B "Labour Courts: Some Comparative Perspectives" (1988) 41 *Current Legal Problems*	Hepple (1988) *CLP*

Horsten D and Le Grange C "The Limitation of the Educator's Right to Strike by the Child's Right to Basic Education" (2012) 27 *Southern African Public Law*	Horsten and Le Grange (2012) *SAPL*
J	
Johnson AK and Sloth-Nielson J "Child Protection, Safeguarding and the Role of the African Charter on the Rights and Welfare of the Child: Looking Back and Looking Ahead" (2020) 20 *African Human Rights Law Journal*	Johnson and Sloth-Nielsen (2020) *AHRLJ*
Jordaan B and Davis D "The Status and Organization of Industrial Courts: A Comparative Study" (1987) 8 *Industrial Law Journal*	Jordaan and Davis (1987) *ILJ* 199
K	
Kruger H "The Protection of Children's Right to Self-Determination in South African Law with Specific Reference to Medical Treatment and Operations" (2018) 21 *Potchefstroom Electronic Law Journal* (*PER/PELJ*)	Kruger (2018) *PER/PELJ*
L	
Landman AA "Unfair Dismissal: The New Rules for Capital Punishment in the Workplace (part one)" (1995) 5 *Contemporary Labour Law*	Landman (1995) *CLL*
Landman AA "Unfair Dismissal: The New Rules for Capital Punishment in the Workplace (part two)" (1996) 5 *Contemporary Labour Law*	Landman (1996) *CLL*
Le Roux P "Substantive Competence of Industrial Courts" (1987) 8 Industrial Law Journal	Le Roux (1987) *ILJ* 183
Leibig A "Girl Child Soldiers in Northern Uganda: Do Current Legal Frameworks Offer Sufficient Protection?" (2005) 3 *Northwestern University Journal of International Human Rights*	Leibig (2005) *NUJIHR*
Levesque RJR "Sexual Use, Abuse and Exploitation of Children: Challenges in Implementing Children's Human Rights" (1994) 60 *Brooklyn Law Review*	Levesque (1994) *BLR*

M	
Mahlangu VP and Pitsoe VJ "Power Struggle between Government and the Teacher Unions in South Africa" (2011) 2 *Journal of Emerging Trends in Educational Research and Policy Studies*	Mahlangu and Pitsoe (2011) *JETERAPS*
Malherbe R "The Constitutional Dimensional of the Best Interests of the Child As Applied in Education" (2008) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg*	Malherbe (2008) *TSAR*
Marshall PJ "The Decline of British Colonial Power" (1979) 6 *India International Centre Quarterly*	Marshall (1979) *IICQ*
Martel G "The Meaning of Power: Rethinking the Decline and Fall of Great Britain" (1991) 13 *The International History Review*	Martel (1991) *TIHR*
Matthews B "Teacher Education to Meet the Challenges Posed by Child Sexual Abuse" (2011) 36 *Australian Journal of Teacher Education*	Matthews (2011) *AJTE*
Memzur BD "The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-Sum Game?" (2008) 23 *SA Publiekreg/SA Public Law*	Memzur (2008) *SAPR/PL*
Miamingi A "The Applicability of the Best Interests Principle to Children of Imprisoned Mothers in Contemporary Africa: Between Hard and Soft Law" (2020) 20 *African Human Rights Law Journal*	Miamingi (2020) *AHRLJ*
Munro CR "Scottish Devolution: Accommodating a Restless Nation" (1999) 6 *International Journal on Minority and Group Rights*	Munro (1998) *IJMGR*
N	
Newaj K "Defining Fairness in Dismissals of Unauthorised Foreign Nationals" (2020) 23 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* (*PELJ/PER*)	Newaj (2020) *PER/PELJ*
Newaj K "The Use of Contractual Recourse in Dismissal Disputes: Settling the Dilemma" (2022) 43 *Industrial Law Journal*	Newaj (2022) *ILJ*
NF "National Policy on Education in Nigeria" (*Nigerian Finder*, 11 August 2019) https://nigerianfinder.com/national-policy-on-education-in-nigeria/	NF (2019)

Nwauzi LO and Akolokwu GO "An Exposition on Nigeria Law on Sexual Offences Against Children: A Focus on the NAPTIP Act" (2015) 8 *Century Journal of Human Rights*	Nwauzi and Akolokwu (2015) *CJHR*
O	
Ogunniyi D "The Challenge of Domesticating Children's Rights Treaties in Nigeria and Alternative Legal Avenues for Protecting Children" (2018) 62 *Journal of African Law*	Ogunniyi (2018) *JAL*
Onuekwa GO and Dike SC "Termination and Dismissal: A Critical Case – Law Review in the Petroleum Industry" (2019) 3 *African Journal of International Energy and Environmental Law*	Onuekwa and Dike (2019) *AJIEEL*
Onyemachi TU "Children, Status and the Law of Nigeria" (2010) 4 *African Review: An International Multi-Disciplinary Journal, Ethiopia*	Onyemachi (2010) *AIMDJE*
Oosthuizen IJ and Van der Walt JL "A Legal and Philosophical Perspective on the *In Loco Parentis* Position of Teachers" (1998) 63 *Koers: Bulletin for Christian Scholarship*	Oosthuizen and Van der Walt (1998) *Koers*
R	
Ramose M "Transforming Education in South Africa: Paradigms Shift or Change?" (2003) 17 *South African Journal of Higher Education*	Ramose (2003) *SAJHE/SATHO*
Renteln AD "The Child Soldier: The Challenge of Enforcing International Standards" (1999) 21 *Whittier Law Review*	Renteln (1999) *WLR*
Reyneke M "Realising the Child's Best Interests: Lessons from the Child Justice Act to Improve the South African Schools Act" (2016) 19 *Potchefstroom Electronic Law Journal* (*PER/PELJ*)	Reyneke (2016) *PER/PELJ*
Rycroft A 'Re-thinking the Con-Arb Procedure' (2003) 24 Industrial Law Journal	Rycroft (2003) *ILJ*
S	
Smit P and Van Eck BPS "International Perspectives on South Africa's Unfair Dismissal Law" (2010) 43 *The Comparative and International Law Journal of Southern Africa*	Smit and Van Eck (2010) *CILSA*
Smith SA "Future Freedom and Freedom of Contract" (1996) 59 *Modern Law Review*	Smith (1966) *MLR*

Steely Smith M "The Process of Sexual Misconduct by Male Teachers and Staff in K-12 Institutions" (2023) 8 *Dignity: A Journal of Analysis of Exploitation and Violence*	Steely Smith (2023) *DAJAEV*
T	
Todres J "Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law" (1998) 30 *Columbia Human Rights Law Review*	Todres (1998) *CHRLR*
U	
Udombana NJ "War Is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflict" (2006) 20 *Temple International and Comparative Law Journal*	Udombana (2006) *TICLJ*
V	
Van der Merwe S "The Constitutionality of Section 16A of the South African Schools Act 84 of 1996" (2013) 46 *De Jure*	Van der Merwe (2013) *DJ*
Van Eck S "The Constitutionalisation of Labour Law: No Place for a Superior Labour Appeal Court in Labour Matters (Part 2): Erosion of the Labour Court's Jurisdiction" (2006) 27 *Obiter*	Van Eck (2006) *Obiter*
Van Eck S "The Right to a Pre-Dismissal Hearing in Terms of the Common Law: Are the Civil Courts Misdirected?" (2008) 29 *Obiter*	Van Eck (2008) *Obiter*
Vettori S "The Role of Human Dignity in the Assessment of Fair Compensation for Unfair Dismissals" (2012) 15 *Potchefstroom Electronic Law Journal* (*PER/PELJ*)	Vettori (2012) *PER/PELJ*
W	
Warner E "Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls" (2004) 12 *American University Journal of Gender, Social Policy and the Law*	Warner (2004) *AUJGSPL*
Weiss M "The Future of Comparative Labor Law As an Academic Discipline and As a Practical Tool" (2005) 25 *Comparative Labour Law & Policy Journal*	Weiss (2005) *CLLPJ*
Wilson A "The Infancy of the History of Childhood: An Appraisal of Philippe Ariès" (1980) 19 *History and Theory*	Wilson (1980) *HT*
Wolhuter L and Hamman A (2010) "A Comparative Analysis of Protective Measures for Vulnerable and Intimidated Victim-Witnesses in South African and English Law" (2010) *Acta Criminologica: Southern African Journal of Criminology*	Wolhuter and Hamman (2010) *SAJC*

Z	
Zack AM "Can Alternative Dispute Resolution Help Resolve Employment Disputes?" (1997) 136 *International Labour Review*	Zack (1997) *ILR*
Zatz MS and Rodriguez N "The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement" (2014) 39 *Law & Social Inquiry*	Zatz and Rodriguez (2014) *LSI*

BOOKS AND CHAPTERS IN BOOKS

NAME	CITATION MODE
A	
Anstey MS and Ngcukaitobi T *Collective Bargaining in the Workplace* Juta (2011)	Anstey and Ngcukaitobi (2011)
Ariès P *Centuries of Childhood: A Social History of Family Life* Knopf Doubleday Publishing Group (1962)	Ariès (1962)
Astor H and Chinkin CM *Dispute Resolution in Australia* LexisNexis Butterworths (2002)	Astor and Chinkin (2002)
B	
Basson A, Christianson M, Garbers C, Le Roux PAK, Mischke C and Strydom EML *Essential Labour Law* Labour Law Publications (2007)	Basson et al (2007)
Brassey M, Cameron E, Cheadle H and Olivier M *The New Labour Law: Strikes, Dismissals, and the Unfair Labour Practice in South African Law* Juta (1987)	Brassey et al (1987)
C	
Chandler RC, Enseln RA and Renstrom PG *The Constitutional Law Dictionary* ABC CLIO (1985)	Chandler et al (1985)
Coetzee M and Schreuder D (eds) *Personal Psychology: An Applied Psychology* Oxford University Press Southern Africa (2010)	Coetzee and Schreuder (2010)
D	
Deacon J *School Governance: Common Issues and How to Deal with Them* Juta (2015)	Deacon (2015)
DeMause L *The History of Childhood* Psychohistory Press (1974)	DeMause (12974)

Devenish GE *A Commentary on the South African Bill of Rights* Butterworths (1999)	Devenish (1999)
Du Plessis JV and Fouche MA *A Practical Guide to Labour Law* LexisNexis (2019)	Du Plessis and Fouche (2019)
Du Toit D, Godfrey S, Cooper C, Giles G, Cohen T, Conradie B, Giles G, Fergus E and Steenkamp A *Labour Relations Law: A Comprehensive Guide* LexisNexis (2023)	Du Toit et al (2023)
F	
Finnis J "The Truth in Legal Positivism" in George RP (ed) *The Autonomy of Law: Essays on Legal Positivism* Oxford University Press (1999)	Finnis (1999)
Finnis J *Natural Law and Natural Rights* Clarendon Law Series, Oxford University Press (2011)	Finnis (2011)
Fowler HW *A Dictionary of Modern English Usage* The Clarendon Press (1926)	Fowler (1926)
G	
Gibson C and Flood P *Everyone's Guide to Labour Law* Zebra Press (2013)	Gibson and Flood (2013)
Gose M *The African Charter on the Rights and Welfare of the Child* Community Law Centre (2002)	Gose (2002)
Grogan J *Dismissal* Juta (2017)	Grogan *Dismissal* (2017)
Grogan J *Workplace Law* Juta (2017)	Grogan *Workplace Law* (2017)
Grogan J *Dismissal* Juta (2022)	Grogan *Dismissal* (2022)
Grogan J *Workplace Law* Juta (2020)	Grogan *Workplace Law* (2020)
Grosset C and Venter A *Labour Law: A Southern African Perspective* Juta (1998)	Grosset and Venter (1998)
H	
Hampton J *Hobbes and the Social Contract Tradition* Cambridge University Press (1986)	Hampton (1986)
Heaton J *The South African Law of Persons* LexisNexis (2017)	Heaton (2017)
Heywood CA *History of Childhood: Children and Childhood in the West from Medieval to Modern Times* Polity Press (2009)	Heywood (2009)

Hoffman LH and Zeffert DT *The South African Law of Evidence* Butterworths (1988). The quotation in Chapter 4 footnote 232 of the thesis misdates this fourth edition as published in 1992.	Hofmann and Zeffert (1988)
Hornby AS *Oxford Advanced Learners Dictionary of Current English* Oxford University Press (2005)	Hornby (2005)
I	
International Training Centre of the International Labour Organization *Labour Dispute Systems: Guidelines for Improved Performance* International Training Centre of the International Labour Organization (2013)	ITC-ILO (2013)
J	
Joubert HJ, Prinsloo IJ, Mahlangu VP and Du Plessis P *The Law of Education in South Africa* Van Schaik Publishers (2015)	Joubert et al (2015)
Joubert HJ and Prinsloo IJ *Education Law: A Practical Guide For Educators* Van Schaik (2001)	Joubert and Prinsloo (2001)
K	
Kaime T *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* Pretoria University Law Press (PULP) (2009)	Kaime (2009)
Kosher H, Ben-Arieh A and Hendelsman Y *Children's Rights and Social Work* Springer International Publishing (2016)	Kosher et al (2016)
L	
Le Roux PAK and Van Niekerk A *The South African Law of Unfair Dismissal* Juta (1994)	Le Roux and Van Niekerk (1994)
Lötter C and Mosime K *Arbitration at Work: Practice & Procedure in Individual Dismissal Disputes* Juta (1993)	Lötter and Mosime (1993)
M	
McGregor M, Dekker A, Budeli-Nemakonde M, Germishuys-Burchell W, Manamela E, Manamela T and Tshoose C *Labour Law Rules!* Siber Ink (2017)	McGregor et al (2017)
McGregor M, Dekker A, Budeli-Nemakonde M, Germishuys-Burchell W, Manamela ME, Manamela TE and Tshoose CI *Labour Law Rules!* Juta (2020)	McGregor et al (2020)
O	
Oosthuizen IJ, Rossouw JP and De Wet A *Introduction to Education Law* Van Schaik Publishers (2004)	Oosthuizen et al (2004)

