

THE BEST INTERESTS OF THE CHILD IN SCHOOL DISCIPLINE IN SOUTH AFRICA



JM Reyneke

**THE BEST INTERESTS OF THE CHILD IN SCHOOL
DISCIPLINE IN SOUTH AFRICA**

Proefschrift ter verkrijging van de graad van doctor
aan Tilburg University,
op gezag van de rector magnificus,
prof. dr. Ph. Eijlander,
in het openbaar te verdedigen ten overstaan van een
door het college voor promoties aangewezen commissie
in de aula van de Universiteit

op vrijdag 28 juni 2013 om 10:15 uur

door

Jacomina Margaretha Reyneke
geboren op 1 februari 1970
in Schweizer-Reneke, Zuid-Afrika

Promotores: prof. dr. J. de Groof
prof. dr. J.L. Pretorius
prof. dr. W.J.M. van Genugten

Leden van de Promotiecommissie: prof. dr. H.P. Füssel
prof. dr. J.G. van Staden
prof. dr. G.M.L.V. Lauwers
prof. dr. W. Berka

This work is partially sponsored by the Thuthuka Programme of the South African National Research Foundation.

***Dedicated to my husband, Roelf
and sons, Roelf and Victor.***

I love you very much.

ACKNOWLEDGEMENTS

Heavenly Father, you kept your promises throughout this study and gave me strength and provided for my every need in abundance. May this thesis contribute, in a small way, to love, peace, understanding and reconciliation, and, above all, Glory to Thy Name.

I wish to extend a sincere word of gratitude to the following persons and institutions for their contributions:

- Professors Jan de Groof and Willem van Genugten from Belgium and the Netherlands respectively. Thank you for providing me with the opportunity to be exposed to the world of international scholars in education law. It is a privilege to learn from you and to be associated with your institutions. I appreciate the time you gave and the efforts you made to guide me through this study and to make me feel part of the WELA (World Education Law Association) family.
- Professor Loot Pretorius of the University of the Free State, South Africa. I honour your unfailing commitment, patience, wisdom, and example of striving for excellence and scholarship.
- Tilburg University for providing me with an opportunity to study at your institution as a foreign student.
- Mrs Hesma van Tonder, the most capable law librarian in the world. Without you, this thesis would not have been possible. Your dedication, service delivery and loyalty are unsurpassed.
- Mr John Henderson, the language editor. Your professionalism, work ethic, and all the time that you spent over weekends to finish this project in time are the reason you are so highly commended by so many. Your dark humour and your level-headedness when the pressure mounted played an important role in getting this project “done and dusted”, to use your turn of phrase.
- Colleagues at, and the management of, the Faculty of Law, University of the Free State, for their support, understanding and encouragement throughout this project.
- Prof Driekie Hay, Vice Rector, for encouraging and financially supporting my transfer to Tilburg University.
- The National Research Foundation for providing partial financial support through the Thuthuka Programme.

- Family and friends for supporting me, believing in me and being there for me. In particular, my parents Gert and Magdaleen Victor: thank you for always encouraging me, having high expectations, and emphasising the importance of giving back to one's community, of standing up for what is right, and of speaking up for those who cannot speak for themselves.
- My children, Roelf and Victor – you grew up and became two fine young men while I spent time on this thesis. I am so proud of who you are. I missed you so much. I wish I could turn the clock back and be part of all your activities and support you the way I would have preferred to. Thank you for the way that you coped on your own and tried to accommodate me. You are supposed to be just boys, but you acted like real gentlemen throughout this testing time in our family. I trust that this thesis, and what flows from it, will somehow have a positive impact on your lives. I really look forward to spending more time with you.
- My dear husband and best friend, Roelf – without you I would never have accomplished this. You never complained, tried to assist as far as possible and alleviated the pressure. You listened to my arguments and took on so many of my responsibilities. Your insights and your technical assistance with the finalisation were invaluable. Most of all, thank you for allowing me to grow and find fulfilment. I am blessed to have you in my life. Thus far, the journey of implementing restorative practices in schools with you has been very precious. I am looking forward to continuing this journey and embarking on further research with you.

Because of this decision we don't evaluate people by what they have or how they look. We looked at the Messiah that way once and got it all wrong, as you know. We certainly don't look at him that way anymore. Now we look inside, and what we see is that anyone united with the Messiah gets a fresh start, is created new. The old life is gone; a new life burgeons! Look at it. All this comes from the God who settled our relationships with each other. God put the world square with himself through the Messiah, giving the world a fresh start by offering forgiveness of sins. God has given us the task of telling everyone what he is doing. We're Christ's representatives. *God uses us to persuade men and women to drop their differences and enter into God's work of making things right between them.* We're speaking for Christ himself now:
Become friends with God; he's already a friend with you.

2 Corinthians 5:16-20

Table of Contents

ACKNOWLEDGEMENTS	ii
CHAPTER 1	1
INTRODUCTION	1
1. RATIONALE AND BACKGROUND	1
2. STATEMENT OF THE PROBLEM, AND RESEARCH QUESTIONS	9
2.1 Statement of the problem	9
2.2 Research questions	13
3. AIMS AND OBJECTIVES OF THE STUDY	14
4. RESEARCH DESIGN AND METHODOLOGY	14
4.1 Conceptualising the best-interests-of-the-child concept through constitutional interpretation	16
4.1.1 Textual analysis of section 28(2) of the Constitution	17
4.1.2 The best interests of the child and the content of other constitutional rights and values	18
4.1.3 The best interests of the child and constitutional values	19
4.1.4 The best interests of the child and international and foreign law	20
4.1.5 The best interests of the child and public opinion	22
4.1.6 The best interests of the child and a specific approach to interpretation	22
4.1.6.1 Purposive interpretation	23
4.1.6.2 Teleological interpretation	25
4.2 Evaluation through a policy analysis	26
5. FOCUS AND DEMARCATION OF THE STUDY	26
6. TERMINOLOGICAL CLARIFICATION	28
7. OUTLINE OF CHAPTERS	34
8. CONCLUSION	35

CHAPTER 2	37
CONTEXTUAL BACKGROUND: DISCIPLINE IN SOUTH AFRICAN SCHOOLS	37
1. INTRODUCTION	37
2. BACKGROUND ON SCHOOLS	38
3. DISCIPLINE	42
3.1 Defining “discipline”	42
3.2 Use of the term “discipline”	47
3.3 Distinguishing discipline and punishment	48
4. BEHAVIOUR, MISBEHAVIOUR AND DISCIPLINARY PROBLEMS	52
5. NATURE AND EXTENT OF DISCIPLINARY PROBLEMS	52
5.1 School-based violence	54
5.1.1 Violent crimes	57
5.1.1.1 Murder, attempted murder and assault	57
5.1.1.1.1 Corporal punishment	58
5.1.1.2 Rape, statutory rape and sexual assault	60
5.1.1.3 Robbery	62
5.1.2 Other forms of school-based violence	62
5.1.2.1 Bullying	62
5.1.2.2 Gang activities	63
5.1.2.3 Verbal aggression	63
5.1.3 Crimes related to property	64
5.1.4 Drug and alcohol abuse	64
5.1.5 Measures taken to deal with school-based violence	64
5.1.6 Extent of school-based violence	65
5.2 Other forms of misconduct	66
5.3 Teenage pregnancies	66
6. PERCEPTIONS ON SCHOOL DISCIPLINE	67
6.1 Educators’ perceptions on discipline	67
6.1.1 Perceptions on crime	67

6.1.2	Perceptions on the level of violence.....	67
6.1.3	Perceptions on the type and level of ill-discipline in schools.....	68
6.1.4	Perceptions on the use of corporal punishment.....	71
6.2	Learners' perceptions on discipline.....	72
7.	IMPACT OF SCHOOL-BASED VIOLENCE AND OTHER FORMS OF MISCONDUCT.....	76
7.1	Impact on the safety of learners.....	76
7.2	Impact of corporal punishment.....	78
7.3	Impact of bullying.....	78
7.4	Impact of sexual harassment, abuse and rape.....	79
7.5	Intimidation of educators.....	80
7.6	Lack of work satisfaction and impact on the personal lives of educators.....	80
7.7	Impact on teaching time and deterioration of the teaching and learning environment.....	81
7.8	Impact on the dignity and other rights of educators and learners.....	81
8.	CAUSES OF DISCIPLINARY PROBLEMS.....	82
8.1	Disciplinary problems associated with the state.....	82
8.1.1	Lack of support from the Department of Education.....	82
8.1.2	Lack of effective action against the unlawful use of corporal punishment and the sexual abuse of learners.....	84
8.1.3	Outcomes-based education.....	86
8.1.4	Insufficient training in the use of alternative disciplinary measures.....	86
8.1.5	Overemphasis of children's rights and underemphasis of educators' rights.....	87
8.1.6	Overcrowded classes.....	90
8.1.7	Underresourced schools.....	91
8.1.8	Insufficient support structures to deal with serious misbehaviour.....	93
8.1.9	Different perceptions on democracy.....	94
8.2	Disciplinary problems associated with parents.....	96
8.2.1	Uninvolved parents.....	97
8.2.2	Undesirable home environment.....	97
8.2.3	Parents not supporting discipline enforced by the school.....	98

8.3	Disciplinary problems associated with school management and educators	99
8.3.1	Unacceptable examples set by educators	99
8.3.2	Underprepared and unprepared educators	100
8.3.3	Educator absenteeism and late-coming	101
8.3.4	Ineffective school and classroom management	102
8.3.5	Low morale	103
8.4	Disciplinary problems associated with learners	103
8.4.1	Challenging authority	103
8.4.2	Peer pressure	104
8.4.3	Gang activities	104
8.4.4	Lack of values	104
8.4.5	Lack of hope and vision for the future	105
8.4.6	Overage learners	106
8.4.7	Underage learners	114
8.4.8	Lack of learner accountability	115
8.5	Disciplinary problems associated with unions	115
8.6	Disciplinary problems associated with SGBs	116
8.6.1	Insufficient knowledge and skills	117
8.6.2	Overpoliticisation of the SGB	118
8.7	Disciplinary problems caused by society	118
8.7.1	Socio-economic background of learners	119
8.7.2	Diversity	119
8.7.3	The media	120
8.7.4	Uninvolvement of society	120
8.7.5	The legacy of apartheid	120
9.	CONCLUSION	121

CHAPTER 3	123
LEGAL BACKGROUND TO SCHOOL DISCIPLINE IN SOUTH AFRICA	123
1. AIM OF CHAPTER	123
2. INTRODUCTION	123
3. THE CONSTITUTION AND SCHOOL DISCIPLINE	125
4. <i>NATIONAL EDUCATION POLICY ACT 27 OF 1996</i>	128
5. <i>SOUTH AFRICAN SCHOOLS ACT 84 OF 1996</i>	129
5.1 Application of the <i>South African Schools Act</i>	129
5.2 Legal status of a public school	130
5.3 Governance of the school through the School Governing Body	131
5.3.1 Composition and liability of the School Governing Body	132
5.3.2 Functions of the School Governing Body	133
5.3.2.1 Promoting the best interests of the school	134
5.3.2.2 Developing the mission statement of the school	135
5.3.2.3 Adopting a code of conduct for learners at the school	136
5.3.2.4 Support function	136
5.3.2.5 Encouraging voluntary service to the school	137
5.3.2.6 Adopting a constitution and adherence to the code of conduct for school governing bodies	138
5.3.2.7 Acting in accordance with the Promotion of Administrative Justice Act	139
5.3.3 Failure by School Governing Body to perform functions	139
5.4 Management of school through the principal	140
5.4.1 The legal status of the principal	141
5.4.2 Functions of the principal	141
5.5 The code of conduct: general requirements	142
5.5.1 Guidelines for drafting a code of conduct	143
5.5.2 Aim	143
5.5.3 Some perspectives on the Guidelines	144
5.5.4 Participation	145

5.5.5	Content of the code of conduct	146
5.5.5.1	The preamble	146
5.5.5.2	School rules	146
5.5.5.3	Exemptions from school rules	149
5.5.5.4	Rights and responsibilities of learners	153
5.5.5.5	Enforceability of a code of conduct	155
5.5.5.6	Procedural rules	155
5.6	Formal disciplinary proceedings regarding serious misconduct	156
5.6.1	The nature of formal disciplinary proceedings	156
5.6.1.1	Due process and the interests of the perpetrator and others	157
5.6.1.2	Support measures and parental involvement in disciplinary proceedings ...	158
5.6.1.3	Role of the intermediary in disciplinary proceedings	159
5.7	Informal disciplinary measures relating to misconduct	159
5.8	Background to sanctions and consequences of misconduct	160
5.8.1	Impact of the Constitution	160
5.8.2	Prohibition of corporal punishment	160
5.8.3	Provisions of the Guidelines	163
5.8.3.1	Punishment as opposed to the educational purpose of discipline	163
5.8.3.2	Positive discipline	167
5.8.3.3	Reconciliation, peace and tolerance	168
5.8.3.4	Discipline and the development of the child	169
5.9	Sanctions for, and consequences of, misconduct after formal disciplinary proceedings	171
5.9.1	Suspensions	171
5.9.2	Expulsions	173
5.10	Sanctions for, and consequences of, misconduct after informal disciplinary measures	181
5.11	Searches and seizures	182
5.12	Provisions regarding repetition by learners	182
5.13	Admission requirements relevant to school discipline	183

5.13.1	Admission of learners under the age-grade norm	184
5.13.2	Admission of learners above the age-grade norm	187
5.14	Parental involvement in school discipline	188
6.	LACK OF FOCUS ON THE BEST INTERESTS OF THE CHILD WITHIN THE LEGAL FRAMEWORK ON DISCIPLINE	188
6.1	Ineffective inclusion of children in the process of drafting the code of conduct.....	189
6.2	Overemphasis of the rights of the transgressor	191
6.3	Narrow focus on the procedural and academic interests of learners	192
6.4	Support measures or structures for counselling	193
6.5	Role of the intermediary	197
6.6	Limitation of the School Governing Body's ability to appeal decisions of the Head of Department	198
6.7	Responsibility of the Head of Department for finding alternative placement for certain expelled learners only	199
6.8	Best interests of the child as opposed to the best interests of the school.....	199
6.9	Lack of prescriptions ensuring that sanctions serve the best interests of the child	200
6.10	Lack of focus on informal discipline	200
6.11	Admission policies and policy on repetition of grades	201
6.12	Insufficient content of the best-interests-of-children concept in school discipline: the need for a contextualised list of factors	201
6.13	Lack of guidance on an approach to discipline which meets the best-interests-of-the-child standard	203
7.	CONCLUSION.....	203
 CHAPTER 4		205
THE CONSTITUTIONAL FRAMEWORK FOR THE BEST-INTERESTS-OF-THE-CHILD PRINCIPLE.....		205
1.	INTRODUCTION	205
2.	DEVELOPMENT OF THE BEST-INTERESTS CONCEPT IN INTERNATIONAL LAW....	205
2.1	Impact of international law on the development of the best-interests concept.....	212

3.	DEVELOPMENT OF THE BEST-INTERESTS CONCEPT IN SOUTH AFRICAN LAW ...	214
3.1	The best interests of the child before 1994	214
3.2	The best interests of the child in the new constitutional dispensation	217
4.	TEXTUAL ANALYSIS OF SECTION 28(2) OF THE SOUTH AFRICAN CONSTITUTION	220
4.1	“A child”	220
4.2	“Best interests”	224
4.2.1	Which children’s best interests?.....	224
4.2.2	What constitutes the interests of children?	226
4.2.3	Variability of children’s interests	227
4.2.4	Short-, medium- or long-term interests	228
4.2.5	Implications of “best” interests	229
4.3	Paramount importance	230
4.4	“In every matter concerning the child”	240
4.4.1	Actions and matters concerning children	240
4.4.2	Direct and indirect actions or matters concerning children	241
5.	BROAD FUNCTIONS AND OPERATION OF THE BEST-INTERESTS CONCEPT	244
5.1	The best interests of the child as a benchmark.....	244
5.1.1	The best-interests-of-the-child concept interprets the provisions of section 28(1).....	245
5.1.2	The best interests of the child determine the ambit of other rights	246
5.1.3	The best interests of the child as a substantive right and principle	247
6.	APPLICATION OF THE BEST-INTERESTS CONCEPT	249
6.1	Best-interests concept applied in public and private law	249
6.2	Applying section 28(2) independently of, or in conjunction with, other rights	254
7.	CHALLENGES POSED BY, AND STRENGTHS OF, THE BEST-INTERESTS CONCEPT.....	255
7.1	Indeterminate nature of the concept as a challenge	255
7.1.1	The determination of the best interests of the child is context-sensitive	256
7.1.2	The future-oriented focus of the best-interests concept.....	257

7.1.3	The possibility of an unlimited number of choices and consequent outcomes ...	258
7.1.4	Subjective and objective approaches in determining the best interests of the child.....	259
7.1.5	The best-interests concept is an evolving one with no exhaustive content.....	261
7.1.6	The role of the child's views in determining the best interests of the child.....	261
7.1.7	Risk of social engineering	262
7.2	Indeterminate nature of the concept as a strength.....	262
8.	THE IMPLEMENTATION OF THE BEST-INTERESTS-OF-THE-CHILD CONCEPT	263
8.1	Failure to adhere to the best-interests-of-the-child benchmark	263
8.2	Application of best interests and the enforcement of socio-economic rights.....	269
8.3	The onus of proof and procedural rules in applying the best interests of the child	269
8.4	The application of the best interests of the child in administrative review proceedings.....	272
8.5	Lack of measures to guide and regulate the implementation of the best interests of the child in the context of school discipline	276
8.5.1	The role of independent parties in assisting with the determination of the best interests of the child.....	276
8.5.2	The role of a list of factors in addressing the indeterminacy of the best-interests-of-the-child concept	278
9.	CONCLUSION.....	281
 CHAPTER 5		283
THE BEST INTERESTS OF THE CHILD AND OTHER CONSTITUTIONAL RIGHTS IN THE CONTEXT OF SCHOOL DISCIPLINE		283
1.	INTRODUCTION	283
2.	RIGHT TO EDUCATION	285
2.1	The aims of education	286
2.1.1	The role of discipline in the holistic development of the individual child	289
2.1.2	The role of discipline in preparing the child to live a responsible life and to respect human rights.....	290
2.1.3	Preparing the child for responsible life through human rights education	291

2.1.3.1	Defining human rights education	292
2.1.3.2	Human rights education through the curriculum	294
2.1.3.3	Human rights education through the development of national policy and legislation.....	295
2.1.3.4	Human rights education on local level through the process of drafting of the code of conduct.....	297
2.1.3.5	Human rights education through the content of the code of conduct.....	297
2.1.3.6	Human rights education through policy implementation	297
2.1.3.7	Human rights education and informal disciplinary measures.....	299
2.1.3.8	Human rights education and formal disciplinary proceedings.....	300
2.1.3.9	Human rights education through the creation of a human rights culture	300
2.1.3.10	Human rights through education and the professional development of staff.....	302
2.2	Provision of education	302
2.2.1	International instruments and international documents on the provision of education	303
2.2.2	South African constitutional provisions on the provision of education	304
2.2.3	Clarification of terms	305
2.2.4	The four As and discipline	310
2.2.4.1	Availability	311
2.2.4.1.1	Availability of adequate physical resources	312
2.2.4.1.1.1	The availability of physical facilities for children with serious behaviour problems.....	313
2.2.4.1.2	Availability of a safe learning environment	314
2.2.4.1.3	Availability of properly qualified educators.....	315
2.2.4.1.4	Availability of an adequate number of educators.....	315
2.2.4.1.5	Availability of support measures and counselling services.....	316
2.2.4.1.5.1	Role of the state.....	317
2.2.4.1.5.2	Role of the School Governing Body	320
2.2.4.2	Accessibility	321
2.2.4.2.1	Non-discrimination	321

2.2.4.2.2	The implications of financial accessibility of education for disciplinary measures.....	322
2.2.4.2.3	Physical accessibility	324
2.2.4.2.4	Responsibility to promote access to social services	324
2.2.4.3	Acceptability	326
2.2.4.3.1	Acceptability of disciplinary measures	326
2.2.4.3.2	Acceptability of support measures and structures for counselling	328
2.2.4.3.3	Acceptability of legislation and policies impacting on discipline	329
2.2.4.4	Adaptability	330
3.	RIGHT TO DIGNITY	332
3.1	Dignity and international instruments related to discipline	332
3.2	Dignity in South African law	334
3.3	Content of the right to dignity	337
3.3.1	Inherent nature of the right to dignity	337
3.3.2	Dignity entails protection from inhuman conditions, treatment or punishment.....	337
3.3.3	Dignity entails equal worth and value.....	339
3.3.4	Dignity prohibits the objectification of people	340
3.3.5	Dignity entails autonomy and self-governance	342
3.3.6	Dignity recognises individual qualities and includes self-actualisation and self-identification.....	343
3.3.7	The collective dimension of dignity	346
3.3.8	Dignity sets boundaries.....	348
4.	RIGHT TO EQUALITY	349
4.1	Equality and international law	350
4.2	Equality in South African law	351
4.2.1	The relationship between equality and dignity	354
4.2.2	The relationship between equality and the right to education	356
4.2.3	Formal and substantive equality	357
4.2.4	Direct and indirect discrimination	360
4.3	Equality and specific aspects of school discipline	363

4.3.1	Equality and the provision of adequate and appropriate educational facilities and social services	363
4.3.2	Equality and the provision of support measures and counselling services	365
4.3.3	Gender equality and disciplinary measures	366
4.3.4	Equality and appeals by the School Governing Body after the Head of Department's refusal to expel a learner.....	368
4.3.5	Equality and the distinction between children under and above 15 years of age	370
4.3.6	Equality and the right to basic education and further education	374
4.3.7	Equality and certificates of good conduct.....	377
5.	RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT	380
5.1	Right to life, survival and development in international law	381
5.2	Right to life, survival and development in South African law	385
5.3	Right to life, survival and development, and disciplinary measures	388
5.3.1	Respect for and protection of life, and disciplinary measures	388
5.3.2	Promotion and fulfilment of the right to life, and disciplinary measures	390
5.3.3	Right to development, survival rights and disciplinary measures.....	391
5.3.4	Right to life, development and a safe environment	391
5.3.4.1	Violence and the creation of a safe environment.....	392
5.3.4.2	Neglect and a safe environment	393
5.3.4.3	Initiation practices and a safe environment.....	393
5.3.4.4	The internet, social networks and a safe environment.....	394
5.3.4.5	Physical resources and a safe environment	395
5.3.4.6	Adversarial processes and a safe environment	395
5.3.5	The right to development and unrestricted opportunities	399
6.	THE RIGHT TO PARTICIPATE.....	399
6.1	The international standard pertaining to the right to be heard.....	400
6.2	The right to participate in the South African legal context	401
6.2.1	The <i>Children's Act</i> 38 of 2005.....	401
6.2.2	Content of the right to participate in South Africa.....	402
6.2.2.1	"Every child"	403

6.2.2.2	The child must be allowed and enabled to participate	403
6.2.2.2.1	Creation of a safe space for participation	403
6.2.2.2.2	Facilitation of the child's voice	405
6.2.2.3	Due consideration of the child's views	407
6.2.2.3.1	Considering the child's voice through audience	407
6.2.2.3.2	Allowing the child's voice to influence decisions.....	408
6.2.2.3.3	Impact of age, maturity and development on the child's right to participate.....	410
6.2.2.4	Participation as an enforceable right.....	412
6.2.2.5	"In matters concerning the child".....	412
6.2.2.6	"In an appropriate way"	414
6.3	Levels of participation.....	414
6.3.1	Level 1: Children are listened to.....	417
6.3.2	Level 2: Children are supported in expressing their views	417
6.3.3	Level 3: Children's views are taken into account	418
6.3.4	Level 4: Children are involved in decision-making processes.....	418
6.3.5	Level 5: Children share power and responsibility for decision-making	419
7.	CONCLUSION.....	421
CHAPTER 6		423
APPROACHES TO DISCIPLINE		423
1.	INTRODUCTION	423
2.	A CONCEPTUAL FRAMEWORK TO DESCRIBE APPROACHES TO DISCIPLINE	423
3.	RETRIBUTIVE APPROACH TO DISCIPLINE	427
3.1	Features of retributive discipline	428
3.1.1	Authoritarianism, dominance, control and power relations.....	428
3.1.2	Focus on establishing guilt for breach of school rules.....	428
3.1.3	Processes are adversarial in nature and focus on consistency in observance of rules and in punishment.....	429
3.1.4	Traditional aims of punishment guide the outcome after a guilty verdict.....	429

3.1.5	Focus on the transgressor	429
3.1.6	Responsibility for actions is equated with punishment	430
3.2	Retributive disciplinary methods	430
4.	THE NEED TO INVESTIGATE ALTERNATIVES TO THE RETRIBUTIVE APPROACH	431
5.	RESTORATIVE JUSTICE APPROACH TO DISCIPLINE	433
5.1	Broad overview of the development of the application of restorative justice	433
5.2	Defining restorative justice	434
5.3	Restorative justice in South Africa	436
5.4	Comparison of the retributive and restorative approaches to discipline	439
5.5	The defining questions in the retributive and restorative approaches	442
5.6	Basic features of a restorative approach to discipline	443
5.6.1	Misbehaviour is harm done to another and creates obligations	444
5.6.2	Addressing the needs of those harmed by misconduct	444
5.6.3	Enhancing transgressor accountability and addressing needs	446
5.6.4	Community involvement	447
5.6.5	Addressing the harm, repairing relationships, and reconciliation	448
5.6.6	Problem-solving	450
5.6.7	Voluntary, inclusive and collaborative processes	451
5.6.8	Reintegration as opposed to stigmatisation	452
5.6.9	The importance of values in the restorative approach	452
5.7	Misconceptions and challenges in respect of the restorative justice approach	453
5.7.1	Restorative justice is not primarily about forgiveness and reconciliation	454
5.7.2	Restorative justice is not mediation	454
5.7.3	Restorative justice is not primarily designed to reduce recidivism or prevent repeat transgressions	455
5.7.4	Restorative justice is not a particular programme or blueprint	456
5.7.5	Restorative justice is not exclusively intended for comparatively minor transgressions and first-time offenders	456
5.7.6	Restorative justice is not a new development	457

5.7.7	Restorative justice is neither a panacea nor necessarily a replacement for existing legal systems	457
5.7.8	Restorative justice is not necessarily an alternative to punishment	457
5.7.9	Restorative justice is not a soft option and one that is too lenient to address misconduct and crime	458
5.7.10	Restorative justice and secondary victimisation and public retribution	459
5.7.11	Addressing cultural differences in the implementation of restorative justice ...	460
5.7.12	A multidisciplinary and multidimensional approach is needed to address misconduct	461
5.7.13	Restorative justice is a time-consuming process	461
5.7.14	The impact on the school's culture is not visible at first	462
5.7.15	Lack of communication skills	463
5.7.16	Unwilling and unconvinced administrators, policy-makers and school communities	463
5.8	A punishment-to-restoration discipline continuum to deal with misconduct	464
5.9	Restorative disciplinary methods	465
5.9.1	General principles of restorative practices	469
5.9.2	Preventative restorative practices through culture change	470
5.9.3	Informal restorative practices for less serious disciplinary issues	471
5.9.4	Formal restorative practices for serious disciplinary issues	472
6.	POSITIVE-DISCIPLINE APPROACH	474
6.1	Comparison of the positive-discipline and restorative-discipline approaches	477
6.1.1	Parties involved in the disciplinary process	477
6.1.2	Focus on harm and the restoration of relationships	478
6.1.3	Focus on proactive and reactive steps to address discipline	479
6.1.4	Doing <i>to</i> children as opposed to doing <i>with</i> children	480
6.1.5	Support for learners	482
6.1.6	The role of punishment	483
6.1.7	Accountability and responsibility	485
6.1.8	Level of child participation	487

7. CONCLUSION	488
CHAPTER 7	491
CONTEXTUALISED LIST OF FACTORS TO DETERMINE THE BEST INTERESTS OF THE CHILD AND EVALUATION OF APPROACHES TO SCHOOL DISCIPLINE.....	491
1. INTRODUCTION	491
2. BEST-INTERESTS FACTORS TO BE CONSIDERED IN EVALUATING APPROACHES TO SCHOOL DISCIPLINE.....	491
2.1 Disciplinary measures must be aimed at the holistic development of the individual child.....	492
2.1.1 Evaluation of the retributive approach to discipline.....	493
2.1.2 Evaluation of the restorative approach to discipline.....	494
2.2 Disciplinary measures must be aimed at developing the child's ability to function in a socially responsible manner in society.....	495
2.2.1 Evaluation of the retributive approach to discipline.....	497
2.2.2 Evaluation of the restorative approach to discipline.....	497
2.3 Disciplinary measures should create a safe environment conducive to teaching and learning	498
2.3.1 Evaluation of the retributive approach to discipline.....	499
2.3.2 Evaluation of the restorative approach to discipline.....	500
2.4 Disciplinary measures should address all the needs and interests of everyone involved in, or who has an interest in, the disciplinary matter	501
2.4.1 Evaluation of the retributive approach to discipline.....	502
2.4.2 Evaluation of the restorative approach to discipline.....	502
2.5 Disciplinary measures should give effect to the intrinsic worth and value of every child and should foster and develop the child's autonomy, self-respect, self-worth, self-actualisation, self-fulfilment, self-identification and self-determination.....	503
2.5.1 Evaluation of the retributive approach to discipline.....	504
2.5.2 Evaluation of the restorative approach to discipline.....	505
2.6 Disciplinary measures should be non-discriminatory and should contribute to the transformation goals of equal outcomes for everyone and to a just and equal society.....	506

2.6.1	Evaluation of the retributive approach to discipline	507
2.6.2	Evaluation of the restorative approach to discipline	508
2.7	Disciplinary measures must promote the child's ability to participate, which includes a safe environment, proper facilitation to elicit the child's voice, appropriate audience by an adult or specified body, and the ability to influence decisions.....	508
2.7.1	Evaluation of the retributive approach to discipline	509
2.7.2	Evaluation of the restorative approach to discipline	511
2.8	Disciplinary measures should foster learner accountability and responsibility	513
2.8.1	Evaluation of the retributive approach to discipline	514
2.8.2	Evaluation of the restorative approach to discipline	514
2.9	Disciplinary measures should be focused on building and repairing relationships	515
2.9.1	Evaluation of the retributive approach to discipline	516
2.9.2	Evaluation of the restorative approach to discipline	517
2.10	Disciplinary measures should ensure the development of the child through adequate support measures and structures for counselling	518
2.10.1	Evaluation of the retributive approach to discipline	518
2.10.2	Evaluation of the restorative approach to discipline	519
2.11	Disciplinary measures should reflect consciousness of the impact of the availability of education, especially with regard to the availability of physical resources, adequate numbers of educators and education material	519
2.11.1	Evaluation of the retributive approach to discipline	519
2.11.2	Evaluation of the restorative approach to discipline	520
2.12	Disciplinary measures should not jeopardise learners' access to education	520
2.12.1	Evaluation of the retributive approach to discipline	520
2.12.2	Evaluation of the restorative approach to discipline	522
2.13	Disciplinary measures should be flexible enough to adapt to the needs of changing school communities and different learners.....	523
2.13.1	Evaluation of the retributive and authoritarian approach to discipline	524
2.13.2	Evaluation of the restorative approach to discipline	524
2.14	Disciplinary measures should not infringe on learners' survival rights and should contribute to the improvement of the quality of life of learners.....	525

