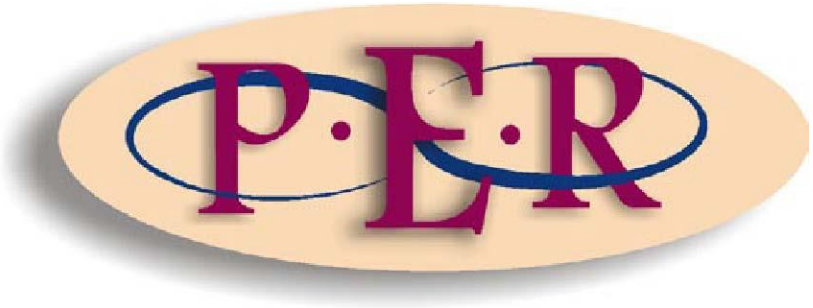
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EDUCATOR SEXUAL MISCONDUCT: EXPOSING OR CAUSING LEARNERS TO BE EXPOSED TO CHILD PORNOGRAPHY OR PORNOGRAPHY

SA Coetzee*

1 Introduction

Pornography is in the news not only because of StarSat's attempt to legalise the broadcasting of hard-core pornography on television in South Africa,[1] but also because of educators who have exposed their learners to pornography.[2] For example, an educator sent a photograph of himself sitting naked in the bathtub to a 16-year-old learner; a Cape dance teacher exposed girls as young as 12 to pornography; a principal showed a learner pornography on his cellphone; an educator watched pornography while his computer was unknowingly still connected to the projector, thereby exposing the whole class to pornography; and an educator took learners into the storeroom to watch a pornographic movie.[3]

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1 2015 (4) BCLR 402 (WCC).

2 In this article "learners" refers to persons who are receiving or obliged to receive education in terms of the South African Schools Act 84 of 1996 and who are still regarded as children in terms of section 28(3) of the South African Constitution of 1996; eg under the age of 18 years.
"Pornography" is defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 as "any image, however created, or any description of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature that is intended to stimulate erotic feelings, including any such image or description of such person
(a) engaged in an act that constitutes a sexual offence;
(b) engaged in an act of sexual penetration;
(c) engaged in an act of sexual violation;
(d) engaged in an act of self-masturbation;
(e) displaying the genital organs of such person in a state of arousal or stimulation;
(f) unduly displaying the genital organs or anus of such person;
(g) displaying any form of stimulation of a sexual nature of the female breasts;
(h) engaged in sexually suggestive or lewd acts;
(i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
(j) engaged in any conduct or activity characteristically associated with sexual intercourse; or
(k) showing or describing the body, or parts of the body, of that person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any other person or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person or any other person."

3 Eliseev 2013 http://ewn.co.za/2013/10/07/Sex-pest-should-have-been-suspended-immediately; Otto 2012 http://www.iol.co.za/capeargus/dance-teacher-raped-7-pupils-1.1400293; Slater 2014 http://bedfordviewedenvalenews.co.za/234042/porn-shown-to-school-pupils/; Teachers in sex

In the light of the high incidence of sexual violence that learners at South African schools are subjected to, being exposed to child pornography or pornography does not seem to be quite THAT serious. However, the law acknowledges that exposing children to child pornography or pornography is indeed harmful to them and that they need to be protected against being exposed to material that may be disturbing, harmful or age-inappropriate.[4] In this article explorative research was done on exposing or causing learners to be exposed to child pornography[5] or pornography in

show shock 2014 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71627?oid=639177&sn=Detail; SAPA 2013 http://www.sabc.co.za.news/a/7b1015804efac74f8b1e5daea0/Principal-shows-pupil-porn-report; SAPA 2014 http://citizen.co.za/148694/child-porn-case-opened-germiston-teacher/.

4 In this article "material" encompasses publications, films and games as defined in section 1 of the Films and Publications Act 65 of 1996. "Film" is defined as: "any sequence of visual images recorded in such a manner that by using such recording such images will be capable of being seen as a moving picture and includes any picture intended for exhibition through any medium or device". "Game" is defined as a computer game, video game or other interactive computer software for interactive game playing, where the results achieved at various stages of the game are determined in response to the decisions, inputs and direct involvement of the game player or players. "Publication" is defined as:
"(a) any newspaper, book, periodical, pamphlet, poster or other printed matter;
(b) any writing or typescript which has in any manner been duplicated;
(c) any drawing, picture, illustration or painting;
(d) any print, photograph, engraving or lithograph;
(e) any record, magnetic tape, soundtrack, or any other object in or on which sound has been recorded for reproduction;
(f) computer software which is not a film;
(g) the cover or packaging of a film; and
(h) any figure, carving, statute or model;
(i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet."

5 "Child pornography" is defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 as: "any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person -
(a) engaged in an act that constitutes a sexual offence;
(b) engaged in an act of sexual penetration;
(c) engaged in an act of sexual violation;
(d) engaged in an act of self-masturbation;
(e) displaying the genital organs of such person in a state of arousal or stimulation;
(f) unduly displaying the genital organs or anus of such person;
(g) displaying any form of stimulation of a sexual nature of such person's breasts;
(h) engaged in sexually suggestive or lewd acts;
(i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
(j) engaged in any conduct or activity characteristically associated with sexual intercourse;
(k) showing or describing such person -
(i) participating in, or assisting or facilitating another person to participate in; or
(ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or

order to distinguish between the various offences dealing with the matter and to conceptualise exposing learners, or causing the exposure of learners, to child pornography or pornography as forms of educator misconduct.[6] The author determined the seriousness that should be attached to these transgressions as forms of misconduct in the light of the various offences, the weight the law attaches to these transgressions, and the potential harm they could cause the victim as a child and as a learner.