P	
Patelia E and Chicktay A *Mediation, Negotiation and Arbitration: A Practical Guide to Dispute Resolution* Law Society of South Africa (2014)	Patelia and Chicktay (2014)
R	
Rossouw JP *Educator Misconduct and Incapacity* CELP (2002)	Rossouw (2002)
S	
SECTION27 *Basic Education Rights Handbook* SECTION27 (2017)	SECTION27 (2017)
Smit PJ, Cronje GJ, Brevis T and Vrba MJ *Management Principles: Special Edition for the IIE, for DPR, DBME, DBM and DSDM* Juta (2013)	Smit et al (2013)
Swanepoel BJ, Erasmus BJ and Schenk HW *South African Human Resource Management: Theory & Practice* Juta (2008)	Swanepoel et al (2008)
Squelch JM *Discipline* Centre for Education Law and Policy (CELP) (2000)	Squelch (2000)
V	
Van Niekerk A, Smit N, Christianson M, McGregor M and Van Eck BPS *Law@Work* LexisNexis (2019)	Van Niekerk and Smit (2019)
Van Niekerk A, Smit N, Botha M, Maloka T, Newaj K, Prinsloo C, Van Eck BPS and Van Staden M *Law@Work* LexisNexis (2023)	Van Niekerk and Smit (2023)
Van Rooyen J and Rossouw JP "School Governance and Management: Backgrounds/Concepts" in Joubert R and Bray E (eds) *Public School Governance in South Africa* Centre for Education Law and Education Policy (2007)	Van Rooyen and Rossouw (2007)
W	
Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration, and Ombudsmen* Juta (2016)	Wiese (2016)

CASES

A

AB and Another v Pridwin Preparatory School and Others 2020 (5) SA 327 (CC)
Gladman Wandile Aba v Department of Education Eastern Cape PSES 643-17/18EC
Ajayi v Texaco Nigeria Ltd [1987] 3 NWLR (Pt. 62) 577 (SC, Nigeria)
Akinfe v Uba Plc. (2007) 10 NWLR PT. 1031, 565 (SC)
Mr. Patrick Joseph Akpan v Federal Road Safety Commission and Boboye O. Oyeyemi NICN/CA/14/2021

Arnold Z Robertson v South African Council for Educators, Western Cape Department of Education, and Department of Basic Education 15547/2013
Appels v Education Labour Relations Council & others (2019) 40 ILJ 2284 (LAC)
Arries v Education Labour Relations Council and Others (C756/2013) [2015] ZALCCT 10 (5 February 2015)
Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration and Others (JR782/05) [2006] ZALC 44 (14 March 2006); [2006] 9 BLLR 833 (LC); (2006) 27 ILJ 1644 (LC)

B

Baloyi v Department of Education Limpopo PSES12-18/19
Bennete v Bethany Playschool EC9133
Oudrew Samuel Bezent v Department of Education Gauteng ELRC456-21/22GP
Bombardier Transportation (Pty) Ltd v Mtiya NO & others [2010] 8 BLLR 840 (LC); (2010) 31 ILJ 2065 (LC)
Frederick Booyse v The Western Cape Department of Education ELRC18-22/23WC
Broom and Another v Administrator, Natal 1966 (3) SA 505 (D)
Mmaselaelo Ross Buthane v Department of Education (Limpopo Provincial Administration) ELRC296-19/20LP

C

Cantor Fitzgerald International v Horkulak [2004] EWCA Civ 1287
Carephone (Pty) Ltd v Marcus NO and Others 1999 (3) SA 304 (LAC)
Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC)
Centre for Child Law and Others v Media 24 Limited and Others 2020 (4) SA 319 (CC)
Centre for Child Law and Others v South African Council for Educators and Others (1289/2022) [2024] ZASCA 45; 2024 (4) SA 473 (SCA) (9 April 2024)
Chirwa v Transnet Ltd and Others 2008 (4) SA 367 (CC)
Clark v Nomura International plc [2000] WL1213073; [2000] IRLR 766
COB Eche v State Education Commission [1983] 1 FNR 386 (HC)
Combined Transport Services (Pty) Ltd v Miya and Others (DA15/2014) [2016] ZALAC 57 (25 November 2016)
Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces 2014 (2) SA 321 (SCA)
Cresswell v Board of Inland Revenue [1984] 2 All ER 713 (Ch)
Christian Education South Africa v Minister of Education [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000)

D

AL Damons v Department of Education – Western Cape PSES 423-19/20WC
Mr L J Davids v Department of Education – Western Cape ELRC767-21/22WC
Davids-Paulse v MEC: Department of Education : NC and Others (825/15) [2015] ZANCHC 37 (4 December 2015)
Department of Basic Education – Kwazulu-Natal v Thembinkosi Mpofana ELRC16-21/22KZN
Department of Education: Eastern Cape v Mpompi Phumza ELRC938-21/22EC
Department of Education: Free State v ELRC and Others (JR2278/12, J2935/12) [2017] ZALCJHB 129 (20 April 2017)
Department of Education-Free State v Mr. T Mokoena ELRC276-23/24FS
Department of Education - Free State v Mr. M Ngcobondwana ELRC965-22/23FS

Department of Education: Gauteng v Education Labour Relations Council and Others (JR496/17) (JR496/17) [2021] ZALCJHB 392 (19 October 2021)
Department of Education – Gauteng Province v J Seerane ELRC478 – 22/23GP
Department of Education KZN v A.P. Baboolall ELRC421-22/23KZN
Department of Education-KZN v SADTU obo Kwanda Frank Khanyile ELRC 124-21-22KZN
Department of Education, KZN v Sugan Naidoo ELRC325-20/21KZN
De Villiers v Head of Department: Education, Western Cape Province (2010) 31 ILJ 1377 (LC)
De Villiers v Minister of Education, Western Cape, and Another 2009 (2) SA 619 (C); (2009) 30 ILJ 1022 (C)
David Diholo and Department of Education GP PSES933-18/19GP
Diholo v Gauteng Department of Education and Others (JR 1775/19) [2023] ZALCJHB 117 (2 May 2023)
Dikobe v Mouton NO & others (2016) 37 ILJ 2285 (LAC)
Zamani Edwin Nyaniso Diniso v Western Cape Education Department ELRC593-22/23WC

E

Egan v Motor Services (Bath) Ltd [2007] EWCA Civ 1002; [2008] 1 All ER 1156; [2008] 1 WLR 1589
Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC)
Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 1996 (3) SA 165 (CC)
Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC)

F

Fawcus J V v Department of Education – Gauteng PSES934-18/19GP
Fletcher, Anto Davids v Gauteng Department of Education PSES428-17/18GP
Fredericks v Jo Borkett Fashions [2011] JOL 27923 (CCMA)
Free State Provincial Department of Education v NAPTOSA obo D. Khongoana ELRC 1030-21/22FS
Fuller v Lloyds Bank plc [1991] IRLR 336
Funani v MEC: Department of Education Eastern Cape Province and Another (479/2016) [2017] ZAECBHC 9 (12 October 2017)

G

Gauteng Dept of Education v Lucky Baloyi ELRC392-21/22GP
Gauteng Department of Education v Mr. Freddy Masondo ELRC 549-20/21GP
Gauteng Department of Education v Mr. P. Phiri ELRC 274-20/21GP
Gauteng Dept of Education Employer v S Rasekhula ELRC 990-21/22GP
Gauteng Department of Education v Peter Williams ELRC 924-21/22GP
Gauteng Department of Education v SADTU obo Kgadi Elliot Mofokeng ELRC1027-21/22GP
General Council of the Bar of SA v Jiba [2019] ZACC 23; 2019 (8) BCLR 919 (CC)
Gcaba v Minister for Safety and Security and Others [2009] ZACC 26; 2010 (1) SA 238 (CC)
Sello Giyose v Department of Education: Eastern Cape ELRC263-21/22EC
Godwin v Minister of Labour 1951 (2) SA 605 (N)
Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 ILJ 943 (LAC)
Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law as Amici Curiae) 2011 (8) BCLR 761 (CC)

Gora v Kingswood College and Others 2019 (4) SA 162 (ECG)
Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others (CCT 29/10) [2011] ZACC 13 (11 April 2011); 2011 (8) BCLR 761 (CC)
Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA)
Grootboom v National Prosecuting Authority and Another (C696/08) [2009] ZALC 143 (18 December 2009); (2010) 31 ILJ 1875 (LC); [2010] 9 BLLR 949 (LC)

H

Hawekwa Youth Camp and Another v Byrne 2010 (6) SA 83 (SCA)
Hawker v Life Offices Association of SA & another (1987) 8 ILJ 231 (C)
Mr Jonathan Hawker v Devenport High School for Girls case no. 1402048/2022 https://assets.publishing.service.gov.uk/media/648c6eeb103ca6000c03a061/Mr_Jonathan_Hawker_V_Devonport_High_School_for_Girls_-_1402048.2022_-_Written_Reasons.pdf
Head of Department, Department of Education, Free State Province v Welkom High School and Others 2014 (2) SA 228 (CC)
Head of the Department of Education v Mofokeng and Others (JA14/2014) [2014] ZALAC 50 (1 October 2014); [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC)
Head of the Department of Education – KwaZulu-Natal v C T Gwamanda ELRC20-22/23KZN
Head of the Department of Education – KwaZulu-Natal v D Gyanishwar ELRC433-21/22KZN
Head of the Department of Education – Kwazulu-Natal v S Nkabinde ELRC697-21/22KZN
Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC)
Health & Other Services Personnel Trade Union of SA on behalf of Tshambi v Department of Health, Kwazulu-Natal (2016) 37 ILJ 1839 (LAC)
Herbert v Head Education - Western Cape Education and Others (CA3/2021) [2022] ZALAC 9 (10 March 2022); (2022) 43 ILJ 1618 (LAC); [2022] 8 BLLR 712 (LAC)
Hi Alloy Castings (Pty) Ltd v Smith & others [2000] 2 BLLR 165 (LC)
HOD, Department of Education, Western Cape v Edgar Dean Fortuin ELRC831-2122WC
HOD, Department of Education, Eastern Cape v J Leisa PSES893-18/19EC
HOD, Department of Eastern Cape v S Qubuda PSES-757-18/19EC
Honica Sawmill Nigeria Ltd v Hoff (1992) 4 NWLR 238
HOSPERSA & another v MEC for Health (2003) 24 ILJ 2320 (LC)

J

Jacobs and Another v Transnet Ltd t/a Metrorail and Another 2015 (1) SA 139 (SCA)
Sibusiso Fortune Jele v Department of Education KwaZulu-Natal PSES 1012-18/19KZN
J I Julius and Western Cape Education Department, Education Labour Relations Council PSES 148-06/07WC
Juta v Western Cape Department of Education CCMA WE2430

K

Key Delta v Marriner 1998 JDR 0387 (E); [1998] 6 BLLR 647 (E)
Kleinbooi v Department of Education Eastern Cape PSES250-13/14EC
Komape v Minister of Basic Education 1416/2015; 2020 (2) SA 347 (SCA)
Kruger v Coetzee 1966 (2) SA 428 (A)

Kungwini Residential Estate & Adventure Sport Centre Ltd v Mhlongo NO & others [2006] 5 BLLR 423 (LAC); (2006) 27 ILJ 953 (LAC)

L

Labe v Legal Aid South Africa and Others (JS895/16) [2017] ZALCJHB 248 (20 June 2017)
Sophonia Leeto v Department of Education, Free State PSES 527-10/11FS
Mr. A Leeuw v Department of Education – Free State ELRC 115-21/22FS
Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC)

M

Motsamai Blondie Maake v Department of Education: North West Provincial Government ELRC274-22/23NW
Namogane Jack Machengwana v Department of Education Limpopo ELRC 184-21/22LP
Madzodzo and Others v Minister of Basic Education and Others 2014 (3) SA 441 (ECM)
Mahlangu v CIM Deltak; Gallant v CIM Deltak (1986) 7 ILJ 346 (IC)
Mahlase v Gauteng Department of Education 2018 311 (JR864/15) ZALCJHB
Magoshi v Gauteng Department of Education (JR864/15) [2018] ZALCJHB 311 (2 October 2018); (2019) 40 ILJ 168 (LC)
Makhitshi v School Governing Body Ntilini JSS unreported judgment Eastern Cape High Court Mthatha, case no 615/08, delivered on 20 March 2009
Mapyane v South African Police Service and Others (JR 1948/19) [2023] ZALCJHB 344 (24 November 2023); (2024) 45 ILJ 564 (LC)
Marapula & others v Consteen (Pty) Ltd (1999) 20 ILJ 1837 (LC)
Ngoako Reuben Masipa v Department of Education: Limpopo PSES905-19/20LP
Masina S v Respondent: Department of Education Gauteng PSES 865-17/18GP
Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metalworkers of SA & others (1995) 16 ILJ 349 (LAC)
Mchuba v Passenger Rail Agency of South Africa (J392/14) [2016] ZALCJHB 73 (2 March 2016); [2016] 6 BLLR 612 (LC); (2016) 37 (ILJ) 1923 (LC)
MEC for Education (North West Provincial Government) v Makubalo (JA37/2012) [2017] ZALAC 13 (3 February 2017)
Musa Mdlalose v The Head of the Department of Education – Kwazulu-Natal ELRC62-20/21KZN
Mdwaba v Nonxuba (A5051/2015) [2018] ZAGPJHC 44 (9 March 2018)
Member of the Executive Council, Department of Education, Western Cape Government v Jethro & another NNO (2019) 40 ILJ 2318 (LAC)
Minister of Defence and Another v Xulu 2018 (6) SA 460 (SCA)
Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC)
Minister of Education and Another v Wynkwart NO 2004 (3) SA 577 (C)
Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another 2006 (1) SA 1 (SCA)
Minister of Safety and Security and Another v Carmichele 2004 (3) SA 305 (SCA)
Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA)
Minister of Welfare and Population Development v Fitzpatrick 2000 (3) SA 422 (CC)
Mofokeng, Tosa Timpane Joseph v Free State Department of Education ELRC 36-20/21FS