2.14.1	Evaluation of the retributive approach to discipline	526
2.14.2	Evaluation of the restorative approach to discipline	526
3.	CONCLUSION.....	526
CHAPTER 8	529
CONCLUSIONS AND RECOMMENDATIONS	529
1.	INTRODUCTION	529
2.	THE-BEST-INTERESTS-OF-THE-CHILD STANDARD INDICATED BY A LIST OF FACTORS.....	531
3.	EVALUATION OF THE COMPATIBILITY OF DIFFERENT APPROACHES TO DISCIPLINE WITH THE BEST-INTERESTS-OF-THE-CHILD STANDARD	532
4.	EVALUATION OF THE EXISTING LEGAL FRAMEWORK	533
4.1	Ineffective inclusion of children in the process of drafting the code of conduct.....	534
4.2	Creation of a safe environment conducive to teaching and learning.....	536
4.3	Provision of guidelines to assist school governing bodies in the drafting of a code of conduct.....	537
4.4	Provisions of the Guidelines for the drafting of a code of conduct	538
4.5	Exemptions in respect of compliance with the code of conduct	540
4.6	Support measures or structures for counselling	540
4.7	Formal disciplinary proceedings.....	542
4.8	The role of the intermediary in formal disciplinary proceedings	543
4.9	Decisions of the Head of Department after an expulsion is recommended	543
4.10	The duty of the Head of Department to find an alternative placement for expelled learners of compulsory school-going age	544
4.11	Limitation of the School Governing Body's right to appeal decisions of the Head of Department	545
4.12	Lack of measures to deal with children after any form of suspension or during detention	546
4.13	The best interests of the child as opposed to the best interests of the school	547
4.14	Provisions regarding corporal punishment	547

4.15	Lack of focus on informal discipline.....	548
4.16	Admission policies.....	549
4.17	Policy on promotion to the next grade.....	549
4.18	Role of the South African Council for Educators.....	551
4.19	Parents' role in school discipline.....	552
4.20	Training.....	552
4.21	Establishment of a school discipline commission or other monitoring mechanism.....	553
4.22	Establishment of an independent body for appeals and other decisions.....	554
5.	CONCLUSION.....	555
	REFERENCES.....	557
	CASE LAW.....	609
	LEGISLATION.....	619
	GOVERNMENT NOTICES (GN).....	620
	PROVINCIAL LEGISLATION.....	621
	PROVINCIAL NOTICES.....	621

List of tables

<i>Table 1: Number of learners per grade in 2010.....</i>	109
<i>Table 2: Percentage of underage and overage learners in different grades in 2010.....</i>	110
<i>Table 3: Learners in and out of school above 19 years of age.....</i>	112
<i>Table 4: Learners attending schools and ABET centres by age.....</i>	113
<i>Table 5: Comparison of the retributive and restorative approaches to discipline</i>	440
<i>Table 6: Comparison of the fundamental questions underlying the retributive and restorative justice approaches.....</i>	443

List of figures

<i>Figure 1: Hart's ladder of participation.....</i>	415
<i>Figure 2: Shier's model of participation</i>	416
<i>Figure 3: Social Discipline Window.....</i>	424
<i>Figure 4: Punishment-to-restoration discipline continuum to deal with misconduct</i>	464
<i>Figure 5: Levels of restorative practices.....</i>	467
<i>Figure 6: Continuum of restorative practices</i>	468
<i>Figure 7: Relationship between positive discipline and other approaches to discipline</i>	476

List of abbreviations and acronyms

ABET	Adult Basic Education and Training
ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	acquired immune deficiency syndrome
ANA	Annual National Assessment
ASIDI	Accelerated School Infrastructure Delivery Initiative
CASE	Community Agency for Social Enquiry
CCTV	closed-circuit television
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CESCRGC	Committee on Economic, Social and Cultural Rights: General Comment
CRC	Convention on the Rights of the Child
CRCGC	Committee on the Rights of the Child: General Comment
CREATE	Consortium for Research on Educational Access, Transitions and Equity
CSTL	Care and Support for Teaching and Learning Programme
DBE	Department of Basic Education
DHET	Department of Higher Education and Training
DOE	Department of Education
ECD	Early Childhood Development
EIG	Education Infrastructure Grant
EU	European Union
FET	Further Education and Training
FSDE	Free State Department of Education
GDP	gross domestic product
GHS	General Household Survey
HIV	human immunodeficiency virus
HoD	Head of Department
HRC	Human Rights Committee
HRCGC	Human Rights Committee: General Comment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IQMS	Integrated Quality Management System
JET	Joint Education Trust
LER	Learners:Educators Ratio

LRC	Learners Representative Council
MEC	Member of the Executive Council
NEIMS	National Education Infrastructure Management System
NGO	non-governmental organisation
NICRO	National Institute for Crime Prevention and the Reintegration of Offenders
NPC	National Planning Commission
NSC	National Senior Certificate
NSVS	National School Violence Study
NYVS	National Youth Victimisation Study
OBE	outcomes-based education
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OHCHRGC	Office of the High Commissioner for Human Rights General Comment
<i>PAJA</i>	<i>Promotion of Administrative Justice Act</i>
PELJ	Potchefstroom Electronic Law Journal
<i>PEPUDA</i>	<i>Promotion of Equality and Prevention of Unfair Discrimination Act</i>
PIRLS	Progress in International Reading Literacy Study
SACE	South African Council for Educators
SACMEQ	Southern and Eastern African Consortium for Monitoring Education Quality
SADTU	South African Democratic Teachers Union
SAHRC	South African Human Rights Commission
SALC	South African Law Commission
SALRC	South African Law Reform Commission
SGB	School Governing Body
SMT	School Management Team
SNE	special needs education
TIMMS	Trends in International Mathematics and Science Study
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Social and Cultural Organization
UNICEF	United Nations Children's Fund
UNWPP	United Nations World Programme for Human Rights Education Phase
UK	United Kingdom
US	United States
USA	United States of America
USD	United States dollars

CHAPTER 1

INTRODUCTION

1. RATIONALE AND BACKGROUND

The importance of discipline in creating an environment conducive to teaching and learning is undisputed. However, the lack of discipline in schools is a persistent problem. Disciplinary problems in South Africa range in severity and frequency from, for instance, continued, low-impact misconduct such as disobedience, talking in class and not doing homework, to serious issues such as bullying, gang violence, sexual violence, the use of and trading in drugs, rape, assault and teenage pregnancies. The lack of discipline has a devastating effect on educational outcomes and is, *inter alia*, contributing to low through-flow figures, to learners and educators feeling unsafe and unmotivated at schools, to children dropping out of school, and to the escalation of violence and other criminal activities in schools.¹

In addition, the lack of discipline has an impact on several rights of educators, of victims of transgressions, and of third parties to these transgressions. These rights include their right to dignity,² to equality,³ to education,⁴ and to personal safety.⁵ In addressing disciplinary problems, the above-mentioned parties' rights as well as the rights of the transgressing learner are often infringed through the use of illegal disciplinary measures such as corporal punishment and other undesirable or ineffective measures, including detention, suspension and expulsion.

In this thesis, the core theme is that the existing legal framework for school discipline is not always compatible with the best-interests-of-children standard and does not properly reflect the developments of the past 20 years regarding human rights, children's rights and the best-interests-of-children concept in South Africa.

South Africa has experienced significant political, social and legal change since the early 1990s. During this time, apartheid came to an end, there was a major regime change, and an interim

¹ De Wet 2003:113-121; De Wet 2003a:85; Burton 2005:1-4; Burton 2008:1-73; Lessing & De Witt 2010:25; SAHRC 2008:5-15; Mestry, Van der Merwe & Snelch 2006:47-48; Wolhuter & Van Staden 2008:389-398; Rossouw 2003:423-424; Wolhuter & Steyn 2003:527; Wolhuter & Meyer 2007:349-358; Badenhorst, Steyn & Beukes 2007:305; Maphosa & Mammen 2011:185-193. See chapter 2 herein for a detailed discussion on these issues.

² Constitution 1996:s 10.

³ Constitution 1996:s 9.

⁴ Constitution 1996:s 29.

⁵ Constitution 1996:s 11 (right to life), s 12 (freedom and security of the person), and s 14 (right to privacy).

Constitution⁶ and a final Constitution⁷ were adopted in 1994 and 1996 respectively. Parliamentary sovereignty was replaced with constitutional supremacy, and, for the first time in the history of South Africa, South Africa had a Bill of Human Rights.⁸

This inevitably resulted in major changes in education as well, and various new pieces of legislation regulating education were adopted. These include the *South African Schools Act*,⁹ (“the *Schools Act*”), which was adopted in 1996 and came into operation in January 1997, and the *Employment of Educators Act*,¹⁰ which came into operation in October 1998. Thus the respective pieces of legislation were adopted shortly after the adoption of the final Constitution.¹¹ Since then, there have been a few amendments to the *Schools Act*. However, the provisions governing discipline are still not in line with the constitutional imperatives. This will be discussed in more detail in this thesis.¹²

Another distinctive feature was the inclusion of children’s rights in the Constitution.¹³ This provision highlights the vulnerability of children and the necessity to ensure that special measures are in place to address their needs. The legislature and others heeded the plight of children and effect was therefore given to the constitutional provisions pertaining to children’s rights. This resulted in new legislation¹⁴ and in several court judgments which highlighted the importance of children’s rights and of a child-centred approach to matters concerning children.¹⁵

The two most important pieces of legislation to give effect to children’s rights are the *Children’s Act*¹⁶ and the *Child Justice Act*.¹⁷ The *Children’s Act* overhauled the whole child-care system

⁶ 200/1993.

⁷ 1996.

⁸ Constitution 1996:ch 2.

⁹ 84/1996.

¹⁰ 76/1998.

¹¹ The final Constitution came into operation on 6 May 1996.

¹² Amendments to section 8 of the *Schools Act* regarding the code of conduct were made in 2002, 2005 and 2007. Amendments were made to section 9, dealing with suspensions and expulsions, in 2005, and in 2011 dealing with the responsibilities of the Member of the Executive Council (MEC) where a child successfully appeals the decision of a Head of Department (HoD) – see *Education Laws Amendment Act 50/2002*; *Education Laws Amendment Act 24/2005*; *Education Laws Amendment Act 31/2007*; *Basic Education Laws Amendment Act 15/of 2011*.

¹³ 1996:s 28.

¹⁴ *Children’s Act 38/2005*; *Child Justice Act 75/2008*.

¹⁵ See, for example, *Centre for Child Law and Others v Minister of Basic Education and Another* – case 1749/2012, Eastern Cape High Court, Grahamstown; *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T); *Centre for Child Law v Minister for Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T); *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC); *S v M* 2007 (2) SACR 539 (CC).

¹⁶ 38/2005.

and contains a comprehensive response to child care and protection rights.¹⁸ Sloth-Nielsen¹⁹ has argued, with the approval of the Constitutional Court,²⁰ that the previous *Child Care Act*²¹ was not truly child-centred, despite the fact that it dealt with children. The main focus was to determine whether parents were unfit to care for children and not necessarily to secure the best interests of the child. The *Child Justice Act*²² recognises that it is inappropriate to treat children in conflict with the law in the same way as adult offenders. The new legislation has therefore changed the face of child justice dramatically and gives effect to, *inter alia*, the constitutional prescriptions pertaining to the best interests of the child and to section 28(1)(g) of the Constitution.²³

¹⁷ 75/2008.

¹⁸ 38/2005. The aims of the Act are set out as follows in the long title:

To give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define parental responsibilities and rights; to make further provision regarding children's courts; to provide for partial care of children; to provide for early childhood development; to provide for the issuing of contribution orders; to provide for prevention and early intervention; to provide for children in alternative care; to provide for foster care; to provide for child and youth care centres and drop-in centres; to make new provision for the adoption of children; to provide for inter-country adoption; to give effect to the Hague Convention on Inter-country Adoption; to prohibit child abduction and to give effect to the Hague Convention on International Child Abduction; to provide for surrogate motherhood; to create certain new offences relating to children; and to provide for matters connected therewith.

Section 2 provides that:

The objects of this Act are –

- (a) to promote the preservation and strengthening of families;
- (b) to give effect to the following constitutional rights of children, namely –
 - (i) family care or parental care or appropriate alternative care when removed from the family environment;
 - (ii) social services;
 - (iii) protection from maltreatment, neglect, abuse or degradation; and
 - (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
- (c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;
- (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
- (e) to strengthen and develop community structures which can assist in providing care and protection for children;
- (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards.

¹⁹ 1996:6-27; 2001:201-231.

²⁰ *S v M* 2007 (2) SACR 539 (CC):fn 17.

²¹ 74/1983.

²² 75/2008.

²³ *Child Justice Act 75/2008*. The long title of the Act indicates that it was adopted:

To establish a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the Constitution and the international obligations of the Republic; to provide for the minimum age of criminal capacity of children; to provide a mechanism for dealing with children who lack criminal capacity outside the criminal justice system; to make special provision for securing attendance at court and the release or detention and placement of children; to make provision for the assessment of children; to

The adoption of these two pieces of legislation was preceded by lengthy processes of input by the public and service providers, and considerable effort was made to research the issues at hand and arrive at an appropriate, workable and child-centred response that is aligned with constitutional imperatives.²⁴ For the purposes of this study, the focus is on section 28(2) of the Constitution, which provides:

provide for the holding of a preliminary inquiry and to incorporate, as a central feature, the possibility of diverting matters away from the formal criminal justice system, in appropriate circumstances; to make provision for child justice courts to hear all trials of children whose matters are not diverted; to extend the sentencing options available in respect of children who have been convicted; to entrench the notion of restorative justice in the criminal justice system in respect of children who are in conflict with the law; and to provide for matters incidental thereto.

Section 2 of the Act provides that the aims of the Act are to –

- (a) protect the rights of children as provided for in the Constitution;
- (b) promote the spirit of *ubuntu* in the child justice system through –
 - (i) fostering children’s sense of dignity and worth;
 - (ii) reinforcing children’s respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;
 - (iii) supporting reconciliation by means of a restorative justice response; and
 - (iv) involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in terms of this Act in order to encourage the reintegration of children;
- (c) provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults;
- (d) prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion; and
- (e) promote co-operation between government departments, and between government departments and the non-governmental sector and civil society, to ensure an integrated and holistic approach in the implementation of this Act.

²⁴ For an overview of the extensive processes followed in drafting the *Child Justice Act 75/2008*, see Skelton & Gallinetti 2008:3-9. The child justice movement started in the early 1990s. By 1996, a project committee of the South African Law Reform Commission (SALRC) was appointed to investigate juvenile justice. This was followed by a process of drafting the Child Justice Bill by the South African Law Commission (SALC), which Bill was tabled in Parliament in 2003. The proposed Bill made comprehensive recommendations for the protection and promotion of children’s rights in the criminal justice system. Parliament amended the proposed Bill considerably. In doing so, it excluded some children from the provisions of the Bill and watered down certain other provisions. This was met with resistance on the part of society. The Bill then disappeared from Parliament’s agenda. In the meantime, civil society and non-governmental organisations (NGOs) lobbied for the reinstatement of the original version of the Bill. By 2006, the Bill was back in Parliament, and, by 2008, far more of the original proposals had been included in the Bill. The Bill was eventually adopted in 2009 and came into operation on 1 April 2010. This time, most of the original proposals were included and children’s rights were comprehensively addressed in the final version of the Act. This version satisfies most of the concerns of child justice activists. – see Sloth-Nielsen 2001:211–213 and Skelton & Proudlock 2007:1-10–1-17 for a detailed discussion on the history of the drafting and adoption of the *Children’s Act 38* of 2005. After the ratification of the Convention on the Rights of the Child (CRC), the previous *Child Care Act 74/1983* was amended to align it with the international standards, but it soon became clear that a new, comprehensive child-centred Act with a holistic approach was necessary. The SALC appointed a project committee to draft new legislation and its First Issue Paper was published in

A child's best interests are of paramount importance in every matter concerning the child.

Not all children are affected by the child-care or child justice systems. However, all children are affected by the education system, and they are obliged to attend some form of schooling at least until completion of grade 9 or until the end of the year in which they turn 15 years of age.²⁵ Education thus clearly concerns children. Yet, thus far, the same rigorous approach designed to ensure the adoption of comprehensive, child-centred education legislation is lacking. Legislation related to education in terms of the *Schools Act*²⁶ is similarly devoid of a child-centred focus, as was the previous legislation on child care and child justice.

This argument will be substantiated in more detail throughout the thesis.²⁷ At this point, suffice it to say that, at first glance, the *Schools Act*²⁸ does not even make a distinction between education for adults and that for children. Instead, the Act applies to all school education for learners from grade R to grade 12. The definition of a "learner" is given as any person who receives education or is obliged to receive education in terms of the Act.²⁹ In fact, the word "child" is not even defined in the Act and is used only twice in the Act.³⁰ The legislation also does not refer to the best interests of the child, except for section 8A dealing with searches and seizures. This provision was added only in 2007. The argument that there is a lack of focus on the best interests of the child is further strengthened by the absence in the *Schools Act* of any real indications that the legislator recognises the particular vulnerabilities of children as learners as opposed to the position of adult learners.

Furthermore, the preamble of the Act is reminiscent of the political climate and sentiments of the political transition phase at the time the Act was adopted. It declares that the aim of the Act is to: redress past injustices; develop people's talents and capabilities; advance democratic transformation; combat racism, sexism and unfair discrimination; contribute to the eradication of

1998. This was followed by widespread grassroots consultations, which included consultations with children, a discussion paper and a draft Bill in 2003. The draft parliamentary processes as well as processes for public submissions followed. The Bill was also subjected to a costing process to determine the budgetary implications of implementing the Bill. Parts of the *Children's Act* then came into operation in 2007, and the remainder on 1 April 2010.

²⁵ *Schools Act* 84/1996:s 3.

²⁶ 84/1996.

²⁷ See in particular chapter 3 herein.

²⁸ 84/1996.

²⁹ 84/1996:s 1.

³⁰ 84/1996:s 3(3) – the MEC must ensure that there are enough places available in schools in a particular province to ensure that children of compulsory school-going age (7 to 15 years) can attend a school; section 8A(10)(a) on random searches and seizures and drug testing provides that parents must be informed that their child was subjected to a drug test.

poverty and to economic well-being; protect and advance diverse cultures and languages; and uphold the rights of learners, parents and educators and promote their acceptance of responsibility for the organisation, governance and funding of schools. Although these aims of the Act are indeed all valid and necessary, they create the impression that the achievement of political goals is more important than the best interests of children and specific education outcomes, such as academic achievement and the holistic development of the child. There is no intention in the preamble to highlight the particular plight of children and to ensure the paramountcy of the best interests of every child in school education. This is despite the Constitutional imperative that children should be afforded special consideration.³¹

It can be argued that the *Schools Act* refers primarily to the education of children and not adults, that the above criticism is too harsh and one-dimensional, and that the Act should be read in conjunction with specific government notices indicating that the *Schools Act* focuses on the education of children. Yet, the relevant notices, namely Admission Policy for Ordinary Public Schools³² and Age Requirements for Admission to an Ordinary Public School,³³ were published almost two years after the *Schools Act* came into force. In addition, the latter policy came into operation only on 1 January 2000. These two notices deal with the admission of learners and provide for age-grade norms that indicate the respective ages that learners should be in specific grades if they attend a school. It can be deduced from these notices that the *Schools Act* is applicable to learners between the ages of 7 and 18 years, with a few possible exceptions. It would thus be fair to conclude that there was no direct, obvious and visible intention during the drafting process to indicate that the Act is aimed at the education of children and that a distinction should be made in schools between the education of children under the age of 18 years and that of people above 18 years of age. In fact, the government notices still make it possible for people above the age of 18 years to attend school, without distinguishing between the needs and interests of adult and child learners.

In 2010, there were more than 12,1 million learners enrolled for school. However, there were 858 093 (7,1%) learners over the age of 18 years in school. This figure has increased steadily since 2008, when there were 687 608 (5,72%) such learners, and 2009, when there were

³¹ Constitution 1996:s 28(2). "School" means "a public or independent school which enrolls learners in one or more grades from grade R (Reception) to grade 12". "Grade" means "that part of an educational programme which a learner may complete in one school year, or any other education programme which the Member of the Executive Council may deem to be equivalent thereto" – see Act 84/1996:s 1. The *National Education Policy Act 27/1996* provides that "school" means: "a pre-primary, primary or secondary school".

³² GN 2432/1998.

³³ GN 2433/1998.

718 347 (5,96%) such learners.³⁴ It is further alarming to note that some of the overage learners were several years above the age-grade norm. In 2010, there were 627 838 learners between 19 and 20 years of age in ordinary schools, 179 028 were between 21 and 22 years of age, 36 463 were between 23 and 24 years of age, and 14 764 were above 25 years of age.³⁵

Apart from the learners above the age of 18 years, there were also enormous age differentials between learners in a specific class due to the enrolment of large numbers of underage learners and high repetition rates. In 2010, 1 131 161 learners were in schools while they were six years of age and younger.³⁶ In 2009, 9% of learners were repeating the grade they were in. This is higher than the average of 5% for developing countries and 1% for developed countries.³⁷

Overage and underage learners, as well as the huge age differentials, impact negatively on the teaching and learning environment, because children who are in different developmental stages are in the same class.³⁸ Educators are not only challenged by the large numbers of learners in classes, but also have to address the needs and interests of a variety of learners simultaneously. This is exacerbated by numerous other factors such as multigrade classes,³⁹ learners' difficult socio-economic backgrounds,⁴⁰ and the impact of school-based violence.⁴¹ To give effect to the best interests of every learner, and to maintain discipline in these circumstances, is indeed a tremendous challenge which requires focused attention.

Another example of the lack of focus on the interests of children in education is to be found in the *Employment of Educators Act*.⁴² In a child-centred system which gives paramountcy to the interests of the child, one would expect to see children's best interests being expressly considered in instances such as serious misconduct by educators,⁴³ misconduct by educators⁴⁴ or the incapacity of educators,⁴⁵ and in the procedures to be followed in these cases. If found guilty of misconduct, such as being under the influence of alcohol at school, the educator can be sent for counselling,⁴⁶ but the procedures do not make provision for the best interests of the

³⁴ DBE 2010:47-48; DBE 2012b:34; see table 1 in ch 2 herein.

³⁵ DBE 2012b:34.

³⁶ DBE 2012b:34.

³⁷ DBE 2011a:33.

³⁸ Maphosa & Mammen 2011:187, 190; Pahad & Graham 2012:6

³⁹ DBE 2010:8-10; DBE 2012b:7; DBE 2012d:68, 81, 104-105, 110; UNESCO 2012:2.

⁴⁰ Rossouw 2003:426; De Wet 2003:86; Wolhuter & Steyn 2003:530; SAHRC 2008:18; Bloch 2009:75.

⁴¹ Nesor 2005:64 & 79-80; SAHRC 2008:14; Burton 2005:2; Jeftha & Artz 2007:46.

⁴² 76/1998.

⁴³ *Employment of Educators Act* 76/1998:s18.

⁴⁴ *Employment of Educators Act* 76/1998:s19.

⁴⁵ *Employment of Educators Act* 76/1998:s16.

⁴⁶ *Employment of Educators Act* 76/1998:s19(3).

learners during the period until the educator is, for instance, rehabilitated. Thus the procedure provides for the educator to be rehabilitated and to continue with his or her work, but the children's interests are not expressly considered in the prescribed procedures.

Another example is the educator's right to strike. No procedures are prescribed to protect the children's interests during a strike. The impression is created that the children's interests are of no concern during strikes, and that preference is given to the labour rights of the adult educators. The lack of focus on children's interests is further highlighted if one considers the conduct of educators during protracted strikes, the impact of these strikes on academic output, and the vehement opposition of unions to proposed legislation to curb educators' right to strike.⁴⁷

The best-interests-of-the-child concept is a well-known one and is well established in the several legal traditions and in international law. However, it is noteworthy that South Africa is only one of six member states of the United Nations which has included the concept in its Constitution.⁴⁸ The role played by this concept in South African law has been developed even further by the Constitutional Court elevating this common law principle to a constitutional right.⁴⁹ Thus not only is a child-centred approach required in the education system, but children are also entitled to the enforcement of their best-interests right.

In this brief background to, and rationale for, the present study, examples have been given to illustrate that the best interests of the child are not always given priority in education. Yet, what constitutes their best interests is not always clear and is dependent on the specific circumstances.

The same lack of focus on the best interests of the child is also to be found in the disciplinary context and should be addressed to ensure that legislation, policies, and implementation strategies are in line with the constitutional imperatives on the best interests of the child.

⁴⁷ Coetzee 2009:5; Serrao 2009:4; Fleish 2009:6; Van Gass 2007:4; Makwabe & Govender 2007:10; Maqhina 2007:4; Chuenyane 2009:10; Serrao 2009a:2; Mbabela 2010:7; Blaine 2010:4.

⁴⁸ Tobin 2005:113. The following states parties have included the best-interests principle in their constitutions: Ecuador; Ethiopia; Gambia; Namibia; South Africa and Uganda.

⁴⁹ *S v M* 2007 (2) SACR 539 (CC); see the discussion in ch 4, par 3.2 herein on the development of the best-interests concept in South Africa.

2. STATEMENT OF THE PROBLEM, AND RESEARCH QUESTIONS

2.1 Statement of the problem

The time has come to investigate, with the same level of intensity as was done in the child-care and child justice sectors, the suitability of existing legislation designed to respect, protect, promote and fulfil children's rights and to secure their best interests in the education system.⁵⁰ It was pointed out above that legislation related to education was adopted in 1996. Since then, however, the overall legal framework has developed considerably owing to new legislation such as the *Promotion of Administrative Justice Act* ("PAJA")⁵¹ and the above-mentioned legislation related to children. The Constitutional Court has also given content to several constitutional rights since the adoption of the education legislation in 1996. This, inevitably, has had some impact on the education sector and on children in particular. Despite several amendments to legislation related to education, the existing responses to the constitutional imperatives do not always reflect these developments, and do not reflect a truly child-centred approach to the education of learners under the age of 18 years.⁵² In particular, the best-interests-of-the-child concept has been subject to profound developments, the most significant of which is its elevation to a constitutional right.⁵³ Therefore, a comprehensive investigation is necessary to determine whether the existing legislation and other provisions regarding education are in line with these developments. This is indeed a multidimensional issue and would require an in-depth investigation. A study of such magnitude transcends the boundaries of a doctoral thesis. Thus, for purposes of this study, the focus falls only on the best interests of the child and on school discipline.

The *Schools Act*⁵⁴ is the main legislative enactment providing prescriptions on the implementation of school discipline. In addition, the legislator has also provided *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners* ("Guidelines")⁵⁵ to assist school governing bodies (SGBs) in drafting a code of conduct. However, an analysis of the legislation and the Guidelines reveals serious flaws.⁵⁶

In view of the number of overage learners and the impact thereof on school discipline, it would be reasonable to expect legislative guidance on issues such as balancing the interests of

⁵⁰ Constitution 1996:s 7(2).

⁵¹ 3/2000.

⁵² *Education Laws Amendment Act 50/2002; Education Laws Amendment Act 24/2005; Education Laws Amendment Act 31/2007; Basic Education Laws Amendment Act 15/of 2011.*

⁵³ *S v M* 2007 (2) SACR 539 (CC).

⁵⁴ 84/1996.

⁵⁵ GN 776/1998.

⁵⁶ See the discussion in ch 3 herein.

different learners, including those of children from different age groups.⁵⁷ However, such provisions are absent. In addition, it should be kept in mind that learners between 7 and 15 years of age are obliged to attend school.⁵⁸ Yet, if learners in these age groups are subjected to undesirable treatment related to discipline, such as bullying or undesirable disciplinary measures, it is to be expected that the legislator would put measures in place to ensure the best interests of this group of children. On the other hand, although learners between 16 and 18 years of age are not obliged to attend school, they are still protected by the best-interests-of-the-child provision. Nevertheless, in some instances, such as the expulsion of learners in this age group, the legislator does not give effect to their best-interest right. In contrast to the situation pertaining to children of compulsory school-going age, the legislator has relieved the Department of Education of the responsibility to find alternative placements for these learners.⁵⁹

Close scrutiny of the provisions, and of the eventual implementation of these provisions, reveals that the rights of transgressing learners are often overemphasised at the expense of the rights of victims of, and third parties to, misconduct.⁶⁰ Furthermore, the current provisions focus on the procedural interests of the transgressing learner and other parties.⁶¹ Although the code of conduct must provide for support measures and structures for counselling the learner involved in a formal disciplinary hearing, it does not extend these services to other children affected by the misconduct or as a prevention strategy. In addition, serious questions regarding the provision of these services arise owing to limited financial and human resources.⁶²

The SGB, on which parents constitute the majority, is responsible for the governance of a school.⁶³ It plays an important role in school discipline and is responsible for the drafting of the code of conduct and for conducting disciplinary hearings when a learner is suspected of serious misconduct.⁶⁴ Disciplinary matters involve serious and complex issues such as bullying, teenage pregnancies, searches and seizures, the provision of support services and structures for counselling, the balancing of the interests of different learners and adults, and suspensions and expulsions. These issues have grave implications for children's rights and their best interests. SGBs thus have a considerable responsibility to safeguard the interests of children. Failure to properly exercise this mandate can have devastating consequences for the best

⁵⁷ See the discussion on overage learners in ch 2, par 8.4.6 herein.

⁵⁸ *Schools Act 84/1996*:s 3.

⁵⁹ *Schools Act 84/1996*:s 9(5).

⁶⁰ See the discussion in ch 3, par 6.2 herein.

⁶¹ *Schools Act 84/1996*:s 5(a).

⁶² *Schools Act 84/1996*:s 5(b).

⁶³ *Schools Act 84/1996*:s 16.