2 Offences relating to the exposure of a child to child pornography or pornography

When it is said that somebody has showed pornography to a child the statement immediately elicits the response that the action constitutes sexual grooming, because sexual behaviour such as exposing or displaying pornography to a child is usually linked to the sexual grooming of a child.[7] Minnie,[8] however, emphasises that one should distinguish between the offence of sexual grooming and various behaviours used during a grooming process, because the offence is defined much more narrowly than the scope of grooming behaviours. Exposing a child to child pornography or pornography is one possible "grooming behaviour":

Exposing a child to child pornography or pornography as part of the sexual grooming process is criminalised in section 18(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007:[9]

> (2) A person ("A") who -
>
> (a) supplies, exposes or displays to a child complainant ("B") - …

(l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons."

6 See the explanation of the difference between a sexual offence, sexual misconduct and a breach of the Code of Professional Ethics in Coetzee 2011 *CARSA* 52.

7 Aucamp *et al* 2012 *CARSA* 3.

8 Minnie "Grooming as a precursor to sexual offences against children".

9 In this article the consolidated Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 as amended by the Judicial Matters Amendment Act 66 of 2008; the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 6 of 2012; and the Judicial Matters Amendment Act 42 of 2013 were used.

(ii) child pornography or pornography; …

with the intention to encourage, enable, instruct or persuade B to perform a sexual act;

(b) …

(e) … is guilty of the offence of sexual grooming of a child

As already averred to above, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides for a specific offence, eg "Exposure or display of or causing exposure or display of child pornography or pornography to children".[10] This offence is committed when person A:

> Unlawfully and intentionally exposes or displays or causes the exposure or display of -
>
> (a) Any image, publication, depiction, description or sequence of child pornography or pornography;
> (b) Any image, publication, depiction, description or sequence containing a visual presentation, description or representation of a sexual nature of a child, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 (Act No. 65 of 1996), or in terms of any other legislation; or
> (c) Any image, publication, depiction, description or sequence containing a visual presentation, description or representation of pornography or an act of an explicit sexual nature of a person 18 years or older, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 (Act No. 65 of 1996), or in terms of any other law,
>
> to a child ("B"), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a child.

How can one distinguish between exposing children to child pornography or pornography as part of the offence of sexual grooming and the offences of "Exposure or display of or causing exposure or display of child pornography or pornography to children"? All these offences are non-contact sexual offences which were created to protect children from paedophilic-type activities.[11] A single instance of exposing a learner to child pornography or pornography can never constitute grooming because grooming is a "process", a "cycle of abuse" which is aimed at

10 Section 19 of the Criminal Law (Sexual Offences) Amendment Act.
11 Fuller 2007 http://www.csvr.org.za/old/wits/papers/papfull.pdf.

enabling a premeditated, eventual sexual act.[12] Exposing a child to child pornography or pornography may, however, together with other sexual behaviours, form part of the normalisation and desensitization stages of the sexual grooming process.[13] Intention to *encourage, enable, instruct or persuade B to perform a sexual act* is not required for the offences of "Exposure or display of or causing exposure or display of child pornography or pornography to children". For these offences the requirement is the *intent to expose, display or causing exposure or display* of child pornography or pornography. Exposing the child to child pornography or pornography or causing the exposure, ARE the offences. The offender does not need to have envisioned an eventual sexual act before these offences will ensue. If an educator who has never made sexual advances towards a learner shows the learner a pornographic movie and thereafter rapes her, he could be charged with both the offence of exposing a child to pornography and rape, but not with the offence of sexual grooming.

Suppose learners of School D accessed pornographic sites from the school's computers and it transpires that the school had failed to take reasonable steps to ensure that learners cannot access pornographic sites from the school's computers.[14] Could it be argued that the school thereby caused the learners to be exposed to pornography and should the school authority be charged with unlawfully and intentionally having caused the exposure or display of child pornography or pornography to children? Though such an argument could be made, it would be difficult, if not impossible, to prove that the school had *intentionally* caused the exposure or display of child pornography or pornography to a child.[15]

Recently an educator was accused of not supervising children who accessed pornography on their cellphones and circulated that to younger children while the

12 Aucamp *et al* 2012 *CARSA* 3; Minnie "Grooming as a precursor to sexual offences against children"; Gillespie 2002 at 412 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2084816.

13 Kreston 2009 *CARSA* 42.

14 The measures that schools could take to prevent learners (or at least attempt to prevent them) from accessing pornographic websites falls outside the scope of this article. Those interested may find the following paper commissioned by the Internet Service Provider Association (ISPA) informative: Esselaar 2008 http://ispa.org.za/code-of-conduct/undesirable-content/.

15 The Films and Publications Act provides for a similar offence with regard to child pornography (see the discussion below).

educator was out of the class.[16] Though the respondents failed to respond and the case was decided in favour of the applicant, had the applicant had the opportunity to defend her case (and had she been charged with causing the exposure of learners to pornography) she could have relied on the absence of intent against the allegation of having caused exposure or the display of pornography to children.