Mogola and Another v Head of the Department: Department of Education NO (JR2987/2010) [2011] ZALCJHB 100 (17 November 2011); [2012] 6 BLLR 584 (LC); (2012) 33 ILJ 1203 (LC)
Mohlala-Mulaudzi v Property Practitioners Regulatory Authority and Another (J68/23) [2023] ZALCJHB 19 (13 February 2023)
Moko v Acting Principal, Malusi Secondary School and Others 2021 (3) SA 323 (CC)
Moletsane v Premier of the Free State and Another 1996 (2) SA 95 (O)
Montle v Rigaline [2010] 2 BLR 120 (IC)
Moropane v Gilbeys Distillers & Vintners (Pty) Ltd & another (1998) 19 ILJ 635 (LC)
Itumeleng Sydney Motlhabane v Department of Education – Free State ELRC 190-20/21FS
Motshoane v Education Labour Relations Council and Others (JR1808/13) [2018] ZALCJHB 98 (9 March 2018)
Mpumalanga Department of Education v Sboniso Gumede ELRC156-22/23MP
Mthashana FET College v Education Labour Relations Council and Others (DA2/2017) [2020] ZALAC 35 (14 July 2020); (2020) 41 ILJ 2594 (LAC); [2020] 11 BLLR 1116 (LAC)
Mtshali D v Department of Education – Kwa-Zulu Natal PSES473-16/17KZN
Muller v Public Investment Corporation (SOC) Limited (PIC) (JR 3021/19) [2022] ZALCJHB 82 (18 February 2022); [2022] 5 BLLR 458 (LC)
Murray v Minister of Defence (2008) 29 ILJ 1369 (SCA)
Mvelase LS v Department of Education – KZN ELRC74-20/21KZN
Myabalala V.C v Department of Education Mpumalanga PSES 816-18/19MP
Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others 2018 (1) SA 38 (CC)

N

Nampak Corrugated Wadeville v Khoza (JA14/98) [1998] ZALAC 24 (12 November 1998); [1999] 2 BLLR 108 (LAC); (1999) 20 ILJ 578 (LAC)
National Education Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA 1 (CC)
National Police Service Union and Others v Minister of Safety and Security and Others 2000 (4) SA 1110 (CC)
National Union of Metal Workers of South Africa (NUMSA) and Another v Passenger Rail Agency of South Africa (JS1071/18) [2021] ZALCJHB 312 (23 September 2021); (2021) 42 ILJ 2637 (LC); [2022] 1 BLLR 90 (LC)
National Union of Mineworkers & Another v Mogale Gold, A Division of Mintails (SA) (Pty) Ltd (2015) 36 ILJ 2815 (LAC)
National Union of Textile Workers v Stag Packings (Pty) Ltd (1982) 3 ILJ 285 (T)
NATU obo TR Ndlovu v Department of Education KwaZulu-Natal PSES377-18/19KZN
NATU obo Buthelezi Qhawe v Dept of Education ELRC1094-19/20KZN
NATU obo Somraba F v Department of Education Eastern Cape PSES216-19/20EC
Ndaa Food Manufacturing CC t/a Ndaa Bakery v Commission for Conciliation, Mediation and Arbitration and Others (JR1986/20) [2022] ZALCJHB 54 (15 March 2022)
NS Nemukombane v Department of Education – Gauteng Province ELRC334–22/23GP
Velile Blessing Ngcobo v Department of Education: Kwa-Zulu Natal ELRC196-20/21KZN
Sandile Ngubo v Department of Education – Kwa-Zulu Natal PSES 109-17/18

Netshisaulu v Commission for Conciliation, Mediation and Arbitration and Others (JR929/15) [2017] ZALCJHB 366 (28 September 2017)
Northern Cape Department of Education v Mr Themba Mtshawu LRC179-19/20NC
NUFBWSAW obo Irvine Jeftha v The Department of Education Western Cape v Reverend Betty Wanza and Patrick Minnaar ELRC644-20/21EC

O

O'Donoghue v Minister for Health [1993] IEHC 2 (27 May 1993); [1996] 2 IR 20
Ogunsanmi v V.C.F Furniture (1961) ALL NLR 862, (Ikeja Suit No. HK/33/61) [1961] NGHC 47 (20 December 1961)
Professor Dupe Olatunbosun v. Nigerian Institute of Social and Economic Research Council (1988) 1 NSCC p. 1025; (1988) 3 NWLR (Pt. 80) 25
Mr. Kunle Osisanya v Afribank Nigeria Plc (2007) LLJR-SC

P

Phenithi v Minister of Education and Others 2008 (1) SA 420 (SCA)
Phutiyagae v Tswaing Local Municipality (J499/06) [2006] ZALC 61 (11 May 2006); (2006) 27 ILJ 1921 (LC)

R

Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 (CC)
Ramabulana v CCMA and Others (JR1190/16) [2019] ZALCJHB 232 (3 September 2019)
Ramsammy v Wholesale & Retail Sector Education & Training Authority (2009) 30 ILJ 1927
Rangasami v Western Cape Education Department CCMA WE1266
Mr. K.C Ratshilumela v Department of Education-Gauteng PSES346-19/20GP
Reinhard v Ondra LLP [2015] EWHC 26 (Ch); [2016] 2 BCLC 571
Gino Carl Collin Rhoda v Respondent: Department of Education Western Cape ELRC814-19/20WC
Arnold Z Robertson v South African Council for Educators, Western Cape Department of Education, and Department of Basic Education 15547/2013
Rusere v The Jesuit Fathers 1970 (4) SA 537 (R)
Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others (598/05) [2006] ZASCA 175 (26 September 2006); 2007 (1) SA 576 (SCA)

S

S v Du Plessis Case No ASOC 122/2004 District Court Kimberley
S v F 1999 (1) SACR 571 (C)
S v M (CCT 53/06) [2007] ZACC 18 (26 September 2007); 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC)
S v Marais, Case No ASOC 122/2204 Regional court held at Kimberley
S v Nonyane (256/05) [2006] ZASCA 21; [2006] SCA 23 (RSA) (20 March 2006)

SA Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd 2002 (3) SA 250 (LAC); (1999) 20 ILJ 2302 (LAC)
SA Commercial Catering & Allied Workers Union & others v Woolworths (Pty) Ltd (2019) 40 ILJ 87 (CC)
SA Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA); (2010) 31 ILJ 529 (SCA)
SADTU obo Godfrey Maphosa v Department of Education - Gauteng ELRC1051-19/20GP
SADTU obo MA Maraka and Department of Education Limpopo PSES448 -11/12LP
SADTU obo Nyiko B. Baloyi v Gauteng Department of Education ELRC644-20/21EC
SADTU obo Neil Zackey v Department of Education Gauteng PSES974-18/19GP
SALIPSWU obo Xolani Madalane v The Department of Education Western Cape ELRC 487-20/21WC
SALIPSWU obo Qagambile Nkosiyane v Department of Education Western Cape PSES553-19/20WC
SAMWU obo Makibinyane and Others v SA Local Government Bargaining Council and Others (JR1043/18) [2020] ZALCJHB 140 (11 August 2020)
SAOU obo G. van der Westhuizen v Gauteng Department of Education ELRC 551-2223GP
CS and Another v Swanepoel and Others (19027/13) [2022] ZAWCHC 37 (17 March 2022); [2022] 2 All SA 810 (WCC); [2022] 7 BLLR 660 (WCC)
Zola Sajini v Department of Education–Eastern Cape PSES 914-18/19EC
Satani v Department of Education, Western Cape and Others (CA10/15) [2016] ZALAC 38 (13 June 2016; (2016) 37 ILJ 2298 (LAC)
Satani v Department of Education Western Cape and Others (C447/2017) [2019] ZALCCT 5 (6 March 2019)
Scheepers v School Governing Body, Grey College Bloemfontein and Others (Suid-Afrikaanse Onderwys-Unie Intervening) (2612/2018) [2018] ZAFSHC 210 (6 September 2018)
Scheepers v South African Council for Educators and Others (4988/2020) [2021] ZAFSHC 212 (29 July 2021)
Schierhout v Minister of Justice 1926 AD 99
School Governing Body Grey College, Bloemfontein v Scheepers and Another (506/19) [2020] ZASCA 82 (3 July 2020); [2020] 3 All SA 704 (SCA)
Schoonbee and Others v MEC for Education, Mpumalanga and Another 2002 (4) SA 877 (T)
Sedick & another v Krisray (Pty) Ltd (2011) 32 ILJ 752 (CCMA)
Segona v Education Labour Relations Council and Others (JA163/17) [2019] ZALAC 51 (27 June 2019); [2019] 12 BLLR 1327 (LAC)
Marvin-Leigh Christo September v Western Cape Education Department ELRC452-22/23WC
Mzikayifani David Shezi v Department of Education (Kwazulu Natal) PSES 714-18/19KZN
Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC)
David Skippers v Western Cape Education Department ELRC 1048-19/20WC
Small v Smith 1954 (3) SA 434 (SWA)
L. L. Snyders v Department of Education – Western Cape (WCED) ELRC251-20/21WC
South African Broadcasting Corporation SOC Ltd v Phasha (JA 36/2019) [2020] ZALAC 50 (27 November 2020); [2021] 3 BLLR 270 (LAC); (2021) 42 ILJ 816 (LAC)
South African Council for Educators v Deon Scheepers and Others (CCT 127/22) [2023] ZACC 23 (12 July 2023); [2023] 10 BLLR 981 (CC); (2023) 44 ILJ 2191 (CC); 2024 (5) BCLR 663 (CC)
South African Council for Educators v Deon Scheepers and Others SCA 045/2022 (24 March 2022)

South African Transport and Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others (D 449/2011) [2012] ZALCD 10 (16 July 2012); (2013) 34 ILJ 706 (LC)
Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another (725/13) [2014] ZASCA 178 (21 November 2014); 2015 (2) SA 118 (SCA)
Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others (CCT33/18) [2019] ZACC 3 (7 February 2019); (2019) 40 ILJ 773 (CC); 2019 (4) BCLR 506
Gerhard Strydom v The Department of Education Western Cape ELRC469-20/21WC
Superintendent General Free State Department of Education v Mr Moshe Moses Mofokeng ELRC276-20/21FS
Superintendent General Free State Department of Education v Mr Setsumi April Ntoni ELRC169-21/22FS
Superintendent General Free State Department of Education and Mr Tokelo Sedson Sethole ELRC245-22/23FS
The Superintendent-General Northern Cape Department of Education v Mr Hulepe Isaac Mogase ELRC890-22/23NC

T

Mr. J Tlhakung v Department of Education – Free State ELRC854-20/21FS
Ntokozo Tom v Department of Education – Eastern Cape ELRC302-23/24EC
Transman (Pty) Ltd v Dick and Another 2009 (4) SA 22 (SCA),
Transnet Ltd t/a Metrorail and Another v Witter 2008 (6) SA 549 (SCA)
Trend Finance (Pty) Ltd and Another v Commissioner for the South African Revenue Service and Another (8712/01) [2005] ZAWCHC 55 (8 August 2005); [2005] 4 All SA 657 (C); 2006 (2) BCLR 304 (C)
Tshishonga v Minister of Justice and Constitutional Development and Another 2007 (4) SA 135 (LC)

U

UBN Ltd. v Ogoh [1995] 2 NWLR (Pt 380) 647
Uramin Incorporated v Perie 2017 (1) SA 236 (GJ)

V

Valinor Trading 133 CC t/a Kings Castle v Commission for Conciliation, Mediation & Arbitration & others (2023) 44 ILJ 1106 (LC)
Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA)
Van der Spuy v General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa Intervening) 2002 (5) SA 392 (CC)
HK van Niekerk v The State Case No A215/2007 TPD
Van Wyk v Acting Superintendent General Department of Education, North West and Others (JR325/14) [2018] ZALCJHB 168 (8 May 2018)
Van Wyk v Department of Education Western Cape PSES508-16/17WC

Vernonia School Dist. 47J v Acton, 515 U.S. 646 (1995)
Vundla and Ashley Motors (2003) 24 ILJ 272 (BCA)

W

Wahl v AECI Ltd (1983) 4 ILJ 298 (IC)
Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another 2011 (5) SA 87 (WCC)
Whitbread plc (t/a Whitbread Medway Inns) v Hall [2001] IRLR 275; [2001] ICR 699
Wille, Peter v Free State Department of Education ELRC69-19/20FS
Wynkwart NO v Minister of Education and Another 2002 (6) SA 564 (C)

Y

Yaroe v Nigeria Stock Exchange [2014] 46 NLLR PT. 149

Z

Zwezwe v Department of Education, Kwazulu-Natal and Others (D 97/2010) [2011] ZALCD 40 (18 October 2011)

DISSERTATIONS AND THESES

NAME	CITATION MODE
B	
Budeli M *Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order* PhD thesis University of Cape Town April (2007)	Budeli (2007)
Bushe B *The Efficacy of Alternative Dispute Resolution (ADR) in Labour Dispute Resolution: A Critical Comparative Analysis of Botswana, South Africa and Zimbabwe* LLM dissertation University of South Africa (2019)	Bushe (2019)
D	
De Villiers C *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* LLD dissertation Stellenbosch University (2021)	De Villiers (2021)
G	
Gyan EK *Conflict in the School System Ghana* PhD in Educational Administration and Management thesis Open University of Malaysia /	Gyan (2015)