⁶⁴ *Schools Act 84/1996*:s 8(1), 9(1A).

interests of children as a result of continued illegal, unconstitutional or undesirable practices prescribed and employed by the SGB. It also results in the unequal implementation of children's rights.

Research indicates that many SGBs are dysfunctional and unable to fulfil their functions properly because of, *inter alia*, a lack of training and experience, difficulties in accessing legal sources, especially in poor and rural areas, and the illiteracy of parents on the SGB.⁶⁵ The risk of infringing children's rights is further exacerbated by the fact that the law is not static and that there are frequent developments, especially owing to new precedents which could impact on school discipline. However, it would be unreasonable to expect SGB members, who are mostly lay people, to remain abreast of all legal developments.

Section 7(2) of the Constitution provides that "the State must respect, protect, promote and fulfil the rights in the Bill of Rights".⁶⁶ SGBs and other decision-makers such as educators do sometimes make decisions and act in ways that are not in the best interests of children or in accordance with the constitutional imperatives. The state therefore has a responsibility to ensure through, *inter alia*, proper legislation and other guidance that SGBs are adequately empowered to draft and implement policies in accordance with these imperatives. It would not be unreasonable to expect the legislator to update the legislation and Guidelines regularly and to implement other regulations to ensure that SGBs fulfil their mandate in accordance with the latest legal developments and in accordance with the best-interests-of-the-child standard.

Yet, the Guidelines provided were drafted in 1998 and have not been amended since then. Moreover, the provisions of the Guidelines are in some respects outdated, contradict themselves on a number of occasions, use terminology without explaining it properly, and do not focus on the best interests of the child. Scrutiny of the legislation and Guidelines also reveals insufficient guidance on matters such as the extent and frequency of consultation with parents and learners in drafting a code of conduct, the role of parents in the disciplinary hearing, and the lack of criteria for the appointment of an intermediary for a disciplinary hearing. No guidelines are provided regarding disciplinary measures for less serious transgressions that do not warrant a disciplinary hearing. In these instances, SGBs and educators are supposed to use their own discretion, with the consequent risk of implementing disciplinary measures which are not in line with constitutional standards. The provisions in the Guidelines regarding alternatives to corporal punishment are insufficient, and the alignment of these alternative measures with the

⁶⁵ See ch 2, par 8.6.1 herein.

⁶⁶ Constitution 1996.

best-interests-of-the-child standard is questionable. The prescribed process for drafting the code of conduct also does not caution SGBs to pay special attention to the needs of minorities in schools and not to focus on the transgressor only, but also the victims of, and third parties to, misconduct. It is thus doubtful whether the existing legislation and Guidelines would survive constitutional scrutiny, especially as regards compliance with the best-interests-of-the-child standard.

Yet, it must be conceded that the best-interests-of-the-child standard is not clear. There is no definition of this standard. In fact, the indeterminacy and vagueness of this concept are acknowledged and criticised by many. Nevertheless, in *S v M*,⁶⁷ the Constitutional Court found that this indeterminacy in respect of the best-interests-of-the-child standard is also its strength, because the standard remains flexible.

Heaton⁶⁸ indicates that the best interests of the child are dependent on the specific circumstances. She therefore proposes a contextualised list of factors to give content to the best interests of the child. The *Children's Act*⁶⁹ provides a list of factors to be considered so as to determine the best interests of the child. However, although some of these factors can be applied in the context of school discipline, they are not entirely applicable to the context. Currently, such a contextualised list of factors applicable to school discipline does not exist within the South African legal framework. Thus, before the existing legislation can be evaluated for compatibility with the best-interests-of-the-child standard, the standard must first be determined.

To enforce discipline, different approaches can be followed, such as the retributive, positive-discipline or restorative approach.⁷⁰ A retributive approach to discipline is currently employed by most schools in South Africa, while there are schools which are implementing positive-discipline measures.⁷¹ There are also a few South African schools, which are mostly in the piloting stages, following trends in, *inter alia*, New Zealand, Australia, Canada, the United Kingdom, Brazil and Flanders regarding the restorative-justice approach to discipline.⁷² The compatibility of these different approaches to discipline with the best-interests-of-the-child standard has as yet not been determined.

⁶⁷ 2007 (2) SACR 539 (CC).

⁶⁸ 1990:96.

⁶⁹ 38/2005:s 7.

⁷⁰ See definitions in the glossary in the present chapter.

⁷¹ See the discussion in ch 6, para 3, 6 herein.

⁷² See the discussion in ch 6, par 5 herein.

Corporal punishment, which is a retributive disciplinary measure, was found to be unconstitutional because it infringes several human rights. Yet, other retributive disciplinary measures such as detention and suspension have, to date, not been subjected to constitutional scrutiny. Since retributive discipline does not only refer to the measures employed to deal with learner misconduct, but also includes authoritarian approaches to drafting school rules and adversarial processes for dealing with misconduct, the question arises whether such form of discipline is compatible with the best interests of the child. It is debatable whether these practices would survive constitutional examination considering, for instance, children's right to participate in matters concerning them as well as their right to education.⁷³ It is necessary to determine which of the approaches to discipline followed in schools will not only respect and protect the rights of children, but will also promote and fulfil the best-interests right of children.⁷⁴

Another problem is the lack of focus on the responsibilities of children and the widespread uncertainty regarding the limits of children's rights. It is rightly claimed that the best interests of the child cannot be served without giving due recognition to children's responsibilities. In Maphosa and Shumba,⁷⁵ an educator responded as follows to the overemphasis of children's rights:

I have read a lot about children's rights and the so called abuses through caning. The worst abuse of children is to produce lawless and undisciplined kids in the name of children's rights. Are we saying children know what to [do and what not to do] and they do not need any guidance? Look at the gravity of indiscipline in schools today. In the past it was unheard of that a learner would kill another learner within the school premises. Without disciplining, we are killing the future of our country.

In conclusion, the overarching research problem that will focus this particular study is the lack of clarity on what is in the best interests of children within the context of school discipline.

2.2 Research questions

To address the above-mentioned research problem, the following research questions must be answered:

⁷³ *Children's Act 38/2005*:s 10; Constitution 1996:s 29.

⁷⁴ See the discussion in ch 7 herein.

⁷⁵ 2010:392.

- Do the current legislative provisions pertaining to school discipline, as contained in the *Schools Act*⁷⁶ and in the Guidelines,⁷⁷ reflect the best-interests imperative of section 28(2) of the Constitution?
- What is the content of the best-interests-of-the-child right?
- Which factors will be taken into consideration to determine whether disciplinary measures, including policies, legislation, decisions and actions, are in line with the best interests of the child?
- Which approach to discipline is in line with the best-interests-of-the-child standard, the retributive, positive-discipline or restorative approach?

3. AIMS AND OBJECTIVES OF THE STUDY

In answering the research questions, this study aims to:

- Define the concept “school discipline”.
- Briefly provide the broad social background to school discipline.
- Analyse the existing legal framework for school discipline.
- Explore the constitutional framework for the best-interests-of-the-child concept.
- Give content to the best-interests-of-the-child concept with reference to other constitutional rights.
- Investigate the retributive, positive-discipline and restorative approaches to school discipline.
- Compile a contextualised list of factors to determine the best interests of the child in the context of school discipline.
- Evaluate the compatibility of the different approaches to school discipline with the identified factors, indicating the best interests of the child.
- Assess the compatibility of the current legal framework pertaining to school discipline with the best-interests-of-the-child standard.

4. RESEARCH DESIGN AND METHODOLOGY

This study is conducted by means of qualitative research. Berg⁷⁸ holds that:

[q]ualitative research refers to the meanings, concepts, definitions, characteristics, metaphors, symbols, and descriptions of things.

⁷⁶ 84/1996.

⁷⁷ GN 776/1998.

⁷⁸ Berg 2009:3. In contrast, quantitative research refers to the counting and measuring of things. Thus, on an elementary level, the focus is on the determination of the amount of something.

Henning, Van Rensburg and Smit⁷⁹ state that, in qualitative research:

[w]e want to understand, and also explain an argument, by using evidence from the data and from the literature [to determine] what the phenomenon or phenomena that we are studying are about. We do not want to place this understanding within the boundaries of an instrument that we designed beforehand because this will limit the data to those very boundaries. In this way our understanding will also be dependent on these boundaries.

Qualitative research focuses on the what, how, when and where of things, trying to determine the essence and ambience of the research object.⁸⁰ The qualitative research process is focused on determining the qualities, characteristics or properties of specific phenomena to improve understanding thereof and the explanations therefor.⁸¹

A qualitative research approach is followed in this study because it is the most appropriate method to determine the content, scope and nature of the best-interests-of-the-child concept (the what) and to apply this determination to the context of school discipline (the how, when and where). The aim of the research process is thus to examine and analyse the best-interests-of-the-child concept in order to enhance comprehension of its application in the equally complex setting of school discipline.

According to McMillan and Schumacher:⁸²

[e]valuation research focuses on a particular practice at a given site. Evaluation research assesses the merit and worth of a particular practice in terms of the values operating at the site(s). Evaluation determines whether the practice works – that is, does it do what it is intended to at the site? Evaluation also determines whether the practice is worth the costs of development, implementation, or widespread adoption. Costs may be those of materials, space, staff development, teacher morale, and/or community support.

The practice to be evaluated in this study is that of school discipline. The aim is to determine whether the different approaches to discipline (practices) are in line with the best-interests-of-the-child standard (value operating at the site) prescribed by the Constitution. The research thus has to evaluate whether the different approaches to discipline do what they are supposed to do,

⁷⁹ 2004:3-4.

⁸⁰ Berg 2009:3.

⁸¹ Henning, Van Rensburg & Smit 2004:5.

⁸² 2001:20.

namely respect, protect, promote and fulfil the best interests of the child.⁸³ The evaluation of the costs would centre on the impact of the different approaches to discipline on the best interests of the child. In other words: Is the particular approach optimising the best interests of the child, or not? If it is not optimising the best interests of the child, the approach is not doing what it is supposed to do and is therefore not suitable for further development, implementation or widespread adoption. In these instances, alternatives must be investigated.

The best-interests-of-the-child standard is the value operating at the site, but it has no fixed content within the context of school discipline. Consequently, the best-interests-of-the-child benchmark must be developed properly before it can be used in the process of evaluation research. To meet this prerequisite, a conceptual study has been chosen as the research design to develop the best-interests-of-the-child concept. A conceptual study critically engages with the understanding of concepts and aims to add to the existing body of knowledge and understanding – it aims at generating knowledge.⁸⁴ Nieuwenhuis⁸⁵ indicates that:

[b]y and large, concepts are central to the quest for knowledge since they are the building blocks from which theories are constructed. Conceptual studies therefore tend to be abstract, philosophical and rich in their theoretical underpinning.

4.1 Conceptualising the best-interests-of-the-child concept through constitutional interpretation

Neither the United Nations Convention on the Rights of the Child (CRC) nor the Constitution provides a particular statement on what constitutes the child's best interests in a particular situation. Furthermore, to give a simple definition of the best interests of the child is not possible because of the complexity of the concept, but it is also not advisable. In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others*,⁸⁶ the Constitutional Court held:

It is neither necessary nor desirable to define with any precision the content of the right to have the child's best interest given paramount importance in matters concerning the child. It is, as we put it in *Sonderup*, "an expansive guarantee" that a child's best interests will be paramount in all matters concerning the child. This provision thus imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child

⁸³ Constitution 1996:s 7(2).

⁸⁴ Nieuwenhuis 2007:71.

⁸⁵ 2007:71.

⁸⁶ 2009 (4) SA 222 (CC):par 73.

enjoy paramount importance in their decisions. Section 28(2) provides a benchmark for the treatment and the protection of children.

Rautenbach and Malherbe⁸⁷ indicate that there are several indefinite and general terms in the Constitution, the best interests of the child being one of them. Yet, these indefinite terms must be interpreted and applied, but this is only possible within a concrete situation where their content is developed and refined. These concepts must thus be supplemented before they can be applied. To supplement legal rules is a law-making action exceeding the mere determination of the meaning of the words in the text. The supplementations are done within the parameters of generally formulated rights and with due regard to the general limitations provision. Although it is impossible and undesirable to define the best interests of the child “with any precision”, it would be equally undesirable to give no content to it in the context of school discipline. The best-interests-of-the-child concept will only become useful if it has content.

The methodology employed to conceptualise the best interests of the child is that of a specific approach to constitutional interpretation. The interpretation process entails a textual analysis, an exploration of other constitutional rights and values, consideration of international and foreign law, and consideration of public opinion. The process of constitutional interpretation will be explained briefly.

4.1.1 Textual analysis of section 28(2) of the Constitution

The traditional, literalist-cum-intentionalist approach to interpretation is not appropriate in the new constitutional dispensation.⁸⁸ The Constitutional Court found in *S v Makwanyane and Another*⁸⁹ that, although due regard should be given to the language used in the text, the Bill of Rights should be interpreted in a generous and purposive way, giving effect to the underlying values of the Constitutions. Currie and De Waal⁹⁰ explain that the courts are bound by the plain meaning of the provisions, but that this literal meaning is not necessarily conclusive. They argue:

To put it another way, a literal meaning will be an acceptable interpretation of a provision only if it accords with a “generous” and “purposive” interpretation that “gives expression to the underlying values of the Constitution”.

⁸⁷ 2004:38. Examples of other indefinite constitutional terms include: unfair discrimination, equitable basis, public interest, efficiency, reasonable measure, and many more.

⁸⁸ Du Plessis 2008:32-40–32-45, 32-52.

⁸⁹ 1995 (3) SA 391 (CC):par 9.

⁹⁰ Currie & De Waal 2005:148.

Therefore, a generous and purposive approach to textual analysis will be followed in this study, having due regard to the underlying constitutional values. This analysis of section 28(2) of the Constitution, is conducted in chapter 4.

4.1.2 The best interests of the child and the content of other constitutional rights and values

The approach followed by the courts thus far in adjudicating matters involving section 28(2) is in line with the principle that all constitutional rights are mutually interrelated and interdependent and form a single constitutional value system.⁹¹ Case law clearly indicates that the courts use other rights to inform the best-interests concept, and vice versa.⁹² Therefore, in giving content to the best-interests-of-the-child concept in the context of discipline, due regard should be had to the content of other constitutional rights.

Constitutional rights relevant to school discipline will be discussed. However, not all the relevant rights will be discussed, but only those rights closely related to the context of education and discipline and purposefully selected for this discussion. This study will not include extensive discussions on the following rights related to school discipline: the right to freedom and security of the person, which includes the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment,⁹³ the right to religion, belief and opinion,⁹⁴ the right to freedom of expression,⁹⁵ and the right to just administrative action.⁹⁶ Respect for, and the protection of, these rights are quite clear and are dealt with in case law. Constraints regarding

⁹¹ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC):432; *S v M* 2007 (2) SACR 539 (CC):par 26.

⁹² *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC):fn vii; *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC):par 22; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC):432; *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T), which dealt with the appalling conditions at a reform school – violation of s 28(1)(b) & (c), 28(2), 10, 12(1)(c) & (e) of the Constitution 1996.

⁹³ Constitution 1996:s 12; see also *S v Williams* 1995 (3) SA 632 (CC); *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC).

⁹⁴ Constitution 1996:s 15; see also *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC); *Antonie v Governing Body, Settlers High School, and Others* 2002 (4) SA 738 (C).

⁹⁵ Constitution 1996:s 16; see also *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC).

⁹⁶ Constitution 1996:s 33; see also *Maritzburg College v Dlamini NO & Others* [2005] JOL 15075 (N); *Pearson High School v Head of the Department, Eastern Cape Province and Others* [1999] JOL 5517 (Ck); *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape and Others* – Eastern Cape Provincial Division, unreported case 454/08; *St Michael's School for Girls and Others v The Head of the Free State Education Department and Others* – Free State Provincial Division, unreported case 5597/2008; *Tshona v Principal, Victoria Girls High School and Others* [2006] JOL 18445 (E); *Mose (Legal Guardian of Luzuko Mose) v Minister of Education, Provincial Government of the Western Cape, Gabru and Others* [2008] JOL 22623 (C).

time, scope and extent of the study also limit the number of rights which can be included meaningfully.

In narrowing down the rights to be discussed, the CRC is used as the point of departure. The best interests of the child constitute one of the four foundational principles of the CRC. Therefore, the other three foundational principles, which are the right to life, survival and development, the right to non-discrimination, and the child's right to be heard will also be discussed.⁹⁷ Furthermore, the importance of the right to dignity is highlighted in several international instruments and/or comments dealing with such right and is mentioned specifically in the context of school discipline.⁹⁸ The important role of the specific context in determining the best interests of the child are also highlighted. Therefore, a discussion of the right to education and of the aims of education with regard to school discipline is indispensable. These rights will be discussed in chapter 5.

4.1.3 The best interests of the child and constitutional values

Section 39(1) of the Constitution provides that, in interpreting the Bill of Rights, the “values that underlie an open and democratic society based on human dignity, equality and freedom, must be promoted”. In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others*,⁹⁹ the Constitutional Court held as follows with regard to the role of values in the interpretation of section 28(2).

Section 28(2) must be interpreted so as to promote the foundational values of human dignity, equality and freedom. These founding values are given effect to in the Bill of Rights, which is the cornerstone of our constitutional democracy. Section 28(2), which is part of the Bill of Rights, protects the dignity of the child and advances the child's equal worth and freedom by proclaiming that “[a] child's best interests are of paramount importance in every matter concerning the child”.

Some of the values underlying the Constitution mentioned in section 1 are human dignity, equality, the advancement of human rights and freedoms, non-racialism, non-sexism, the supremacy of the Constitution, the rule of law, democracy, accountability, responsiveness and openness.¹⁰⁰ However, these are not the only principles and values applicable to the

⁹⁷ CRCGC 5 2003:par 12.

⁹⁸ CRC 1989:a 28(2), 39; UN 1959: principle 2; ICESCR 1966:a 13(1); European Union 2000:a 1; ACHPR 1981:a 5; CRCGC 1 2001:par 1; CRCGC 8 2006:par 26; ACRWC 1990:a 11(5).

⁹⁹ 2009 (4) SA 222 (CC):par 72.

¹⁰⁰ Section 1 of the Constitution 1996 provides as follows:

interpretation and application of the rights contained in the Constitution. Roederer¹⁰¹ refers to case law and the rest of the Constitution and states that other constitutional principles and values include social justice,¹⁰² constitutionalism, separation of powers, cooperative governance,¹⁰³ transformation,¹⁰⁴ *ubuntu* and cosmopolitanism.¹⁰⁵

It will be necessary to investigate the founding and other values underlying the Constitution to determine the content of the best interests of the child as a right and principle within the context of school discipline.¹⁰⁶ However, the scope of this study does not allow for an in-depth analysis of the relevant constitutional values. The alignment of best interests with these values will merely be highlighted where applicable, without discussing the content of these values.

4.1.4 The best interests of the child and international and foreign law

Section 39(1)(b) and (c) of the Constitution provides that international law must be considered, while foreign law may be considered in the interpretation of constitutional provisions. In *S v M*,¹⁰⁷ the Constitutional Court emphasised the fact that section 28 of the Constitution is the South African response to its international obligations regarding children's rights. It highlights the important role of the principles of the CRC in interpreting the provisions of section 28 of the Constitution. These principles are survival, development, protection and participation. The court

-
1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
 - (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
 - (b) Non-racialism and non-sexism.
 - (c) Supremacy of the constitution and the rule of law.
 - (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

¹⁰¹ 2005:13-3.

¹⁰² Constitution 1996:preamble, s 1, ch 2.

¹⁰³ Constitution 1996:ch 3.

¹⁰⁴ Constitution 1996:preamble; *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1698 (CC):par 8.

¹⁰⁵ Roederer 2005:13-8. "Cosmopolitanism" refers to the fact that South Africa is not an isolated country anymore as it was during the apartheid struggle when the oppressed reached out to the rest of the world to rid the country of apartheid. The international community not only played an important role in this regard, but also played an important part in the establishment of a normative framework for the new constitutional order. Therefore, it is a constitutional imperative that international law must be considered in the interpretation of the Bill of Rights.

¹⁰⁶ See ch 6 herein in this regard.

¹⁰⁷ 2007 (2) SACR 539 (CC):par 17.

found that what lies at the heart of these principles is the child's right "to be a child and enjoy special care".¹⁰⁸

Hammarberg¹⁰⁹ avers that the best interests of the child should always be linked to other provisions of the Convention (the CRC). The substantive articles in the Convention provide clear guidelines on how children should and should not be treated. He states:

Though necessarily general and incomplete, a reasonable first building block towards the definition of what is in the best interests of the child is the sum total of the norms of the Convention. This means, for example, that it is in the best interests of the child to: receive education (Art. 28); have family relations (A12); and to be respected and seen as an individual person (A16). In the same way, the Convention states what is not in the best interests of the child: for instance, to be exposed to any form of violence (Art 19); to be wrongly separated from his or her parents (Art.9); to be subjected to any traditional practices prejudicial to the child's health (Art 24); to perform any work that is hazardous or harmful (Art 32), or to be otherwise exploited or abused (Arts 33-36).

He is of the opinion that this definition of the best interests of the child provides a universal interpretation, because the Convention is universal and its provisions cut across cultural, religious and other differences. Different implementation strategies might therefore be necessary to address, *inter alia*, different family structures, education levels, standards of living, and levels of information on children's rights. Yet, this "relativism" cannot justify a compromised interpretation of the rights.¹¹⁰ The CRC will thus remain the benchmark and is accepted as such in South African law. However, reference will be made to other international documents throughout the study.

The Committee on the Rights of the Child stresses the importance of interpreting the best interests of the child with due regard to all the provisions of the Convention and takes a firm stand on a holistic approach. It provides:

But interpretation of a child's best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child's views; it cannot be used to justify practices, including corporal

¹⁰⁸ *S v M* 2007 (2) SACR 539 (CC):par 17. The Committee on the Rights of the Child however clarified the position as to what exactly constitute the foundational principles of the CRC. This is it did, after this decision, in GC 5 of 2003.

¹⁰⁹ 2008:5.

¹¹⁰ Hammarberg 2008:5.

punishment and other forms of cruel or degrading punishments, which conflict with the child's human dignity and right to physical integrity.¹¹¹

This affirms the idea of the interrelatedness of rights and the importance of a uniform value system. There will inevitably be intersections in the discussion of the different rights and values. Furthermore, although South Africa might not be bound to apply foreign law, it is still obliged to consider it in the interpretation of the Bill of Rights, and of section 28(2) in particular.¹¹²

4.1.5 The best interests of the child and public opinion

In *S v Makwanyane*,¹¹³ the court held as follows on the impact of public opinion on the determination of the constitutionality of provisions:

Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the legal order established by the 1993 Constitution.

It is evident that it does not matter that the majority of educators prefer the reinstatement of corporal punishment or that parents are in favour of its application.¹¹⁴ The Constitution remains the supreme law and has declared it unconstitutional. In developing disciplinary measures, not only majority rule should be kept in mind, but also the constitutionality of any provisions.¹¹⁵

4.1.6 The best interests of the child and a specific approach to interpretation

Not only does the Constitution prescribe guidelines for the interpretation of the constitutional provisions, but there are also particular approaches to the interpretation of constitutional provisions which will eventually have an impact on the content given to a right. In what follows, the two main approaches, namely the purposive and teleological approach to constitutional interpretation, will be discussed briefly to guide the interpretation process of the best-interests-of-the-child provision. However, care should be taken not to be trapped by a rigid and specific

¹¹¹ CRCGC 8 2006:par 26.

¹¹² Rautenbach & Malherbe 2004:42.

¹¹³ 1995 (3) SA 391 (CC):par 88.

¹¹⁴ Burton 2008:28-29; SAHRC 2008:11-13.

¹¹⁵ *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC).

approach only. Du Plessis¹¹⁶ warns that care should be taken to avoid limiting the interpretation of the Constitution to one “essential(-ist) or predominant catchword”. In *Ozeleni v Minister of Law and Order*,¹¹⁷ the court held as follows:

[I]t serves little purpose to characterize the proper approach to constitutional interpretation as liberal, generous, purposive or the like. These labels do not in themselves assist in the interpretation process and carry the danger of introducing concepts or notions associated with them which may not find expression in the Constitution itself.

It is thus apposite to consider different approaches to interpretation and not to be restricted to one approach only.

4.1.6.1 Purposive interpretation

Purposive interpretation entails supplanting the literalist-cum-intentionalist approach in order to interpret the South African Constitution.¹¹⁸ In the purposive approach to interpretation, the courts are not restricted to the text of the provision and the interpreter is at liberty to look beyond the text to external sources to determine the intended purpose of the legislator. The difference between intentionalism and a purposive approach to interpretation is thus to be found in the sources used to determine the “intention of the legislator”. An intentionalist approach to interpretation restricts the interpreter to the text only, while the purposive approach includes not only scrutinising the language of the text, but also the character and aims of the Bill of Rights, the historical background of the concept, and, where applicable, the meaning and objects of other specific rights.¹¹⁹ The purpose of legislation is thus a broader concept than the intent of the legislator.¹²⁰ Consequently, if the purpose of a right is determined, one will be able to determine the scope of the right.¹²¹

¹¹⁶ 2008:32-54–32-56.

¹¹⁷ 1994 (3) SA 625 (E):633; see also *In re Former Highlands Residents: Sonny and Others v Department of Land Affairs* 2000 (2) SA 351 (LCC):par 12.

¹¹⁸ Du Plessis 2008:32-52.

¹¹⁹ Currie & De Waal 2005:48-149; Rautenbach & Malherbe 2004:40.

¹²⁰ Devenish 1992:36.

¹²¹ In *African Christian Democratic Party v The Electoral Commission and Others* 2006 (3) SA 305 (CC), the Constitutional Court used the purposive approach to interpret legislation pertaining to the registration of political parties. One of the parties had accidentally not paid its fees for taking part in the elections in one of the constituencies, but had paid additional fees in another constituency. Thus, technically, it had paid over enough money, but had not paid it into the correct account. If a literal approach had been followed, the party would have been unable to take part in the elections. The court, however, found that the circuitous and, arguably, even the unintended compliance of the applicant had duly served the *purpose* of the provision and that the payment was therefore in order. Here, the applicant received the greatest possible advantage owing to the elasticity of the language used in the legislation. The court’s interpretation afforded the applicants the best possible benefits and ensured that it was regarded as having complied with the registration requirements. In addition, the court’s interpretation also ensured that the purpose of the Act

Roux¹²² provides some practical advice on how to apply the purposive approach. He refers to the Constitutional Court's approach to interpretation followed in *African Christian Democratic Party v The Electoral Commission and Others*,¹²³ and indicates that, in adopting a purposive approach to interpretation, the court should not follow:

[a]n unduly narrow (read textualist or literalist) approach to statutory interpretation. By contrast, the broader (read purposive) approach which the Court favours includes the following distinct steps: (i) establish the central purpose of the provision in question; (ii) establish whether that purpose would be obstructed by a literal interpretation of the provision; if so, (iii) adopt an alternative interpretation of the provision that "understands" (read promotes) its central purpose; and ensure that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights.¹²⁴

The purposive approach to interpretation is, however, not without criticism. Devenish¹²⁵ indicates that, if the purpose of a policy or legislation is untenable and is used in the interpretation, one is at risk of enforcing unacceptable legislation, such as previous apartheid legislation. Therefore, if not applied cautiously, the purposive approach to interpretation is at risk of being unfettered and of having unintended consequences. It should also be kept in mind that the purposive approach to interpretation does not imply that a generous or broad interpretation should be given to all provisions.¹²⁶ In determining the purpose of a provision, a restrictive interpretation can be given to the provision, because the original purpose of the provision was restrictive in nature. Lastly, a "purposive interpretation cannot begin (and end) by giving effect to the (alleged) purpose of a provision". The aim of a provision can only be known through interpretation and not prior to interpretation. Interpreters are therefore cautioned not to arrive, prematurely, at conclusions on the purpose of a provision.¹²⁷ The risk inherent in this approach is that the interpreter may not take sufficient care to justify, or at least explain, his or her preference for a specific interpretation.

and of the Constitution was fulfilled. The purpose of the Act is to facilitate and encourage multiparty municipal elections, while the aim of the Constitution is to ensure multiparty democracy through free and fair elections. The court was thus not hamstrung by the literal interpretation of the legislation, but focused rather on its operative effect.

¹²² In *Du Plessis* 2008:32-53-32-54.

¹²³ 2006 (3) SA 305 (CC).

¹²⁴ *Du Plessis* 2008:32-53-32-54.

¹²⁵ 1992:36.

¹²⁶ *Du Plessis* 2008:32-54-32-55.

¹²⁷ *Du Plessis* 2008:32-55.

In view of this criticism, Du Plessis¹²⁸ is of the opinion that the purposive approach to interpretation provides a useful point of departure in interpretive endeavours and can even be decisive, but proposes the teleological approach as an alternative or complement to the purposive approach.

4.1.6.2 Teleological interpretation

Although the teleological approach to interpretation still focuses on the purpose of the provision, it goes a step further and takes the underlying values of the constitutional order into account.¹²⁹

Du Plessis¹³⁰ summarise this as follows:

This “value-activating interpretation”, in other words, goes beyond the design and purpose that lies behind an individual provision and invokes the entire scheme of values said to inform the legal and constitutional order in its totality.

Unlike the situation with regard to the purposive approach, the courts have thus far not explained the application of the teleological approach in much detail. However, the court actually applied it in *African Christian Democratic Party v The Electoral Commission and Others*,¹³¹ with the judgment giving effect, ultimately, to the entrenched core values found in section 1 of the Constitution. This approach of the court thus took the purposive approach a step further and the court moved:

from the effectual acknowledgement of the purpose of a particular provision to the realization and fulfillment of values and purposes key to the legal and constitutional order as a whole.¹³²

In conclusion, it is clear that there are a number of approaches available to interpret the Constitution and legislation. Each has some strong and weak points. It is therefore preferable, and possible, to use various interpretive approaches, thereby benefiting from the enriching effect that these have on the interpretation process and outcome.¹³³ For this reason, this study will not be limited to the use of only one approach in order to interpret and conceptualise the best-interests-of-the-child concept. Once the conceptualisation of the concept is completed, the evaluation of the policies and practices related to discipline will be conducted.

¹²⁸ Du Plessis 2008:32-52.

¹²⁹ Currie & De Waal 2005:148-149.

¹³⁰ Du Plessis 2008:32-55.

¹³¹ 2006 (3) SA 305 (CC).

¹³² Du Plessis 2008:32-56.

¹³³ Du Plessis 2008:32-56.

4.2 Evaluation through a policy analysis

To undertake the eventual evaluation of disciplinary measures and policies, a specific variation of evaluation research has been chosen, namely a policy analysis. A policy analysis is described by Patton¹³⁴ as:

[t]he process through which we identify and evaluate alternative policies or programmes that are intended to lessen or resolve social, economic, or physical problems.