The question is: Are educators who unintentionally show pornography to learners (such as the educator who watched pornography while his computer was unknowingly still connected to the projector, thereby exposing the whole class to pornography) off the hook because intent is absent? The answer to this question will depend on whether the prosecutor can prove *dolus eventualis*, eg that while the educator did not desire that learners be exposed to pornography, he foresaw the possibility that that might happen but continued watching pornography while in the classroom. Unless the educator confesses, evidence will have to be inferred from the educator's conduct.[17] For example, if the educator had sat in the store room behind a locked door while watching pornography without being aware that his computer was still connected to the projector, it might be inferred that he lacked the intention to expose the learners to pornography because he took precautions not to expose the learners. De Vos[18] warns that "intention" should not be confused with "motive". Thus, the educator's motive (reason) for watching pornography in the classroom cannot be regarded as meaning that he meant the learners to be exposed to pornography.

The definition of "sexual abuse" in section 1 of the Children's Act 38 of 2005 includes

> (c) using a child in or deliberately exposing a child to sexual activities or pornography

"Deliberately" indicates that intent is also required for this offence. Though the educator may succeed in the defence of absence of intent with regard to the offences of causing children to be exposed to pornography and sexual abuse, he

16 CCMA arbitration award GAEK-6695-12 para 6. It wasn't clear from the arbitration award whether the applicant was charged only with failure to supervise or with causing learners to be exposed to pornography.

17 Snyman *Criminal law* 189.

18 De Vos 2013 http://constitutionallyspeaking.co.za/oscar-pistorius-criminal-law-101.

may be found guilty of negligence. If the educator did not actually subjectively foresee the possibility of the consequence, though he reasonably should have objectively foreseen the consequence, this would constitute gross negligence.[19] In this instance it is probably a case of conscious negligence (*luxuria*), eg the educator had foreseen the possibility that learners might see the pornography while he was watching it but unreasonably decided that that would not happen.[20]

The Films and Publications Act 65 of 1996 contains offences in relation to exposing children to disturbing, harmful and age-inappropriate materials such as child pornography and pornography.[21] In terms of sections 24A(2) or (4) of the Films and Publications Act 65 of 1996, a person commits an offence if he or she knowingly broadcasts, distributes or exhibits to a child material classified as "Refused" (eg child pornography), "XX", "X18", or material which contains depictions, descriptions or scenes of explicit sexual conduct.[22] For the purposes of sections 24A and 24B of the Films and Publications Act 65 of 1996, "distribute", in relation to a film or a publication,

> …, includes to hand or exhibit a film, game or a publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access thereto by such a person.

It should be noted that this does not mean that the mere distribution of prohibited material will automatically constitute an offence, because the offences in sections 24A(2) and (4) require that the distribution should have been made "knowingly" in

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19 See Neethling and Potgieter *Law of delict* 127 for an explanation of the difference between *dolus eventualis* and *gross negligence.*

20 See Snyman *Criminal law* 187-188 and 219 for an explanation of conscious negligence.

21 In this article the consolidated version of the Films and Publications Act 65 of 1996 as amended by the Films and Publications Amendment Act 34 of 1999, the Prevention and Combatting of Corrupt Activities Act 12 of 2004, the Films and Publications Amendment Act 18 of 2004, the Films and Publications Amendment Act 3 of 2009 were used.

22 s 24A(2) of the Films and Publications Act 65 of 1996 prohibits the distribution of child pornography or "XX" rated material irrespective of whether it is to an adult or a child. Section 24A(4) of the Films and Publications Act 65 of 1996, reads:
Any person who knowingly distributes or exhibits any film, game or publication -
(a) classified as "X18"; or
(b) which contains depictions, descriptions or scenes of explicit sexual conduct, unless such film, game or publication is a *bona fide* documentary or is of scientific, literary or artistic merit or is on a matter of public interest,
to a person under the age of 18 years, shall be guilty of an offence and liable, upon conviction, to a fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

order to constitute the relevant offences. There is much debate on whether "intentionally" and "knowingly" should be regarded as synonyms. The definition of "knowingly" in section 1 of both the Broad-based Black Economic Empowerment Amendment Act 46 of 2013 and the Companies Amendment Act 3 of 2011 gives some idea as to the meaning that should be attached to the term:

> that the person either-
> (a) had actual knowledge of that matter; or
> (b) was in a position in which the person reasonably ought to have -
> (i) had actual knowledge;
> (ii) investigated the matter to an extent that would have provided the person with actual knowledge; or
> (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.

Unfortunately it is not clear what is meant by "the matter" and whether that encompasses knowledge of the crime as well as knowledge of unlawfulness. The Model Penal Code of the American Law Institute indicates that there is a difference between "intentionally" and "knowingly":

> A person acts knowingly when he is aware that his conduct will result in certain consequences.

If one adapts the Institute's example, the difference between "intentionally" and "knowingly" can be illustrated as follows: Mr Educator knows that if he shows pornography to a learner with whom he has a "love relationship" in the class on the projector during break, that other learners who walk past his classroom will also be exposed to the pornography, but he shows the pornography anyway and some of the other learners see it. Thus, the educator had the intent that the learner with whom he has a "love relationship" be exposed to pornography but he also knowingly exposed other learners to pornography.[23]

Chetty and Basson[24] contend that the offence of failing to take reasonable steps to prevent access to child pornography provided for in section 27(3) of the Films and Publications Act 65 of 1996 may "in appropriate circumstances be extended to include those who have control over the child's access to the Internet" (such as

[23] American Law Institute 2003 http://nationalparalegal.edu/public_documents/courseware_asp_files/criminalLaw/basicElements/ModelPenalCodeMensRea.asp.