Accra Institute of Technology (2015)	
K	
Kwakwala BOK *A Critical Evaluation of the Dispute Resolution Function of the Commission for Conciliation, Mediation and Arbitration (CCMA)* MCom thesis University of Stellenbosch (2010)	Kwakwala (2010)
M	
Makibi MA *The Nature of Teacher Conflict and Conflict Management in Sixteen Selected Primary Schools in Lesotho* MEd dissertation University of KwaZulu-Natal, Durban (2010)	Makibi (2010)
Mlungisi ET *The Liability of Trade Unions for Conduct of Their Members during Industrial Action* LLD thesis University of South Africa (2016)	Mlungisi (2016)
P	
Pandit S *Legalism in the South African Trade Union Movement: 1979-1988* PhD thesis London School of Economics (1994)	Pandit (1994)
T	
Taiwo EA *The Implementation of the Right to Education in South Africa and Nigeria* LLD thesis Nelson Mandela Metropolitan University (2011)	Taiwo (2011)
U	
Ulrich N *Only the Workers Can Free the Workers: the origin of the workers' control tradition and the Trade Union Advisory Coordinating Committee (TUACC), 1970-1979* MA dissertation University of the Witwatersrand (2007)	Ulrich (2007)

PAPERS

NAME	**CITATION MODE**
B	
Benjamin P "Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)" Working Paper No. 47 International Labour Organization (2013) https://www.ilo.org/media/458126/download	Benjamin (2013) *ILO*

E	
Ekundayo OOS "Education in Nigeria Is in a Mess from Top to Bottom. Five Things Can Fix It" (*The Conversation*, 26 March 2019) https://theconversation.com/education-in-nigeria-is-in-a-mess-from-top-to-bottom-five-things-can-fix-it-112894#:~:text=Nigeria%E2%80%99s%20education%20system%20is%20based%20on%20the%20%281%29-6-3-3-4,and%20a%20minimum%20of%20four%20years%20tertiary%20education	Ekundayo (2019)
F	
Federal Ministry of Education "Nigeria Education Management Information System (NEMIS)", presentation at the 2020 UIS Regional Virtual Meeting on experience sharing by countries and regions as it affects data collection and learning needs due to the effects of the COVID-19 pandemic, 12 May 2020 https://tcg.uis.unesco.org/wp-content/uploads/sites/4/2020/05/UIS-VIRTUAL-MEETING-PRESENTATION-FME-ABUJA2020.pdf#:~:text=The%20Nigeria%20Education%20Management%20Information%20System%20%28NEMIS%29%20is	Federal Ministry of Education (2020)
N	
Lord Neuberger "The Role of the Judge: Umpire in a Contest, Seeker of the Truth or Something in Between?", opening remarks at the Singapore Panel on Judicial Ethics and Dilemmas on the Bench, 19th August 2016 https://www.supremecourt.uk/docs/speech-160819-04.pdf	Neuberger (2016)
O	
Okharedia AA "The Emergence of Alternative Dispute Resolution in South Africa: A Lesson for Other African Countries", a paper presented at the 6th IIRA African Regional Congress of Industrial Relations, Lagos Nigeria, 2011	Okharedia (2011)
Opeloye M "Child's Rights Act 2003 in Nigeria: What Implications for the Application of Child's Rights in Islam?" (2016) 1st International Conference on Women and Children Legal and Social Issues	Opeloye (2016)

STATUTES

A

Act of Union (Ireland) 1800 (Acts of the Old Irish Parliament)
African Charter on the Rights and Welfare of the Child, adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU, Addis Ababa, Ethiopia on 11 July 1990, and entered into force on 29 November, 1999 OAU Doc. CAB/LEG/24.9/49 (1990) ((ACRWC); "the African Children's Charter") (Organisation of African Unity; African Union)
Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (South Africa) https://www.gov.za/documents/employment-equity-act-code-good-practice-handling-sexual-harassment-cases-workplaces
Anglo-Irish Treaty (1921) (United Kingdom; Republic of Ireland)

B

Basic Conditions of Employment Act 75 of 1997 (South Africa)
Basic Education Laws Amendment Act 15 of 2011 (South Africa)
Black Labour Relations Regulation Act 48 of 1953 (South Africa)

C

Children Act 2004 (United Kingdom)
Children and Families Act 2014 (United Kingdom)
Children and Young Persons Act 1945 (chapter 44) (Nigeria)
Children's Act 38 of 2005 (South Africa)
Children's Amendment Act 41 of 2007 (South Africa)
Child's Rights Act, 2003 (Act No. 26 of 2003) (Nigeria)
Code of Good Practice: Dismissal in Schedule 8 to the Labour Relations Act 66 of 1995 (South Africa)
Code of Good Practice on Handling Sexual Harassment cases in the Workplace (South Africa)
Collective Agreement (ELRC Resolution 2 of 2005) (South Africa)
Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 ("The Third Alteration Act") (Nigeria)
Constitution of the Federal Republic of Nigeria 1979 (Nigeria)
Constitution of the Federal Republic of Nigeria 1999 (Nigeria)
Constitution of the Irish Free State (Saorstát Eireann) Act, 1922 (electronic Irish Statute Book (eISB))
Constitution of the Republic of South Africa Act, 1996 (South Africa)
Continuing Education and Training Act 16 of 2006 (South Africa)
Convention on the Rights of the Child (1989) ("the CRC") (United Nations)
Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the "Sexual Offences Act) (South Africa)
Criminal Procedure Act 51 of 1977 (South Africa)

D

Declaration of Geneva on Children's Rights 1924 (the Geneva Declaration) (League of Nations)
Declaration of the Rights of the Child (1959) (United Nations)
DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters Official Journal of the European Union (European Union)
https://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF

E

Education (Northern Ireland) Act 1947 (United Kingdom)
Education (Scotland) Act 1945 (United Kingdom)
Education Act 1944 (United Kingdom)
Education Act 1996 (United Kingdom)
Education Act 2002 (United Kingdom)
Education Act 2011 (United Kingdom)
Education Laws Amendment Act 1 of 2004 (South Africa)
Education Laws Amendment Act 50 of 2002 (South Africa)
Education Laws Amendment Act 53 of 2000 (South Africa)
Education Laws Amendment Act 57 of 2001 (South Africa)
Educators' Employment Act 138 of 1994 (South Africa)
ELRC Collective Agreement No. 1 of 2006 (the ELRC Constitution) (South Africa)
ELRC Collective Agreement No. 1 of 2010 (South Africa)
ELRC Collective Agreement No. 5 of 2008 (South Africa)
ELRC Collective Agreement No. 5 of 2013 (South Africa)
ELRC Collective Agreement No. 6 of 2016 (the ELRC new constitution) ("ELRC Constitution") ("the Collective Agreement") (South Africa)
Electronic Communication and Transactions Act 25 of 2002 (South Africa)
ELRC Resolution 2 of 2005 ("Collective Agreement") (South Africa)
Employment Equity Act 55 of 1998 ("the Equity Act"; "the EEA") (South Africa)
Employment of Educators Act, 1994 (Proclamation 138 of 1994) (South Africa)
Employment of Educators Act 76 of 1998 ("the Educators Act") (South Africa)
Employment Laws Amendment Bill 1999 (South Africa)
Employment Rights Act 1996 (United Kingdom)
Employment Rights (Dispute Resolution) Act 1998 (United Kingdom)
Employment Tribunals Act 1996 (United Kingdom)
Explanatory Memorandum (1995) 16 *ILJ* 278 (South Africa)
Explanatory Memorandum Labour Relations Amendment Bill, 2010, GN 1112 in GG 33873 of 17-12-2010 ("the Explanatory Memorandum LRAB 2010") (South Africa)
Explanatory Memorandum to the Education Act 2011 (Abolition of the General Teaching Council for England (GTCE) Consequential Amendments and Revocations) Order 2012 No. 1153 (United Kingdom)

G

Government of Ireland Act 1920 (United Kingdom)

H

Human Rights Act 1998 (United Kingdom)

I

Industrial Conciliation Act 11 of 1924 (South Africa)
International Covenant on Civil and Political Rights (1966) (ICCPR) (United Nations)
International Covenant on Economic and Social and Cultural Rights (1966) (ICESCR) (United Nations)

L

Labour Act, 2004 Chapter 198 of the Laws of the Federation of Nigeria 1990, (Cap L1 LFN 2004) (Nigeria)
Labour Relations Act 28 of 1956 (South Africa)
Labour Relations Act 66 of 1995 (South Africa)
Labour Relations Amendment Act 12 of 2002 (South Africa)
Labour Relations Amendment Act 6 of 2014 (South Africa)
Labour Relations Amendment Bill 2000 (South Africa)
Lagos State Teaching Service Commission Law No. 3 of 2018 (Nigeria)

M

Magna Carta (1215) (England)

N

National Education Policy Act 27 of 1996 (South Africa)
National Industrial Court Act, 2006 (NICA) (Nigeria)
National Industrial Court of Nigeria (Civil Procedure) Rules, 2017 (Nigeria)
National Policy Framework for Teacher Education and Development in South Africa (NPFTED) (South Africa)
New Code of Good Practice: Harassment in the Workplace (2022) (South Africa)

P

Personnel Administration Measures 1999 (PAM) (South Africa)
Plateau State Teachers Service Commission (Law No. 3 of 1980) (Nigeria)
Policy on the South African Standard for Principalship: Enhancing the Professional Image and Competencies of School Principals (South Africa)
Promotion of Administrative Justice Act 3 of 2000 (“the PAJA”) (South Africa)
Protected Disclosures Act 26 of 2000 (South Africa)
Protection of Personal Information Act 4 of 2013 (“the POPI Act” or “the POPIA”) (South Africa)
Public Service Act, 1994 published in Proc 103 in *GG* 15791 of 3 June 1994 (South Africa)

R

Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (RICA) (South Africa)
Regulations for Prevention of Re-Employment of Former Educators Discharged or Deemed Discharged for Misconduct or Deemed Resigned ("GN 331 in *GG* 44433 of 9-04-2021") (South Africa)

S

SACE Code of Professional Ethics for Educators (South Africa)
School Governance (Constitution) (England) Regulations 2012 (United Kingdom)
School Staffing (England) Regulations 2009 (United Kingdom)
Sexual Offences Act 23 of 1957 (South Africa)
Sexual Offences Act 2003 (United Kingdom)
South African Council for Educators Act 31 of 2000 ("the SACE Act") (South Africa)
South African Schools Act 84 of 1996 ("the Schools Act") (South Africa)

T

Teachers' Disciplinary (England) Regulations 2012 (SI 2012/560) (United Kingdom)
Teachers Registration Council of Nigeria Act, Act 31 of 1993 ("the TRCN Act") (Nigeria), now the Teachers Registration Council of Nigeria Act, CAP T3, 2004
Teaching and Higher Education Act 1998
Termination of Employment Convention, 1982 (No. 158) (International Labour Organization)
The School Governance (Constitution) (England) Regulations 2012 (SI 2012/1034) (United Kingdom)
The School Staffing (England) Regulations 2009 (SI 2009/2680) (United Kingdom)
The School Standards and Framework Act 1998 (c. 31) (United Kingdom)

U

Uniform Rules of Court, Supreme Court Act 59 of 1959 Rules (South Africa)
Union with England Act 1707 (Acts of the Old Scottish Parliament)
Union with Ireland Act 1800 (Acts of the Parliament of Great Britain)
Union with Scotland (Amendment) Act 1707 (Acts of the Parliament of Great Britain)
United Nations Declaration of Human Rights 1948 (UDHR) (United Nations)

V

Violence Against Persons (Prohibition) Act, 2015 ("VAPP Act") (Nigeria)
Voluntary Conciliation and Arbitration Recommendation No. 92 (1951) (International Labour Organization)

Gazette in Nigeria

Lagos State Government Notice No. 9; a Supplement to the Lagos State of Nigeria Official Gazette Extraordinary No. 8 Vol. 51 of 16th March 2018

Government Gazettes in South Africa

Department of Basic Education "Personnel Administrative Measures (PAM)" GN 2468 in *GG* 46879 of 9 September 2022

Department of Basic Education "Policy on the South African Standard for Principalship: Enhancing the Professional Image and Competencies of School Principals" 2015 GN 323 in *GG* 39827 of 18 March 2016

Department of Employment and Labour "Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace" R1890 in *GG* 46056 of 18-03-2022

INTERNET SOURCES

NAME	**CITATION MODE**
Anonymous sources	
R	
"reg 38 Dismissal of staff" in Legislation.gov.uk "The School Staffing (England) Regulations 2009" (2024) https://www.legislation.gov.uk/uksi/2009/2680/regulation/38/made	"reg 38 Dismissal of staff" in Legislation.gov.uk "The School Staffing (England) Regulations 2009" (2024)
S	
"s 35 Staffing of community, voluntary controlled, community special and maintained nursery schools" in Legislation.gov.uk "Education Act 2002" (2024) https://www.legislation.gov.uk/ukpga/2002/32/section/35/enacted	"s 35 Staffing of community, voluntary controlled, community special and maintained nursery schools" in Legislation.gov.uk "Education Act 2002" (2024)