McMillan and Schumacher¹³⁵ claim that a policy analysis evaluates government policies so as to provide policy-makers with practical recommendations on the issue at hand. Policy research focuses on present or past policies on different levels of government and includes the following processes: firstly, the investigation of policy formulation; secondly, an exploration of the implementation of the policies; and, thirdly, a determination of the effectiveness and/or efficiency of the policies.

In this study, the legislation and regulations pertaining to school discipline will be investigated, the implementation of existing policies and their manifestations in the different approaches to discipline will be examined, and the effectiveness of these policies, measured against the best-interests-of-the-child standard will be determined.

Data for this study was collected by means of a document analysis, which is a non-interactive strategy.¹³⁶ However, to enhance the authenticity of the data, the documents consulted were, as far as possible, primary sources, including international instruments, legislation, case law and common law.¹³⁷ Secondary sources included books, academic journal articles, newspaper articles, research reports, reports released by the Department of Education and the Department of Basic Education, White Papers, internet sources and other relevant publications. Multiple sources were used as far as possible to enhance the validity of the data.¹³⁸

5. FOCUS AND DEMARCATION OF THE STUDY

As mentioned above, only the purposefully selected rights will be discussed in order to inform the content of section 28(2) of the Constitution, which is the focus of this study. Other constitutional rights will only be discussed to the extent that they impact on the best interests of the child.

¹³⁴ 1999:1.

¹³⁵ 2001:20.

¹³⁶ McMillan & Schumacher 2001:38-39, 42.

¹³⁷ Mouton 2001:72.

¹³⁸ Babbie & Mouton 2001:274-278; Niewenhuis 2007:113-115.

Since educators are learners' role models, their conduct plays an important part in learner discipline. Educators are sometime guilty of unacceptable behaviour, and some of these forms of ill-discipline are explicitly forbidden in legislation. Furthermore, specific procedures are prescribed to deal with educator misconduct.¹³⁹ However, this study will not focus on the impact of educator discipline on school discipline, except where necessary for the focus of this particular study.

Searches and seizures are contentious issues within the context of school discipline and there are numerous risks which should be accounted for to ensure that there is no violation of human rights during these processes. Unlike the other provisions in the *Schools Act* related to school discipline – which do not refer to the best interests of the child – the provision dealing with searches and seizures does refer to the best-interests-of-the-child concept.¹⁴⁰ Although learners can only be searched if, *inter alia*, this is in the best interests of the learners in question or any other learner, the legislator has failed to give an indication of what would indicate the best interests of the different learners.¹⁴¹ Even though searches and seizures, which constitute a substantive topic with numerous dimensions, are a very important aspect related to school discipline, they will not be addressed in this thesis. Rather, the aim of this study is to give a broader overview of the legal framework for school discipline and to provide a list of factors indicating the best interests of the child. Such a list of factors may be useful in an investigation focusing on the best interests of the child and on searches and seizures.

Since parents are in the majority on the SGB, they can play a decisive role in the enforcement of children's rights in disciplinary matters. In view of the dysfunctionality of many SGBs, which was highlighted above, it could be claimed that this situation creates too many risks for the proper enforcement of children's rights and that SGBs should therefore not be mandated to play such an important role in school discipline. This argument cannot be sustained, because parents not only have an interest in the education of their children, but also a right, as well as the accompanying responsibilities, to have a substantial say in the education of their children. This is equally true of the individual parent who is not a representative on the SGB, but whose child is involved in a disciplinary matter. Balancing parents' rights and responsibilities with the best interests of children is a multidimensional issue. This is exacerbated by the South African context where there are well-functioning SGBs with highly educated parents on the one hand,

¹³⁹ *Employment of Educators Act 76/1998*:s 11, 16-18.

¹⁴⁰ Compare the *Schools Act 84/1996*:s 8 (drafting of the code of conduct), s 8A (searches and seizures), and s 9 (suspensions and expulsions from public schools).

¹⁴¹ *Schools Act 84/1996*:s 8A(3)(a)(i).

and illiterate parents with no exposure to governance on the other. This then raises serious questions regarding equality, the extent to which parents' rights can be limited, the responsibility to empower parents to exercise their rights and fulfil their responsibilities, as well as the balance between their rights as opposed to their responsibilities. The parents' role in determining the best interests of their children in the context of school discipline is an important issue to address, but, owing to the enormity of the issues related to this determination and the limited scope of a doctoral thesis, it will not be addressed explicitly in this study.

6. TERMINOLOGICAL CLARIFICATION

Age-grade norm: Refers to a specific statistical age norm for every grade. The age-grade norm is determined by way of the following calculation: grade number plus 6. For example: Grade 1 + 6 = age 7 years implies that a child in grade 1 should be 7 years of age; or Grade 12 + 6 = age 18 years. Thus children should ordinarily finish school at the age of 18 years.

Child: A person under the age of 18 years.¹⁴²

Class size: The average number of learners per class, calculated by dividing the number of learners enrolled by the number of classes.¹⁴³

Combined school: A school that offers a selection of grades from grade R to 12, but where such a selection is not in line with the grade limits of either a primary or secondary school.¹⁴⁴

Compulsory school-going age: Children must attend school from the first school day of the year in which they turn 7 years of age until the last school day of the year in which they turn 15 years of age, or until grade 9, whichever comes first.¹⁴⁵

Constitution: Refers to the *Constitution of the Republic of South Africa*, 1996. References to the constitutions of other jurisdictions will be clearly indicated.

Department: Refers to the Department of Basic Education or the Department of Education. The national Department of Education was previously responsible for all levels of education. However, in 2009, the Department was divided in two departments, the Department of Higher

¹⁴² Constitution:s 28(3).

¹⁴³ DBE 2010:43.

¹⁴⁴ DBE 2012b:32.

¹⁴⁵ *Schools Act 84/1996:s 3.*

Education and Training and the Department of Basic Education.¹⁴⁶ The latter is responsible for education in schools for learners doing grade R to grade 12. On a provincial level, reference is still made to “the Department of Education”. A ridged distinction between the former national Department of Education and the existing Department of Basic Education is rather immaterial for purposes of this study, because legislation and regulations drafted by the former Department of Education are still applicable, unless explicitly amended. The division of the former Department of Education does not have any substantial impact on the focus of this study.

Disciplinary measure: Refers to any action, decision, policy, legislative provision and/or procedure used to enforce discipline in a school. The term has been chosen to avoid constant repetition of the whole list of different types of measures which impact on school discipline. The exact scope of the word should be deduced from the broader context of the discussion in which the term is used.

Disciplinary method: Refers to any specific actions taken by an educator to enforce discipline. For example, under the punitive approach to discipline, detention or corporal punishment would be typical disciplinary methods, while a restorative reminder or mini-conference would be disciplinary methods applied in terms of the restorative approach to discipline.

Discipline: “Discipline” is defined as a teaching and learning process with two distinct aims. The first aim is to create an orderly environment conducive to teaching and learning and thus enable the learner and other learners to develop holistically. The second aim of this teaching and learning process is to teach learners to behave in a socially acceptable manner and to attain self-control, which will ultimately result in respect for the rights and needs of others. The term “discipline” therefore refers to school discipline, unless it is clear from the context that a wider application of the term than just school discipline is intended. Thus “discipline” and “school discipline” are used interchangeably.¹⁴⁷

Double-shift schools: Term used for schools in which the school day is divided into two sessions, with two different groups of learners being taught by the same educators and principal.¹⁴⁸

Education: “Education” goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to

¹⁴⁶ DHET 2012:x; GN 1040/2012; GN 972/2012; NPC 2011:261-294.

¹⁴⁷ See ch 2, par 2.1 herein for further development of this definition.

¹⁴⁸ DBE 2012b:32.

develop their personalities, talents and abilities and to live a full and satisfying life within society. To live a full life in society requires one to be part of the society, to embrace the values of the society, and to respect the rights and freedoms of others.¹⁴⁹

Educator: In terms of the *Schools Act*,¹⁵⁰ “educator” means “any person, excluding a person who is appointed to exclusively perform extracurricular duties, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at a school”. For purposes of this study, the term “educator” will refer only to a person who renders the above-mentioned at a school where children from grade R (reception) to grade 12 are educated. Tertiary education educators are thus excluded.

Formal disciplinary proceedings: Refers to a structured disciplinary hearing by the SGB in instances of serious misconduct on the part of learners and can result in the suspension or expulsion of learners. These proceedings are regulated by section 9 of the *Schools Act*.¹⁵¹

Further education and training: Refers to all learning and training programmes leading to qualifications after the compulsory phase of education.¹⁵²

Grade R: The grade before grade 1, that is, the reception year aimed at preparing the learner for formal education.¹⁵³

Independent school: A school established by private persons or organisations which must comply with the minimum standards set by the Department of Basic Education and must register with the respective provincial department of education.¹⁵⁴

Informal disciplinary measures: Refers to any disciplinary measure taken by educators and/or prescribed by the SGB in order to enforce school discipline, but excludes any formal disciplinary proceedings prescribed by the *Schools Act*¹⁵⁵ in terms of section 9.

¹⁴⁹ See ch 5, par 2 herein for a discussion on the right to education.

¹⁵⁰ 84/1996:s 1.

¹⁵¹ 84/1996.

¹⁵² *Further Education and Training Colleges Act* 16/2006. See also ch 5, par 2.2.3 herein for a discussion of further education.

¹⁵³ DBE 2012b:32.

¹⁵⁴ *Schools Act* 84/1996:ch 5.

¹⁵⁵ 84/1996.

Learner: A “learner” is defined in the *Schools Act*¹⁵⁶ as “any person who is receiving education or is obliged to receive education in terms of this Act”.

Matric: A term used in South Africa to indicate grade 12, the final year of school.

Multigrade classes: Refers to a class in which more than one grade is taught in the same classroom at the same time. Multigrade classes are most common in rural and farm schools owing to the small numbers of learners. In some instances, such classes are also formed where there is a shortage of classrooms.¹⁵⁷

National Senior Certificate: The qualification obtained after successfully completing grade 12; also known as “matric”.

No-fee school: In terms of the no-fee policy of the Department of Education, schools in poor areas are identified by the Department and are assigned the status of a no-fee school, which implies that the school is not allowed to levy any fees from parents in order to enrol a child in the school.¹⁵⁸ However, this does not absolve the SGB from the responsibility to raise funds via other means, such as voluntary contributions by parents and other fundraising events.¹⁵⁹

Ordinary school: A school that is not a special school.¹⁶⁰ In terms of the definitions of the *Schools Act*,¹⁶¹ “school” means “a public school or an independent school which enrolls learners in one or more grades from grade R (Reception) to twelve”. In terms of the *National Education Policy Act*,¹⁶² a “school” means a “pre-primary, primary or secondary school”.

Primary school: An institution that offers formal schooling from grade R to grade 7. An institution that offers only a selection of grades from grade R to grade 7 is also referred to as a primary school.¹⁶³

Public school: A school established in terms of chapter 3 of the *Schools Act*.¹⁶⁴

¹⁵⁶ 84/1996:s 1.

¹⁵⁷ DBE 2010: 8-10; DBE 2012b:32.

¹⁵⁸ GN 869/2006:s 151-163.

¹⁵⁹ *Schools Act* 84/1996:s 36(1).

¹⁶⁰ DBE 2010:44; DBE 2011:4, 18; DBE 2012b:32.

¹⁶¹ 84/1996.

¹⁶² 27/1996.

¹⁶³ DBE 2010:45.

¹⁶⁴ 84/1996:s 12-33.

Reactive discipline: See definition of “retributive discipline”.

Restorative discipline: Refers to disciplinary measures taken in accordance with the principles of restorative justice.

Restorative justice: Is, for purposes of this study, a set of principles, a philosophy and an alternative way of thinking about wrongdoing. It encompasses practices to involve, to the extent possible, those who have a stake in a specific disciplinary matter and to collectively identify and address harm, needs, and obligations in order to heal and put things as right as possible, in instances of wrongdoing. Furthermore, the broader approach to restorative practices, as followed in this study is to include the restorative values and principles in disciplinary measures so as to prevent misconduct and to build relationships and communities of care in schools.¹⁶⁵

Restorative-justice practices: Refer to all the strategies, approaches, programmes, models, methods and techniques used on a proactive level to prevent misconduct, as well as on a reactive level to address the harm caused by misconduct.

Retributive discipline: Refers to disciplinary measures taken to address misconduct after misconduct has occurred. Retributive discipline is mostly punitive in nature and is associated with an authoritarian approach to discipline. Other terms used interchangeably with the idea of retributive discipline include “punitive discipline”, “reactive discipline” and “corrective discipline”. With regard to the term “corrective discipline”, a distinction should be made between correction as a punitive response to “correct” misconduct as opposed to corrective measures used as an educational response to misconduct.

School: For purposes of this study, the term “school” will refer only to a public school as envisaged in the *Schools Act*¹⁶⁶ and will not include independent schools. A “school” will thus refer to any public school which enrolls learners in one or more grades from grade R (reception) to grade 12. “School” also refers to a pre-primary, primary or secondary school.

School environment or learning environment: Refers mainly to the environment of school governance and management, and not to physical resources.¹⁶⁷

¹⁶⁵ Zehr 2002:37. Amstutz & Mullet 2005:15; Morrison 2005:106.

¹⁶⁶ 84/1996:s 1.

¹⁶⁷ UNESCO 2005:44.

School fees: Any form of contribution of a monetary nature paid by a person or body in relation to the attendance or participation by a learner in any programme in a public school.¹⁶⁸

Secondary school: An institution that offers formal schooling from grade 8 to grade 12. An institution that offers only a selection of grades from grade 8 to grade 12 is also referred to as a secondary school.¹⁶⁹

Social grant: Means a child-support grant, a care dependency grant, a foster child grant, a disability grant, an older person's grant, a war veteran's grant or a grant-in-aid.¹⁷⁰

Special Needs Education (SNE): Is defined as "education that is specialised in its nature and addresses barriers to learning and development experienced by learners with special education needs (including those with disabilities) in special as well as ordinary schools".¹⁷¹ Education is provided on a full-time basis to address the curriculum-support needs of these learners. For a learner to be classified as an SNE learner, the assessment done by the school, with the permission of the parent(s), must be ratified by a member of the district-based support team or any other relevant district official.¹⁷²

Special school: Is defined as a school "resourced to deliver education to learners requiring high-intensity educational and other support on either a full-time or a part-time basis. The learners who attend these schools include those who have physical, intellectual or sensory disabilities or serious behaviour and/or emotional problems, and those who are in conflict with the law or whose health-care needs are complex".¹⁷³

Stakeholder: The term includes those with rights and/or responsibilities in education in general or a specific school or schools, as well as those with a direct or indirect interest in a school or schools. It includes parents, educators, non-educators, the SGB, learners, donors and the broader community. Not all the stakeholders will be applicable in every reference to the term and the relevant role players should be deduced from the context of the discussion.

Third parties to misconduct: Refers to those who are not the direct or intended target of the misconduct of the transgressor, but who are adversely affected by such misconduct. For

¹⁶⁸ DBE 2012b:32.

¹⁶⁹ DBE 2010:45; DBE 2012b:32.

¹⁷⁰ DBE 2010:45.

¹⁷¹ DBE 2011:4, 18.

¹⁷² DBE 2012b:32.

¹⁷³ DBE 2011:4, 18.

instance, a learner who disrupts a class does not necessarily aim to cause harm to the other learners, but his or her conduct has an impact on the whole class; or a bully may target a specific victim, but the learners who witness the bullying may be adversely affected because they are afraid that they will become victims too.¹⁷⁴

Transgressor: Refers to a learner who transgresses school rules and/or is guilty of misbehaviour or criminal acts, and/or refers to a person who infringes on the constitutional rights of others through his or her conduct.

Victims of misconduct: Refers to any person who is adversely affected by the actions of a transgressor. "Adversely affected" refers to physical, psychological, emotional or any other form of harm experienced by the person as a result of the actions of the transgressor.

7. OUTLINE OF CHAPTERS

Chapter 2: Provides a broad contextual background to the school education system, starting with definitions of the concepts "discipline" and "misbehaviour". The nature, extent and impact of school disciplinary problems will be discussed in order to stress the importance of the study. Further, the causes of ill-discipline will be examined so as to indicate the complexity of the matter. Thereafter, the social background is explored to ensure that the legal framework is evaluated within a specific context, and to ensure that any recommendations that follow from the study will be appropriate to the context.

Chapter 3: Provides a discussion on the existing legal framework. Relevant legislative provisions as well as case law will be discussed to map the current legal position with regard to school discipline. The chapter concludes with the identification of problem areas in the current legal framework, which is apparently not in line with the best-interests-of-the-child standard.

Chapter 4: To determine whether the existing legal framework is aligned with the best-interests-of-the-child standard, the standard must first be clarified. The standard is context-specific and must therefore be developed so as to be suitable for the school disciplinary context. In this chapter, the focus will be on the general development of the concept in international and national law. The textual analysis of the best-interests-of-the-child provision contained in the Constitution will be followed by a discussion of the functions, strengths and challenges of the concept.

¹⁷⁴ Mestry, Van der Merwe & Squelch 2006:47-48.

Chapter 5: The main aim of the chapter is to give content to the best interests of the child. This is done with reference to other constitutional rights relevant to the school disciplinary context, namely the right to dignity, the right to education, the right to life, survival and development, the right to non-discrimination, and the right to participate.

Chapter 6: Provides an examination of three approaches to discipline, namely the retributive, positive-discipline and restorative approaches. These approaches will be defined, their implementation will be discussed, and advantages and challenges will be considered. Comparisons between the different approaches will also be made.

Chapter 7: One of the aims of this study is to give content to the best-interests-of-the child concept and to determine a benchmark for policy-makers and those who have to enforce discipline so that they can measure the constitutionality of their decisions and actions against the benchmark. The focus of this chapter is twofold: firstly, it provides a list of factors to be taken into account in any actions or decisions with regard to discipline in order to ensure that these actions or decisions are in line with the best-interests-of-the-child standard; secondly, the different approaches to discipline will be evaluated against the factors indicating the best interests of the child.

Chapter 8: In this chapter, the solutions to the research questions will be summarised and conclusions will be drawn. In addition, recommendations will be made to address the lack of focus on the best interests of the child as highlighted in chapter 3. Recommendations will also be made on the most appropriate approach to discipline in accordance with the best-interests-of-the-child standard and the identified list of factors.

8. CONCLUSION

This chapter provided a brief overview of the intensified focus on the best interests of the child in the child-care and child justice contexts. The lack of a similar focus on the best interests of the child in education and in school disciplinary matters in particular was briefly highlighted. The need therefore arises to investigate policies and practices related to school discipline to ensure that these are also compatible with the best-interests-of-the-child standard. The main aim of this study is to determine what would be in the best interests of the child in the context of school discipline.

Currently, the best-interests-of-the-child standard is not properly developed in the context of discipline. The need for a conceptual study, determining the content of the best-interests-of-the-child concept was therefore identified as an appropriate research method. In addition, the

existing policies and practices should be evaluated. A policy analysis was also identified as a suitable research method to determine the compliance of existing policies and practices. In the next chapter, the contextualisation of the best-interests-of-the-child concept will commence with an investigation of the social context of school discipline.

CHAPTER 2

CONTEXTUAL BACKGROUND: DISCIPLINE IN SOUTH AFRICAN SCHOOLS

1. INTRODUCTION

It is claimed that discipline has collapsed in many South African schools. There are even some who are of the opinion that the lack of discipline has reached crisis proportions or that, at the very least, the issue of discipline is heading towards a severe crisis.¹ It is further claimed that a culture of crime and violence exists in South African education.² There is, consequently, a unanimous call among researchers, politicians, administrators and parents for urgent intervention in school discipline. Several studies³ have been undertaken over time to determine the nature, extent and causes of disciplinary problems. Numerous recommendations have been made and have been implemented to improve discipline in schools, and the situation is still being monitored. Thus far, these studies have focused primarily on determining the extent of the problem at its primary location, namely in schools and in classrooms where educators are faced with the realities on a day-to-day basis.

The aim of this study is not to add to the knowledge on the nature, extent or causes of the lack of school discipline. Rather, the focus is on an analysis of the legal framework pertaining to discipline, of the measures used to address the issues concerned, and of the compatibility of these measures with the best-interests-of-the-child standard. However, this legal analysis cannot take place in a vacuum, and the current social context relevant to school discipline must therefore be investigated to ensure a proper appreciation of the problems and of the suitability of the existing legal response to addressing the necessary social demands. Furthermore, recommendations to change the legal framework must be practical and suitable for the specific social context. An understanding of the social context also provides a sense of the urgency of the matter at hand and whether legal reforms should be a priority or not.

¹ Wolhuter & Van Staden 2008:389-398.

² De Wet 2003:118.

³ De Wet 2003:113-121; Pienaar 2003:263; Zulu, Urbani, Van der Merwe & Van der Walt 2004:170-175; De Wet 2005a:705-725; Oosthuizen & Van Staden 2007:359-371; Prinsloo 2008:27-36; Motala, Dieltiens & Sayed 2009:251-263; Lessing & De Witt 2010:21-37, 2011:403-418; Motseke 2010:117-133; Ntuta & Schurink 2010:1-9; Maphosa & Shumba 2010:387-399; Le Roux & Mokhele 2011:318-335; Maphosa & Mammen 2011:185-193; Pahad & Graham 2012:3-15; SACE 2012; Sedibe & Fraser 2012:151-157.

In what follows, a brief background on South African schools will be provided. Thereafter, the concepts of discipline and misconduct will be explored. The nature and extent of disciplinary problems will be investigated, as well as the perceptions of educators and learners in this regard. The impact of school-based violence will also be discussed in order to enhance the sense of urgency of the matter. Therefore, the causes of ill-discipline associated with the different role players will be examined so as to provide assistance in this regard.

2. BACKGROUND ON SCHOOLS

According to the 2011 census data, the South African population grew from over 40,5 million people in 1996 to more than 51,7 million people in 2011.⁴ This has inevitably resulted in increasing pressure on existing educational resources and in the continuous need to expand these to ensure quality education for all. The Department of Basic Education reported that, in 2012, 425 167 educators taught 12 428 069 learners in 25 826 ordinary schools, which included public and independent schools.⁵ Although there is, in general, an increase in the number of independent schools, the majority of schools (95%) are public schools.⁶ The number of no-fee public schools has increased over time. The target was to provide education for 60% of learners in no-fee schools. However, the norm was exceeded and approximately 78% of learners attended more than 20 000 no-fee schools in 2011.⁷

There were significant improvements in access to education. These included an increase in the number of children attending pre-primary programmes,⁸ and in learners of compulsory school-

⁴ Statistics South Africa 2012:14-15. The national census was conducted from 9 to 31 October 2011.

⁵ DBE 2012c:1. There has been a steady increase in the number of learners attending school. For instance, in 2008, 12 197 241 learners attended ordinary schools. For details of the increase in numbers over the years, see DBE 2010:2, DBE 2012:33 & DBE 2012b:14. For details on the number of schools since 2008, see DBE 2010:2, DBE 2012b:5.

⁶ DBE 2010:8, DBE 2012b:10-11. The number of public schools decreased slightly from 95,6% in 2008 to 95% in 2010 – DBE 2012b:6, DBE 2012c:1. Independent schools increased from 1 145 in 2009 to 1 338 in 2010, and to 1 571 in 2012; see also Statistics South Africa 2012:27-29. Although the vast majority of people in the age group 5 to 24 years still attend public institutions, there was a decline from 94,9% to 92,7% in this regard between 2001 and 2011.

⁷ See DBE 2012:99, DBE 2012b:10-11, DBE 2010:18 to track progress over time. In 2008, 55% of public schools were no-fee schools – GN 869/2006:s 151–163. Schools are divided into five quintiles, with quintile 1 representing the poorest schools. A poverty index is used to redistribute non-personnel expenditure – Motala, Dieltiens & Sayed 2009:262. A pro-poor policy is followed with quintile 1 schools receiving the largest portion of the expenditure. Quintile 1 and 2 schools are mostly classified as no-fee schools.

⁸ DBE 2012e:7-10. The percentage of 0 to 4-year-olds attending Early Childhood Development (ECD) facilities increased from 7% in 2002 to 32% in 2010. Furthermore, 64% of 3- to 5-year-olds attended ECD facilities in 2010, which is very encouraging, since there is a positive correlation between the attendance of ECD facilities and subsequent retention and performance in schooling. This statistics was obtained from the 2010 annual General Household Survey (GHS), which is conducted by Statistics South Africa. This national survey includes approximately 30 000 households and has been undertaken during the month of July since

going age.⁹ In the age cohort 7 to 18 years of age, there was a general improvement in school attendance and, in 2009, only 5,3% of all children in this age group did not attend school, compared with 7% in 2002.¹⁰ There was also a significant decrease in functional illiteracy levels.¹¹ These decreased from 33,6% in 1996 to 19,1% in 2011.¹² Furthermore, the number of qualified educators also increased from a mere 53% in 1990 to 95,1% in 2010.¹³ In 2010, there was almost universal school attendance (98,7%) of children between 7 and 15 years.¹⁴

Despite all the laudable improvements, there is cause for concern regarding a number of issues. Macro Indicator Trends in Schooling: Summary Report 2011 shows that there has been a steady decline in attendance of an education institution per year group in the age cohort 16 to 18 years.¹⁵ In 2009, 93% of 16-year-olds attended an education institution, while this fell to 85% for 17-year-olds and to 72% for 18-year-olds. It is conceded by the Department of Basic Education that there has been no improvement in the participation of learners in this age group (16–18-year-olds) since 2002.¹⁶ In line with these findings, the 2010 report, General Household Survey (GHS) 2010: Focus on Schooling,¹⁷ found that 82,9% of children in this age group (16–18-year-olds) attended an educational institution. Thus, 17% of children in this age group were not attending an educational institution, but some of these children had completed matric (5,6%).¹⁸

2002. It is aimed at obtaining information on the availability of goods and services and includes education provisioning. This is in line with the findings of Macro Indicator Trends in Schooling: Summary Report 2011, DBE 2011a:18- 23 which indicates that access to education programmes for 5-year-olds more than doubled from 29% in 2002 to 78% in 2009.

⁹ *Schools Act* 84/1996:s 3. DBE 2011a:25 indicates that the number of 7-year-olds to 15-year-olds increased from 96,3% in 2002 to 98,5% in 2009. According to Social Surveys Africa 2010:3, only 1,2% of learners in this age cohort do not attend school. In line with this finding, the 2010 GHS found that 99% of children in this age group attend an educational institution – DBE 2012e:14.

¹⁰ DBE 2011a:30, 32. In 2002, 860 035 children did not attend school, compared with 662 419 children in 2009.

¹¹ Statistics South Africa 2012:34-35. A person above 15 years of age with no education or a highest level of education less than grade 7 is regarded as functionally illiterate. Despite the overall decrease in the functional illiteracy level, it is still quite high for some race groups, namely 22% for Blacks, 16,6% for Coloureds, 8,85% for Indians and 1,95% for Whites – 2011 census data.

¹² Statistics South Africa 2012:35. Functional illiteracy levels have decreased by about 50% for Blacks and Coloureds since 1996. This is in line with the DBE 2012e:49-50 data indicating that 80% of adults aged 20 years or above completed grade 7. In the age group 15 to 24 years, 91% were functionally literate in 2010.

¹³ DBE 2011a:56.

¹⁴ DBE 2012e:18.

¹⁵ DBE 2011a:27.

¹⁶ DBE 2011a:26-29. Compare this with the results of Social Surveys Africa 2010:3 in Access to Education in South Africa. Submissions to the Portfolio Committee on Basic Education indicating that educational institutions are attended by an acceptable 90% of children aged 16 to 18 years of age.

¹⁷ DBE 2012e:18-21.

¹⁸ DBE 2012e:21-22.

The improvement in enrolments to 95% of children in this age cohort has been set as a strategic goal for 2014. To achieve this goal, the building of additional classrooms and training of additional teachers are prerequisites. If this goal is not attained, the number of youths who eventually drop out of school after they reach 15 years of age, but before they reach grade 12, will remain at about 500 000.¹⁹ This constitutes about 50% of all learners who access schools in grade 1. Hence, currently, only about one in two children who access school will stay in school until grade 12 and take the National Senior Certificate (NSC) examination, also known as the “matric examination”.²⁰

Apart from the high learner dropout rate, the output of the education system is, in general, unsatisfactory, despite huge financial inputs. In fact, South African expenditure on education exceeds that of similarly situated countries.²¹ The unsatisfactory state of education is evident from the low completion rates, the high repetition rates, the low matric pass rate, and the unacceptable performance of learners in national and international literacy and numeracy tests. These aspects will be discussed briefly below.

According to Census 2011, 51,1% of all people in the age group 20 to 24 have not obtained matric, 40,6% have passed matric and 8,3% have obtained some higher qualification.²² This is in line with another study that indicates that a mere 38,8% of 19- to 25-year-olds have completed grade 12 successfully.²³ Mbanjwa²⁴ argues that despite the official information provided by the Department of Education that the matric pass rate was 70,2% in 2011, the

¹⁹ DBE 2011a:26-28, DBE 2012e:20, DBE 2012b:34. According to the data provided by the Department of Basic Education, there were about a million learners in every grade, except grade 12 with only slightly more than 570 000 learners, indicating that about 50% of learners do not return to school to finish grade 12. This is further corroborated in that, since 2008, only about 500 000 learners wrote the matric examination – see DBE 2011b:44 and table 1 in this chapter.

²⁰ DBE 2011a:26-28. Dropout rates for the compulsory school-going ages are low, but escalate to about 12% in both grades 10 and 11. Dropout rates in grades 1 to 3 are around 1%, are less than 1% for grades 2 to 4, and are between 2% and 4% from grades 5 to 8 – DBE 2011b:34. In 2010, the number of learners steadily dropped from 1 028 706 in grade 10, to 828 894 in grade 11 and to 572 338 in grade 12 – see table 1 in this chapter.

²¹ DBE 2011a:59. In 2009/2010, government expenditure on schooling as a percentage of gross domestic product (GDP) was about 4%, which compares favourably with that of other countries. Average expenditure in developing countries is about 3%, and 2,9% in the countries of sub-Saharan Africa. Since 2007/2008, there has been a steady increase in public expenditure on schooling as a percentage of GDP. In 2009/2010, government spent 17,7% of its budget on education, and per capita expenditure on primary as well as secondary education has increased in nominal as well as real terms since 2000/2001. Per capita expenditure in USD on primary-school learners amounts to USD 1 383 in South Africa, USD 167 in sub-Saharan Africa and USD 614 in Latin America, whereas per capita expenditure on secondary-school learners is USD 1 726 in South Africa, USD 376 in sub-Saharan Africa and USD 594 in Latin America.