[24] Chetty and Basson 2006 http://www.gov.za/sites/www.gov.za/files/report%20internet%20usage%20and%20exposure%20of%20pornography_0.pdf.

schools and educators). This section was repealed and section 27A(4)(b) was inserted. However, section 27A(4)(b) applies to Internet service providers only. Though "Internet service provider" is defined very broadly as "any person who carries on the business of providing access to the Internet by any means", it is doubtful whether one can argue that schools are really in the *business* of providing access to the Internet. Furthermore, it is clear that the Internet Service Providers' Association does not regard schools as "service providers". In a report commissioned by the Internet Service Providers Association, Esselaar classifies schools under "Public services" together with Internet cafés and libraries.[25]

As the definitions of child pornography and pornography are broad enough to include material used in sex education offered as part of Life Orientation, schools may request the Film and Publication Board to reduce the age restriction category of films with educational value. If the application is successful, the Film and Publication Board may impose certain viewing conditions which should be adhered to strictly and may include but are not limited to:

> (i) A minimum number of suitably-qualified educators to supervise the viewing of the film;
>
> (ii) A mandatory briefing by suitably-qualified educators prior to the viewing of the film to prepare the learners for what to expect, and to provide an opportunity for sensitive learners to leave without viewing the material; and
>
> (iii) A mandatory debriefing by suitably-qualified educators, after the viewing of the film, to provide further context for the material, if necessary to reassure learners who may be adversely affected, and to allow them to ask questions and share experiences of the material.[26]

The Films and Publications Act 65 of 1996 makes the reporting of persons who expose children to child pornography to the police obligatory; failure to do so constitutes a punishable offence.[27] As exposing children to child pornography or pornography constitutes child sexual abuse, educators have a legal obligation in terms of section 110(1) of the Children's Act 38 of 2005 to report the matter to the relevant provincial department of education. Furthermore, section 54(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

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25 Esselaar 2008 http://ispa.org.za/code-of-conduct/undesirable-content/.

26 Item 19.2 in GN 770 in GG 38051 of 3 October 2014.

27 Section 24B (2) of the Films and Publications Act.

requires that the commission of any of the sexual offences included in the Act be reported to the police.[28]

3 Exposing learners to child pornography or pornography as educator sexual misconduct

Educator misconduct is regulated by the Employment of Educators Act 76 of 1998.[29] Exposing or displaying or causing the exposure or display of pornography to a child is regarded as section 18 misconduct. Cases where an educator has shown pornography to learners are dealt with in terms of section 18(q) of the Employment of Educators Act 76 of 1996, which states that it constitutes misconduct if an educator

> while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner.[30]

The harm in exposing children to *child* pornography is regarded as more serious than exposing learners to pornography. In the *De Reuck v Public Prosecutions (Witwatersrand Local Division)* the Constitutional Court highlighted the harms of child pornography:,

> there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available.[31]

The seriousness ascribed to child pornography is also evident from the many offences dealing specifically with child pornography, such as: "Exposure or display of or causing exposure or display of child pornography to persons 18 years or older",

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28 Chetty and Basson 2006 http://www.gov.za/sites/www.gov.za/files/report%20internet%20usage%20and%20exposure%20of%20pornography_0.pdf. Also see Coetzee 2011 *CARSA* 58-59.

29 Sections 17 and 18 and Schedule 2. In this article the Employment of Educators Act 76 of 1998 as amended by the Educations Laws Amendment Act 48 of 1999, the South African Council for Educators Act 31 of 2000, the Education Laws Amendment Act 53 of 2000, the Education Laws Amendment Act 57 of 2001, the Education Laws Amendment Act 50 of 2002, the Education Laws Amendment Act 1 of 2004, the Education Laws Amendment Act 24 of 2005, the Further Education and Training Colleges Act 16 of 2006 and the Basic Education Laws Amendment Act 15 of 2011 (hereafter the Employment of Educators Act) were used.

30 ERLC arbitration award PSES-49-09/10KZN 2010, para 27 https://www.google.co.za/?gfe_rd=cr&ei=JhytVJSZLuuo8wfo8oL4Ag&gws_rd=ssl#q=Dispute+resolution+services:+Arbitration+awards+for+sexual+harassment+cases+(2009%E2%80%932010).+

31 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 ZACC 19 para 63.

"Using children for or benefiting from child pornography" and the prohibition of the creation, production, possession, importation and exportation of child pornography.[32]

Harm can be determined by the impact the exposure to child pornography or pornography has or could possibly have on the child. The Film and Publication Board determines "impact" by looking at the potential effect of a single classifiable element such as imitative acts and techniques, nudity, sexual conduct or sex-related activity and sexual violence or the cumulative effect of a number of these elements. Based on the impact, material falling within the definition of child pornography draws a "Refused" classification and must be reported to the police.[33] Section 24A(2)(b) of the Films and Publications Act 65 of 1996 prohibits the broadcasting, distribution, exhibition, offering for sale or hire or the actual sale or hire, or advertising for exhibition, sale or hire of material falling within the "XX" rating. In terms of sections 16(4)(b) and 18(3)(b) of the Films and Publications Act 65 of 1996 material classified as "XX" is regarded as very harmful to children and the distribution or exhibition thereof to the public is totally prohibited.

The author contends that exposing children to child pornography or any pornography that falls within the "XX" category should draw dismissal. However, the current forms of serious misconduct in section 17 of the Employment of Educators Act 76 of 1998 do not cover these offences. The author asserts that a new form of misconduct should be inserted in section 17 of the Employment of Educators Act 76 of 1998 to cover exposing or causing the exposure of learners to child pornography or pornography that falls within the "XX" category. Exposing learners to any of the following should thus be regarded as serious misconduct:

- child pornography
- propaganda of war or incitement to imminent violence
- material that contains advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm

[32] Sections 10 and 20 of the Criminal Law (Sexual Offences) Amendment Act and s 24B(1) of the Films and Publications Act.