NAMED SOURCES

Named sources	
A	
AbdulWahab M "TESCOM: What You Need to Know" (*TESCOM*, 20 October 2020) https://explain.com.ng/topic/tescom-what-you-need-to-know/	AbdulWahab (2020)
Adebumiti A "Taming menace of sexual abuse in schools" (*Guardian Nigeria News*, 17 May 2024)	Adebumiti (2021)

https://www.pressreader.com/nigeria/the-guardian-nigeria/20211111/281792812268806	
Adepegba A "FCTA suspends two teachers for molesting blind students" (*Punch*, 18 July 2019) https://punchng.com/fcta-suspends-two-teachers-for-molesting-blind-students/	Adepegba (2019)
Amnesty International "South Africa: Broken and Unequal: The state of education in South Africa: Executive summary, Conclusions and recommendations" (February 11, 2020 Index Number: AFR 53/1706/2020; 2020) https://www.amnesty.org/en/documents/afr53/1706/2020/en/	Amnesty International (2020)
Anarado C "Why Nigeria's New Violence Against Persons (Prohibition) Act Is Only the Beginning" (*Ventures Africa*, 15 June 2015) https://venturesafrica.com/why-nigerias-new-violence-against-persons-prohibition-act-is-only-the-beginning/	Anarado (2015)
Ani E "Ekiti TESCOM Board Dismisses Teachers for Sexual Molestation" (*Daily Post Nigeria*, 28 February 2020) https://dailypost.ng/2020/02/28/ekiti-tescom-board-dismisses-teachers-for-sexual-molestation/	Ani (2020)
B	
Baxter A "Hundreds of Teachers Accused of Sex with Pupils, Figures Show" (*BBC News*, 16 January 2014) https://www.bbc.com/news/newsbeat-25367715	Baxter (2014)
BBC "SA Headteacher 'made Pupil Dig in Poo for Lost Phone'" (16 March 2021) https://www.bbc.com/news/world-africa-56413812	BBC (2021)
Besart "UK Education System Guide 2023 - Everything You Need to Know" (*Study in UK*, 14 February 2023) https://www.studying-in-uk.org/uk-education-system-guide/	Besart (2023)

Brader C "Children and Families Act 2014: Lords Committee Report" (*House of Lords Library*, 7 July 2023) https://lordslibrary.parliament.uk/children-and-families-act-2014-lords-committee-report/#:~:text=The%20Children%20and%20Families%20Act%202014%20%28the%20CFA%29,those%20affected%20by%20decisions%20of%20the%20family%20courts	Brader (2023)
Bright World "British Education System" (*Brightworldguardianships.com*, 2019) https://www.brightworldguardianships.com/en/guardianship/british-education-system/	Bright World (2019)
Britannica, The Editors of Encyclopaedia "due process" (*Encyclopedia Britannica*, 19 March 2024) https://www.britannica.com/topic/due-process	Britannica (2024) https://www.britannica.com/topic/due-process
Britannica, The Editors of Encyclopaedia "Members of the League of Nations" (*Encyclopedia Britannica*, 26 April 2024) https://www.britannica.com/topic/League-of-Nations/Members-of-the-League-of-Nations	Britannica (2024) https://www.britannica.com/topic/League-of-Nations/Members-of-the-League-of-Nations
Browning R and Thomas RM "Education Act of 1944" (*Encyclopedia Britannica*, 21 July 2024) https://www.britannica.com/topic/education/Education-Act-of-1944	Browning and Thomas "Education Act of 1944" (2024)
C	
Cambridge Dictionary "Federation" (17 July 2024) https://dictionary.cambridge.org/us/dictionary/english/federation	Cambridge Dictionary "Federation" (2024)
Carney-Jones B "The Creation of Teaching Regulation Agency - What Does This Mean For Teachers?" (*Stephensons Solicitors LLP*, 9 April 2018) https://www.stephensons.co.uk/site/blog/professional-discipline-blog/creation-of-tra-what-does-this-mean-for-teachers	Carney-Jones (2018)
CCMA "CCMA Fees and Costs Information Sheet" https://www.ccma.org.za/wp-content/uploads/2023/02/CCMA-Fees-and-Costs-Info-Sheet-2022-01.pdf	CCMA "Fees and Costs Information Sheet" (2022)

Central Intelligence Agency "Nigeria" The World Factbook (2024) https://www.cia.gov/the-world-factbook/countries/nigeria/	Central Intelligence Agency (2024)
Charles M "Back to work for teachers but fears linger: 'Don't rush to open schools, give us more support'" (*News24*, 01 February 2021) https://www.news24.com/news24/southafrica/news/back-to-work-for-teachers-but-fears-linger-dont-rush-to-open-schools-give-us-more-support-20210201	Charles (2021)
Cheevers A "What is Neutrality?" (*DCU Conflict Institute, formerly the Institute for International Conflict Resolution and Reconstruction*, Dublin City University, 2021) https://iicrr.ie/what-is-neutrality/	Cheevers (2021)
Constitutional Court of South Africa "What Is Constitutional Supremacy?" (*Concourt.org.za*, 2024) https://www.concourt.org.za/index.php/45-what-is-a-constitution/what-is-constitutional-supremacy/108-what-is-constitutional-supremacy	Constitutional Court of South Africa (2024)
Legal Information Institute "Parens Patriae" (*LII / Legal Information Institute*, 2022) https://www.law.cornell.edu/wex/parens_patriae	Legal Information Institute "Parens Patriae" (2022)
D	
Dayimani M "Eastern Cape Principal Fired for Forcing Pupil to Retrieve Phone from Pit Latrine" (*News24*, 22 June 2021) https://www.news24.com/news24/SouthAfrica/News/just-in-eastern-cape-principal-fired-for-forcing-pupil-to-retrieve-phone-from-pit-latrine-20210622	Dayimani (2021)
De Lench B "U.S. Failure To Ratify UN Convention on Rights of the Child Is Embarrassing and Unacceptable" (*HuffPost*, 10 October 2015) https://www.huffpost.com/entry/us-failure-to-ratify-un-c_b_8270982	De Lench (2017)

De Vos P "DCJ Dikgang Moseneke: The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice" (*Constitutionally Speaking*, 18 May 2015) https://constitutionallyspeaking.co.za/dcj-dikgang-moseneke-the-media-courts-and-technology-remarks-on-the-media-coverage-of-the-oscar-pistorius-trial-and-open-justice/	De Vos (2015)
Department for Education and Skills "Education Act 2002 - Explanatory Notes" (*Legislation.gov.uk*, 2024) https://www.legislation.gov.uk/ukpga/2002/32/notes	Department for Education and Skills (2002)
Department for Education "Working Together to Safeguard Children" (*GOV.UK*, 23 February 2024) https://www.gov.uk/government/publications/working-together-to-safeguard-children--2.	Department for Education "Working Together to Safeguard Children" (2024)
Department for Education "Keeping Children Safe in Education" (*GOV.UK*, 24 May 2024) https://www.gov.uk/government/publications/keeping-children-safe-in-education--2	Department for Education "Keeping Children Safe in Education" (2024)
Department for Education "Staffing and Employment Advice for Schools Departmental Advice for School Leaders, Governing Bodies, Academy Trusts and Local Authorities" (2021) https://assets.publishing.service.gov.uk/media/616e92fd8fa8f529777ffc40/Staff_Advice_Handbook_Update_-_October_2021.pdf	Department for Education "Staffing and Employment Advice for Schools Departmental Advice for School Leaders, Governing Bodies, Academy Trusts and Local Authorities" (2021)
Department for Education "The Children Act 1989 guidance and regulations Volume 2: care planning, placement and case review" (July 2021) https://assets.publishing.service.gov.uk/media/60e6fb43d3bf7f56896127e5/The_Children_Act_1989_guidance_and_regulations_Volume_2_care_planning__placement_and_case_review.pdf	Department for Education (2021)
Department of Justice and Constitutional Development "Gender-Based Violence" (2024) https://www.justice.gov.za/vg/gbv/GBV-Summit.html	Department of Justice and Constitutional Development (2024)

Department of Public Service and Administration "Z83 Application for Employment" form https://www.dpsa.gov.za/dpsa2g/documents/ep/2020/Approved%20New%20Z83%20form%20Gazetted%206%20Nov%202020.pdf	Department of Public Service and Administration "Z83 Application for Employment"
Department of Public Service and Administration *Guide on Managing Discipline in the Public Service* (March 2021) https://www.dpsa.gov.za/dpsa2g/documents/iem/2021/Disicpline%20Management%20Guide.pdf	Department of Public Service and Administration *Guide on Managing Discipline in the Public Service* (2021)
Dipa K "'School Ties' Is an Expose on the Sexual Abuse and Grooming at Some of SA's Top Schools" (*IOL*, 20 May 2024) https://www.iol.co.za/sunday-tribune/entertainment/school-ties-is-an-expose-on-the-sexual-abuse-and-grooming-at-some-of-sas-top-schools-b00b4f2d-bafa-4eb2-8e0b-a4a6b7b91af6	Dipa (2024)
Duba S "ELRC Dismisses Teacher for Alleged Sexual Offences against Learners" (*IOL*, 13 August 2024) https://www.iol.co.za/capeargus/news/elrc-dismisses-teacher-for-alleged-sexual-offences-against-learners-87595414-23a2-4f24-86ea-1a5fdaaa21d2	Duba (2024)
Durojaiye S "Hall of Shame: 23 States yet to Pass Anti- Rape Law, Majority Are from the North" (*The International Centre for Investigative Reporting (ICIR)*, 12 June 2020) https://www.icirnigeria.org/hall-of-shame-23-states-yet-to-pass-anti-rape-law-majority-are-from-the-north/	Durojaiye (2020)
E	
Edapt "Teaching Prohibition Order" (2024) https://www.edapt.org.uk/support/knowledge-base/teaching-prohibition-order/	Edapt "Teaching Prohibition Order" (2024)
Edokwe B "The Duties, Rights and Termination of Contract of Employment and Labour Law In Nigeria" (*BarristerNG.com*, 9 June 2020) https://barristerng.com/the-duties-rights-and-termination-of-contract-of-employment-and-labour-law-in-nigeria/	Edokwe (2020)

Educate to Lead "Federal Republic of Nigeria, National Policy on Education 2013" https://educatetolead.wordpress.com/wp-content/uploads/2016/02/national-education-policy-2013.pdf	Educate to Lead "Federal Republic of Nigeria, National Policy on Education 2013"
Ehrensal PAL "Vernonia School District 47J v. Acton" (*Encyclopedia Britannica*, 19 June 2023) https://www.britannica.com/event/Vernonia-School-District-47J-v-Acton	Ehrensal (2023)
Ekundayo OOS "Education in Nigeria Is in a Mess from Top to Bottom. Five Things Can Fix It" (*The Conversation*, 26 March 2019) https://theconversation.com/education-in-nigeria-is-in-a-mess-from-top-to-bottom-five-things-can-fix-it-112894#:~:text=Nigeria%E2%80%99s%20education%20system%20is%20based%20on%20the%20%281%29-6-3-3-4,and%20a%20minimum%20of%20four%20years%20tertiary%20education	Ekundayo (2019)
Electronic Irish Statute Book "Constitution of the Irish Free State (Saorstát Eireann) Act, 1922" (Irishstatutebook.ie, 2024) https://www.irishstatutebook.ie/eli/1922/act/1/enacted/en/print	Electronic Irish Statute Book "Constitution of the Irish Free State (Saorstát Eireann) Act, 1922" (2024)
ELRC "Frequently Asked Questions (FAQ) Collective Agreement No. 3 of 2018 (Inquiry by the Arbitrator)" (*Education Labour Relations Council (ELRC)*, 2020) https://elrc.org.za/wp-content/uploads/2020/11/Frequently-Asked-Questions.pdf	ELRC (2020)
ELRC "Frequently Asked Questions (FAQ): Collective Agreement No. 3 of 2018 (Enquiry by the Arbitrator)" https://elrc.org.za/wp-content/uploads/2020/11/Frequently-Asked-Questions.pdf	ELRC (2018)
Equal Education "Equal Education Submission to the South African Human Rights Commission on the National Investigative Hearing on Ensuring the Right to Basic Education in the Context of Protests Submitted in June 2016" (*Equal Education*, 7 September 2016) https://equaleducation.org.za/document/ee-sahrc-submission-june-2016/	Equal Education (2016)

Explore Education Statistics "School Workforce in England, Reporting Year 2023" (*GOV.UK*, 19 June 2024) https://explore-education-statistics.service.gov.uk/find-statistics/school-workforce-in-england	Explore Education Statistics "School Workforce in England, Reporting Year 2023" (2024)
Explore Education Statistics "Schools, Pupils and Their Characteristics, Academic Year 2023/24" (*GOV.UK*, 10 June 2024) https://explore-education-statistics.service.gov.uk/find-statistics/school-pupils-and-their-characteristics?ref=blog.plinth.org.uk	Explore Education Statistics "Schools, Pupils and Their Characteristics, Academic Year 2023/24" (2024)
Emerson E "Breaking down the Education Act 2002: A Comprehensive Summary" (*Equisitive Education*, 26 November 2023) https://exquisitiveeducation.com/what-is-the-education-act-2002-summary/	Emerson (2023)
F	
Federal Ministry of Education (Statistics and NEMIS) "Nigeria Education Data Summary 2019 to 2021" https://nemis.gov.ng/Education_data_Summary_NEMIS.pdf	Federal Ministry of Education (Statistics and NEMIS) (2021)
Federal Republic of Nigeria "National Policy on Education" 6th edition first print, 2013; reprint 2014 https://education.gov.ng/wp-content/uploads/2020/06/NATIONAL-POLICY-ON-EDUCATION.pdf	Federal Republic of Nigeria "National Policy on Education" 6th ed (2014)
Fihlani P "South Africa's School Pit Latrine Scandal: Why Children Are Drowning" (*BBC.com*, 3 June 2018) https://www.bbc.com/news/world-africa-44329712	Fihlani (2018)
G	
General Teaching Council for England "General Teaching Council for England Has Closed" (*GOV.UK*, 28 June 2012) https://www.gov.uk/government/organisations/general-teaching-council-for-england#:~:text=The%20General%20Teaching%20Council%20for,transferring%20to%20the%20Teaching%20Agency	General Teaching Council for England (2012)