²² Statistics South Africa 2012:14; compare this with DBE 2012e:46, which indicates that 46,6 % of 24-year-olds have completed grade 12.

²³ Social Surveys Africa 2010:3.

²⁴ 2012:1.

reality is that it was only 38% if one takes into account the number of learners who dropped out of school.²⁵ Apart from the low numbers of learners completing matric, those who pass it, barely pass it, and then meet only the minimum requirements.²⁶

The poor matric results are actually final confirmation that the education system fails to provide acceptable education, because the quality of education is not comparable with international standards. This is substantiated by the results of a number of international tests. Eight of South Africa's neighbouring countries outperform South Africa in tests of the Southern and Eastern African Consortium for Monitoring Education Quality (SACMEQ), and this despite the fact that these countries have a gross domestic product of one-tenth to one-fifth of that of South Africa.²⁷ South African learners scored significantly lower than the international average in both the Trends in International Mathematics and Science Study (TIMSS)²⁸ and in the Progress in International Reading Literacy Study (PIRLS)²⁹ in 2011.

A study by the Joint Education Trust, Education Services, indicates that 80% of high schools are highly ineffective. These schools produce only 15% of the higher-grade passes in the matric examination, compared with 66% of these passes produced by only 7% of the top-performing schools.³⁰

In an effort to address the low quality of education, the Department of Basic Education introduced national standardised annual tests called the Annual National Assessment (ANA) in 2011. The results were alarming, indicating that, country-wide, more than half of grade 6 learners actually performed at a grade 3 level or below. The ANA results for 2011 and 2012 are nationally as follows: grade 3 learners³¹ scored, on average, 35% and 52% in the literacy test in 2011 and 2012 respectively. There was an increase from 28% in 2011 to 41% in 2012 in the numeracy test. In grade 6,³² the national average for the language test was 28% in 2011 and

²⁵ DBE 2011b:43. In 2011, 496 090 learners enrolled for the examination and 348 117 passed the examination.

²⁶ DBE 2011a:43. A learner is issued with the NSC if he or she achieves: at least 40% in the required official language at Home Language level; at least 30% in another required language on at least First Additional Language level; at least 30% in Mathematical Literacy or Mathematics; at least 40% in Life Orientation; at least 40% in one of the remaining three subjects; and at least 30% in two other subjects in the NSC examination. In 2010, only 24% of the 364 513 candidates who passed the examination were eligible to enter a university for further studies.

²⁷ Taylor 2008:2.

²⁸ Mullis, Martin, Foy & Arora 2012:40-47, 122-137.

²⁹ Mullis, Martin, Foy & Drucker 2012:50-53, 69-103.

³⁰ Taylor 2008:2-3.

³¹ DBE 2012a:14. In 2012, 974 363 learners in grade 3 took part in the test.

³² DBE 2012a:14. In 2012, 944 397 grade 6 learners took part in the test.

43% for home-language tests and 36% for first additional language tests in 2012.³³ Further, there was a decrease in the mathematics test results from an average of 30% in 2011 to 27% in 2012.³⁴ Grade 9 learners³⁵ wrote the test for the first time in 2012. They scored, on average, 43% for their home-language test, 35% for the first additional language test and 13% for the mathematics test. Although there were some improvements in some of the results, it should be kept in mind that, in 2011 and 2012, respectively, only 17% and 37% of learners obtained more than 50% for the grade 3 mathematics test. In the grade 6 mathematics test, the number of learners obtaining more than 50% decreased from 12% to 11% in 2012.³⁶

The relevance of the above-mentioned statistics will become more evident in the discussion below on the high level of overage learners due to high repetition rates and their impact on school discipline.³⁷ On a national level, the impact of the growing number of unemployable youths on the economy must be considered.³⁸ School discipline has an impact on academic output. On the other hand, academic success (or the lack of it) also has an impact on the motivation and self-esteem of learners, for it contributes to acceptable or unacceptable behaviour.³⁹

3. DISCIPLINE

Educators interpret the term “discipline” differently. Their opinions on what the term “discipline” means vary and include: forming the moral character of learners, exercising control over learners, proactive and restorative measures, self-discipline, and even a very narrow view that equates discipline with punishment. It is thus important to determine the meaning of this concept.⁴⁰

3.1 Defining “discipline”

The English word *discipline* is derived from the Latin word *disciplina* which means:

instruction, tuition, teaching in the widest sense of the word; ... are the objects of instruction... all that is taught in the way of instruction, whether with reference to single

³³ In 2011, learners wrote only one language test, while they wrote two such tests in 2012, distinguishing between home language and first additional language.

³⁴ DBE 2012a:3.

³⁵ DBE 2012a:14. In 2012, 1 089 049 grade 9 learners took part in the assessment.

³⁶ DBE 2012a:2-3.

³⁷ See par 8.4.6 below, as well as the discussion in ch 3, par 6.11 herein on the lack of a clear distinction in legislation between the interests of children under 18 years of age and learners in schools above the age of 18 years.

³⁸ Vollgraff 2011:7; Phakati 2012:4.

³⁹ See the discussion below in par 8.4.5.

⁴⁰ Lessing & De Witt 2010:24.

circumstances of life, or science, art, morals politics, ... *learning, knowledge, science, discipline*. Object: ... *music, ... agriculture, ... art of war tactics, ... military discipline, ... domestic discipline, ... science of government, ... statesmanship, ... philosophical doctrines, ... philosophical system*. Subject: *a custom, habit*.⁴¹

Related words are *disciplinabilis*, which means to learn as a result of teaching; *disciplinabiliter*, which means “in an instructive manner”; *disciplinatus*, which means “instructed, disciplined”; *discipulatus*, which means “the condition of a disciple, discipleship”; *discipulus*, which means “a learner, scholar, pupil, disciple” and “a learner in an art or trade, an apprentice, disciple of Christ”.⁴²

Similar translations can be found in the *Latijnsch Woordenboek*. Apart from the one alternative translation for the word *disciplina* with the Dutch word *tucht*, there is no indication that discipline is about punishment.⁴³ The translations are rather indicative of a relationship between the educator and the learners, and the focus is on the transfer of knowledge and skills through a process of instruction or teaching and learning in the widest possible sense. The focus is thus on instructing the child and not on punishment. The aim is to instil customs and habits according to which a person is supposed to act. It implies a two-way process where the one party teaches, and the other party learns and follows.

Oosthuizen, Roux and Van der Walt⁴⁴ are of the opinion that discipline is about “disciplining” learners. This entails guiding them on the right way, correcting inappropriate behaviour in a loving and caring way, and warning and supporting learners where necessary.

The same approach is to be found in translations of Greek words related to discipline, such as *paideia*, *sophronismos* and *kathartizo*.⁴⁵ Concepts that arise in the translations include: the well-rounded and holistic upbringing of the child; the idea of discipline as a process of guidance; teaching and instruction; the empowerment of the child by equipping him or her for the future; the process of guiding the child to a self-controlled and sound life; and the process of bringing someone in line with what is right and acceptable in a specific community. Minimal reference is made to chastisement as a dimension of discipline.

⁴¹ Lewis & Short 1962:587.

⁴² Lewis & Short 1962:587.

⁴³ Van Wageningen & Muller 1965:283.

⁴⁴ 2003:375.

⁴⁵ Oosthuizen, Roux & Van der Walt 2003:373-390. They discuss the different classical approaches to discipline and provide some insight into the words related to discipline used in Greek and Latin.

Brendtro, Brokenleg and Van Bockern⁴⁶ argue that the original concept of discipline whereby the adult provides guidance through teaching and the child follows, became distorted over time to the point where many dictionaries include punishment as a synonym for discipline. Oosthuizen, Roux and Van der Walt⁴⁷ researched several dictionaries in this regard, and their summary of the descriptions of the concept reveals a number of themes related to it, which include the following: order, orderliness, ordered behaviour, control, self-control, to restrain, restraint, punishment, chastisement, to train oneself in obedience, obedience to rules, set rules of conduct, teaching, training resulting in ordered behaviour, improved behaviour due to training, training in obedience, a subject of instruction, and a branch of learning or instruction.

Discipline is therefore a concept with a variety of dimensions and connotations that result in different people attaching different meanings to it.⁴⁸ It is thus necessary to determine what it means, or is supposed to mean, in the context of school discipline. In what follows, several authors' views of what discipline entails will be investigated in order to arrive at a definition of discipline for purposes of this study. Some of the themes identified above will also be explored further.

Modern writers⁴⁹ describe the role of the educator as that of providing guidance and training, as well as acting as a positive role model for the child. This point of view is also to be found in the original meaning of "discipline" discussed above. Children learn through what they see and experience, and therefore imitate the examples set by educators. The educator should strive to guide the child towards maturity, useful citizenship, responsible adult life and holistic development. Oosthuizen Roux and Van der Walt⁵⁰ emphasise the importance of guiding learners towards taking care of themselves, of one another, and of the entire creation. These authors therefore add concepts such as healing, reconciliation, peace-making, loving and caring relationships, and using authority to serve others in humility in the disciplinary process. Amstutz and Mullet⁵¹ are in agreement and highlight the importance of developing and promoting the following in the disciplinary process: empathy, responsiveness to the needs of others affected by the misconduct, accountability and responsibility, the reintegration of the transgressor into the community, the creation of a caring climate, and then being adaptable if the system employed does not promote these outcomes.

⁴⁶ 2002:109.

⁴⁷ 2003:374.

⁴⁸ Lessing & De Witt 2010:24.

⁴⁹ De Klerk & Rens 2003:357-358; Oosthuizen, Roux & Van der Walt 2003:377-388; Rossouw 2003:419-420.

⁵⁰ Oosthuizen, Roux & Van der Walt 2003:384.

⁵¹ Amstutz & Mullet 2005:10.

Several authors agree that discipline is a continuous learning process aimed at eventual self-discipline. Pienaar⁵² states that, in a scholastic environment, discipline in a positive sense refers to “learning, regulated scholarship, guidance and orderliness”. Joubert, De Waal and Rossouw⁵³ highlight the importance of positive behaviour management in advancing self-control among learners, while Brendtro, Brokenleg and Van Bockern⁵⁴ emphasise the importance of involving children in the process of learning social responsibility and self-control and indicate that it is not about doing things to them, but is rather a process that includes them and gives them autonomy. Learners should therefore be given the opportunity to make “intelligent” decisions and to take responsibility for their choices. By making choices and taking responsibility for the consequences of their choices, learners learn and develop.⁵⁵ The outcome of discipline should be to guide the learner to:

the kind of self-control that underlies voluntary compliance with just rules and laws, that is the mark of mature character, and that a civilized society expects of its citizens.⁵⁶

With regard to order, the focus should be on its purpose. Order should enable learners to develop their full potential with regard to, *inter alia*, their social, emotional, cognitive, physical, and psychological characteristics. Order should also be distinguished from uniformity. To develop the full potential of every child requires recognising the unique needs of every child.⁵⁷ The aim of order is thus not to satisfy adults’ needs for submissiveness on the part of learners, and for control, authority, power, and uniformity, or for children to be obedient for the sake of the adult. Le Mottee⁵⁸ explains that:

[d]iscipline has nothing to do with controlling disruptive or other unacceptable bad behaviours, whether on the part of children or adults. It has everything to do with ensuring a safe and valuing environment so that the rights and needs of people are respected, vindicated and safeguarded ... every child has the right to be loved, valued, see for self, communicated with in open, respectful and equalizing ways and allowed to pursue legitimate work, leisure, spiritual and other goals in life.

While the learner is at school, the school must ensure that the learner is safe and protected from any form of harm. Safety does not only refer to physical safety, but also to emotional and

⁵² 2003:262.

⁵³ 2004:78.

⁵⁴ 2002:109.

⁵⁵ Lessing & De Witt 2010:25.

⁵⁶ De Klerk & Rens 2003:358.

⁵⁷ De Klerk & Rens 2003:357-358; Le Mottee 2005:sp.

⁵⁸ 2005:sp.

social safety, which is a prerequisite in every social system in order to ensure the self-actualisation of those in the system.⁵⁹ Thus, discipline must ensure the safety of learners and must contribute to an environment conducive to teaching and learning.⁶⁰ Consequently, discipline is aimed at providing an environment where everyone's constitutional rights will be respected, protected, promoted and fulfilled.⁶¹ The process of dealing with securing the short-term safety of learners should also be used as teachable moments to facilitate the long-term aims, namely the full development of the child and self-discipline.

Oosthuizen⁶² highlights the important role of values in the education process of teaching, forming and advancing the learner. He therefore states that the disciplinary process is dependent on clear rules which are founded on specific values. Le Mottee⁶³ agrees with this point of view and highlights the importance of respect, stating that discipline is not only about what happens among people, but, more importantly, also about what happens within people. Brendtro Brokenleg and Van Bockern⁶⁴ argue along the same lines and are of the opinion that:

[a]ll child rearing involves some assertion of power of adults over their young. In the purest form of "discipline", an adult provides a strong model and value guidance to the young "disciple".

These rules and values set the parameters within which the learner is allowed to act, and they form the foundation for dealing with misconduct. "To discipline" involves guiding the child in accordance with the social values of the group to which the child belongs.⁶⁵ Learners' conduct should thus be in accordance with the values of the school, which are determined by the particular school community. Through this value-setting process, discipline becomes the vehicle for maintaining order. The educator assumes the position of leader and the learner assumes that of follower. The educator should therefore occupy the position in such a way that the learners will accept and respect him or her.⁶⁶

The reality of the distortion of the original focus on teaching and learning in the disciplinary process was highlighted above and is reflected quite profoundly as follows:

⁵⁹ Le Mottee 2005:sp; see also De Klerk & Rens 2003:357-358; Nieuwenhuis 2007:208-209.

⁶⁰ Joubert, De Waal & Rossouw 2005:208.

⁶¹ Le Mottee 2005:sp.

⁶² 2006:48; see also Nieuwenhuis 2007:65-82.

⁶³ 2005:sp.

⁶⁴ 2002:109.

⁶⁵ Lessing & De Witt 2010:23-24.

⁶⁶ Lessing & De Witt 2010:24.

If a child can't read... we teach,
 If a child can't spell... we teach,
 If a child can't swim... we teach,
 When a child can't behave... we punish.⁶⁷

It should be kept in mind that children are born without any social skills or knowledge as to how to behave in an acceptable way. This they must be taught like any other skill. Yet, punishment is frequently used as the preferred method of teaching appropriate behaviour, and, often, as the only method.⁶⁸ Punishment is, consequently, wrongly equated with discipline.⁶⁹ The use of punishment – which includes corporal punishment – in the disciplinary process is, however, not uncommon, but the key to the use of punishment in the such process is moderation, that is, it should be applied only as a measure of last resort within a trusting relationship.

To conclude, the discipline concept includes dimensions of control and order that are aimed at creating an environment conducive to teaching and learning and focuses on the holistic development of the child. It must focus on the future of the child and must ensure that the child develops self-discipline and the ability to take his or her place in society as a useful and responsible citizen. Punishment is an acceptable dimension of the discipline concept if it is used as a last resort and as part of a trusting relationship.

For purposes of this study, discipline is viewed as a teaching and learning process with two distinct aims: to create an orderly environment conducive to teaching and learning so as to enable the holistic development of every learner; and to teach learners to behave in a socially responsible manner and to develop self-discipline, which, ultimately, will result in respect for the rights and needs of others.

3.2 Use of the term “discipline”

The term “discipline” is used in different ways. In this study, the word “discipline” or variants thereof should be read so as to align it with the two main aims of discipline as set out above, unless such a reading is not compatible with the context.

As a verb, “discipline” indicates the process of teaching the child acceptable social conduct to ensure that he or she can develop to his or her full potential, for example: “The child is being

⁶⁷ Jansen & Matla 2011.

⁶⁸ See the discussion in par 6.1.4 and 8.1.4 below on educators complaining about the lack of proper alternatives to punish children after the abolition of corporal punishment.

⁶⁹ See the detailed discussion in par 3.3 below on the distinction between discipline and punishment.

disciplined to correct his or her behaviour.” As an adjective, it describes the state of the noun: for example: “This is a well-disciplined child or school.” Thus, in this context, what is being stated is that the school or child functions within the parameters of the taught guidelines of what constitutes acceptable and responsible behaviour. “Disciplinary measures” would indicate any action, decision, policy, legislative provision and/or procedure used to teach responsible conduct. As a noun, it can indicate a process or state, such as order or disorder, for example: “School discipline is a considerable problem in South Africa.” Thus, here, the environment and/or the processes followed in schools to maintain order are regarded as not being conducive to teaching and learning; or that the evidence indicates that many educators still revert to unconstitutional measures to deal with discipline. Thus the environment and/or the processes followed to create a suitable environment, are deemed inappropriate.

3.3 Distinguishing discipline and punishment

It is often argued that to punish children is to discipline them. Therefore, the terms “discipline” and “punishment” are often used interchangeably. Furthermore, punishment is often seen as an integral part of discipline and the disciplinary process. In this regard, Coetzee, Van Niekerk and Wydeman⁷⁰ suggest that punishment should be regarded as part of discipline “in that it constitutes the measures used to enforce and ensure discipline”.

To determine whether their assertions are valid in modern times, one has to examine the definition of what constitutes punishment in the context of school discipline. General Comment 8 of the Committee on the Rights of the Child defines corporal or physical punishment as:

any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting (“smacking”, “slapping”, “spanking”) children, with the hand or with an implement – a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example kicking, shaking or throwing children, scratching, pinching, biting, pulling hair, boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children’s mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.⁷¹

⁷⁰ 2008:216.

⁷¹ CRCGC 8 2006:par 16.

It is thus clear that punishment entails some form of physical or mental violence. This definition clearly has no element of teaching and learning to it in order to ensure that children are taught acceptable social behaviour. It is also not reconcilable with a process of ensuring a safe environment conducive to teaching and learning. Rather, it reflects a process of assaulting children physically or emotionally. Although it might be argued that punishment is used to teach children to act in a socially acceptable manner, the definition of punishment has no inherent element of teaching and learning to it. This is in sharp contrast to the definition of discipline. Since teaching and learning are not an integral part of the definition of punishment, punishment is at risk of being misused to abuse children under the guise of teaching them appropriate social skills.

This argument is further strengthened by a closer examination of the general aims of punishment in, for instance, the criminal law. The general aims of punishment in criminal law are said to be retribution, deterrence, revenge, prevention and rehabilitation.⁷² In contrast to the primary aim of discipline, namely to teach children acceptable social conduct, the aims of punishment are clearly not the same. It must, however, be conceded that, as far as rehabilitation is concerned, there might be some overlap between punishment and discipline. It is nevertheless argued that the central focus of discipline and punishment is not the same. The risk of confusing discipline and punishment is illustrated by the provisions of 8.1 of Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (hereafter “Guidelines”), which provides:

Punishment is a corrective measure or penalty inflicted on an offender who has to suffer the consequences of misconduct in order to maintain the orderly society of the school.⁷³

Consequently, if children do not act in a socially acceptable manner, they should be punished and suffer for their misconduct. This formulation is in line with the traditional aims of punishment mentioned above. It further creates the impression that order in society can be maintained only if people suffer or that it is generally acceptable that someone who does not act in a socially appropriate way should suffer the consequences. A strong word such as “suffer” is a far cry from the idea of teaching learners who are still in the process of acquiring social skills and are learning how to act appropriately.

In this regard Nelsen, Lott and Glenn⁷⁴ rightly ask:

⁷² *S v Zinn* 1969 (2) SA 537 (A).

⁷³ GN 776/1998;par 8.1.

⁷⁴ Nelsen, Lott & Glen 2000:120.

Where did we ever get the crazy idea that to make people do better we first have to make them feel worse?

Despite these sentiments, public opinion plays an important part and society regards punishment as an acceptable and even expected means to deal with instances of conduct which are not in line with social norms. It is therefore maintained that there is a set of norms and values accepted by the majority of a society, and that, if conduct is not in line with these, the majority expects the transgressor to be punished. Punishment is therefore regarded as

a facet of discipline that involves actions taken in response to inappropriate behaviour in order to correct or modify behaviour and to restore harmonious relations.⁷⁵

This argument also suggests that punishment not only corrects and modifies behaviour, but is also an acceptable, or even preferred, way of restoring relationships. The argument thus seems to be that, once a transgressor is punished, this automatically restores harmed relationships and that punishment is thus an acceptable and essential part of discipline. The question, however, arises as to how punishment in itself can teach appropriate conduct. In this regard, Skinner, one of the fathers of modern psychology, warns as follows:

[W]hen we punish a person for behaving badly, we leave it up to him to learn how to behave well.⁷⁶

This is clearly not in line with the idea that discipline is about teaching acceptable behaviour and helping children to acquire the necessary social skills. The above definition of punishment and its application is hardly reconcilable with a process of creating an environment conducive to teaching and learning which will facilitate the development of children's full potential or teach them (albeit by example) how to behave in a socially acceptable way. Consequently, for purposes of this study, a clear distinction is made between discipline as a process of teaching and learning, and the traditional views pertaining to what constitutes punishment. Therefore, these terms cannot be used interchangeably.

Despite all the criticism levelled at punishment, it is conceded that:

⁷⁵ Joubert, De Waal & Rossouw 2004:78; also published as 2005:209.

⁷⁶ In Drewery 2004:332.

no society can exist without some negative sanctions to define limits. But children can never be effectively socialized if the balance of interventions is more punitive than positive. If punishment is to be “occasionally and judiciously used”, it is essential that it come from adults who communicate an acceptance of the child. Punishment always has a destructive effect if youth interpret it as a lasting dislike or hostility from the people on whom they are dependent for love and security.⁷⁷

The Constitution provides, in section 12, that cruel, inhuman and degrading treatment or punishment is unlawful.⁷⁸ Thus, punishment *per se* is not unlawful. Therefore, there is still room for punishment in the context of school discipline, on condition that it is the last, rather than the first, option in handling instances of misconduct, that it is meted out in accordance with what is in line with the provisions of the Constitution, and that processes of inflicting punishment should, as far as possible, be aligned with the purpose of discipline, namely to create a safe environment and to teach acceptable social conduct. Violence is, however, never an acceptable form of punishment.

General Comment 8 of the Committee on the Rights of the Child recognises that it might sometimes be necessary to use non-punitive force to protect people. It is thus necessary to make a clear distinction between protective physical action and punitive assault.⁷⁹ If force is necessary for protection, minimum force for the shortest period necessary must be applied. Force used to restrain may not involve the deliberate infliction of pain as a form of control.⁸⁰

In conclusion, Le Mottee⁸¹ highlights the differences between discipline and punishment as follows:

- Discipline is intrinsic, while punishment is external
- Discipline is educative, while punishment is punitive
- Discipline is about self-control for the sake of self-actualisation, while punishment is the exercise of control over people for the sake of compliance

These dimensions of the distinctions will form an important part of the discussions in chapter 6 on the different approaches to discipline and will also become more evident in the evaluations of the different approaches in chapter 7.

⁷⁷ Jenkins in Brendtro, Brokenleg & Van Bockern 2002:110-111.

⁷⁸ Constitution 1996.

⁷⁹ CRCGC 8 2006:par 12, 14.

⁸⁰ CRCGC 8 2006:par 15.

⁸¹ Le Mottee 2005:*sp.*

4. BEHAVIOUR, MISBEHAVIOUR AND DISCIPLINARY PROBLEMS

Charles⁸² indicates that behaviour can be defined as all the physical and mental acts that humans perform. This includes behaviour that is “good or bad, right or wrong, helpful or useless, productive or wasteful”. On the other hand, misbehaviour is considered to be any behaviour that is “inappropriate to the setting or situation in which it occurs”. Most misbehaviour in the classroom is considered to be intentional if the learners know they should not behave in a certain way. The terms “misbehaviour” and “misconduct” are used interchangeably.

He further indicates that social scientists divide classroom misbehaviour into five broad types, in order of seriousness, namely:

1. *Aggression*, physical and verbal attacks by learners on the teacher or other learners.
2. *Immorality*, acts such as cheating, lying and stealing.
3. *Defiance of authority*, where learners refuse, sometimes hostilely, to do what the teacher tells them to do.
4. *Class disruptions*, such as talking loudly, calling out, walking about the room, clowning, tossing objects and so forth. (Most class behaviour rules focus on this category of misbehaviour.)
5. *Goofing off*, fooling around, not doing the assigned tasks, day dreaming, and so forth.

Undisciplined behaviour is behaviour that disturbs the order and educational opportunities in the classroom. This behaviour does not reflect respect for others.⁸³ The term “disciplinary problems” thus refers to any disruptive behaviour that affects learners’ fundamental rights to feel safe, to be educated, to dignity, and to personal autonomy in the learning environment.⁸⁴ Disruptive behaviour substantially interferes with the educator’s ability to teach effectively.

5. NATURE AND EXTENT OF DISCIPLINARY PROBLEMS

To determine the nature and extent of disciplinary problems with precision is a considerable challenge. This is due to the lack of recent national surveys focusing on school discipline. The latest available report on school violence is the 2011 report compiled by the South African Council for Educators (SACE).⁸⁵ Although this is a recent report, it essentially replicates the

⁸² 1989:2.

⁸³ Lessing & De Witt 2010:23.

⁸⁴ Pienaar 2003:262.

⁸⁵ 2011:1-40.

findings of the 2008 National School Violence Study (NSVS) conducted by Burton.⁸⁶ It also refers to the findings of the South African Human Rights Commission (SAHRC)⁸⁷ report on school violence and to other research by academics. No new research was undertaken for the 2011 SACE report – only a few newspaper reports and the work of academics were added to the core data provided by the NSVS. What is of interest is the fact that SACE did not challenge the previous findings or indicate that the situation had improved since 2007. Rather, this report accepts that the previous research results reflected the current situation. The report, however, rightly recommends that further research is necessary.⁸⁸

Apart from the fact that these two fairly comprehensive surveys are relatively dated, they also focus only on school-based violence and not on other less serious aspects of school discipline, such as mere insubordination or learners not doing homework. It is therefore difficult to generalise on the state of discipline in schools, and this is further exacerbated by the diversity found in schools.

Numerous researchers have conducted studies on school discipline and, in what follows, reference will be made to some of these studies. It should, however, be kept in mind that certain of the studies focus on a relatively small sample of schools, that some focus on a particular province or selected number of provinces, that some include schools with a similar socio-economic status, and that some combine schools from different socio-economic backgrounds and areas, for instance schools from urban and rural areas. The research questions posed in the different studies also vary, making comparisons and the determination of change over time more difficult.

Without considering these variables, it might be concluded that the studies contradict one another. Furthermore, there is a real risk of overestimating or underestimating the extent of disciplinary problems on a national level if a single research study is viewed in isolation, especially where smaller samples of schools are involved. These risks and lacunae can only be

⁸⁶ 2008:1-92. Respondents in this study were representative of all provinces, primary and secondary schools, principals, learners and educators. In total, there were 12 794 learners, 260 principals and 521 educators. Data was collected through interviews and age-appropriate questionnaires – Burton 2008:7-10.

⁸⁷ 2008. The SAHRC conducted public hearings in September 2006 on the issue of school-based violence. This investigation arose as a result of several complaints received by the Commission regarding school-based violence. Furthermore, another investigation by the Commission on the right to basic education, conducted in 2006, indicated that school violence in South Africa had a negative impact on learners' ability to exercise their right to basic education and that the issue warranted further investigation – SAHRC 2006. Apart from oral submissions to the Commission, several written submissions were received and were included in the final report. The report was launched on 12 March 2008; see also SAHRC 2006:15, 22-23 on the prevalence of school violence.

⁸⁸ SACE 2011:32-33.

properly addressed in a comprehensive national survey. Only then will the exact extent of school disciplinary problems be known. However, for purposes of this study, the available studies will be used to give a broad overview of trends and indications in respect of the state of discipline in schools.

5.1 School-based violence

School-based violence cannot be evaluated in isolation. It must be seen against the backdrop of the wider South African society, which is, in general, regarded as very violent.⁸⁹ Violence is to a large extent ingrained in the identity of South Africans, and violence is to some extent seen as a normal part of people's and children's lives. For instance, the incidence of domestic violence is among the highest in the world.⁹⁰ This is further underpinned by the findings of the 2005 National Youth Victimization Study (NYVS)⁹¹ which found that, between September 2004 and September 2005, more than 4,3 million (41,5%) of South African children and youths between the ages of 12 and 22 years were the victims of crime and violence. These crimes included assault, sexual assault/rape, theft, robbery, housebreaking and car hijacking.

In 2007 and 2009 respectively, 520 and 479 learners committed suicide, and 766 and 573 died owing to violence and homicide, albeit not necessarily at school. According to the statistics of the NYVS, there was a decrease in violent deaths of learners.⁹² Although it is difficult to determine the exact extent of violence, studies such as the NYVS provide an indication of the extreme exposure of South African youths to crime and violence in general. In what follows, the focus will be on the situation in schools.

There is some debate on what is meant by the term "violence" in the school environment. In general, the discourse includes:

all forms of intentional harm or discomfort inflicted on learners, including incidents such as school yard fights, bullying and drug abuse.⁹³

However, Batsche and Knoff⁹⁴ argue that the concept of school violence should be approached from a very broad perspective and should include not only circumstances where learners are

⁸⁹ Jefthas & Artz 2007:41-42, 48; Leoschut & Bonora 2007:91- 93.

⁹⁰ Jefthas & Artz 2007:41-42, 48; Leoschut & Bonora 2007:91- 93.

⁹¹ Burton 2005:1-4.

⁹² DBE 2010:38.

⁹³ Burton 2008:3.

⁹⁴ 1994:165.

the victims of actual assault, theft or vandalism, but also instances where learners and educators experience anxiety due to intimidation.

School violence is thus seen as any physical, emotional or psychological force or power, threatened or actual, which is directed against oneself, another person or a group or community, and which is experienced by a learner while under the school's supervision. It takes many forms and results in, or has a high likelihood of resulting in, injury, death, psychological harm, mal-development or another form of deprivation. Different forms of school violence include verbal violence (teasing, taunting or sexual harassment), physical forms of violence (ranging from assault to murder), and violence involving property (robbery).⁹⁵

On a national level, three reports are of significance. The first is the 2008 NSVS focusing on school violence. The study indicated that one in five (16,3%) youths in the study had been threatened with harm, scared or hurt while at school, and that half of these were exposed to it more than once.⁹⁶ Furthermore, 1 821 054 (15,3%) learners were victims of assault, sexual violence, robbery or threats at school in the 12 months preceding the study. The most common form of violence experienced by learners was threats of violence (12,8%).⁹⁷

In line with the NSVS, the 2010 GHS showed that 16% of learners had indicated that they had experienced some form of violence in schools.⁹⁸ The highest incidences were reported in the Eastern Cape (24,1%), the North West (23,2%) and KwaZulu-Natal (22%). The lowest incidences were reported in the Western Cape (7,2%) and Mpumalanga (7,1%). The decrease from 19% (in 2009) to 16% (in 2010) of learners experiencing violence at school was a positive sign. Although there was a general decrease in violence in schools, there was an escalation of violence in three of the nine provinces.⁹⁹ In general, it seems as though nothing really changed since the 2005 NSVS, because, in both studies, about 16% of learners reported exposure to school-based violence.