[33] Sections 16(4)(a), 16(6), 18(3)(a)(i) and 18(5) of the Films and Publications Act 65 of 1996.

- material that contains explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person, is degrading of human beings, constitutes incitement, encourages or promotes harmful behaviour
- material which contains bestiality, incest, rape, explicit infliction of sexual violence or explicit visual presentation of extreme violence.[34]

Where an educator has exposed a learner to child pornography or pornography as part of a sexual grooming process, the presiding officer should consider the fact that the exposure was part of a sexual grooming process as an aggravating factor.

Material classified as "X18", eg "adults-only" in terms of sections 16(4)(c) or 18(3)(c) of the Films and Publications Act 65 of 1996, is classified as such because it contains disturbing, harmful or age-inappropriate materials which are "presumptively harmful" to children.[35] The author contends that exposing or having caused the exposure of learners to material classified as "X18" should be handled in terms of section 18 of the Employment of Educators Act. Where section 17 of the Employment of Educators Act deals with serious misconduct, section 18 deals with forms of misconduct that do not attract compulsory dismissal but which nevertheless result in a breakdown of the employment relationship. From the employer's side, the handling of educators who have exposed or have caused the exposure of learners to child pornography or pornography will be based on the premise that the educator's conduct has given rise to a breakdown in the employment relationship.[36] In the ELRC arbitration award between Motshoane and the Department of Education the arbitrator commented that:

> It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the "innocent" party to cancel the agreement.[37]

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34 Section 16(4) of the Films and Publications Act 65 of 1996.

35 Item 3.3(g) in GN 770 in GG 38051 of 3 October 2014.

36 ELRC arbitration award PSES582-13/14NW 2014 http://www.elrc.org.za/awards/award-pses582-1314-nw.

37 ELRC Arbitration Award PSES282–12/13GP 2013 http://www.elrc.org.za/awards/award-pses-282-%E2%80%931213-gp.

Sexual offences at a workplace will definitely be regarded as having affected the trust relationship, and if the employee is an educator it will be considered an aggravating factor. In the Arbitration Award between Natu obo Xolani Emmanuel Mabaso and the Department of Education[38] the arbitrator expressed the following sentiment:

> It is trite that sexual offences in the workplace are viewed in a serious light because of its very nature, that from an inherent perspective dents the trust relationship between Employer and Employee. Should it be found that the Applicant indeed conducted himself in the manner alleged by the complainant, the weight of the said offence would be aggravated by the fact that he was in a position of trust, ie an educator, and the complainant was in the vulnerable position of being a learner, and minor of age.

Exposing learners to child pornography or pornography also constitutes a contravention of the South African Council for Educators Code of Professional Ethics (hereinafter SACE Code). Depending on the circumstances of the case, exposing learners to child pornography or pornography could constitute a contravention of the following ethical and professional standards:

> An educator
> - respects the dignity and constitutional rights of learners (item 3.1)
> - avoids any form of humiliation, and refrains from any form of abuse, physical or psychological (item 3.5)
> - refrains from any form of sexual harassment (physical or otherwise) of learners (item 3.8)
> - does not abuse his or her position for personal gain (item 3.12)
> - behaves in a way that enhances the dignity and status of the teaching profession and that does not bring the profession in disrepute (item 7.2)[39]

Should an educator be found guilty of transgressing the SACE Code of Professional Ethics, he or she may be deregistered, which means that the educator may no longer be employed as an educator.[40] When considering the appropriate sanction, the presiding officer has to consider the extent to which the employment relationship was affected by the misconduct and whether the employment relationship has broken down to such an extent that it cannot be repaired. During this process the harm caused to the learner should be taken into account.

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38 ELRC Arbitration Award PSES198-09/10KZN 2010 https://www.google.co.za/?gfe_rd=cr&ei=JhytVJSZLuuo8wfo8oL4Ag&gws_rd=ssl#q=Dispute+resolution+services:+Arbitration+awards+for+sexual+harassment+cases+(2009%E2%80%932010).+.

39 SACE *Code of Professional Ethics* paras 3.1, 3.5, 3.8, 3.13, 7.2 http://www.sace.org.za/upload/files/ethics-brochure.pdf.

40 SACE *Code of Professional Ethics*, paras 1.2, 7.1.3 http://www.sace.org.za/upload/files/ethics-brochure.pdf.

4 Recognition in law of the harm child pornography or pornography holds for children

There is the inclination to regard non-contact sexual child abuse such as sexual grooming, exposing or causing learners to be exposed to pornography as not serious and lesser offences.[41] It is argued that a child suffers no "real harm" when being exposed to pornography. As Le Roux[42] correctly indicates, there is an array of research on the potential harm of pornography for children with "contradictory, debatable and confusing" results.

In this article the focus is on what the law accepts as harmful to children. The offences as set out in section 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007[43] contains indications of why exposing children to child pornography or pornography should be prohibited, eg because it "may be disturbing or harmful to, or age-inappropriate for children". It is evident from this that children's safety and development need to be protected. The same sentiments are evident from the aim of the Films and Publications Act 65 of 1996, eg preventing children from being exposed to "disturbing, and harmful materials and from premature exposure to adult experiences",[44] and the purpose of the classification system of films, interactive games and publications, eg "to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences".[45]

Finkelhor and Browne[46] refer to harm that is caused due to age-inappropriate sexual stimulation or conduct as "traumatic sexualisation". Traumatic sexualisation occurs when a

> child's sexuality (including his or her sexual feelings and sexual attitudes) is shaped in a developmentally inappropriate and interpersonally dysfunctional way.[47]

41 Aucamp *et al* 2013 *CARSA* 127.
42 Le Roux 2010 http://www.hts.org.za/index.php/HTS/rt/printerFriendly/847/1043.
43 Section 19 of the Criminal Law (Sexual Offences) Amendment Act.
44 Section 1(b) of the Films and Publications Act.
45 Item 1 in GN 770 in GG 38051 of 3 October 2014.
46 Finkelhor and Browne 1985 *American Journal for Orthopsychiatry* 531.