Gillard D "Education in the UK: A History – Timeline" (*Education-uk.org*, 2015) https://education-uk.org/history/timeline.html	Gillard (2015)
Gnot M "1964 - ILO Activities in the Post-War World (Part 2: 1960-1988) - Bureau of Library and Information Services Home Page" (*ILO.org*, 2015) https://webapps.ilo.org/static/english/lib/century/content/1964.htm#:~:text=In%20order%20to%20avoid%20being%20officially%20excluded%2C%20the,of%20Nelson%20Mandela%20as%20President%20of%20the%20Republic	Gnot (2015)
Gous N "Government Accused of Trying to Silence Teachers" (*TimesLIVE*, 23 July 2018) https://www.timeslive.co.za/news/south-africa/2018-07-23-government-accused-of-trying-to-silence-teachers/	Gous (2018)
Gouws A "Violence against Women Is Staggeringly High in South Africa – a Different Way of Thinking about It Is Needed" (*The Conversation*, 29 November 2022) https://theconversation.com/violence-against-women-is-staggeringly-high-in-south-africa-a-different-way-of-thinking-about-it-is-needed-195053	Gouws (2022)
Govender P "'There Is Something Wrong Here': Questions over How Primary School Pupil's Body Ended up behind Pit Toilet" (*TimesLIVE*, 26 March 2023) https://www.timeslive.co.za/news/south-africa/2023-03-26-there-is-something-wrong-here-questions-over-how-primary-school-pupils-body-ended-up-behind-pit-toilet/	Govender (2023)
Govender, P "Western Cape teacher fired after allegedly sending sex positions to pupil on WhatsApp" (*News24*, 12 August 2024) https://www.news24.com/news24/southafrica/news/western-cape-teacher-fired-after-allegedly-sending-sex-positions-to-pupil-on-whatsapp-20240812	Govender (2024)
H	
Hanna F "Mediation Explained" (2022) https://youtu.be/jsNmOUa8L1A	Hanna (2022)

HM Government "Working Together to Safeguard Children 2023" A guide to multi-agency working to help, protect and promote the welfare of children (December 2023) https://assets.publishing.service.gov.uk/media/65803fe31c0c2a000d18cf40/Working_together_to_safeguard_children_2023_-_statutory_guidance.pdf	HM Government (2023)
Home Office Independent Panel "The Report of the Independent Inquiry into Child Sexual Abuse, Section 1 and Section 2 Parts A to J (Accessible)" October 2022 HC 720 (*GOV.UK*, 2023) https://www.gov.uk/government/publications/iicsa-report-of-the-independent-inquiry-into-child-sexual-abuse/the-report-of-the-independent-inquiry-into-child-sexual-abuse-section-1-and-section-2-parts-a-to-j-accessible	Home Office Independent Panel "The Report of the Independent Inquiry into Child Sexual Abuse, Section 1 and Section 2 Parts A to J (Accessible)" (2023)
Humanium "Geneva Declaration of the Rights of the Child, 1924" (4 February 2023) https://www.humanium.org/en/geneva-declaration	Humanium (2023)
I	
Igwe I "Kaduna Govt Conducts Fresh Competency Test for 35,000 Teachers' (*Channels Television*, 7 December 2021) https://www.channelstv.com/2021/12/07/kaduna-govt-conducts-fresh-competency-test-for-35000-teachers/	Igwe (2021)
Independent Inquiry into Child Sexual Abuse "Schools Reluctant to Report Child Sexual Abuse by Staff and Pupils, Report Finds" (*Iicsa.org.uk*, March 2022) https://www.iicsa.org.uk/news/schools-reluctant-report-child-sexual-abuse-staff-and-pupils-report-finds.html	Independent Inquiry into Child Sexual Abuse (2022)
International Centre for Investigative Report (ICIR) "How Nigeria's justice system frustrates cases of sexual violence against street children" (*ICIR*, 19 December 2021) https://www.icirnigeria.org/how-nigerias-justice-system-frustrates-cases-of-sexual-violence-against-street-children/	ICIR (2021)
International Labour Organization "Convention C158 - Termination of Employment Convention, 1982 (No. 158)" (*ILO.org*, 2024)	International Labour Organization

https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158	"Convention C158" (2024)
International Labour Organization "History of the ILO" (*International Labour Organization*, 28 January 2024) https://www.ilo.org/about-ilo/history-ilo	International Labour Organization "History" (2024)
International Labour Organization "Nigeria" (*International Labour Organization*, 8 April 2024) https://www.ilo.org/nigeria#:~:text=Nigeria%20is%20an%20ILO%20member%20since,1960%20and%20has%20ratified%2040%20international%20labour%C2%A0Conventions	International Labour Organization "Nigeria" (2024)
J	
Jannamike L "Ending Child Sexual Abuse in Nigeria: Stakeholders Proffer Solutions" (*Vanguard News*, 26 November 2020) https://www.vanguardngr.com/2020/11/ending-child-sexual-abuse-in-nigeria-stakeholders-proffer-solutions	Jannamike (2020)
Jus Mundi "ICC (International Chamber of Commerce) ADR Rules (2001)" https://jusmundi.com/en/document/rule/en-icc-international-chamber-of-commerce-adr-rules-2001-icc-adr-rules-2001-sunday-1st-july-2001	Jus Mundi (2001)
K	
The Key "Maintained schools governance guide: summary of changes" (13 March 2024) https://schoolgovernors.thekeysupport.com/the-governing-body/the-role-of-the-board/maintained-schools-governance-guide-summary-of-changes/	The Key (2024)
Kuforiji AW "Teachers Registration Council of Nigeria: History & Roles" (*Nigeria Finder*, 16 September 2020) https://nigerianfinder.com/teachers-registration-council-of-nigeria-history-roles/#:~:text=The%20Teachers%20Registration%20Council%20was%20established%20in%201993,regulatory%20agency%20for%20the%20teaching%20profession%20in%20Nigeria	Kuforiji (2024)
L	

Lagos State Government Notice No. 9; a Supplement to the Lagos State of Nigeria Official Gazette Extraordinary No. 8 Vol. 51 of 16th March 2018 https://www.bing.com/ck/a?!&&p=24631d8ac8f1dad8JmltdHM9MTcxOTEwMDgwMCZpZ3VpZD0zYzM2YjE1YS05OGM3LTZkZDctMjEyOS1hMjhkOTljNzZjOWYmaW5zaWQ9NTE5MA&ptn=3&ver=2&hsh=3&fclid=3c36b15a-98c7-6dd7-2129-a28d99c76c9f&psq=Law+No.+3+of+2018+of+Lagos+State+of+Nigeria+&u=a1aHR0cHM6Ly9nYXpldHRlcy5hZnJpY2EvYXJjaGl2ZS9uZy1sYS8yMDE4L25nLWxhLW9mZmljaWFsLWdhemV0dGUtc3VwcGxlbWVudC1kYXRlZC0yMDE4LTAzLTE2LW5vLTgucGRm&ntb=1	Lagos State Government Notice (2018)
Law Nigeria Admin "3PLR – OSISANYA v. AFRIBANK NIGERIA PLC – Judgements" (5 December 2018) https://judgements.lawnigeria.com/2018/12/05/3plr-osisanya-v-afribank-nigeria-plc/	Law Nigeria Admin (2018)
Lawless J "Keir Starmer Becomes UK Prime Minister with a Sensational Victory" (*AP News*, 5 July 2024) https://apnews.com/article/uk-election-keir-starmer-profile-labour-e98d16e0810273f6041b61747e084aae	Lawless (2024)
LawPavilion Blog "The Violence against Persons (Prohibition) Act, 2015" (*LawPavilion Blog - No1 legaltech resource in Africa*, 5 April 2016) https://lawpavilion.com/blog/the-violence-against-persons-prohibition-act-2015/	LawPavilion Blog (2016)
League of Nations "Ratification of Agreements and Conventions Concluded under the Auspices of the League of Nations" Annex to the Report on the Work of the Council and the Secretariat to the Fifteenth Ordinary Session of the Assembly of the League of Nations V. Legal 1934. V. 1 https://archive.org/details/officialjournals00leag/page/n3/mode/2up?ref=ol&view=theater	League of Nations (1934)
Leão G "These Nigerian Teen Activists Are Organizing to End Child Marriage in Their Country" (*Womensmediacenter.com*, 2019) https://womensmediacenter.com/fbomb/these-nigerian-teen-activists-are-organizing-to-end-child-marriage-in-their-country	Leão (2019)

Legal Dictionary "In loco parentis" (*Law.com Legal Dictionary*, 2019) https://dictionary.law.com/Default.aspx?typed=in+loco+parentis&type=1&submit1.x=86&submit1.y=20&submit1=Look+up	Legal Dictionary "In loco parentis" (2019)
Legislation.gov.uk "Children Act 2004" (2024) https://www.legislation.gov.uk/ukpga/2004/31/contents	Legislation.gov.uk "Children Act 2004" (2024)
Legislation.gov.uk "Education Act 1944 (Repealed 1.11.1996)" (2024) https://www.legislation.gov.uk/ukpga/Geo6/7-8/31/contents	Legislation.gov.uk "Education Act 1944 (Repealed 1.11.1996)" (2024)
Legislation.gov.uk "Employment Rights Act 1996" (2024) https://www.legislation.gov.uk/ukpga/1996/18/contents	Legislation.gov.uk "Employment Rights Act 1996" (2024)
Legislation.gov.uk "Explanatory Memorandum to the Education Act 2011 (Abolition of The GTCE Consequential Amendments and Revocations) Order 2012 No. 1153 ("Explanatory Memorandum 2011"), https://www.legislation.gov.uk/uksi/2012/1153/pdfs/uksiem_20121153_en.pdf	Legislation.gov.uk "Explanatory Memorandum 2011"
Legislation.gov.uk "s 7 of the Employment Rights (Dispute Resolution) Act 1998" (2024) https://www.legislation.gov.uk/ukpga/1998/8/section/7	Legislation.gov.uk "s 7 of the Employment Rights (Dispute Resolution) Act 1998" (2024)
Legislation.gov.uk "Sexual Offences Act 2003" (2024) https://www.legislation.gov.uk/ukpga/2003/42/contents	Legislation.gov.uk "Sexual Offences Act 2003" (2024)
Legislation.gov.uk "Teaching and Higher Education Act 1998" (2024) https://www.legislation.gov.uk/ukpga/1998/30	Legislation.gov.uk "Teaching and Higher Education Act 1998" (2024)
Legislation.gov.uk "The School Governance (Constitution) (England) Regulations 2012" (2024) https://www.legislation.gov.uk/uksi/2012/1034/regulation/13/made	Legislation.gov.uk "The School Governance (Constitution) (England) Regulations 2012" (2024)

Legislation.gov.uk "The Teachers' Disciplinary (England) Regulations 2012" https://www.legislation.gov.uk/uksi/2012/560/made	Legislation.gov.uk "The Teachers' Disciplinary (England) Regulations 2012" https://www.legislation.gov.uk/uksi/2012/560/made
Lewis L "What Are the Disadvantages of Mediation?" (*Findlaw*, 4 April 2016) https://www.findlaw.com/adr/mediation/what-are-the-disadvantages-of-mediation.html	Lewis (2022)
Limon M "UK Education Scandal Has Made Explicit What Has Long Been Implicit: Children's Equal Right to a Quality Education Is Systematically Violated in the UK" (*Universal-rights.org*, 26 August 2020) https://www.universal-rights.org/uk-education-scandal-has-made-explicit-what-has-long-been-implicit-childrens-equal-right-to-a-quality-education-is-systematically-violated-in-the-uk	Limon (2020)
LSData "Justa Causa Definition" (*Lsd.law*, 2024) https://www.lsd.law/define/justa-causa	LSData (2024)
M	
Macquire K "Introduction to the British Industrial Revolution" (*Worldhistory.org*, 2024) https://www.worldhistory.org/video/3134/introduction-to-the-british-industrial-revolution/#:~:text=The%20British%20Industrial%20Revolution%20was%20a%20period%20of,necessary%20developments%20before%20or%20after%20this%20general%20period	Macquire (2024)
Macrotrends "U.K. Population 1950-2024" (*Macrotrends.net*, 2024) https://www.macrotrends.net/global-metrics/countries/GBR/united-kingdom/population	Macrotrends "U.K. Population 1950-2024" (2024)
Macupe B "Sexual Misconduct Rife in Schools, with Teachers as Leading Perpetrators" (*City Press*, 17 August 2021) https://www.news24.com/citypress/news/sexual-misconduct-rife-in-schools-with-teachers-as-leading-perpetrators-20210817 accessed 23 July 2024	Macupe *City Press* (2021)

Macupe B "Abusive Teachers Still Slip through System, Council for Educators Admits" (*The Mail & Guardian*, 24 May 2021) https://mg.co.za/education/2021-05-24-abusive-teachers-still-slip-through-system-council-for-educators-admits/	Macupe *The Mail & Guardian* (2021)
Mandela N "Speeches - Address by President Nelson Mandela at National Men's March, Pretoria" 22 November 1997 (*Mandela.gov.za*, 2024) http://www.mandela.gov.za/mandela_speeches/1997/971122_mensmarch.htm	Mandela (22 November 1997)
McCain N "Eight Rapes at Western Cape Schools in Just Three Months" (*News24*, 28 August 2023) https://www.news24.com/news24/southafrica/news/eight-rapes-at-western-cape-schools-in-just-three-months-20230828	McCain (2023)
Media Statement: Basic Education Committee Receives Briefing On GBV Programmes and Interventions Parliament, Tuesday, 17 August 2021 https://www.parliament.gov.za/press-releases/media-statement-basic-education-committee-receives-briefing-gbv-programmes-and-interventions	Media Statement: Basic Education Committee Receives Briefing on GBV Programmes and Interventions (2021)
Merriam-Webster "Forum shopping" (*Merriam-Webster.com Legal Dictionary*) https://www.merriam-webster.com/legal/forum%20shopping#:~:text=forum%20shop%C2%B7%E2%80%8Bping%20%3A%20the%20practice%20of%20choosing%20the,is%20likely%20to%20provide%20the%20most%20favorable%20outcome	Merriam-Webster Online Dictionary Forum shopping Definition & Meaning | Merriam-Webster Legal
Merriam-Webster "In loco parentis" (*Merriam-webster.com*, 2024) https://www.merriam-webster.com/dictionary/in%20loco%20parentis	Merriam-Webster "In loco parentis" (2024)
Merriam-Webster Dictionary "forum shopping" (*Merriam-webster.com*, 2024) https://www.merriam-webster.com/legal/forum%20shopping#:~:text=forum%20shop%C2%B7%E2%80%8Bping%20%3A%20the%20practice%20of%20choosing%20the,is%20likely%20to%20provide%20the%20most%20favorable%20outcome	Merriam-Webster Dictionary "forum shopping" (2024)