The third report indicating the national position regarding school violence was the 2008 SAHRC report. The report made a finding on the number of schools affected by school-based violence, but made no finding concerning the learners themselves. It found that it "appeared" as though the majority of schools were safe places, with only 25% of schools reporting school-based

⁹⁵ Prinsloo 2008:27; Nesor 2005:63-64; Council of Europe 2006:13.

⁹⁶ Burton 2008:15.

⁹⁷ Burton 2008:16.

⁹⁸ The GHS focused on the availability of services and goods and not on school violence. Yet, a question on school violence was included in this national survey involving 30 000 households.

⁹⁹ DBE 2012e:35-37.

violence. However, this percentage is still disconcerting, because schools are supposed to be safe places conducive to teaching and learning.¹⁰⁰ The Commission used the word “appears”, which is indicative of the fact that it had not been scientifically proven that this was indeed the position. Although the Commission found that only 25% of schools had reported school violence, there was no indication that all schools did indeed report all incidents of school violence. The underreporting rate is uncertain. The criteria for reporting are also not clear. In addition, it is not clear to whom these instances of school based-violence should have been, or were, reported, because the source for this finding of the Commission is indicated as the Centre for Justice and Crime Prevention and the Western Cape Education Department. There is no legislative prescription that school violence should be reported to the first-mentioned, and the latter would only have data available for one province. The report highlighted, under another heading, that crime-reporting rates in South Africa were low in general and were even lower among the youth. Furthermore, evidence was presented at the hearing on the lack of proper monitoring mechanisms due to the failure on the part of school management and the police to record violent and non-violent crimes accurately. This inevitably resulted in a probably inaccurate reflection of the extent of school-based violence with regard to the number of schools affected. It is possible that more or less than 25% of schools were affected.¹⁰¹

The statistics become more worrisome when the results of smaller studies, focusing on a smaller research sample, are investigated. A few examples indicate that there are pockets of schools where exposure to school-based violence is much higher than that found in the national studies (16% of learners).

Neser¹⁰² found in 2005 that 45,1% of learners experienced verbal aggression such as name-calling by others on a daily basis, and that 26,1% reported experiencing physical aggression on a daily basis. In addition, 53,1% indicated that they had been personally exposed to school violence at some point in their school career, while 49,1% indicated that they had frequently been subjected to school violence in the year preceding the study. More than 13% of learners were subjected to school violence on a daily basis, while more than 28% were subjected to it once or twice a week. Verbal aggression is a real challenge in schools, with 54,3% of learners being teased in an unpleasant or cruel way, and 62,5% being exposed to hurtful name-calling. Physical aggression occurred less frequently, with 43,4% indicating that they had been kicked, hit or pushed. Considerably fewer learners (27,1%) were subjected to social exclusion.

¹⁰⁰ SAHRC 2008:vi.

¹⁰¹ SAHRC 2008:12.

¹⁰² 2005:70. There was a total of 1 866 learners from grades 6 to 11 in this sample. They were from nine primary schools, eight secondary schools, and two special schools from Tshwane South, District 4.

A 2008 study by Prinsloo¹⁰³ is in line with that of Nesor. Prinsloo's study was conducted in the southern part of the City of Tshwane in Gauteng. This area is considered to be one of the most demographically representative areas of the City of Tshwane. A total of 1 873 learners from grade 6 to 11 were included in the study. The study revealed that almost 53% of participating learners were subjected to school violence. About 40% of these victims indicated that they had been exposed to school violence on a daily basis.

In the Western Cape, also in 2008, a study was conducted in five township schools surrounding Cape Town, in neighbourhoods notorious for their high levels of violence. The results were particularly disturbing, considering that the mean age of the respondents was only 10,7 years. An alarming 69,4% of learners had been hit by someone at school, 56,1% had been kicked/shoved, 19,1% had been badly beaten, 16,1% had been threatened with a weapon and 8,5% had actually been attacked with a gun, while 3,6% had been threatened with a gun, 52,7% had been in a fight at school, and 24,4% had been robbed. It is distressing that 40% of these learners had already witnessed a murder.¹⁰⁴

It is clear from the above that it would be inappropriate to generalise concerning any of the reports because of the vast differences between the outcomes of the national studies and those of the smaller, localised studies. The point of departure should thus be to exercise caution and keep in mind that there are schools which experience much more or much less violence than that indicated in any of the studies referred to.

5.1.1 Violent crimes

Although not all forms of violence constitute crimes, most of them do. The nature and extent of some of the forms of school violence that do in fact constitute crimes will be discussed in more detail below.

5.1.1.1 Murder, attempted murder and assault

In 2003, De Wet¹⁰⁵ conducted an extensive study on media reports on crime in South African schools. In her analysis, she found reports of learners killing each other, educators killing learners, learners killing educators, and outsiders killing educators and learners at school, outside the school or in hostels. In addition, there were numerous reports on attempted murder, assault with the intent to do grievous bodily harm, and common assault by the different role

¹⁰³ 2008:29.

¹⁰⁴ Shields, Nadasen & Pierce 2009:1192-1208.

¹⁰⁵ 2003:113-121. She found more than 6 000 media reports on crimes committed within the education setting for the period from January 2001 to February 2002.

players. This trend has continued and there are numerous newspaper reports of more recent examples of these incidents on school grounds.¹⁰⁶ Jefthas and Artz¹⁰⁷ indicate that the number of deaths on school premises has increased. Weapons frequently used in these killings and assaults include fists, knives, firearms, pangas, screwdrivers, broken bottles, scissors, stones, and axes.¹⁰⁸

The NYVS indicated that 1,7 million youths were assaulted in 2005, with 26% of these assaults occurring at school.¹⁰⁹ According to the NSVS, one in 20 learners reported being physically assaulted at school. A total of 569 174 (7,5%) primary-school learners reported being assaulted at school in the 12 months prior to the study, while 162 078 (4,3%) secondary-school learners reported the same.¹¹⁰

The Red Cross Children's Hospital in Cape Town gave evidence at the public hearings before the SAHRC that learners were mostly admitted and treated for assault with a fist or object, for assault with sharp objects such as knives and pangas, for rape or sexual assault, for bite wounds, and for injuries related to the use of firearms. The hospital statistics indicated that 10% of all the injuries treated at the hospital were due to assaults at schools. It was argued before the Commission that, considering that children under the age of 12 spend less than 7% of their time at school, it would appear to be more dangerous to be at school than anywhere else. Furthermore, it is clear from the evidence of several witnesses and from the statistics with which the Commission was provided that children are often more at risk of being exposed to crime and violence while they are at school.¹¹¹

5.1.1.1.1 Corporal punishment

Corporal punishment by any person at a school is outlawed in terms of the *South African Schools Act* ("Schools Act").¹¹² Any transgression in this regard constitutes an offence punishable by a sentence similar to that which can be imposed for assault. It is therefore appropriate to discuss the unlawful infliction of corporal punishment as part of the discussion on violent crimes committed at schools against learners.

¹⁰⁶ Burton 2007:1. An internet search was conducted on 21 December 2012 on the SA Media website for the period 2010 to the date of the search. The key words used were "schools and assaults or murders or rape". There were 341 hits indicating numerous media reports dealing with these types of offences committed at schools. Note that the De Wet 2003 study included a much broader spectrum of crimes than this search.

¹⁰⁷ 2007:47.

¹⁰⁸ De Wet 2003:113-121.

¹⁰⁹ Burton 2005:2.

¹¹⁰ Burton 2008:16-17.

¹¹¹ SAHRC 2008:5, 13.

¹¹² 84/1996:s 10.

The extent of the use of corporal punishment is not clear, and the figures provided in different studies vary. The 2008 NSVS indicated that 7 out of 10 (70,1%) primary-school learners and almost half (47,5%) of secondary-school learners had been beaten, caned or spanked by an educator or the principal for wrongdoing. Another national survey showed that 51,7% of learners had been physically punished.¹¹³ The GHS¹¹⁴ of 2011 indicated that 17,2% of learners had experienced corporal punishment in schools. In a 2010 study involving a small sample of respondents (16 primary-school educators) in the Matjhabeng Municipality, 31,25% of the educators admitted that they still used corporal punishment despite its abolition.¹¹⁵

It is not uncommon to read media reports on educators using extreme measures to maintain discipline in class or to deal with learners who have allegedly committed crimes. There are examples of educators placing children in solitary confinement under lock and key, burning a child's hands on a stove, choking a child and almost drowning the learner in a bucket of water, pulling ears, breaking a child's arm, or hitting children with pipes¹¹⁶ The extent of the violence used is illustrated by the way it is administered. Educators use, *inter alia*, sjamboks, fan belts, straps, sticks or plastic pipes to hit learners in their faces, on their legs, on their buttocks and arms, in addition to kicking them. In some instances, the assaults were so grave that the learners were unable to walk, became disabled or even died.¹¹⁷ Other forms of physical punishment are also used, such as physical exercises, picking up paper; pinching learners and making learners stand in uncomfortable positions.¹¹⁸ Learners also reported fainting because of being made to run around the school for late-coming while they had had nothing to eat.¹¹⁹

There are parents who believe that corporal punishment is an appropriate form of maintaining discipline and therefore unlawfully mandate educators to use it. Parents themselves often use corporal punishment to punish learners if educators approach them in order to discuss their child's problems.¹²⁰

¹¹³ Leoschut 2009:41.

¹¹⁴ Statistics South Africa 2012a:11. Compare this with the 2010 GHS data provided in DBE 2012e:35 indicating that approximately 13% of learners experienced corporal punishment at school. The highest incidents were reported in the Eastern Cape (21,6%), North West (19,8%), KwaZulu-Natal (19,5%) and Northern Cape (16,5%). The lowest incidence was in the Western Cape (3,6%).

¹¹⁵ Motseke 2010:124.

¹¹⁶ De Wet 2003:116; Govender & Laganparsad 2011:1, 5; *Rapport Verslagspan* 2011:13.

¹¹⁷ De Wet 2003:116; Maree & Cherian 2004:74, Govender & Laganparsad 2011:1. A principal was videotaped beating a child with a hosepipe and kicking the child.

¹¹⁸ Mgwangqa & Lawrence 2008:27; Motseke 2010:124; Maphosa & Shumba 2010:393; Maphosa & Mammen 2011b:217-218.

¹¹⁹ Mgwangqa & Lawrence 2008:27.

¹²⁰ Maree & Cherian 2004:74-75; Van Wyk 2004:52; see also *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC). Christian parents claimed that the prohibition against corporal punishment in schools

Although some educators do no longer use physical force to deal with breaches of discipline, they still use punitive measures based on the patriarchal and authoritarian dispensation. Physical force has now been replaced with sarcasm, humiliation, exclusion, name-calling, criticism, discouraging, shouting, creating obstacles and barriers, blaming, shaming, swearing, cruel humour and other forms of emotional abuse. These forms of punishment are equally unacceptable and violent in nature.¹²¹

5.1.1.2 Rape, statutory rape and sexual assault

The 2001 Human Rights Watch report,¹²² *Scared at School: Sexual Violence against Girls in South African Schools*, found that 37,7% of women who indicated that they had been raped as a child said that they had been raped by their educators. It also indicated that girls were raped, sexually abused, sexually harassed or assaulted by male learners and educators. Educators abused their power and threatened girls with corporal punishment or coerced them with promises of better grades or money in exchange for sex. To travel to and from school also posed risks of sexual violence for schoolgirls.

Jeftha and Artz¹²³ indicate that girls are often victimised, not only by educators but also by male learners. The latter fondle the girls, make aggressive sexual advances or make verbally degrading remarks. In line with other studies focusing on unsafe places at school, they found evidence that girls were raped in school toilets, empty classrooms, hallways, hostels and dormitories, which suggests, according to them, that there are very few safe places for girls at school.

The above-mentioned trends are also to be seen in the 2003 study of newspaper reports by De Wet.¹²⁴ More recent reports confirm that these trends are still prevalent in schools.¹²⁵ Female learners constitute, by far, the majority of victims of sexual violence or sexual harassment, but male learners are also victims.

infringed on their religious rights and the belief that one should not spare the rod in the upbringing of children.

¹²¹ Oosthuizen, Wolhuter & Du Toit 2003:465, 469; DoE 2000:10; Maree & Cherian 2004:74-76; Mgwangqa & Lawrence 2008:27; Motseke 2010:124.

¹²² Human Rights Watch 2001:14-15, 27-40.

¹²³ 2007:47.

¹²⁴ 2003:113-121; Nesor 2005:65 indicates that, in a specific area, sexual violence on school grounds increased from 20 cases reported to the police in 2001 to 111 such reported cases in 2004; Anderson, Paredes-Solis, Milne, Omer, Marokoane, Laetsang & Cockcroft 2012:1-9 found in their study conducted in 2003 and 2007 that there was no evidence to suggest that there was a decline in the prevalence of forced or coerced sex among school-going youths in 10 African countries, including South Africa.

¹²⁵ The 2011 and 2012 news reports included, among others, those by: Moloto 2012:6; Memela 2012:2; Monama 2011:5; Pretorius 2011:5; see also Moletsane, Mitchell & Lewin 2010:1-18 for a critical analysis of gender violence and inequality in and around schools in South Africa in the age of AIDS.

It was argued by Community Action towards a Safe Environment at the SAHRC hearing on school violence that violence has become part of the identities of children, that children are brutalised, and that sexual violence has become endemic in society.¹²⁶ This was illustrated by children playing “hit me, hit me” and “rape me, rape me”, where they chase each other and, when caught, pretend to hit or rape the child who has been caught. Research further indicates that more than a fifth of all sexual assaults against young people occur at school. Educators are responsible for 8,58% of reported sexual assaults according to the SAHRC report.¹²⁷

The 2008 NSVS combined sexual assault and rape for purposes of the study. The report highlighted the underreporting of these crimes owing to their sensitivity. Despite the underreporting, 106 249 (1,4%) primary-school learners and 116 847 (3,1%) secondary-school learners were exposed to sexual assault or rape at school in the 12 months preceding the study. This excluded any form of consensual sex that might have constituted statutory rape.¹²⁸ It is also worrying that the incidence of “corrective rape” is increasing. Here, homosexual, bisexual or transgendered learners are raped in the belief that this will change the victim’s sexual orientation.¹²⁹

Despite the legal prohibition against sexual relationships between educators and learners, reports of consensual relationships with the knowledge of parents are not uncommon.¹³⁰ In response to a question in Parliament, the Minister of Basic Education indicated that the number of complaints to the SACE had increased from 26 complaints of sexual abuse by teachers in 2008 to 111 complaints in 2011, including 15 related to the impregnation of learners in 2011.¹³¹ From 1 April 2011 to 31 March 2012, 126 cases of sexual misconduct were reported to the SACE.¹³² Since 2010 until the Minister answered the question in Parliament,¹³³ 38 educators

¹²⁶ SAHRC 2008:8.

¹²⁷ SAHRC 2008:8.

¹²⁸ Burton 2008:18-19.

¹²⁹ SAHRC 2008:9; Le Roux & Mokhele 2011:325. They are raped in the belief that the act will “correct” them and convert them back to being heterosexual.

¹³⁰ De Wet 2003:113-121.

¹³¹ Davis 2012:sp. The high rate of underreporting of acts of sexual abuse committed by educators is evident from the relatively small number of educators reported in comparison with the high number of learners who were victims of sexual violence, according to the NSVS; see also SACE 2012a:8-10 for more details on the outcomes of the investigations; see also Ntuta & Schurink 2010:5; see also the comments of learners on the inappropriateness of relationships between educators and learners – Mgwangqa & Lawrence 2008:28.

¹³² SACE 2012:26.

¹³³ It is not clear on what date the Minister gave his answer to Parliament, but the media report was dated 7 November 2012. The number of incomplete investigations was also not specified, but it was merely stated that there were “many”. For a more detailed discussion in this regard, see par 8.1.2 below.

were struck from the roll in this regard and many of the investigations still have to be finalised, with some cases being nearly three years old.¹³⁴

5.1.1.3 Robbery

Robbery is regarded as a very serious offence. According to the 2008 NSVS, a total of 235 259 (3,1%) primary-school learners were robbed at school, while 222 386 (5,9%) secondary-school learners were robbed at school in the year preceding the study. Thus, 31 per 1 000 primary-school learners and 59 per 1 000 secondary-school learners were the victims of a robbery at school.¹³⁵

5.1.2 Other forms of school-based violence

5.1.2.1 Bullying

Bullying is one of the serious manifestations of violence in schools according to the SAHRC report.¹³⁶ The NSVS indicated that 12% of primary-school learners reported that they had been teased, taunted or made to feel ashamed at school.¹³⁷ De Wet¹³⁸ found in a 2005 study conducted in the Free State that only 16,22% of learners indicated that bullying was not a problem in their schools, while 12,98% indicated that it was a significant problem.¹³⁹ The rest (70,8%) of the learners indicated that it was either a big problem or somewhat of a problem. Furthermore, about 70% of the respondents indicated that they had been the victims of direct or indirect verbal bullying.¹⁴⁰

¹³⁴ Davis 2012:sp.

¹³⁵ Burton 2008:17-18; see also De Wet 2003:113-121 on her findings regarding media reports on robberies at schools.

¹³⁶ SAHRC 2008:6. Bullying is typified by an imbalance of power that exists over a period of time between two individuals, two groups, or a group and an individual. There is intentional use of aggression, which includes the causing of physical and/or emotional misery. Physical bullying includes repeated acts of pushing, hitting, punching, strangling, tripping, kicking, biting, intentional damage to property, theft and even extortion. Emotional and verbal forms of bullying are more common and include repeated acts of teasing, gossiping, blackmailing, defaming, name-calling, whispering campaigns, exclusion, passing notes, betraying trust, ridiculing, threatening, insulting, ignoring the victim, verbal harassment, public humiliation and threats of harm. Sexual bullying includes exhibitionism, sexual harassment and abuse. More recent forms of bullying include electronic bullying. Here destructive messages are sent by phone or e-mail to victims. Sometimes, websites are created with demeaning information about the victim; see Mestry, Van der Merwe & Squelch 2006:47-48; SAHRC 2008:6; Aluede, Adeleke, Omoike & Afen-Akapaida 2008:153; Prinsloo 2008:27; De Wet 2005:82-83; Aluede *et al.* 2008:154.

¹³⁷ Burton 2008:19.

¹³⁸ 2005:86-87. She highlights the importance of taking into account that the definition of what constitutes bullying might differ in different jurisdictions and states that the fine line between, for instance, mere teasing and verbal bullying should be kept in mind; De Wet 2005a:705-725.

¹³⁹ The research was conducted in 60 secondary and combined schools in the Free State.

¹⁴⁰ De Wet 2005a:719.

More recent studies indicate that bullying remains a challenge in schools and is one of the major forms of ill-discipline.¹⁴¹ A 2010 study of 1 050 children aged from 10 to 19 years, in 20 high-poverty, Xhosa-speaking urban neighbourhoods of Cape Town, found that 34% of these children were victims of bullying. In this study, the risk of becoming the victims of bullying were found to increase in the case of abused children or children affected by AIDS-related diseases.¹⁴² In a 2011 study of 15 schools in the Eastern Cape, 83,2% of the educators indicated that bullying was one of the major forms of ill-discipline in the schools where they taught.¹⁴³

5.1.2.2 Gang activities

Gang activities, with shoot-outs on school premises, are a reality for some schools, especially in some parts of the country such as the Western Cape.¹⁴⁴ Gang violence in the community inevitably spills over to the school grounds, since learners are sometimes recruited to become members of gangs. Drug and alcohol abuse is another evil related to gang activities, with accompanying negative effects on the school environment.¹⁴⁵

5.1.2.3 Verbal aggression

In the 2008 NSVS, 9 out of 10 principals reported incidents of verbal violence by learners against fellow learners. Nine out of 10 secondary-school principals reported incidents of physical violence between learners, while 7 out of 10 primary-school principals reported the same.¹⁴⁶

Learner violence against educators is increasing and almost three out of five (59,7%) secondary-school principals reported incidents of verbal violence against educators. One in four secondary-school principals reported incidents of physical violence against educators, while 2,2% reported sexual violence against educators. Almost one in 10 primary-school principals reported incidents where primary-school learners inflicted, or attempted to inflict, physical harm on their educators.¹⁴⁷

¹⁴¹ Maphosa & Mammen 2011:190.

¹⁴² Cluver, Bowes & Gardner 2010:793, 801.

¹⁴³ Maphosa & Mammen 2011:190.

¹⁴⁴ De Wet 2003:113-121.

¹⁴⁵ De Wet 2003:113-121; SAHRC 2008:14, 18; see also Jethfas & Artz 2007:45-46 for an explanation of the reasons for youngsters getting involved in gangsterism.

¹⁴⁶ Burton 2008:27.

¹⁴⁷ Burton 2008:27; see also Maphosa & Mammen 2011:190.

5.1.3 Crimes related to property

Crimes related to property include breaking and entering, theft, arson, damage to property and vandalism. Almost anything found on a school's premises is reported to have been stolen in one or other report. Learners as well as educators are often the culprits in these crimes.¹⁴⁸

Schools are the most common site for the theft of learners' property. According to the 2005 NYVS, theft was the most common crime committed at schools. More than 38% of secondary-school learners and 32,8% of primary-school learners reported incidents of theft at their schools.¹⁴⁹ The NSVS also found that 93,1% of thefts in primary schools and 90,8% of thefts in secondary schools occurred in the classroom.¹⁵⁰ Taking into account the fact that almost half (48,5%) of the South African population lives below the poverty line, the theft of any property can cause severe trauma and can have a myriad of negative consequences for the victims.¹⁵¹

5.1.4 Drug and alcohol abuse

Le Roux and Mokhele¹⁵² indicate that there is a clear link between drug and alcohol abuse and misconduct. The escalation of drug abuse is alarming, in particular the increase in the use of "tik" – methamphetamine – in the Western Cape. Accidents, violence and other irresponsible activities are more likely to happen when under the influence of drugs and alcohol. This inevitably increases the risks for other learners.

5.1.5 Measures taken to deal with school-based violence

The measures taken to deal with disciplinary problems are another indicator of the extent and severity of such problems. The situation is so serious in some schools that the services of private security companies have been called upon, and metal detectors and closed-circuit television (CCTV) cameras have been installed.¹⁵³ Searches for drugs are also not uncommon in schools. Therefore, in 2007 the *Schools Act* was amended to include a specific provision on the requirements for lawful searches and seizures, as well as drug-testing procedures in schools.¹⁵⁴ Fencing of schools and the improvement of security at schools are just some of the infrastructure projects being undertaken by the Department of Basic Education. In 2011, 83

¹⁴⁸ De Wet 2003:113-121.

¹⁴⁹ Burton 2008:19-20; Burton 2005:2.

¹⁵⁰ Burton 2008:33.

¹⁵¹ Burton 2005:2; see also other reports confirming that theft is a disciplinary problem at schools – De Wet 2003:113-121; Wolhuter & Van Staden 2008:389-398; Maphosa & Mammen 2011:190.

¹⁵² 2011:326.

¹⁵³ Mhlongo 2008:3

¹⁵⁴ *Schools Act* 84/1996:s 8A.

schools had electric fencing, 1 865 had access control and 2 730 had no fencing.¹⁵⁵ It was reported in the 2011/2012 Annual Report of the Department of Basic Education that, in terms of the Accelerated School Infrastructure Delivery Initiative (ASIDI), 96 schools had been fenced, and that, in terms of the Education Infrastructure Grant (EIG), 33 526 square metres of fencing had been erected on school premises.¹⁵⁶

5.1.6 Extent of school-based violence

De Wet¹⁵⁷ argues that it can be deduced from all the media reports that a culture of crime and violence exists in South African education. In line with this conclusion, the final conclusion of the NSVS highlighted that the levels of violence in South African schools were significantly higher than in countries such as the United States of America (USA) and higher than in other developing countries with reliable, recent data available. For instance, the rate of violence in South African primary schools is 75 learners per 1 000 learners, and 43 learners per 1 000 learners in secondary schools. In comparison, the rate in schools in the USA is 5 per 1 000 learners.¹⁵⁸ On the other hand, the study indicated that the levels of violence in South African schools were more comparable with other developing countries in similar situations, such as Brazil, Argentina and Chile.¹⁵⁹

Although learners from disadvantaged schools are more prone to be exposed to school violence, violence occurs across the whole socio-economic spectrum.¹⁶⁰ The perpetrators of school violence are normally other learners, although adults, such as educators, also expose learners to violence.¹⁶¹ The forms of violence also differ in degree, ranging from serious physical violence, such as murder, to less serious forms of violence, such as verbal violence in the form of name-calling.¹⁶² Boys are more often the victims of physical violence than girls, while girls are more likely to be exposed to sexual violence than boys.¹⁶³

In conclusion, the NSVS found as follows:

The findings underscore the important symbiotic relationship that exists between what occurs in schools and what happens in learners' homes and communities. It shows that

¹⁵⁵ DBE 2011:table 6.

¹⁵⁶ DBE 2012:34, 115.

¹⁵⁷ 2003:119.

¹⁵⁸ Burton 2008:76.

¹⁵⁹ Burton 2008:77.

¹⁶⁰ Jefthas & Artz 2007:47.

¹⁶¹ Jefthas & Artz 2007:47.

¹⁶² Jefthas & Artz 2007:47.

¹⁶³ Jefthas & Artz 2007:47.

there appears to be a widespread “banalisation” and normalisation of violence, which is seen as a legitimate form of conflict resolution.¹⁶⁴

5.2 Other forms of misconduct

Not all forms of misconduct in schools constitute a crime. There are numerous other forms of misconduct that impact on the school environment and its suitability for teaching and learning. This includes learners who arrive at school while under the influence of alcohol or become intoxicated while they are at school.¹⁶⁵ Less serious forms of misconduct include ordinary disruptions in class, rudeness, teasing of other children, and a lack of commitment to do homework. In fact, it is rather the continuous, low-impact misconduct which affects most educators and learners and which will be discussed in more detail below in the discussion on the perceptions of educators regarding school discipline.¹⁶⁶

Late-coming is a particular manifestation of ill-discipline which impacts negatively on the teaching and learning environment. The activist group, Equal Education, avers that learners in poor areas have 20% less instruction time due to late-coming. Late-coming also impacts on the education of other learners because of the disruption of the class. Some learners are of the opinion that education is not worth pursuing and therefore come to school late. Ill-discipline on the part of educators and learners plays an important part in late-coming.¹⁶⁷

5.3 Teenage pregnancies

Teenage pregnancies are regarded as a disciplinary issue.¹⁶⁸ The Report on the 2008 and 2009 Annual Surveys for Ordinary Schools¹⁶⁹ found that almost 50 000 learners were pregnant in both 2007 and 2008. In 2009, more than 45 000 learners were pregnant.¹⁷⁰ The 2010 GHS indicated that 1,4% of female learners fell pregnant. In some provinces, this percentage was as high as

¹⁶⁴ Burton 2008:75; Burton 2007:4.

¹⁶⁵ Maphosa & Mammen 2011:191.

¹⁶⁶ See the discussion below in par 6.1.3, 6.2 and 7.

¹⁶⁷ Dwane & Isaacs 2011:30; Abramjee 2012:35 – members of an activist group monitored the late-coming one morning at one school and recorded that 700 learners and 7 educators arrived late on that particular morning; see also Mgwangqa & Lawrence 2008:22, 27; Masitsa 2006:171, 173, 177-178; Mahlomaholo 2011:317. The link between the high dropout rates of learners and walking long distances to school is highlighted. Mngambi 2012:8 reports that children living in a poor village walk five kilometres to school and back home again, very often without having anything to eat.

¹⁶⁸ See the discussion in ch 5, par 2.2.2, 2.2.4.4, 4.3.3 herein; see also the detailed report *Teenage Pregnancy in South Africa – with a Specific Focus on School Going Learners* – DBE 2009.

¹⁶⁹ DBE 2010:39.

¹⁷⁰ DBE 2012b:29.

2,6%. More than 32 000 learners attending school were pregnant and more than 52 000 gave birth in that year.¹⁷¹

6. PERCEPTIONS ON SCHOOL DISCIPLINE

In what follows the perceptions of educators and learners with regard to the extent, nature and level of ill-discipline, crime, violence and the use of corporal punishment in schools will be discussed. The disciplinary measures employed by educators will also be investigated.

6.1 Educators' perceptions on discipline

6.1.1 Perceptions on crime

In 2003, De Wet¹⁷² conducted a survey of Free State educators' perceptions on learner crime. She found that none of the schools or their adjacent neighbourhoods involved in the survey were entirely free of learner crime, nor was learner crime entirely out of control in any of the schools or adjacent neighbourhoods. Educators were of the opinion that learners who were involved in crime were involved in less serious forms of crime such as the use of alcohol, the smoking of marijuana, theft and vandalism. Crimes against the person, such as the use of obscene signs and directing abusive language towards fellow learners, were relatively common, but unlikely to lead to criminal prosecutions. Even hate speech, such as racist remarks in particular, occurred rarely. Although serious crimes are committed by learners in the Free State, it would be an overreaction to claim that learner crime is rampant.

The same is probably true of schools across the country, and, although there are serious incidents of violence reported in the media which might create the impression that there is a general culture of crime and violence in schools, care should be taken to bear in mind the sensationalist nature of the media. It would be closer to the truth to state that there are some schools which are affected far more by crime than others. It would be a grave overgeneralisation to aver that crime is generally present in all schools.

6.1.2 Perceptions on the level of violence

The 2008 NSVS found, though, that educators throughout South Africa reported growing levels of violence in schools. They attributed this to the increased availability of alcohol and drugs.¹⁷³

¹⁷¹ DBE 2012e:29; see also Mgwangqa & Lawrence 2008:29-30 for revelations of schoolgirls deliberately falling pregnant to access child-support grants, as well as of girls falling pregnant after being raped by strangers and family members and having to drop out of school.

¹⁷² 2003b:173-174.

¹⁷³ Burton 2008:25.