Being exposed to age-inappropriate sexual material is harmful to children because it distorts the development of the child's sexual identity. As children are not emotionally ready for the experience, they cannot filter or understand what they see and they may imitate or play out what they see without understanding that it is wrong.[48] Many of the reasons mentioned in an affidavit presented to the Western Cape High Court in the case *Justice Alliance of South Africa v Mncube and 2 Related Matters*[49] by a group of children in defence of why a pornography channel should not be allowed relate to the fact that age-inappropriate sexual material is harmful to children because it distorts the development of the child's sexual identity. The children argued that premature exposure to pornography may create false perceptions on how sex and sexual relations should be and it may result in children wanting to try what they saw because they are inquisitive and curious by nature. They also argued that it may cause girls to think they have to look and act like porn stars for boys to like them, it equates porn with sex in the minds of the youth, and it supports the integration of pornography into the social lives of the youth.[50] Commissioner Kruger[51] emphasised the need to protect learners, especially teenagers, against their own immature judgement, their impulsiveness and their vulnerability to be influenced. Because of this vulnerability, exposing learners to views that are frowned upon in society are harmful to them.

Both international and national law emphasise that children are vulnerable and in need of protection. Children have a right to protection, which translates into the right not to be subjected to harm (to be kept safe) and to ensure they receive what they need to "survive, develop and thrive".[52] The fact that this is guaranteed in the HRL arena "reflects a basic human consensus that a world fit for children is one in

47 Van der Merwe 2007 *CARSA* 15.

48 Chetty and Basson 2006 http://www.gov.za/sites/www.gov.za/files/report%20internet%20usage%20and%20exposure%20of%20pornography_0.pdf; Childline South Africa 2008 https://www.google.co.za/?gfe_rd=cr&ei=WYsyVfbCHuyo8weJ5oCYBw&gws_rd=ssl#q=Childline+How+children+are+exposed+and+why%3F+

49 2015 (4) BCLR 402 (WCC).

50 Justice Alliance of South Africa v Mncube and Others, Children's Affidavit 2007 http://justicealliance.co.za/download/cc-%20top%20TV%20childrens%27%20affidavits %2007-11-13.pdf.

51 CCMA pre-dismissal award GATW-10625-13 para 52.

52 Stanley and Appleton 2008 *Child Abuse Review* 76-77.

which all children are protected".[53] Article 19 of the United Nations Convention on the Rights of the Child guarantees a child's right to be protected from

> all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child[54]

The African Charter on the Rights and Welfare of the Child (African Children's Charter) obliges State parties to 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 … (art 16(1)).[55]

Protection against maltreatment, neglect, abuse or degradation is also guaranteed in section 28(1)(d) of the South African Constitution of 1996.[56] The protection of children is thus not only a legal duty in the normal sense of the word but also a constitutional duty. The importance attached to this duty is highlighted by the fact that it is guaranteed in the supreme law of the country.[57]

Section 28(2) guarantees children's right to have their best interests be regarded as of paramount importance. Pornography is not in the best interests of children.[58] Chetty and Basson[59] maintain that exposing learners to pornography is not in their best interests because it violates children's right to childhood innocence.

The *Classification guidelines for the classification of films, interactive computer games and certain publications* indicates the best interests of the child as one of the guiding principles that the Film and Publication Board should consider:

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53 O'Donnell and Seymour *Child protection: UNICEF Handbook for Parliamentarians No 7* 8, 13.

54 UN Doc A/44/49(1989) (hereinafter CRC). Ratified by South Africa on 16 June 1995.

55 OAU DocCAB/LEG/24.9/49 (1990) (hereinafter ACRWC). Ratified by South Africa on 7 January 2000.

56 Section 28(1)(d) of the Constitution.

57 Section 2 of the Constitution.

58 Justice Alliance of South Africa v Mncube and Others 2007 http://justicealliance.co.za/download/cc-%20top%20TV%20childrens%27%20affidavits %2007-11-13.pdf

59 Chetty and Basson 2006 http://www.gov.za/sites/www.gov.za/files/ report%20internet% 20usage%20and%20exposure%20of%20pornography_0.pdf.

> In making their decisions, classification committees, consistent with the principle that in all matters concerning children, the best interests of the child are paramount, aim to strike a reasonable balance between competing interests and the protection of children from potentially disturbing, harmful and age-inappropriate materials[60]

In the education milieu one of the most important rights that is affected by educator sexual misconduct, such as exposing a learner to pornography is children's right to a basic education, because such misconduct prevents them from full participation in education. The right to a basic education is a socio-economic right with both positive and negative dimensions.[61] The right to a basic education holds positive obligations (eg education has to be provided) and negative obligations (nothing may be done to prevent or hamper one's right to basic education). Sexual abuse creates barriers to learning and development because it changes a child's cognitive and emotional orientation to the world, distorts the child's self-concept, world view and affective capacities,[62] and is therefore an infringement of the learner's right to a basic education. Showing child pornography or pornography to learners is counter-productive to the aim of sexuality education, which includes the creation of a climate in schools where learners are free from sexual abuse and educators are living examples of the values enshrined in our Constitution.[63]

The guiding principles used by the Film and Publication Board may be most valuable to presiding officers deciding cases where educators have exposed or caused learners to be exposed to child pornography or pornography. One such guiding principle is that the impact of classifiable elements (and thus the possible harm)

> may increase in intensity according to frequency of occurrence, realism, detail, techniques used, and nature of theme, bona fide status, verbal references or visual presentation of sexually-related activity, sexual conduct or violence.[64]

Another guiding principle to consider is the release format of the material based on its impact, with regard to the following:

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60 Item 1 in GN 770 in GG 38051 of 3 October 2014.