Merriam-Webster Dictionary "Quorum" (*Merriam-webster.com*,14 July 2024) https://www.merriam-webster.com/dictionary/quorum	Merriam-Webster Dictionary "Quorum" (2024)
Monama T "Section27 Wins Key Ruling in Bid to Appeal 'Lenient' Sanctions against Teachers Who Beat Pupils" (*News24*, 6 December 2022) https://www.news24.com/news24/southafrica/news/section27-wins-key-ruling-in-bid-to-appeal-lenient-sanctions-against-teachers-who-beat-pupils-20221206	Monama (2022)
Motloung T "Gauteng Teacher Fired for Alleged Sexual Misconduct, Rape and Having a Baby with a Pupil" (*News24*, 10 May 2023) https://www.news24.com/news24/southafrica/news/gauteng-teacher-fired-for-alleged-sexual-misconduct-rape-and-having-a-baby-with-a-pupil-20230510	Motloung (10 May 2023)
Muhammad A "TRCN Teachers Code of Conduct" (*Academia.edu*, 7 August 2021) https://www.academia.edu/50785658/TRCN_TEACHERS_CODE_OF_CONDUCT	Muhammad (2021)
N	
National Human Rights Commission "Child Rights" (24 April 2019) https://www.nigeriarights.gov.ng/focus-areas/child-rights.html	National Human Rights Commission (2019)
New World Encyclopedia "England" (2022) https://www.newworldencyclopedia.org/entry/England	New World Encyclopedia "England" (2022)
News "King Charles III, the UK's Monarch" (*Bbc.com*, 8 September 2022) https://www.bbc.com/news/uk-59135132	News (2022)
Norfolk Safeguarding Children Partnership "3.11 Video Recorded Interviews and Achieving Best Evidence within S47 Investigations" (31 January 2023) https://norfolklscp.org.uk/about/policies-procedures/managing-individual-cases-where-there-are-concerns-about-a-childs-safety-and-welfare/311-video-recorded-interviews-and-achieving-best-evidence-within-s47-investigations	Norfolk Local Safeguarding Children Partnership (2023)
NSPCC Learning "Protecting Children from Sexual Abuse" (*NSPCC Learning*, 12 July 2024)	NSPCC Learning (2024)

https://learning.nspcc.org.uk/child-abuse-and-neglect/child-sexual-abuse	
Nwafor A "Why Kaduna Government Plans to Fire 232 Teachers" (*The International Centre for Investigative Reporting (ICIR)*, 3 December 2021) https://www.icirnigeria.org/why-kaduna-government-plans-to-fire-232-teachers/	Nwafor (2021)
O	
Office for National Statistics "Gross Domestic Product (GDP)" (*Ons.gov.uk*, 2021) https://www.ons.gov.uk/economy/grossdomesticproductgdp	Office for National Statistics "Gross Domestic Product (GDP)" (2021)
Office for National Statistics "Overview of the UK population: January 2021" (*Ons.gov.uk*, 14 January 2021) https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/january2021	Office for National Statistics "Overview of the UK population: January 2021" (2021)
Office of the High Commissioner for Human Rights "Background to the Convention" (*OHCHR*) https://www.ohchr.org/en/treaty-bodies/crc/background-convention	Office of the High Commissioner for Human Rights https://www.ohchr.org/en/treaty-bodies/crc/background-convention
Office of the United Nations High Commissioner for Human Rights "Legislative History of the Convention on the Rights of the Child" Volume I (United Nations New York and Geneva, 2007) https://www.ohchr.org/sites/default/files/Documents/Publications/LegislativeHistorycrc1en.pdf	Office of the United Nations High Commissioner for Human Rights (2007)
Ofsted "Review of Sexual Abuse in Schools and Colleges" (*GOV.UK*, 10 June 2021) https://www.gov.uk/government/publications/review-of-sexual-abuse-in-schools-and-colleges	Ofsted "Review of Sexual Abuse in Schools and Colleges" (2021)
Ogundepo J "Activists Worry, Urge Hesitant States to Domesticate Law against Gender-Based Violence" (*Punch*	Ogundepo (2021)

Newspapers, 21 August 2021) https://punchng.com/activists-worry-urge-hesitant-states-to-domesticate-law-against-gender-based-violence/	
Ogunlowo S "Court Orders Arrest of Teacher Accused of Sexual Harassment" (*Premium Times Nigeria*, 26 May 2022) https://www.premiumtimesng.com/news/more-news/532633-court-orders-arrest-of-teacher-accused-of-sexual-harassment.html	Ogunlowo (2022)
Online Etymology Dictionary "governance" (*Etymonline.com*, 2023) https://www.etymonline.com/word/governance	Online Etymology Dictionary "governance" (2023)
Online Etymology Dictionary "management" (*Etymonline.com*, 2022) https://www.etymonline.com/word/management	Online Etymology Dictionary "management" (2022)
Online Etymology Dictionary "professional" (*Etymonline.com*, 2020) https://www.etymonline.com/word/professional	Online Etymology Dictionary "professional" (2020)
Oxford Advanced Learner's Dictionary "Investigate" (*Oxfordlearnersdictionaries.com*, 2024) https://www.oxfordlearnersdictionaries.com/definition/english/investigate?q=%22investigate%22	Oxford Advanced Learner's Dictionary "Investigate" (2024)
Oxford English Dictionary "In Loco Parentis" (*Oed.com*, 2023) https://www.oed.com/dictionary/in-loco-parentis_adv?tl=true	Oxford English Dictionary "In Loco Parentis" (2023)
Oxford Reference "Raising of the School-Leaving Age" (*Oxford Reference*, 2024) https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100402286	Oxford Reference (2024)
Oyo State Government "Oyo State Teaching Service Commission 'Who We Are'" (2024) https://oyotescom.oyostate.gov.ng	Oyo State Government (2024)
P	
P.M.News "TRCN Begins Nationwide Crackdown on Unlicensed Teachers" (*Pmnewsnigeria.com*, 4 March 2021) https://pmnewsnigeria.com/2020/03/04/trcn-begins-nationwide-crackdown-on-unlicensed-teachers/	P.M.News (2021)

Partners West Africa Nigeria "VAPP Tracker" (25 April 2024) https://www.partnersnigeria.org/vapp-tracker/	Partners West Africa Nigeria (2024)
Paton G "General Teaching Council 'to Be Scrapped'" (*The Telegraph*, 2 June 2010) https://www.telegraph.co.uk/education/educationnews/7798333/General-Teaching-Council-to-be-scrapped.html	Paton (2010)
Pijoos I "Northern Cape Teacher Fired, Deregistered for Raping Pupil and Showing Porn to Minors" (*News24*, 13 September 2023) https://www.news24.com/news24/southafrica/news/northern-cape-teacher-fired-deregistered-for-raping-pupil-and-showing-porn-to-minors-20230913	Pijoos (2023)
Pillay Y "Increase in Teacher Sexual Misconduct - SA Council for Educators" (*Iol.co.*za, 28 March 2023) https://www.iol.co.za/mercury/news/increase-in-teacher-sexual-misconduct-sa-council-of-educators-06caa5c5-820f-4669-a311-4fdbd3e2398a	Pillay (2023)
Plateau State Government Website "Plateau State Teachers Council" (2021) https://www.plateaustate.gov.ng/commissions/plateau-state-teachers-council	Plateau State Government Website (2021)
Premium Times Nigeria https://www.premiumtimesng.com/news/more-news/532633-court-orders-arrest-of-teacher-accused-of-sexual-harassment.html?tztc=1	Premium Times Nigeria https://www.premiumtimesng.com/news/more-news/532633-court-orders-arrest-of-teacher-accused-of-sexual-harassment.html?tztc=1
Public Health and Social Development Sectoral Bargaining Council "About Us" (*PHSDSBC*, 31 May 2022) https://www.phsdsbc.org.za/about-us/	PHSDCBC (2022)
R	
Redmans Solicitors "ET Awards £45K to Teacher Accused of Sexual Assault 'For Fun' by Highschool Girls" https://redmans.co.uk/insights/et-awards-45k-to-teacher-accused-of-sexual-assault-for-fun-by-highschool-girls	Redmans Solicitors "ET Awards £45K to Teacher Accused of Sexual Assault 'For Fun' by

	Highschool Girls" https://redmans.co.uk/insights/et-awards-45k-to-teacher-accused-of-sexual-assault-for-fun-by-highschool-girls
RefWorld "Nigeria: Violence Against Persons (Prohibition) Act, 2015 (VAPP)" (25 May 2015) https://www.refworld.org/legal/legislation/natlegbod/2015/en/105106	RefWorld (2015)
Rimi A and Uka OA "The Position of Nigerian Law on Termination of Employment Without Reason: A Better View" (African Law Practice Newsletter, 2021) https://www.alp.company/sites/default/files/ALP%20Article%20-%20The%20Position%20of%20Nigerian%20Law%20on%20Termination%20of%20Employment%20Without%20Reason.pdf	Rimi and Uka (2021)
S	
SAHRC "Abusive Teachers Still Slip through System, Council for Educators Admits" (*South African Human Rights Commission*, 24 May 2021) https://sahrc.org.za/index.php/sahrc-media/news/item/2681-abusive-teachers-still-slip-through-system-council-for-educators-admits	SAHRC (2021)
SAPA "Principal Accused of Showing Pupil Porn" (*Iol.co.za*, 22 March 2013) https://www.iol.co.za/news/principal-accused-of-showing-pupil-porn-1490102	SAPA (2013)
Shange N "Primary School Principal Suspended for 'Lowering Pupil into Pit Toilet' to Retrieve Dropped Cellphone" (*TimesLIVE*, 16 March 2021) https://www.timeslive.co.za/news/south-africa/2021-03-16-primary-school-principal-suspended-for-lowering-pupil-into-pit-toilet-to-retrieve-dropped-cellphone/	Shange (2021)
Sharman J "Record Numbers of Teachers Banned for Sexual Misconduct" *The Independent* (9 July 2017) https://www.independent.co.uk/news/uk/home-news/teachers-	Sharman (2017)

banned-classroom-sexual-misconduct-record-numbers-statistics-investigation-a7828891.html	
Shepherd J "Gove to Abolish General Teaching Council for England" (*The Guardian*, 2 June 2010) https://www.theguardian.com/education/2010/jun/02/general-teaching-council-england-abolished	Shepherd (2010)
Showmax "School Ties" Episode 4: Nemo Resideo, 34:41 to 34:50 (2024)	Showmax (2024)
Smith LB et al "United Kingdom" (*Encyclopedia Britannica*, 25 July 2024) https://www.britannica.com/place/United-Kingdom	Smith et al (2024)
Sobuwa Y "Rising Sexual Misconduct against Teachers a Concern" (*SowetanLIVE*, 18 August 2021) https://www.sowetanlive.co.za/news/south-africa/2021-08-18-rising-sexual-misconduct-against-teachers-a-concern/	Sobuwa (2021)
South African Council (SACE) "The Code of Professional Ethics" https://www.sace.org.za/pages/the-code-of-professional-ethics.	SACE Code of Professional Ethics
South African Council for Educators "How to Lodge a Complaint" (*Sace.org.za*, 2019) https://www.sace.org.za/pages/how-to-lodge-a-complaint	South African Council for Educators "How to Lodge a Complaint" (2019)
South African Democratic Teachers Union "SADTU Signs Ground-breaking ELRC Collective Agreements" https://www.sadtu.org.za/content/sadtu-signs-ground-breaking-elrc-collective-agreements	SADTU (2018)
South African Government "Basic Education Welcomes Agreements Reached with Teacher Unions" (*Www.gov.za*, 17 October 2018) https://www.gov.za/news/media-statements/basic-education-welcomes-agreements-reached-teacher-unions-17-oct-2018	South African Government (2018)
South African Government "Employment of Educators Act 76 of 1998" https://www.gov.za/documents/employment-educators-act	South African Government (1998)
South African Government "Government System" (2024) https://www.gov.za/about-government/government-system	South African Government

	"Government System" (2024)
South African Government "Parliament on SACE Sanctions against Educators Violating Ethical Standards" (12 May 2020) https://www.gov.za/news/media-statements/parliament-sace-sanctions-against-educators-violating-ethical-standards-12	South African Government (2020)
South African Government "Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000" (*Www.gov.za*, 2023) https://www.gov.za/documents/promotion-equality-and-prevention-unfair-discrimination-act	South African Government (2023) https://www.gov.za/documents/promotion-equality-and-prevention-unfair-discrimination-act
South African Government "South Africa's Green Economy Accord" (*Www.gov.za*, 29 November 2011) https://www.gov.za/news/media-statements/south-africas-green-economy-accord-29-nov-2011	SA Government (2011)
South African History Online (*SAHO*, 2016) "People and Culture of South Africa" https://www.sahistory.org.za/article/people-and-culture-south-africa	SAHO (2016)
Strom S "What Is a Deposition?" (*Findlaw*, 28 August 2023) https://www.findlaw.com/litigation/filing-a-lawsuit/what-is-a-deposition.html	Strom (2023)
T	
TeacherPediaNG "TRCN Code of Conducts" (8 October 2020) https://teacherpedia.net/trcn-code-of-conducts/	TeacherPediaNG (2020)
Teaching Regulation Agency "Mr Ezar Khan: Professional conduct panel meeting outcome" (January 2023) https://assets.publishing.service.gov.uk/media/648c62225f7bb700127fabcc/Mr_Ezar_Khan_Professional_conduct_panel_meeting_outcome__web_.pdf	Teaching Regulation Agency "Mr Ezar Khan: Professional conduct panel meeting outcome" (2023)
Teaching Regulation Agency "Mr John Lane: Professional conduct panel meeting outcome" (September 2022) https://assets.publishing.service.gov.uk/media/634d2fdcd3bf	Teaching Regulation Agency "Mr John Lane: Professional conduct panel meeting outcome" (2022)