Some educators averred that the nature of conflict at school did not really change over time, but that learners rather reverted to more physically aggressive measures to resolve the conflict.¹⁷⁴

Despite the perception that violence is increasing in schools, the findings of the SAHRC that the majority of schools are safe, must be kept in mind.¹⁷⁵ As with the perceptions on crime, care should be taken not to overemphasise or underemphasise the extent of violence in schools as a general phenomenon. In addition, the normalisation of violence and acceptance of violence as part of learners' identities should also be added to the equation of what people's perceptions on violence are.¹⁷⁶

6.1.3 Perceptions on the type and level of ill-discipline in schools

A study by Wolhuter and Van Staden¹⁷⁷ on educators' perceptions on the frequency of occurrence of specific forms of misconduct was conducted in 2008 in primary and secondary schools in three provinces, namely Gauteng (specifically the Vaal Triangle), the Free State and North West.¹⁷⁸ The research indicated that the educators believed that relatively less serious transgressions were the most prevalent.

The majority of educators (more than 75%) had to deal with disruptive behaviour, rudeness, dishonesty, obscene language, cheekiness, untidy/incorrect clothing, neglect of duty, telling lies and absenteeism on a daily, weekly or monthly basis. About two-thirds of these educators experienced these problems on a daily or at least weekly basis. This type of misconduct is in line with the findings of a 2011 study in the Eastern Cape.¹⁷⁹

On the other hand, more serious transgressions were reported much less frequently. Only 10% of educators encountered serious transgressions, such as disrespect for educators, *crimen iniuria* against educators, graffiti and vandalism, gang activities, and possession of pornography on a weekly basis. Depending on the transgression, between 25% to 28% of educators reported that more serious transgressions, such as graffiti, vandalism and theft only occurred once a year, while 24% to 30% reported that these offences occurred on a monthly basis.

¹⁷⁴ SAHRC 2008:5; Burton 2008:15.

¹⁷⁵ The figure of 25% unsafe schools was criticised above in par 5.1.

¹⁷⁶ Jefthas & Artz 2007:41-42, 48; Leoschut & Bonora 2007:91-93.

¹⁷⁷ 2008:389-398.

¹⁷⁸ Wolhuter & Van Staden 2008:389-398.

¹⁷⁹ Maphosa & Mammen 2011:189. The same type of low-impact ill-discipline is reported in their study and includes noise-making, non-submission of work, teasing of other learners, swearing, minor lies, late-coming, violating dress codes, and back-chatting educators; see also Rossouw 2003:423-424.

Of the educators concerned, 71% had to deal with violence at least once a year. Of these, 11% had to deal with it daily, 15% on a weekly basis and 25% on a monthly basis. Gang-related disciplinary problems were part of the daily lives of 5% of educators, and 20% of educators dealt with this problem at least once a month. Possession of pornography posed a problem for 38% of educators at least once a year.

Of the educators polled, 57% had to deal at least once a year with smoking, 31% with alcohol abuse, 32% with drug abuse, 35% with sexual harassment between fellow learners, and 8% with the sexual harassment of an educator by a learner. Fewer educators had to deal with the same transgressions on a monthly basis, indicating that, although these transgressions still involved large numbers of educators, their prevalence was less frequent. Moreover, 38% of educators had to deal at least once a month with smoking, 15% with alcohol abuse, 16% with drug abuse, 14% with sexual harassment between fellow learners, and 4% with the sexual harassment of an educator by a learner. On the other hand, more than 50% of schools reported that *crimen iniuria* against educators, possession of pornography and gang activities never occurred.

The 2011 Eastern Cape study does not contain information on the exact prevalence of the more serious forms of misconduct in schools, but merely indicates how many educators were of the opinion that a specific type of misconduct occurred in their schools. Thus 83% of educators indicated that the following serious forms of misconduct were most prevalent in their schools: truancy, bullying, and the threatening of learners.¹⁸⁰

It must be kept in mind that these figures are the combined figures for primary and secondary schools. It is universally acknowledged that crime and violence are more prevalent in secondary schools, and this was confirmed in the NSVS.¹⁸¹ Thus, figures for serious offences such as gang activities, violence, sexual harassment and possession of pornography, which are more likely to occur in a secondary school, will be higher on average if separated from the primary-school figures.

¹⁸⁰ Maphosa & Mammen 2011:190. Other serious forms of misconduct include (in order of most educators to least educators indicating it): theft (80,8%), verbal attacks on fellow learners (80%), assaults on fellow learners (77,6%), graffiti (69,9%), vandalism (68%), verbal attacks on educators (64%), substance abuse (64%), sexual harassment (64%), indecent assault of female learners (63,2%).

¹⁸¹ Wolhuter & Steyn 2003:527; Burton 2008:27.

In line with the findings of Wolhuter and Van Staden,¹⁸² Lessing and De Witt¹⁸³ also found that low-impact or less serious forms of misconduct are the most common. The majority of educators (85,5%) complained about learners talking often, or very often, while they were teaching. The second-highest form of misconduct complained of was laziness, with 45,7% of educators claiming that learners were often lazy and 20,3% claiming that this occurred very often. Educators also mentioned that rudeness (31,1%), low levels of cooperation (36,9%), disrespect (28,2%), moodiness (29,0%), dishonesty (31,1%), smoking (28,3%) and bullying (35,5%) occurred often or very often. Less than a quarter of educators indicated that provocation (19,6%), truancy (17,3%), use of alcohol (9,4%), and violence (15,2%) occurred often or very often. It is thus clear that the more serious forms of misconduct occurred less often. This is also in line with the 2011 Eastern Cape study where educators complained about, for instance, noise-making (96%), talking without permission (87,2%), swearing at other learners (84,8%), late-coming (83,2%), violating the school dress code (72%), and back-chatting teachers (71,2%).

Wolhuter, Oosthuizen and Van Staden¹⁸⁴ published their survey results on the age of learners as a factor in learner discipline, in 2010. They found that disruptive behaviour had the highest frequency in the foundation phase (grade 1 to 3). Dishonesty, moodiness, cheekiness, the telling of lies, laziness, vandalism, theft, bullying, and violence had the highest frequency in the intermediate phase (grade 4 to 6). In the senior phase (grade 7 to 9), rudeness, the use of foul language, provocative behaviour, disrespect towards educators, untidy and incorrect attire, negligence, laziness, and truancy had the highest frequency. Gang activities, pornography, smoking, alcohol abuse, drug abuse and sexual harassment of fellow learners had the highest frequency in the further education and training phase (grade 10 to 12). Thus, the more serious transgressions occurred in the higher grades.

It is difficult to draft a specific pattern or list of misconduct in a hierarchical order after considering all the results of the different surveys. However, it is clear that the frequency of low-impact misconduct is much higher than that for serious transgressions, which include criminal acts. Although there is a perception created by the media that there is a pervasive culture of crime in schools, not all schools are affected to the same extent;¹⁸⁵ and, although there are

¹⁸² 2008:389-398.

¹⁸³ 2010:25-30. Although representative, the survey was less representative than the study of Wolhuter and Van Staden, since Lessing and De Witt's respondents had to have access to the electronic questionnaire and had to have an understanding of Afrikaans, since the questionnaire was only available in Afrikaans.

¹⁸⁴ Wolhuter, Oosthuizen & Van Staden 2010:389-398.

¹⁸⁵ De Wet 2003:113-121.

many educators who are really despondent and negative about the state of discipline,¹⁸⁶ there are still educators who are of the opinion that, though, there is indiscipline in classrooms, the situation “could not be deemed to be really out of control” and is still manageable.¹⁸⁷ However, if timeous steps are not taken to address the issue, it might escalate into a crisis. Signs of a pending crisis are to be seen in the increase in the number of educators experiencing health problems, experiencing decreasing job satisfaction, leaving the profession, and abdicating their responsibility to maintain discipline.¹⁸⁸

6.1.4 Perceptions on the use of corporal punishment

In the past, educators were in a position to use physical violence to force learners into a state of submissiveness, humility and obedience. Order was achieved and maintained by way of inflicting pain when deemed necessary. Learners thus obeyed the rules out of fear of pain and humiliation.

The abolition of corporal punishment is seen by some educators as the catalyst for the downward spiral of discipline in schools.¹⁸⁹ In addition, some of them, especially those who are in schools situated in areas with high levels of violence and gangsterism, are of the opinion that physical force is the only effective way to deal with indiscipline, since it is the only way that learners understand and respect authority.

There is still strong support for the reinstatement of corporal punishment in schools. According to the SAHRC, 58% of educators are in favour of its reinstatement.¹⁹⁰ Supporters of corporal punishment claim that it contributes to character-building, is effective, is fast and easy to administer, provides immediate results, contributes to the speedy elimination of misbehaviour, is harmless, fosters respect, and is the only language children understand. Furthermore, they argue that misbehaviour increases in the absence of corporal punishment.¹⁹¹ There is also recent research indicating that some educators hold very strong opinions on corporal punishment and believe that its abolition is the key reason for the escalating ill-discipline in schools.¹⁹²

¹⁸⁶ Lessing & De Witt 2011:416; Wolhuter & Van Staden 2008:397.

¹⁸⁷ Maphosa & Mammen 2011:191; Motseke 2010:130.

¹⁸⁸ Wolhuter & Van Staden 2008:397; see also par 7.3 and 8.1.5 below.

¹⁸⁹ Maphosa & Shumba 2010:391-397; Badenhorst, Steyn & Beukes 2007:305; Rossouw 2003:429; SAHRC 2008:12; Burton 2008:4; Van Wyk 2001:197.

¹⁹⁰ SAHRC 2008:13.

¹⁹¹ Badenhorst, Steyn & Beukes 2007:306; DoE 2000:6-7; Maphosa & Shumba 2010:391-397.

¹⁹² Maphosa & Shumba 2010:387-399.

On the other hand, there are educators who are not in favour of the reinstatement of corporal punishment. Motseke¹⁹³ found, albeit in a small sample of respondents, that 66.6% of the educators in the study do not favour the reinstatement of corporal punishment, 60% are of the opinion that the abolition of corporal punishment did not lead to an increase in disciplinary problems and 73.3% are of the opinion that the banning of corporal punishment did not affect learner performance.

Contrary to the reported demands for the reinstatement of corporal punishment Oosthuizen and Van Staden¹⁹⁴ declare that their research results are in line with other studies which indicated that educators are of the opinion that corporal punishment is the least effective disciplinary measure. It is thus clear that there are two separate schools of thinking on the suitability and effectiveness of corporal punishment.

6.2 Learners' perceptions on discipline

In what follows, the results of a number of studies on learners' perspectives on school discipline will be discussed. The aims of these studies were to determine how learners experienced the state of discipline in their schools, what disciplinary measures were used, which disciplinary measures they perceived to be effective or ineffective, and what their preferences with regard to discipline were.

Learners acknowledged the need for discipline in order to create an environment conducive to teaching and learning. It is evident that they had clear perceptions and expectations regarding school discipline and how to enforce it.¹⁹⁵ Yet, there were differences of opinion on how this should be done.

On the one hand, there were learners who were in favour of strict rules and punishment. These learners were comfortable with the traditional authoritarian and punitive approach to managing their behaviour. They supported corporal punishment and believed that it should be used, with some even suggesting that it should be administered by the police at police stations. Some learners were also in favour of suspensions and expulsions. A particular learner held strong views on the admission of learners with a criminal record or a record of ill-discipline and argued that these learners should not be admitted to any school. Another learner supported this view and stated that learners who were guilty of violence should be excluded from all schools.¹⁹⁶

¹⁹³ 2010:125. The study was conducted in township primary schools and comprised 16 respondents.

¹⁹⁴ 2007:369-370.

¹⁹⁵ De Wet 2003a:89-90; Wolhuter & Oosthuizen 2003:449-450.

¹⁹⁶ De Wet 2003a:89-90.

There were also learners who indicated that they had deserved the punishment meted out to them and that the aim of it was to correct them, yet “some learners did not realise this.”¹⁹⁷ These learners thus believed that punishment had some educational value.

On the other hand, there were many learners who were opposed to the use of corporal punishment, and degrading and humiliating punishment. Some used very strong language to voice their opinions. They indicated that these punishments were ineffective because learners continued with the unacceptable behaviour despite being punished frequently, and that other measures should be explored.¹⁹⁸ In a study by Maphosa and Mammen,¹⁹⁹ learners revealed that punishment did not teach them self-discipline, respect for the rights of others, responsible behaviour and accountability, or to better understand disciplinary problems and the feelings of others. They indicated that punishment contributed to rebellious and aggressive conduct on their part, made them less cooperative and impacted on their relationships with educators, especially where corporal punishment was used. More than one learner indicated that they “hated” educators who used corporal punishment, and such resentment is evident from their responses.

From the above it can thus be seen that punishment does not necessarily deter learners from future misconduct, but, if it does, the deterrence is anchored in the fear of being suspended or expelled or of a parent or guardian being informed of the misconduct. Therefore, the deterrence is not due to changed values or a desire to do the right thing, but to fear of the consequences. The continued use of corporal punishment and other humiliating forms as the predominant measures used to instil discipline was discussed above.²⁰⁰ The impact of fear and humiliation is evident from the responses of learners in another study by Maphosa and Mammen.²⁰¹ One of the interviewees revealed that the verbal abuse and insults “deeply hurt” them.

Learners expressed a desire to have positive relationships with educators. Some voiced the need to be assigned to a specific educator who would act as a guardian and indicated that they would prefer to report incidents to that particular educator, for instance where they were bullied or sexually harassed.²⁰² Yet research by Masitsa²⁰³ shows that some educators do not care about the welfare of learners, which contributes to the high dropout rates of learners. On the

¹⁹⁷ Maphosa & Mammen 2011a:257.

¹⁹⁸ De Wet 2003a:89.

¹⁹⁹ 2011a:156-158.

²⁰⁰ See par 5.1.1.1.1 above.

²⁰¹ 2011b:217.

²⁰² De Wet 2003a:90.

²⁰³ 2006:177-178.

other hand, the positive impact of a caring school climate on learners is illustrated by a study by Moloi and Kamper,²⁰⁴ who discuss the cases of two successful secondary schools in a very poor rural area in Mpumalanga. These schools are faced with serious challenges such as poverty, unemployment, orphaned learners and a lack of resources, such as water and enough classrooms. Nevertheless, their achievements in several areas are exceptional, including a 100% matric pass rate for a couple of years now. Apart from the exceptional leadership of the principals, relationships involving educators, learners, parents, the Department and the community at large are highlighted as the secret to these schools' success. The schools are described as "safe, healthy and happy" and the creation of an ethos of care is evident from the measures taken to address the physical and emotional needs of learners. The learners' emotional needs are first and foremost addressed through ensuring that the school is a physically and emotionally safe place and a sense of belonging is emphasised.²⁰⁵ One of the learners summarises the school ethos and its impact as follows:

I am happy because it is a school where the teachers motivate us. Our future is important to them. We are supported and we are usually encouraged to succeed.²⁰⁶

The school is characterised by the "principal's integrative capabilities". Measures are taken to break down any possible poverty-based distinctions, to accommodate diversity and to create a caring and respectful environment.²⁰⁷ In contrast, in a study done by Van der Merwe,²⁰⁸ learners felt they were disrespected by the educators and described the attitude and actions of their educators as follows:

Teachers make decisions about us without our input.
We are not cared about.
We are stereotyped.
We are under-estimated.
Our way of doing things is not accepted because we are black.
We are threatened by the teachers.
Teachers tell us what they think we need.
Our needs are not acknowledged and not taken seriously.
We are told that we wouldn't be able to understand something.
Our questions are not answered or are evaded.

²⁰⁴ 2010:256-279.

²⁰⁵ Moloi & Kamper 2010:266-268. Care is further shown by providing a vegetable garden and feeding scheme, and by ensuring that every learner has a uniform and medical care through liaison with a clinic.

²⁰⁶ Moloi & Kamper 2010:268.

²⁰⁷ Moloi & Kamper 2010:268.

²⁰⁸ 2012:657.

Disrespect and lack of accommodation of cultural differences contribute to misunderstandings between educators and learners, and to conflict, distrust and hostility. Violent behaviour on the part of learners is identified as one of the possible outcomes of this conduct of educators.²⁰⁹

Some learners also acknowledged that they had specific responsibilities with regard to school discipline and safety, and that they had a responsibility to report misconduct, and crime in particular, in order to secure a safe environment.²¹⁰ In this regard, they also offered practical solutions such as the installation of security cameras, the employment of security guards, searches and seizures, fencing, alarm systems, burglar-proofing, improved lighting, and more supervision in the cloakrooms. Some learners also expressed the need to be physically empowered and recommended self-defence classes for learners, which is indicative of the need to protect themselves, albeit through physical force. Although learners were not in agreement on the content of some of the values mentioned in the one study, they were in agreement on the need for values as part of discipline in schools.²¹¹

In some schools, the majority of learners indicated that the state of discipline in their schools was not acceptable and that it impacted negatively on their work.²¹² The level of dissatisfaction varied, depending on the extent of the disciplinary problems and levels of violence in the schools.²¹³ More serious forms of misconduct were found in secondary schools.²¹⁴ Some learners expressed hopelessness with regard to the state of discipline and frustration at their inability to change the situation. They felt desponded at the prospect that the situation would not change any time soon and indicated that, even if security measures were improved, the situation would not change. They claimed that, although a sense of security could be created through these measures, danger would always be lurking.²¹⁵ Learners also indicated that the lack of discipline impacted on their academic performance and increased their levels of stress and anxiety, and that educators were becoming frustrated with the ill-discipline, with negative consequences for all.²¹⁶

²⁰⁹ Van der Merwe 2012:657-658.

²¹⁰ De Wet 2003a:90.

²¹¹ De Wet 2003a:90; see also Wolhuter & Oosthuizen 2003:452.

²¹² Wolhuter & Meyer 2007:349-358.

²¹³ Maphosa & Mammen 2011:190-191; Wolhuter & Oosthuizen 2003:450; Wolhuter & Meyer 2007:349-358; De Wet 2003a:90.

²¹⁴ Maphosa & Mammen 2011:190-191.

²¹⁵ De Wet 2003a:90.

²¹⁶ Wolhuter & Oosthuizen 2003:451.

7. IMPACT OF SCHOOL-BASED VIOLENCE AND OTHER FORMS OF MISCONDUCT

School-based violence and other forms of misconduct have an impact on educators, learners, and the teaching and learning environment. In what follows, some of its consequences will be discussed.

7.1 Impact on the safety of learners

It is clear from the above discussion on school-based violence that learners are exposed to severe forms of violence on a fairly regular basis. Learners as well as educators often experience the trauma of these crimes, as they either witness them or are the victims of them.²¹⁷

The NSVS highlights the fact that most children who are exposed to school violence are exposed to it on more than one occasion. Thus, patterns of violence, victimisation and fear are established as early as primary school and are carried forward into adolescence and adult life.²¹⁸ Almost 11% of learners indicated that they were afraid of a specific place at school. Of these scared secondary-school learners, 50,5% said they were scared of the school cloakrooms, 19,8% felt unsafe on the open grounds, and 10% felt insecure on the playing fields. Scared primary-school learners found the same places intimidating, and 4,1% indicated that they were fearful of their classrooms.²¹⁹ To travel to and from school was also a frightening experience for 14,3% of learners. Not only did they fear a traffic accident, but also forms of victimisation such as robbery, assault, theft and sexual assault.²²⁰ Ironically, in reality, most assaults occurred in the classroom (42,8%).²²¹

Despite being afraid of specific places at school, of being exposed to corporal punishment or of travelling to school, the majority of learners indicated that they felt safe at school. Primary-school learners (96,3%) felt safer at school than secondary-school learners (85,5%).²²² The fears of the learners "feed into what can be called the normalisation of crime for [the] young in South Africa".²²³

²¹⁷ De Wet 2003:113-121.

²¹⁸ Burton 2008:31-32.

²¹⁹ Burton 2008:33. SAHRC 2008:7

²²⁰ Burton 2008:34.

²²¹ Burton 2008:32.

²²² Burton 2008:32-35.

²²³ Burton 2005:3; see also Nesor 2005:73-80.

Notwithstanding the general perception created by national survey information, research undertaken by Neser²²⁴ in a non-randomly selected participation study of primary- and secondary-school learners in South Tshwane shows that 70,8% of learners felt safe in school. Male learners (66,7%) felt less safe than female learners (74,7%). In addition, learners' feeling of safety decreased as they moved into more senior years. Learners who felt safe at school indicated significantly less exposure to physical and verbal aggression.

Neser²²⁵ indicates that school violence impacts on learners as victims, perpetrators and witnesses. It has an extensive and detrimental effect on schools, families, peer groups, communities and society at large. The long-term effects of school violence should not be underestimated, as its effects are not limited to physical injuries but also include interpersonal and intrapersonal forms of maladjustment which extend into adolescence and into adulthood and manifest themselves in, *inter alia*, depression, the physical abuse of children and/or a spouse and/or others, alienation and masochistic sex. The impact of school violence on victims includes poor self-esteem, feelings of isolation and loneliness, being frightened, being humiliated, developing an aversion to school, the development of aggressive behaviour, becoming violent perpetrators, and even mental health problems. Increased anxiety, feelings of helplessness and social dissatisfaction, enhanced feelings of aggression, destructive and self-destructive behaviour, post-traumatic stress disorder, depression, limited attention span, serious numeracy and literacy problems, inability to deal with class assignments, and poor academic performance are often recorded among victims of school violence. These learners are also more prone to frequent absences from school, are unmotivated to succeed, and have high dropout rates.

Another negative consequence of being exposed to school violence is that there is a correlation between exposure to violence at a young age and the likelihood that the youngster concerned will eventually also get caught up in the cycles of violence, both as a repeat victim and as potential perpetrators of violence.²²⁶

Not only learners feel unsafe at school. According to the NSVS, a little more than one in two primary- (57,7%) and secondary-school educators (58,1%) felt safe in the school environment. Thus, more than 40% of educators generally felt unsafe in schools.²²⁷

²²⁴ 2005:69, 79-80.

²²⁵ 2005:64, 79-80; see also SAHRC 2008:14; Burton 2005:2; Jefthas & Artz 2007:46.

²²⁶ Burton 2007:2; Leoschut & Bonora 2007:91-93, 104.

²²⁷ Burton 2008:25-26.

7.2 Impact of corporal punishment

Not only does corporal punishment infringe on several constitutional rights,²²⁸ but several research reports clearly indicate that corporal punishment also has a negative impact on the development of children. The psychological effects of corporal punishment might be just as harmful as, or even more harmful than, the physical effects. Learners subjected to corporal punishment present with lower academic achievements and higher levels of aggression, and are more prone to criminal behaviour, depression and anxiety. Furthermore, lower levels of self-esteem, moral internalisation, and lower levels of mental health are reported among these children. Harm to ego functioning, the creation or enhancement of feelings of loss, helplessness and humiliation, destructive and self-destructive behaviours, a shortened attention span, and attention-deficit disorder are also associated with the infliction of corporal punishment. There is also a positive correlation between being subjected to corporal punishment and violent behaviour in adult life. Children also learn that it is acceptable to solve problems by hitting others, and fail to learn to find creative ways to solve problems and conflict. In addition, corporal punishment is not an effective measure to ensure that children's value systems change positively or to ensure that children refrain from misbehaviour.²²⁹ In fact, there are educators who are of the opinion that corporal punishment is one of the least effective disciplinary measures.²³⁰

Despite these negative consequences and the fact that corporal punishment was outlawed, it is still administered extensively in schools.²³¹ It is common cause that violence, aggression and criminal behaviour are part of the reality of many schools.

7.3 Impact of bullying

The cyclical nature of bullying is alarming, with learners who are bullied sometimes becoming bullies themselves to prevent being bullied. The victims of bullies are learners who have a low self-esteem, who are shy or non-assertive, who have difficulty reading social signs, who tend to cry or overreact when teased or who have no friends. Bullies often come from dysfunctional families, are exposed to domestic violence, and have little or no parental discipline and involvement. Research indicates that bullying can instigate aggression and may lead to more serious acts of violence in future. Bullying is often the first step to juvenile crime. Bullies are

²²⁸ In *S v Williams* 1995 (3) SA 632 (CC), the Constitutional Court found that corporal punishment infringed on the right to dignity, the right not to be subjected to cruel, inhuman and degrading treatment, and other personal security rights.

²²⁹ Badenhorst, Steyn & Beukes 2007:305; Van Wyk 2001:196; Oosthuizen, Wolhuter & Du Toit 2003:464-465; Maree & Cherian 2004:76-77.

²³⁰ Oosthuizen & Van Staden 2007:370.

²³¹ Wolhuter & Van Staden 2008:396; De Wet 2003:116; SAHRC 2008:13; Burton 2008:28-30.

more prone to drug and alcohol abuse and often carry weapons to school. They also harbour thoughts of suicide, have symptoms of depression and experience a loss of belonging.²³²

Victims of bullying are more likely to become depressed, are more likely to be suicidal, have difficulty concentrating, and find their academic performance decreasing. Victims experience high levels of insecurity, anxiety, loneliness, unhappiness, tension and fear, as well as feelings associated with post-traumatic stress, confusion, anger and grief. Physical consequences due to bullying include headaches, bed-wetting, loss of appetite, poor posture, and stomach problems. Absenteeism rates are higher among bullied learners, and some even drop out of school.²³³ Other negative consequences are psychological distress and increased levels of psychological disorder.²³⁴ These negative effects have a long-term effect on the victims and are often carried into adult life. Chronic bullies, on the other hand, seem to continue their unacceptable behaviour in adult life and find it difficult to maintain meaningful relationships, with some of them abusing their children, marriage or life partners.²³⁵

Mestry, Van der Merwe and Squelch²³⁶ add a valuable additional perspective on bullying by referring not only to its impact on the bully and the victim, but also to its impact on third parties. A third party is neither the bully nor the victim. About 83% of peers observing bullying feel uncomfortable.²³⁷ Third parties may experience feelings of guilt or helplessness for not standing up to the bully on behalf of their fellow learners, may be extremely fearful that they might be the next victim or may become afraid of certain areas at the school.²³⁸

7.4 Impact of sexual harassment, abuse and rape

Apart from the risk of pregnancy, of the transmission of sexually transmitted diseases, of HIV, of feeling unsafe and of psychological harm, victims are also prone to low academic performance, absenteeism, despondency, depression and other emotions and reactions that impact adversely on their ability to perform optimally.²³⁹

Absenteeism and dropout rates are some of the negative consequences of the lack of security,

²³² SAHRC 2008:6-7; Aluede *et al.* 2008:151-154; De wet 2005:82.

²³³ Aluede *et al.* 2008:154; Mestry, Van der Merwe & Squelch 2006:47-48; Prinsloo 2008:30-34; De Wet 2005:82; Le Roux & Mokhele 2011:324- 325; Maphosa & Mammen 2011:191.

²³⁴ Cluver, Bowes & Gardner 2010:801-802.

²³⁵ Aluede *et al.* 2008:154; Mestry, Van der Merwe & Squelch 2006:47-48; Prinsloo 2008:30-34; De Wet 2005:82; Le Roux & Mokhele 2011:324-325.

²³⁶ 2006:48.

²³⁷ Mestry, Van der Merwe & Squelch 2006:49.

²³⁸ Mestry, Van der Merwe & Squelch 2006:47-49; Aluede *et al.* 2008:153.

²³⁹ Le Roux & Mokhele 2011:325.

and of the prevalence of school-based violence and bullying. Chauke²⁴⁰ states that there is no indication that dropout rates are declining and maintains that they remain unacceptably high in South Africa. Urgent attention should therefore be given to these issues to ensure that South Africa complies with its international obligations in terms of the Convention on the Rights of the Child (CRC), which provides that states parties are obliged to take measures to ensure regular attendance at school and to reduce dropout rates.²⁴¹

7.5 Intimidation of educators

An educator in the Eastern Cape study highlighted another dimension of the impact of gangsterism on discipline, stating that it was risky to enforce discipline in schools, especially where senior learners are involved, because they belong to gangs. Educators are threatened by learners and are afraid that gang members will attack them after school “with knives and guns”.²⁴² The specific reference to the weapons used by gang members may be indicative of the level of violence and of the fear that this instils in the educator. Therefore, educators do not enforce proper discipline, which impacts negatively on the learning environment, making it less conducive to teaching and learning. Although gangs consist of a very small, but hard-core, group, their impact is significant and devastating for victims.²⁴³ Another educator reported feeling threatened by learners after trying to prevent them from using drugs at school.²⁴⁴

7.6 Lack of work satisfaction and impact on the personal lives of educators

Wolhuter and Van Staden²⁴⁵ found that the lack of learner discipline caused 85% of educators to be unhappy in their work, either at time or regularly, and that this sometimes or regularly caused tension in their family lives. It led to health problems in the case of 54% of educators. Furthermore, 57% of the educators indicated that they sometimes or regularly considered leaving the profession because of the disciplinary problems. Le Roux and Mokhele²⁴⁶ highlight the fact that educators who are exposed to violence are more likely to transfer to other schools, thus impacting negatively on teaching continuity. Other negative consequences are that these educators are absent from school more often, lack motivation, seek early retirement or resign. Wolhuter and Van Staden²⁴⁷ indicate that the effect of disciplinary problems on educators may lead to a crisis in future if this is not addressed urgently.

²⁴⁰ 2012:7.

²⁴¹ CRC 1989:a 28(1)(e).

²⁴² Maphosa & Mammen 2011:190-191.

²⁴³ Le Roux & Mokhele 2011:326.

²⁴⁴ Pahad & Graham 2012:7.

²⁴⁵ 2008:397.

²⁴⁶ 2011:324; see also Pahad & Graham 2012:10 on educators resigning owing to deteriorating discipline.

²⁴⁷ 2008:379.

The SAHRC report²⁴⁸ reveals that several educators who were exposed to gang violence presented with chronic symptoms of post-traumatic stress, which negatively impacted on their ability to teach properly. In such instances, they lose interest and may become detached to the extent that they are unable to relate to their learners. They experience lowered self-confidence and self-esteem, with a concomitant negative impact on their work performance. Continuous stress due to school-based violence sometimes triggers depression and violent behaviour towards learners. They also report feelings of hopelessness, exasperation, and of not being supported and heard. School violence thus often has a negative impact on the personal lives of educators, with some resorting to alcohol or drug abuse.

7.7 Impact on teaching time and deterioration of the teaching and learning environment

Coetzee, Van Niekerk and Wydeman²⁴⁹ aver that half of instruction time is lost due to disciplinary problems in class. The dismal academic results of the system discussed above clearly illustrate the need to improve discipline as a matter of urgency so as to allow more time for much-needed instruction.²⁵⁰

Maphosa and Mammen²⁵¹ found that some female teachers find it challenging to discipline older boys. Consequently, they ignore them and leave them to misbehave. This is a strategy that is also employed by other educators who fear that action might impact on their employment security because it might infringe on learners' rights²⁵² or are intimidated by learners as discussed above. This inaction on the part of educators contributes to the further deterioration of the learning environment.