61 *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 9.

62 Finkelhor and Browne 1985 *American Journal for Orthopsychiatry* 530.

63 Department of Education 2001 *Protecting the right to innocence: The importance of Sexuality Education* 7.

64 Item 3.3 in GN 770 in GG 38051 of 3 October 2014.

(a) the ability to replay scenes;

(b) the likelihood that certain scenes will be viewed out of context;

(c) the clarity of images;

(d) interactivity with an unknown third person; and

(e) the impact of technology such as 3D.[65]

From this one can deduce that exposing a learner to a pornographic video that can be replayed or a game where the learner can become interactive with a third person should be considered more harmful than exposing a learner to a hard copy of a pornographic photo.

The age of the learners should also be considered when determining the appropriateness of a sanction. Le Roux[66] correctly concludes that the effects of exposure to pornography will be "largely determined by the child's stage of development". For example, a film or video with a PG rating may be regarded as more harmful to very young children than to a matric learner. Similarly, a publication rated 18 may be regarded as more harmful to a 16 year old learner than to a matric learner.[67]

5 Giving consideration to the educator-learner relationship

The author contends that as exposing or causing the exposure of learners to child pornography or pornography are not contact or violent forms of sexual misconduct, the nature of the relationship between learners and educators will play a significant role in determining the harm arising from educators exposing learners to child pornography or pornography. The nature of the relationship between a learner and an educator, who stands *in loco parentis* towards the learners, renders any form of sexual involvement inappropriate.[68] In the ELRC arbitration award between Kgomo

65 Item 4 in GN 770 in GG 38051 of 3 October 2014.
66 Le Roux 2010 http://www.hts.org.za/index.php/HTS/rt/printerFriendly/847/1043
67 Item 4.3 in GN 770 in GG 38051 of 3 October 2014.
68 De Wet and Oosthuizen 2007 *Tydskrif vir Geesteswetenskappe* 87.

Mokhetle & Tlou obo Seema and the Department of Education, North West[69] the arbitrator emphasised:

> It is a well known (sic!) principle that educators are in loco parentis of their learners, meaning that they stand in the shoes of their learners' parents. It is expected of an educator [to] provide a moral leadership to learners and to provide safe learning environment to them. Educators are expected to protect their learners against all forms of abuse and they are under legal obligation, as in loco parentis to do so.

Though I agree with the argument that educator sexual abuse of learners has dynamics similar to incest because of the importance of trust in the relationship, to directly equate the educator-learner relationship with the parent-child relationship may be unsound.[70] In 2012, Section 27 and Lawyers Against Abuse, representing a learner who had been sexually abused by an educator, successfully argued before a Gauteng Magistrate's Court that "[a] teacher assumes parental responsibility for learners at the school at which he teaches," thereby creating a domestic relationship under the Domestic Violence Act 116 of 1998. The magistrate presiding over that case held that, pursuant to the Domestic Violence Act 116 of 1998, the learner was entitled to an order of protection against the educator who had abused her.[71] This argument may not be as sound as it may seem at first glance. In South Africa we have compulsory school attendance

> from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.[72]

As was argued in the Australian High Court in *Ramsay v Larsen* 1964 HCA 40, where there is compulsory school attendance it cannot be said that it is the parents (eg *in loco parentis*) that delegate authority and obligation to protect to educators. In such an instance it is the state that delegates the authority and places a duty of care on educators.[73] The obligatory positioning of children under the authority and control of

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69 ELRC arbitration award PSES270-09/10NW 2010 para 6.3 https://www.google.co.za/?gfe_rd=cr&ei=JhytVJSZLuuo8wfo8oL4Ag&gws_rd=ssl#q=Dispute+resolution+services:+Arbitration+awards+for+sexual+harassment+cases+(2009%E2%80%932010).+.

70 Knoll 2010 *Journal of Child Sexual Abuse* 377.

71 Section 27 2012 http://section27.nicework.co.za/victims-of-school-based-violence-afforded-protection-under-domestic-violence-act/.

72 Section 3(1) of the South African Schools Act 84 of 1996.

73 Law handbook 2013 http://www.lawhandbook.org.au/handbook/ch06s03s02.php.

an adult educator demands a much higher duty of care and response from the state when that relationship is violated.[74]

Furthermore, to ascribe educators' duty of care only to the fact that they are *in loco parentis* is to negate their professional status. Neethling[75] in my opinion correctly argues that the standard of care exercised by parents is not an appropriate standard for educators. Educators do not only act *in loco parentis* but also in their capacity as experts, eg professional educators. Educator-on-learner sexual misconduct such as exposing learners to pornography constitutes a violation of professional boundaries.[76] All forms of educator sexual misconduct presuppose a boundary transgression where the educator oversteps the educator-learner relationship boundaries. Interestingly, in a study conducted by Barrett, Headly, Stovall and Witte among all educators and school personnel in two school districts in Northwestern South Carolina, the educators rated boundary violations (such as educator sexual misconduct) as the single most serious ethical violation.[77]