7f6181ac93ed/Professional_conduct_panel_outcome_-_John_Lane.pdf	
Teaching Regulation Agency "Mr Michael Bright: Professional conduct panel meeting outcome" (October 2023) https://assets.publishing.service.gov.uk/media/65290359244f8e00138e7525/Bright__Michael_SOS_Decision.pdf	Teaching Regulation Agency "Mr Michael Bright: Professional conduct panel meeting outcome" (2023)
Teaching Regulation Agency "Teacher Misconduct: Information for Teachers" (*GOV.UK*, 28 January 2022) https://www.gov.uk/government/publications/teacher-misconduct-information-for-teachers	Teaching Regulation Agency "Teacher Misconduct: Information for Teachers" (2022)
Teaching Regulation Agency "Teacher Misconduct: The Prohibition of Teachers" (*GOV.UK*, 1 February 2022) https://www.gov.uk/government/publications/teacher-misconduct-the-prohibition-of-teachers--3	Teaching Regulation Agency "Teacher Misconduct: The Prohibition of Teachers" (2022)
Tes Magazine "Controversial Registration Fee to Die along with GTC next Year" (9 September 2011) https://www.tes.com/magazine/archive/controversial-registration-fee-die-along-gtc-next-year	Tes Magazine (2011)
The Parliament Portfolio Committee on Basic Education "Basic Education BRRR; ELRC Collective Agreements; Current Matters Affecting Basic Education Sector" (*PMG*, 17 October 2018) https://pmg.org.za/committee-meeting/27264/	The Parliament Portfolio Committee on Basic Education (2018)
Together for Girls "Understanding School-Related Gender-Based Violence" (13 July 2020) https://www.togetherforgirls.org/en/blog/understanding-school-related-gender-based-violence	Together for Girls (2020)
TRCN "TRCN Website" (*Trcn.gov.ng*, 2024) https://trcn.gov.ng/	TRCN (2024)
TRCN "TRCN Website" Grounds for De-registration (*Trcn.gov.ng*, 2024) https://trcn.gov.ng/registration/ground-for-de-registration	TRCN Grounds for De-registration (2024)
Trueman CN "Tripartitie Education" (*History Learning Site*, 22 May 2015)	Trueman (2015)

https://www.historylearningsite.co.uk/sociology/education-and-sociology/tripartitie-education/#google_vignette	
U	
UK Government "Education System in the UK" (2012) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/219167/v01-2012ukes.pdf	UK Government "Education System in the UK" (2012)
UK Parliament "Act of Union 1707" (*Parliament.uk*, 2024) https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/act-of-union-1707	UK Parliament "Act of Union 1707" (2024)
UK Parliament "The Education Act of 1944 (*Parliament.uk*, 2024) https://www.parliament.uk/about/living-heritage/transformingsociety/livinglearning/school/overview/educationact1944/#:~:text=The%20Education%20Act%20of%201944%20was%20steered%20through%20Parliament%20by,secondary%20education%20for%20all%20pupils	UK Parliament "The Education Act of 1944" (2024)
UNICEF "Convention on the Rights of the Child" https://www.unicef.org/child-rights-convention/convention-text	UNICEF "Convention on the Rights of the Child" https://www.unicef.org/child-rights-convention/convention-text
United Nations Commission on International Trade Law "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018" (*Un.org*, 2018) https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation	UNCITRAL (2018)
United Nations https://www.un.org/en/global-issues/children	United Nations (2025) *CHILDREN*
United Nations https://www.un.org/en/about-us/universal-declaration-of-human-rights	United Nations (2025) *UDHR*

Van der Walt D "191 Cases of Sexual Misconduct Reported to SACE, Only 4 Educators Struck off the Roll!" (*Democratic Alliance*, 27 March 2023) https://www.da.org.za/2023/03/191-cases-of-sexual-misconduct-reported-to-sace-only-4-educators-struck-off-the-roll	Van der Walt (2023)
W	
Wallenfeldt J "Acts of Union: Uniting the United Kingdom" (*Encyclopedia Britannica*, 19 July 2018) https://www.britannica.com/story/acts-of-union-uniting-the-united-kingdom	Wallenfeldt (2018)
Workman-Davies B "The Right Not to Be Dismissed – a Multiplicity of Rights and Actions" (*Werksmans.com*, 2020) https://www.werksmans.com/legal-updates-and-opinions/the-right-not-to-be-dismissed-a-multiplicity-of-rights-and-actions	Workman-Davies (2020)
WorldAtlas "England" (24 April 2023) https://www.worldatlas.com/maps/united-kingdom/england	WorldAtlas "England" (2023)
WorldAtlas "Nigeria" (31 July 2023) https://www.worldatlas.com/maps/nigeria	WorldAtlas "Nigeria" (2023)
Zahorka H-J "Mediation in Labour Relations: What Can Be Learned from the North American and European Example?" Labour Legislation and Arbitration Project. EuropeAid/113649/C/SV/Ru. Annex 5. http://www.libertas-institut.com/de/PDF/Mediation.pdf	Zahorka (2022)

STRATEGIES, POLICIES AND REPORTS

Name	**Citation Mode**
B	
Bertelsmann Stiftung. BTI 2022 Country Report – Nigeria (Gütersloh 2022)	Bertelsmann Stiftung (2022)
Bhorat H, Pauw K and Mncube L. Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data Development (Policy Research Unit Cape Town 2007)	Bhorat et al (2007)
C	

Cawson P, Wattam C, Brooker S, and Kelly G. Child Maltreatment in the United Kingdom: A study of the prevalence of child abuse and neglect (2000 NSPCC, London)	Cawson et al (2000)
Culhane L and McGeough E. Respect, Equality, Participation: Exploring Human Rights Education in Great Britain. Research report. (Equality and Human Rights Commission, November 2020)	Culhane and McGeough (2020)
D	
Dawson K, Healy-Cullen K, MacNeela P and De Visser R. An Exploratory Study on Teacher Perpetrated Sexual Misconduct in Irish and UK Secondary Schools (DOI:10.13140/RG.2.2.30895.10406 2023)	Dawson et al (2023)
Department for Education and Skills. Schools Achieving Success. White Paper Cm 5230 (5 September 2001) https://www.gov.uk/government/publications/schools-achieving-success	Department for Education and Skills (2001)
Department for Education. Staffing and Employment Advice for Schools (2021) https://assets.publishing.service.gov.uk/media/616e92fd8fa8f529777ffc40/Staff_Advice_Handbook_Update_-_October_2021.pdf	Department for Education Staffing and Employment Advice for Schools (2021)
Department for Education. The Education Act 2011: Equalities Impact Assessment (5 May 2011) https://www.gov.uk/government/publications/the-education-act-2011-equalities-impact-assessment	Department for Education (2011)
Department of Education. White Paper on Education and Training. Notice 196 of 1995 (Department of Education, Parliament of the Republic of South Africa, Cape Town, 15 March 1995 WPJ/1995)	Department of Education (1995)
Department of Public Service and Administration. Guide on Managing Discipline in the Public Service (2021) https://www.dpsa.gov.za/dpsa2g/documents/iem/2021/Disicpline%20Management%20Guide.pdf	Department of Public Service and Administration (2021)
E	
ELRC Annual Report 2009/2010 ELRC Centurion (2010)	ELRC (2010)

ELRC Annual Report 2010/2011 ELRC Centurion (2011)	ELRC (2011)
ELRC Annual Report 2011/2012 ELRC Centurion (2012)	ELRC (2012)
ELRC Annual Report 2012/2013 ELRC Centurion (2013)	ELRC (2013)
ELRC Annual Report 2013/2014 ELRC Centurion (2014)	ELRC (2014)
ELRC Annual Report 2015/2016 ELRC Centurion (2016)	ELRC (2016)
ELRC Annual Report 2016/2017 ELRC Centurion (2017)	ELRC (2017)
ELRC Annual Report Annual Report 2014/2015 ELRC Centurion (2015)	ELRC (2015)
ELRC Annual Report 2017/2018 ELRC Centurion (2018)	ELRC (2018)
ELRC Annual Report 2018/2019 ELRC Centurion (2019)	ELRC (2019)
ELRC Annual Report 2020/2021 ELRC Centurion (2020-2021)	ELRC (2021)
ELRC Annual Report 2021/2022 ELRC Centurion (2022)	ELRC (2022)
F	
Federal Republic of Nigeria "National Policy on Education" 6th edition (2013) https://educatetolead.wordpress.com/wp-content/uploads/2016/02/national-education-policy-2013.pdf	Federal Republic of Nigeria "National Policy on Education" (2013)
G	
Government Digital Service "Serious Teacher Misconduct" (*GOV.UK*, 29 April 2014) https://www.gov.uk/report-teacher-misconduct	Government Digital Service (2014)
I	
IIEP-UNESCO Dakar. Education Sector Analysis of the Federal Republic of Nigeria, Assessing the Status of Education in the Federation and Oyo, Adamawa and Katsina States 2021 (Almadies–Route de Ngor World Bank, IIEP-UNESCO Dakar (2021)) https://unesdoc.unesco.org/ark:/48223/pf0000379618	IIEP-UNESCO Dakar (2021)
L	

Love I. Settling Out of Court: How Effective is Alternative Dispute Resolution? Viewpoint: Public Policy for the Private Sector; Note No. 239 (World Bank, Washington DC (2011))	Love (2011)
M	
Mahomed I, Olivier P, Mokgoro JY, Nhlapo RT, Gauntlett SC, Mojapelo P, and Seedat Z. Alternative Dispute Resolution. Issue Paper 8 Project 94 (South African Law Commission, Pretoria 1997)	Mahomed et al (1997)
S	
SACE Annual Report 2014/2015 (2015)	SACE (2015)
SACE Annual Report 2015/2016 (2016)	SACE (2016)
SACE Annual Report 2016/2017 (2017)	SACE (2017)
SACE Annual Report 2017/2018 (2018)	SACE (2018)
SACE Annual Report 2018/2019 (2019)	SACE (2019)
SACE Annual Report 2019/2020 (2020)	SACE (2020)
SACE Annual Report 2020/2021 (2021)	SACE (2021)
Shakeshaft C. Educator Sexual Misconduct: A Synthesis of Existing Literature (US Department of Education 2004) https://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf	Shakeshaft (2004)
T	
Teacher Registration Council of Nigeria (TRCN) Professional Diary: A News Magazine of the Teacher Registration Council of Nigeria, Federal Ministry of Education 2012/2013 Abuja 2013	TRCN (2013)
Teaching Regulation Agency. Teacher misconduct: the prohibition of teachers. Government consultation. 25 August 2021 19 October 2021. (*GOV.UK*, 1 February 2022) https://assets.publishing.service.gov.uk/media/611fdc2e8fa8f53dc88ae92a/Teacher_misconduct_the_prohibition_of_teachers_-_government_consultation.pdf	TRA (2022)
Teaching Regulation Agency. Teaching Regulation Agency Annual Report and Accounts. For the year ended 31 March 2023 (Department for Education)	TRA (2023)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1169468/TRA_Annual_Report_and_Accounts_2022-23.pdf	
Teaching Regulation Agency. Corporate plan. 1 April 2018 to 31 March 2021 https://dera.ioe.ac.uk/id/eprint/31424/1/teaching-regulation-agency-corporate-plan.pdf	TRA (2021)
Teaching Regulation Agency. Framework Document: Teaching Regulation Agency. Executive Agencies (September 2022) https://assets.publishing.service.gov.uk/media/63d165ddd3bf7f3c3e1c08d1/TRA_Framework_Document.pdf	Teaching Regulation Agency "Framework Document" (September 2022)
Teaching Regulation Agency. Teacher Misconduct: Information for Teachers (updated 28 January 2022) https://www.gov.uk/government/publications/teacher-misconduct-information-for-teachers/teacher-misconduct-information-for-teachers	Teaching Regulation Agency "Teacher Misconduct: Information for Teachers" (2022)
U	
UNESCO. School Violence and Bullying: Global Status Report. (UNESCO Publishing 2017)	UNESCO (2017)
UNICEF. UNICEF Annual Report 2021: Protecting child rights in a time of crises (2021) https://www.unicef.org/reports/unicef-annual-report-2021	UNICEF (2021)
UNICEF Office of Research. Fairness for Children: A league table of inequality in child well-being in rich countries. Innocenti Report Card 13, UNICEF Office of Research – Innocenti, Florence (2016)	UNICEF Office of Research (2016)
W	
White N Alternative Dispute Resolution: Mediation and Conciliation. (Law Reform Commission Ireland 98-2010 (2010))	White (2010)
Wiehahn N Report of the Wiehahn Commission of Inquiry into Labour Legislation ("Wiehahn Report") (Dept of Labour and of Mines, Republic of South Africa 1982)	Wiehahn (1982)
World Conference on Human Rights, Vienna, 25 June 1993, (A/CONF. 157/24 (Part 1), chap. 111). Fact Sheet No.10	World Conference on Human Rights (1993)

(Rev.1), The Rights of the Child. https://www.ohchr.org/en/about-us/history/vienna-declaration	