



## Reporting Sexual Offences Against Learners

### A legal duty to report

There is a legal duty to report sexual violence committed against learners. When we refer to a 'legal duty' to report, it means that not reporting has certain consequences. For example, in terms of section 110 of the Children's Act<sup>1</sup> and section 54 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>2</sup> both state that there is a duty to report any sexual offence committed against a child to the relevant authorities. When failing to do so the result in terms of both acts is criminal sanction, where failing to report carries a criminal sentence and/or a fine. What also emerges from a legal duty is the potential for a person to sue and claim damages against the person who has a duty to report and has failed to do so. In the case of an educator who fails to report that educator can be sued and/or, the school itself and/or, the Department of Basic Education.

### Who must report?

The Children's Act and Sexual Offences Act differ a bit on who exactly has a duty to report sexual violence committed against a learner. In terms of the Children's Act certain professions carry this duty, such as medical practitioners, nurses, social workers and importantly educators. Yet, in terms of the Sexual Offences Act any person who has knowledge of the sexual offence committed against a learner must report this. Under both laws educators have a legal duty to report sexual violence against learners and their failure to do so can result in criminal sanction against that individual and/or the individual educator and/or the school and/or the Department of Education can be sued. Important to note is when the Sexual Offences Act says a person who has knowledge of the commission of a sexual offence against a child must report, this creates a legal duty on *any* individual who has such knowledge to report the offence. This means family members, neighbours and community members all have a legal duty to report.

### Who must one report to?

In terms of the Children's Act sexual offences committed against learners should be reported to the provincial department of social development, a designated child protection organisation or a police official. The Sexual Offences Act on the other hand says that one must report the incident to a police official only. Educators can fill in what is called a 'Form 22' and submit it to any one of the above departments or organisations.<sup>3</sup> When submitting a report to the South African Police Service (SAPS) or a designated child protection organisation the report will be forwarded to the provincial department of social development.

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<sup>1</sup> Children's Act 38 of 2005 ('Children's Act').

<sup>2</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('Sexual Offences Act').

<sup>3</sup> Regulation 33 (Proclamation No. R. 497, 2012) Government Gazette June 29 (Regulation Gazette No. 35476) of the Children's Act. You can get a copy of Form 22 at [http://www.hpcs.co.za/uploads/editor/UserFiles/FORM\\_22.pdf](http://www.hpcs.co.za/uploads/editor/UserFiles/FORM_22.pdf).

The provincial department of social development or any designated child protections organisation who receives reports of sexual violence must submit the particulars of the abuse to the Director-General so it can be included in Part A of the National Child Protection Register.<sup>4</sup> An educator or any person acting on behalf of the child victim can also report the incident to the provincial department of education, which can result in a disciplinary hearing if the perpetrator is an educator.

### **Can I be sued for reporting a sexual offence by the perpetrator if he is found innocent?**

As long as a person makes a report of sexual violence in good faith (with honesty), no civil claim can be made against her/him. This is set out in section 110(3) of the Children's Act and 54(2) of the Sexual Offences Act. These two provisions act as protection for individuals who disclose sexual violence and should encourage people to come forward with reports.

### **What are the two processes that emerge from an educator failing to report and who handles them?**

When an educator reports a sexual offence against a learner two processes should take place if the perpetrator is an educator. The first is a criminal one; in this instance SAPS should open a case against the perpetrator and investigate. Following investigation, the National Prosecuting Authority (NPA) will decide whether to prosecute and if so the result will be a criminal trial. The second process that should take place is the provincial department of education should be advised of the offence and a disciplinary hearing against the educator perpetrator should take place. It is important that a report be made to the provincial education department, even if this is not a legal duty, as the educator perpetrator needs to be removed from the school as soon as possible to prevent further sexual violence against learners and to prevent further traumatising of the victim.

### **What if the parents of a learner do not want to pursue the matter, must an educator still report the sexual violence?**

The duty to report sexual violence against a learner is not dependent on whether the child's parents or care-giver want to pursue the matter, it is a legal requirement. Educators have a duty to report any instances of sexual violence committed against a learner and can face criminal sanction for failing to report such.

### **Can an educator have consensual sex with a learner?**

There is nothing in criminal law barring consensual sex between an educator and a learner older than 16 years old.<sup>5</sup> There is however a provision in the definition section of the Sexual Offences Act that might consider this as being rape. The definition of consent as set out in the act includes 'voluntary' or 'uncoerced agreement' and states that there is no consent in the case where there is an abuse of power or authority by the perpetrator to the extent that the victim is unable to show unwillingness or resistance.<sup>6</sup> In the instance of a relationship between an educator and a learner, not only is there a power difference because the educator is an adult and the learner a child, there is the added power difference because educators are legally considered as having a similar role to parents or care-givers of children ('loco in parentis') and are seen by children and treated by the law as similar to parental figures.

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<sup>4</sup> As above.

<sup>5</sup> Section 16 of the Sexual Offences Act.

<sup>6</sup> Section 1 of the Sexual Offences Act.

There is finally one extra level of power difference between learners and educators in so far as educators are respected individuals in our communities that makes disclosure of sexual abuse by the learner even more difficult as she may feel she will not be believed when she comes forward to report an educator. In terms of the Employment of Educators Act<sup>7</sup> it is considered serious misconduct if an educator has a sexual relationship with a learner in his/her school.<sup>8</sup> This may result in suspension of the educator as well as the commencing with disciplinary processes.<sup>9</sup> Sexual relationships (sexual abuse) between learners and educators should always be reported to both SAPS and the provincial department of education whether this is consensual or not.

**What if an educator offers damages (informal) to the parents of a learner sexually abused by that teacher, who must this be reported to?**

The parents or caregiver of a violated learner also have an obligation to report sexual violence committed against their child to the relevant authorities. If they fail to do so a case can be opened at a SAPS branch for this failure. The incident(s) of sexual violence should still be reported by any person who has knowledge of it to the provincial department of social development or a designated child protection organisation or to SAPS. Furthermore, the provincial department of basic education should be made aware of both the educator's sexual offence as well as the payment of informal damages to the parent or caregiver of the learner to make sure they do not report the abuse to SAPS. The department can then suspend the educator to make sure the abused learner's is safe from further abuse as well making sure other learners are safe and a disciplinary process against the educator can begin.

**The Shukumisa Coalition**

We are a coalition of over 60 organisations across South Africa working against sexual violence. We have a vision of a South Africa where adults and children are free from sexual violence. Our mission is to ensure that South Africa takes the problem of sexual violence seriously, as evidenced by well crafted, well implemented legislation derived from broad-based public participation processes.

For any questions or queries, please visit our website [www.shukumisa.org.za](http://www.shukumisa.org.za)  
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or on 021-447 1467

<sup>7</sup> Employment of Educators Act 76 of 1998 ('Educators Act').

<sup>8</sup> Section 17(c) of the Educators Act.

<sup>9</sup> Schedule 2, section 6 of the Educators Act.