This duty of care exists whenever an educator-learner-relationship exists.[78] Thus, this duty is owed whenever the educator acts in his capacity as educator, eg an authority figure. The educator cannot argue that he or she has showed pornography to a learner after school or at his or her home. It should be kept in mind that the educator has requested (or ordered) the learner to stay after school or to come to his or her home in his or her capacity as an educator. Summit[79] emphatically states that the basic subordination and helplessness of children within authoritarian relationships cannot be ignored, especially as parents and schools expect (and even require) learners to be obedient to adults entrusted with their care. Educators

74 Avon Global Center for Women and Justice 2014, at 4 http://resourcecentre.savethechildren.se/sites/default/files/documents/south_africa-sexual_violence_by_educators_in_south_african_schools-_gaps_in_accountability_may_2014.pdf.

75 Potgieter J 2004 *Perspectives in Education* 155.

76 Knoll 2010 *Journal of Child Sexual Abuse* 375; Strydom *Sexual abuse within the context of public education* iv, 16.

77 Barrett *et al* 2006 *Journal of Psychology* 430.

78 Law handbook 2013 http://www.lawhandbook.org.au/handbook/ch06s03s02.php.

79 Summit 1983 *Child Abuse and Neglect* 182.

always stand in a protective relationship towards learners,[80] and must act accordingly.

Educators are important behavioural models and must model Constitutional norms and values.[81] Because educators play such an important role in transmitting cultural norms and values, they are important behavioural models of what acceptable social interactions are.[82] Educators who expose learners to pornography may teach learners implicit lessons such as that it is normal for educators and learners to share sexual information.

6 CONCLUSION

All the offences related to the exposure or causing the exposure of children to child pornography or pornography are non-contact sexual offences primarily aimed at protecting children from being exposed to material that may be disturbing, harmful to or age-inappropriate for them. It is relatively "easy" to distinguish exposing children to child pornography or pornography as part of sexual grooming from the other offences, because grooming requires that the exposure be part of the grooming "process" and that there must be an intention to facilitate a premeditated sexual act.

It is evident that the current provision of what constitutes serious misconduct in section 17 of the Educators Employment Act 76 of 1998 is not sufficient for effectively dealing with educators who expose or cause learners to be exposed to child pornography or pornography that can be classified as "XX". The law clearly regards offences related to child pornography in a more serious light than offences dealing with pornography in general, and the forms of educator sexual misconduct should accommodate this distinction. There is a need for a new form of serious misconduct to cover instances where educators have exposed or have caused learners to be exposed to child pornography or any pornography that can be

80 De Wet ('s.a.') at 25 https://www.google.co.za/?gfe_rd=cr&ei=zugzVc3ZOO eo8wfM1oHwAQ&gws_rd=ssl#q=Annexure+A:+Misconduct:+Sexual+harassment+and+sexual+abuse+law+applicable+in+public+education.

81 Knoll 2010 *Journal of Child Sexual Abuse* 377; S 7(2) of the Constitution.

82 Knoll 2010 *Journal of Child Sexual Abuse* 377.

classified as "XX". The author suggests that the following section be inserted in section 17 of the Employment of Educators Act: *An educator must be dismissed if he or she is found guilty of – (g) exposing a learner to or causing exposure of a learner to material classified as "Refused" or "XX" in terms of the Films and Publications Act 65 of 1996*. An added bonus is that this form of serious misconduct will also cover exposing learners to material that contains propaganda of war or incitement to imminent violence, the advocacy of hatred based on any identifiable group characteristic, and incitement to cause harm.

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LIST OF ABBREVIATIONS

CARSA	Child Abuse Research South Africa
ELRC	Education Labour Relations Council
SACE	South African Council for Educators

EDUCATOR SEXUAL MISCONDUCT: EXPOSING OR CAUSING LEARNERS TO BE EXPOSED TO CHILD PORNOGRAPHY OR PORNOGRAPHY

SA Coetzee*

SUMMARY

The law recognises that non-contact sexual offences can cause harm and several offences were created to regulate non-contact sexual child abuse offences. Several of these offences deal with the exposure or causing exposure of children to child pornography or pornography. Sexual grooming of children and the "Exposure or display of or causing exposure or display of child pornography or pornography to children" are criminalised in sections 18(2) and 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. And offences in relation to exposing children to disturbing, harmful and age-inappropriate materials are criminalised in sections 24A(2) and (4) of the Films and Publications Act 65 of 1996. In this article the author considered the content of the offences of "Exposure or display of or causing exposure or display of child pornography or pornography to children" in relation to the other offences dealing with exposure of children to child pornography or pornography. Benchmarked against these criminal offences the author then conceptualised exposing learners, or causing the exposure of learners to child pornography or pornography as forms of educator misconduct. The seriousness that should be attached to these forms of misconduct was considered in light of the various criminal offences. The review of the criminal offences and the forms of educator misconduct brought the ineffectiveness of current forms of serious educator misconduct to the fore. There is no form of serious misconduct that covers the transgression of educators who expose learners to child pornography or

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pornography that can be classified as "XX". In conclusion a suggestion is made with regard to how a new form of serious misconduct could be worded so as to cover this gap, eg *An educator must be dismissed if he or she is found guilty of – (g) exposing a learner to or causing exposure of a learner to material classified as "Refused" or "XX" in terms of the Films and Publications Act 65 of 1996*.

KEYWORDS: child pornography, Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Employment of Educators Act 76 of 1998, Films and Publications Act 65 of 1996, educator sexual misconduct, pornography.