7.8 Impact on the dignity and other rights of educators and learners

Lessing and De Witt²⁵³ are of the opinion that disruptive behaviour indicates a lack of reliability, trustworthiness, responsibility, respect, and care for the educator and fellow learners. If a learner refuses to obey the instructions of an educator, this is indicative of some cheekiness and audacity on the part of the learner. In addition, this has an impact on the educator's image as a person in a position of authority and indicates disrespectfulness towards the educator. Misconduct often provokes the educator, which might lead to an emotional outburst by him or

²⁴⁸ SAHRC 2008:14-15.

²⁴⁹ 2008:91.

²⁵⁰ See par 2 above.

²⁵¹ 2011:191.

²⁵² Maphosa & Shumba 2010:392; Motseke 2010:124. See the discussion below in par 8.1.5 on the overemphasis of learners' rights.

²⁵³ 2010:25

her, with a resultant negative impact on the atmosphere in the class. An emotional outburst by the educator not only causes the educator stress and even humiliation, but also has a negative impact on learners' conduct and the sense of dignity that should prevail in a class.

Apart from the right to dignity of educators and learners, other rights which are impacted by misconduct include personal security rights, labour rights, and the right to education to mention but a few. It is thus imperative not only to address the consequences of misconduct, but also to endeavour to prevent it.

In conclusion, the impact of misconduct varies considerably; from learners claiming it has no effect on their learning to those who claim that it seriously impacts on their education. On the other hand, the impact of disciplinary problems on educators ranges from mere frustration to post-traumatic stress and resignations. Unfortunately, it is quite difficult to quantify the extent of the disciplinary problems in exact terms. However, it can be deduced that there is a vast range of levels of discipline and order in schools, from schools with no, or hardly any, problems with discipline to schools which are totally dysfunctional.

However, even if the disciplinary problems are not so serious in a particular school, they should be addressed, since every child has the right to be taught in an environment that is safe and conducive to teaching and learning. Every child must also be afforded the opportunity to develop to his or her full potential. Disciplinary problems and their impact, even if minimal, should thus be addressed to ensure that the best interests of every child are served properly.

8. CAUSES OF DISCIPLINARY PROBLEMS

All the stakeholders in education contribute to the unacceptable state of discipline. In what follows, the reasons for the state of discipline are discussed and are attributed to a specific stakeholder. However, it must be kept in mind that more than one stakeholder can play a part in a specified reason for the disciplinary problems, and that no single cause is responsible for all the problems highlighted above.

8.1 Disciplinary problems associated with the state

8.1.1 Lack of support from the Department of Education

After the abolition of corporal punishment, the Department of Education embarked on a comprehensive campaign to transform discipline on all levels in education so as to be in line with the constitutional imperatives, equality and autonomy. The powers of educators and

principals to discipline learners were drastically curtailed through the abolition of corporal punishment.²⁵⁴

School governing bodies (SGBs) are required to conduct disciplinary hearings in instances of serious misconduct. Educators are of the opinion that the due-process provisions are lengthy, are not suitable for the education environment, and prevent immediate and strong action.²⁵⁵ One educator remarked in a recent interview that it is very difficult, for example, to expel a learner from school. There has to be permission from the Department, the expulsion has to be substantiated, and a decision has to be arrived at after many lengthy meetings. As a result, justice is delayed and, at times, never realized. A learner may commit a very serious act of misconduct but remains in school while the hearing is held and letters are written. The process is long and tedious and really sends the wrong signals to would-be offenders.

In addition, the Department provides insufficient assistance and is contributing to delays in effecting discipline. Lessing and De Witt²⁵⁶ found that 62,3% of educators are of the opinion that they receive no support from the Department with regard to disciplinary problems in schools. A respondent was very vocal about this point and claimed that the Department normally blames the school and not the learner for the situation. This attitude on the part of the Department demotivates educators and SGBs.²⁵⁷ On the other hand, exceptions to the lack of support by the Department were also recorded in this study.²⁵⁸ Schools sometimes have to wait for unreasonable periods to receive feedback from the Department on disciplinary matters referred to it.²⁵⁹

²⁵⁴ Badenhorst, Steyn & Beukes 2007:312; Van Wyk 2001:197-198.

²⁵⁵ *Schools Act 84/1996* s 9; Rossouw 2003:425; Lessing & De Witt 2011:415. Maphosa & Shumba 2010:394. See the detailed discussion on the due-process provisions in ch 3, par 6.3.

²⁵⁶ 2011:415.

²⁵⁷ Lessing & De Witt 2011:415.

²⁵⁸ Lessing & De Witt 2011:415.

²⁵⁹ Badenhorst, Steyn & Beukes 2007:312. One principal claimed that to wait five weeks for a response from the Department was not uncommon, and another principal claimed that disciplinary action two to three months after the incident was ineffective. Examples of schools approaching the court to deal with issues of expulsions: *Maritzburg College v Dlamini NO & Others* [2005] JOL 15075 (N); *Pearson High School v Head of Department, Eastern Cape Province, and Others* [1999] JOL 5517 (Ck); *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government, and Others* – Eastern Cape Provincial Division: unreported case 454/08; *St Michael's School for Girls and Others v The Head of the Free State Education Department and Others* – Free State Provincial division: unreported case 5597/2008. See also the comprehensive discussion in ch 3, par 5.9.1.

Furthermore, expulsions recommended by SGBs are mostly not confirmed by the Head of Department (HoD).²⁶⁰ If confirmed, and the child is of compulsory school-going age, another school is simply compelled to enrol the child. One principal claims that he was compelled by the Department to accept three children with disciplinary problems in his school in a period of 18 months.²⁶¹ The Department also fails to render support in order to address the root causes of disciplinary problems.²⁶²

8.1.2 Lack of effective action against the unlawful use of corporal punishment and the sexual abuse of learners

Despite knowledge of the consequences of corporal punishment and of sexual offences against learners, as well as the widespread occurrence thereof,²⁶³ it seems as though the Department of Basic Education, especially at the provincial level, lacks the will to take effective steps to address these issues. Employers (the respective provincial departments of basic education) are supposed to report any misconduct on the part of educators to the SACE.²⁶⁴ However, the annual report of SACE highlights the underreporting.²⁶⁵ The consequences of this underreporting are evident from the combined data from several reports.

The 2010 GHS²⁶⁶ indicates that 21,6% of learners in the Eastern Cape were subjected to corporal punishment, yet, in 2008 and 2009 respectively, a total of only 6 and 13 complaints of misconduct were lodged with the SACE.²⁶⁷ These complaints include all the complaints received by the SACE, not only those related to corporal punishment. In contrast, in the Western Cape, only 3,6% of learners indicated that they had been subjected to corporal punishment, but, in 2008 and 2009, 94 and 50 complaints respectively were lodged with the SACE. Most of the complaints against educators filed in that period were received from the Western Cape. The same reporting trend continued in the period 1 April 2011 to 31 March 2012. Although there was a considerable increase in the total number of complaints laid, the disparity between the provinces is clear. In the Western Cape, a total of 174 complaints were recorded by the SACE, of which 99 related to corporal punishment.²⁶⁸ On the other hand, in the Eastern Cape, a total of

²⁶⁰ See the discussion, in ch 3, par 5.9.1 herein, on the increase in the number of court cases regarding the refusal of the HoD to expel transgressing learners.

²⁶¹ Badenhorst, Steyn & Beukes 2007:312.

²⁶² See the discussion in ch 3, par 6.4 herein.

²⁶³ See the discussion in par 5.1.1.1 of this chapter.

²⁶⁴ *Employment of Educators Act 76/1998*:s 26.

²⁶⁵ SACE 2012:25.

²⁶⁶ DBE 2012e:36.

²⁶⁷ SACE 2012a:3.

²⁶⁸ SACE 2012:29.

33 complaints were received, including only 11 complaints related to corporal punishment.²⁶⁹ Three complaints related to verbal abuse, victimisation, harassment and defamation were received in both provinces.²⁷⁰ What is further alarming is that the Eastern Cape had the second-largest number of educators after KwaZulu-Natal.²⁷¹

It can thus be concluded that the lack of external control by the Department of Basic Education on a provincial level contributes to the continued high levels of unlawful use of corporal punishment and of sexual abuse of learners. The Department is therefore effectively condoning the use of violence against learners and contributes to the perceived acceptability of school-based violence.

Yet, the SACE also has to carry some responsibility for the unacceptable state of affairs. It has acknowledged that reporting mechanisms are not accessible and that measures should be put in place to make them more accessible for the public to lay complaints against educators. Furthermore, the Council displays a lack of professional service delivery and unacceptably high levels of unresolved issues are reported. Less than half of cases reported in 2008 had been finalised in less than 20 months. It took, on average, 27 months to finalise a complaint. By June 2012, 44% of complaints laid in 2008 and 45% of complaints laid in 2009 had still not been finalised.²⁷² The existing rate of finalisation is worrying if one keeps in mind the fact that the total number of cases increased from 277 in 2008 to 525 in the period 1 April 2011 to 31 March 2012.

Of the 26 complaints received by the Council regarding sexual misconduct by educators in 2008, only 12 had been finalised by June 2012.²⁷³ The number of complaints escalated to 126 for the period 1 April 2011 to 31 March 2012.²⁷⁴ The level of underreporting of sexual misconduct is alarming considering the high prevalence of sexual violence committed by educators.²⁷⁵ The Council reported in 2012 that it had reviewed its processes in order to shorten the time taken to finalise cases. The success of the new processes, when implemented, remains to be seen.²⁷⁶ If service provision does not improve dramatically, the SACE will be regarded as a toothless watchdog.

²⁶⁹ SACE 2012:27.

²⁷⁰ SACE 2012:27, 29.

²⁷¹ SACE 2012a:8.

²⁷² SACE 2012a:12.

²⁷³ Davis 2012:sp; SACE 2012a:12.

²⁷⁴ SACE 2012:126.

²⁷⁵ See the discussion above in par 5.1.1.2.

²⁷⁶ SACE 2012:24.

8.1.3 Outcomes-based education

Only two years after the abolition of corporal punishment, the Department introduced the new outcomes-based education curriculum. One of the components of outcomes-based education (OBE) is group work. Furniture in classes is therefore often arranged so that groups of learners face one another. This creates an environment which increases the risk of learners distracting one another. Learners often lack the necessary self-discipline to work without constant close supervision by the educator in these circumstances. Educators thus need special skills to ensure that discipline stays intact in this environment.²⁷⁷

Educators claim that the curriculum was not properly thought through and that they were not adequately trained to deal with the demands of OBE. The realities of large classes and the demands of OBE are also not compatible.²⁷⁸ Educators are of the opinion that disciplinary problems escalated when learners who were subjected to the full OBE curriculum entered secondary schools.²⁷⁹ Recently, it was widely acknowledged that OBE had failed and it was stated that the Department was in the process of phasing in a new curriculum. Apart from the fact that the new curriculum will also contribute to disciplinary problems in some schools,²⁸⁰ the effect of the deterioration in the culture of school discipline brought about by the OBE curriculum will not disappear overnight.

8.1.4 Insufficient training in the use of alternative disciplinary measures

The Department has been criticised for not providing sufficient in-service training on alternative disciplinary measures.²⁸¹ Many educators feel helpless because they are of the opinion that no effective alternative disciplinary measures are available to replace corporal punishment.²⁸² Educators are also of the opinion that they are unprepared to deal with disruptive behaviour. It is claimed that a booklet, *Alternatives to Corporal Punishment: the Learning Experience*, was made available to schools, but that educators were supposed to study the content in their own time without any workshops or other forms of training. It is questionable how many educators studied this booklet.²⁸³ For instance, one remarked that she was aware of the alternatives and

²⁷⁷ Oosthuizen 2006:17; Pienaar 2003:262; Rossouw 2003:425. See the discussion below in par 8.1.4 on insufficient training.

²⁷⁸ See the discussion below in par 8.1.6 on overcrowded classes.

²⁷⁹ Badenhorst, Steyn & Beukes 2007:313.

²⁸⁰ Ncana 2010:6; Kruger 2009:14; see also the discussion below in par 8.3.4.

²⁸¹ Coetzee, Van Niekerk & Wydeman 2008:91; Badenhorst, Steyn & Beukes 2007:313; Rossouw 2003:429; SAHRC 2008:12; Burton 2008:4.

²⁸² Badenhorst, Steyn & Beukes 2007:306; Maphose & Shumba 2010:391-397.

²⁸³ See ch 3, par 5.8.3.1 herein for a discussion of the content of this booklet.

that the booklet was somewhere in one of her files.²⁸⁴ In addition, educators who did receive training maintain that many of the methods suggested by the Department are not practical.²⁸⁵

Maphosa and Shumba²⁸⁶ recorded interviews with educators on their capabilities to enforce discipline after the banning of corporal punishment. Some of the remarks on the usefulness of alternatives to corporal punishment included the following and serve as a good summary of the responses of other interviewees as well:

Most of these alternative methods are actually time-wasting. A teacher would spend weeks just trying to deal with the case of a child who is not doing his or her work at school. This takes a lot of the teacher's time and also disturbs serious learners, as the teacher may not attend classes while attending to disciplinary hearings or talking to parents summoned to the school.²⁸⁷

The responses of the educators mentioned under this heading as well as the high prevalence of corporal punishment are indicative of the fact that many educators are not properly trained and are unable to make the mind-shift from reactive forms of discipline through punishment to proactive and preventive forms of dealing with discipline. Wolhuter and Van Staden²⁸⁸ therefore rightly stress educators' needs for guidance and the development of new or alternative methods of maintaining discipline.

Not only is the Department of Basic Education criticised for the lack of training of educators, but universities are also criticised for the fact that beginner educators do not have the necessary skills to maintain discipline and are not adequately prepared in this regard.²⁸⁹

8.1.5 Overemphasis of children's rights and underemphasis of educators' rights

Specific children's rights were introduced in the Constitution.²⁹⁰ The content and ambit of the rights are not always known to lay people and they therefore ascribe their own meaning to these rights. The inclusion of children's rights in the Constitution and the eventual emphasis given to them have unfortunately resulted in them being overemphasised and misinterpreted, with devastating consequences for discipline in schools and the relationships between educators

²⁸⁴ Maphosa & Shumba 2010:394.

²⁸⁵ Pienaar 2003:262; Wolhuter & Van Staden 2008:396.

²⁸⁶ 2010:391-395.

²⁸⁷ Maphosa & Shumba 2010:395.

²⁸⁸ 2008:396; see also Badenhorst, Steyn & Beukes 2007:317; Maphosa & Mammen 2011:220-221.

²⁸⁹ Mabasa 2011:1541-1552; Badenhorst, Steyn & Beukes 2007:313.

²⁹⁰ Constitution 1996:s 28.

and learners. In fact, children's rights are being blamed by some for the deterioration in school discipline. Remarks by educators interviewed by Maphosa and Shumba²⁹¹ indicate the sentiments of educators.

The child has more rights than a teacher. Imagine a teacher being hauled before the courts for being accused of threatening a learner, not even beating, threatening. It shows you the problems we face in these schools. Learners are not only aware of their rights but [are] very sensitive to them. You only need to teach and whether these learners listen or do assigned work is not our concern, for any attempt to deal with them is putting your future at risk.²⁹²

Another educator responded as follows when asked about children's rights.

I believe the issue of rights has been taken too far. Learners now feel completely liberated and as teachers we now feel powerless because the learners we teach have rights and they know [this]. It is humiliating when you want to discipline a learner and he or she tells you in the face that you are abusing him or her. In the eyes of our learners we are now weak as far as maintaining discipline is concerned.²⁹³

The devastating effect of these misinterpretations of children's rights on school discipline is evident from the above-mentioned remarks of these educators. It is clear that they do not really understand the content of rights. The reactions of the educators and learners suggest that there is a misconception that any form of discipline (without specifying the measure) constitutes an infringement of children's rights. Oversimplifications are also evident, because it is sometimes simply not accepted that to discipline a child equates to child abuse. The educators' remarks also reveal a perception that children's rights trump the rights of others and cannot be limited. Educators therefore feel powerless. It is thus clear that terms such as "discipline" must be clearly defined as well as the content of rights.

In the absence of these clarifications, children might claim infringements of rights which do not exist. On the other hand, these misperceptions create hostility and a power play between educators and learners. Educators become disempowered and fearful that they may transgress the law, end up in court or even lose their jobs. Consequently, they rather act cautiously and do nothing to discipline the learner for fear of their own safety. Similar sentiments were expressed by other researchers.²⁹⁴

²⁹¹ 2010:391-397.

²⁹² Maphosa & Shumba 2010:392.

²⁹³ Maphosa & Shumba 2010:393.

²⁹⁴ Oosthuizen 2006:4; Rossouw 2003:424; SAHRC 2008:22; Pahad & Graham 2012:11-12.

The inaction of educators to deal with disciplinary issues is also evident from other researchers' work. Motseke,²⁹⁵ for instance, found that 6,25% of the educators in the study always just kept quiet when learners misbehaved. Masitsa²⁹⁶ provided respondents with a list of possible reactions to misconduct, including different forms of corporal punishment, refusing to mark late assignments, reprimanding learners, giving additional work, and ordering the learner to stand in front of the class. What was disturbing about the findings was that they indicated that educators basically do nothing to address misconduct, except, sometimes, to have a serious talk with the learners. At first sight, it just does not make sense that all the respondents would do nothing about misconduct. However, their responses make far more sense when considered in conjunction with educators' fears of using disciplinary measures that might infringe on learners' rights and being at risk of losing their work.

The truth as to what really happens in schools probably lies somewhere in the middle. There is enough evidence on the continued use of corporal punishment to accept that it exists and that many educators hide the truth from researchers for fear of the consequences of the illegal use of such punishment.²⁹⁷ It is also inconceivable that all educators will sometimes only talk to learners when they misbehave.²⁹⁸ However, it must be acknowledged that there are educators who in fact do nothing to address misconduct in their classes because they are afraid of the consequences if they deliberately or by mistake infringe on the rights of learners.²⁹⁹

Another misinterpretation regarding children's rights is that learners have rights, but no responsibilities. This might be because children are regarded as a vulnerable group or are seen as too immature to have any responsibilities. To address this, the Bill of Responsibilities was drafted and is included in the new Life Orientation Curriculum which is in the process of being implemented.³⁰⁰ Furthermore, the *Children's Act*³⁰¹ now specifically has a provision highlighting children's responsibilities.

The quoted remarks of the educators indicate that they experience a sense of being exposed, of being left with no rights or protection, of being without remedies, and of having no effective

²⁹⁵ 2010:124.

²⁹⁶ 2008:256-258.

²⁹⁷ See the discussion on corporal punishment in par 5.1.1.1.1 above. See also Oosthuizen & Van Staden 2007:369-370 who give a similar explanation for the results of a study that they conducted.

²⁹⁸ Masitsa 2008:256-258.

²⁹⁹ Maphosa & Shumba 2010:392.

³⁰⁰ DBE 2012:101.

³⁰¹ 38/2005:s 10.

mechanisms available to maintain discipline.³⁰² The imbalance created by these misperceptions recently forced a defamed educator to approach the High Court to protect his right to dignity. He was eventually granted damages and the order was confirmed by the Supreme Court of Appeal and the Constitutional Court.³⁰³

8.1.6 Overcrowded classes

Class size is an acknowledged factor contributing to the level of order and discipline in a class. Large classes generally have a negative impact on educational achievements, especially in the early years. Large classes or multigrade classes are more challenging to manage, because there is more interaction. They also result in less effective teaching methods, which can lead to boredom and ill-discipline and limit the individual attention and guidance given to learners.³⁰⁴

The Report on the 2008 and 2009 Annual Surveys for Ordinary Schools³⁰⁵ indicated that the average class size in public schools was 37 and 36 learners in 2008 and 2009 respectively, compared with the 23 and 22 respectively in independent schools. For this reporting period, more than 1 000 public schools had an average class size of more than 60 learners. The norm, however, is set at 40 learners per class. In 2009, more than 8 000 public schools (a third of schools) had class sizes above the 40 learner norm.³⁰⁶

Although most schools had a Learners:Educators Ratio (LER) under the norm of 40 learners per class in 2012, it was still exceeded. A total of 1 225 (5,1%) schools had an LER of 41 to 45 learners per class, 324 (1,3%) schools had a LER of 46 to 50 learners per class, and 301 (1,2%) schools had a LER of more than 50 learners per class.³⁰⁷ It must also be kept in mind that these figures include the impact of independent schools on the LER. The LERs in public schools are, in general, much higher than those of independent schools. For instance, in 2009, the average class size in an independent school was 22 learners, while it was 36 in public schools.³⁰⁸

³⁰² See also Badenhorst, Steyn & Beukes 2007:313; Oosthuizen 2010:228.

³⁰³ *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC).

³⁰⁴ UNESCO 2012:2; Froyen 1988:3; Rossouw 2003:425.

³⁰⁵ DBE 2010:2, 11-12.

³⁰⁶ UNESCO 2012:2. This is much higher than the average class size in the European Union (EU) or in member countries of the Organisation for Economic Co-operation and Development (OECD). In most of the countries, class sizes are, on average, below 20. None of the countries have an average class size above 30.

³⁰⁷ DBE 2012c:4. There were 3 714 (15,3%) schools which had an LER of 36 to 40 learners per class. The LER was between 31 and 35 learners in 24,9% of schools, and 22,8% of schools had between 26 and 30 learners. Almost a third of the schools had an LER of less than 25 learners per class.

³⁰⁸ DBE 2010:11.

Apart from large classes, an additional factor that should be taken into account is multigrade classes. In 2009, 6 619 ordinary schools had multigrade classes.³⁰⁹ This number increased in 2010 to 6 694 and constitutes 25,9% of all schools.³¹⁰ The majority of these schools were primary schools, and about 5 200 schools had less than 300 learners.³¹¹ The challenges posed by multigrade classes are also highlighted by monitors of the Integrated Quality Management System (IQMS).³¹²

8.1.7 Underresourced schools

The physical environment at schools must be conducive to teaching and learning and is regarded as one of the important prevention strategies to address disciplinary problems.³¹³ Shortages of school resources further contribute to violence and fights, for instance educators reported that children were fighting because there were not enough chairs, cloakrooms and textbooks available for everyone.³¹⁴ Many incidents are reported of no, or not enough, textbooks being delivered or late or wrong deliveries of textbooks, books and stationery.³¹⁵ In Limpopo, the non-delivery of textbooks resulted in court action in 2012.³¹⁶

There are still numerous schools which lack basic facilities such as running water,³¹⁷ electricity,³¹⁸ sanitation,³¹⁹ fencing and security, as well as basic information communication mechanisms.³²⁰ Most schools do not have proper libraries (79%),³²¹ science laboratories

³⁰⁹ DBE 2010:8-10.

³¹⁰ DBE 2012b:7.

³¹¹ DBE 2012b:7; DBE 2010:8-10; see also a provincial breakdown of multigrade schools in DBE 2012d:61, 68, 74, 81, 87, 93, 99, 104, 110.

³¹² DBE 2012d:68, 81,104-105, 110.

³¹³ Bear 2010:S4H18-2.

³¹⁴ Pahad & Graham 2012:10; Ntuta & Schurinck 2010:7.

³¹⁵ DBE 2012d:47-48. The IQMS report indicates that 47% of schools did not receive the full consignment of workbooks – DBE 2012e:24. In the GHS, 6,4% of respondents complained about the lack of books. This figure decreased from 21% in 2002.

³¹⁶ *Section 27 and Others v Minister of Basic Education and Another* – unreported case 24565/2012; judgment handed down in the Gauteng North High Court on 17 May 2012.

³¹⁷ DBE 2011:sp, table 4. 2 402 schools (9,6%) had no water supply and 2 611 (10,5%) had an unreliable water supply; see also Masitsa 2006:178-179; Fredericks 2010:5; Grobbelaar & Masuku 2011:4; Maqhina 2012:3. Gernetzky 2012:4 reports that the Minister of Basic Education has now called upon the public to assist the Department to address the backlogs, since it is unable to address the needs within acceptable timeframes.

³¹⁸ DBE 2011:sp, table 3. 3 544 schools (14,2%) had no electricity and 804 (3,2%) had unreliable electricity.

³¹⁹ DBE 2011:sp, table 5. 913 schools (3,7%) had no sanitation facilities.

³²⁰ DBE 2011:sp, table 6. 2 730 schools (11%) had no fencing. The availability of information communication technology facilities is another indicator of the level of resources available at schools – see DBE 2011:sp, table 11. In 2011, 2% of schools had no communication system. Schools made use of one or more of the following communication systems: cellphone (92%), telephone (45%), facsimile (35%), two-way radio (1%), internet (13%) and callbox (20%). These figures must be seen in the context of the disparities between the provision of resources in urban and rural schools and provisioning in different provinces. For instance, with

(85%),³²² computer centres (77%)³²³ and/or sports fields (17%).³²⁴ Taking the overall socio-economic position into account, it can be argued that these should be regarded as luxuries that schools have to do without. This is further emphasised by the fact that 41% of schools are in a poor or unacceptable state of maintenance and include mud schools and prefabricated buildings which have long ago come to an end of their economic life.³²⁵ In some provinces, there is also an influx of people moving from rural to urban areas, which puts pressure on the existing resources. Therefore, schools are forced to admit huge numbers of additional learners for whom no provision has been made by the provincial department through the timeous establishment of new facilities.³²⁶

The Department of Basic Education is giving attention to the dire state of physical facilities at some schools through several projects.³²⁷ Despite its efforts, the delivery of infrastructure continues to be a challenge, with serious backlogs still remaining.³²⁸ It is estimated that R66,6 billion will be required to bring all ordinary schools up to the level of optimum functionality.³²⁹

Underresourced schools also lack proper facilities for extracurricular and leisure activities. Learners are consequently unable to take part in sports, cultural and artistic endeavours and are bored after school. This makes them more prone to become involved in antisocial behaviour, such as substance abuse and delinquency, which negatively impacts on the school culture and discipline.³³⁰

Another important resource in education is the availability of enough educators. The 2010 GHS indicate that the number of complaints about teacher vacancies in schools increased from 5% in

regard to e-mail facilities, 98% of schools in the Western Cape had an email address, while only about 3% of schools in Limpopo had such an address; see also DBE 2012b:9.

³²¹ DBE 2011:sp, table 7. 19 541 schools did not have a library.

³²² DBE 2011:sp, table 8. 21 021 schools did not have laboratories.

³²³ DBE 2011:sp, table 9. 19 037 schools did not have a computer centre.

³²⁴ DBE 2011:sp, table 10. 4 312 schools had no sports facilities.

³²⁵ Mbuyazi 2010:2; Johwa 2008:3; Matlala 2010:5; Kruger 2010:9; Matomela 2010:1; Wolhuter & Steyn 2003:529; Oosthuizen, Wolhuter & Du Toit 2003:467; SAHRC 2008:22; Bloch 2009:81-82.

³²⁶ Ntuta & Schurink 2010:7.

³²⁷ DBE 2012:34, 41, 76, 101, 15. In the 2011/2012 financial year, 39 090 projects were completed in terms of the Education Infrastructure Grant (EIG) and included: 131 ablution facilities; 721 new or additional classrooms; 49 specialised classrooms; 50 schools provided with water; 420 mobile classrooms; and 33 526 square metres of fencing. The Accelerated School Infrastructure Delivery Initiative (ASIDI) was launched in the 2011/2012 financial year and projects included: the building of 1 648 classrooms; 316 sanitation blocks; the installation of a water supply for 63 schools; the provision of electricity for 540 schools; and fencing for 96 schools. The total project value was R785,9 million for this financial year.

³²⁸ DBE 2012:34, 76, 101.

³²⁹ DBE 2012:34. This excludes preliminaries, contingencies, escalations, professional fees and value-added tax.

³³⁰ Ward 2007:23; Mgwagqa & Lawrence 2008:26-27.

2002 to 9% in 2010. The survey report therefore urged the Department of Basic Education to conduct an in-depth investigation on staff vacancy rates.³³¹ This point is further illustrated by the litigation in the Eastern Cape regarding post establishments.³³² To maintain order in an overcrowded class without the necessary equipment to teach is a heavy burden on the shoulders of any educator and should be alleviated as far as possible through the provision of adequate resources.

8.1.8 Insufficient support structures to deal with serious misbehaviour

Owing to this socio-economic background and social environment, many learners experience emotional and often physical needs which can be addressed only through professional counselling. Counselling of learners is an important tool to remove the root cause of learners' misbehaviour.

Unfortunately, there is a huge shortage of social workers and psychologists. In 2003, a conservative estimate indicated that the ratio between educational psychologists and learners was 1:100 000. Furthermore, vacant positions for psychologists are not always filled by the provincial departments of education.³³³ The position has not changed for the better over time. In 2011, there were 641 805 learners enrolled in the Free State, but there were only 4 social workers or related professionals employed by the Department. It is not clear whether they have been appointed to work at special schools or to provide social services in general in the province.³³⁴ If they are designated for specific schools, there are no services in general available. If employed to render services to the learners in the province in general, the ratio would be more than 1:150 000. Children with especially serious behavioural problems need professional help, but these ratios are not conducive to professional service delivery.

On the upside, the 2011/2012 Annual Report of the Department of Basic Education refers to the piloting of a Care and Support for Teaching and Learning Programme (CSTL) under the heading "health promotion". There were 235 schools in 8 provinces in that financial year included in the programme.³³⁵ The details of the programme are not discussed in the Annual Report, but another document indicates that social welfare services and psychological support are two of the nine priorities of the CSTL.³³⁶ At the very least, the provision of these services is

³³¹ DBE 2012e:25.

³³² See the detailed discussion in ch 5, par 2.2.4.1.4, 2.2.4.1.5.1 herein.

³³³ Gerardy 2003:4.

³³⁴ FSDE 2012:30, 193.

³³⁵ DBE 2012:85.

³³⁶ The other priorities of the programme include nutritional support, health promotion, infrastructure, water and sanitation, safety and protection, curriculum support, co-curricular support, and materials support –

being considered on the national executive level. The extent of the services and the availability of financial and human resources remain to be seen.

8.1.9 Different perceptions on democracy

Participation, community engagement, rationality, consensus, equality and freedom are regarded as some of the constitutive principles of the South African democracy.³³⁷ During the deliberations to draft the new Constitution, and in the drafting of the White Paper on Education and Training, a participatory democracy was envisaged according to Smit and Oosthuizen.³³⁸ They describe participatory democracy as:

a form of direct democracy which enables all members of a society to participate in decision-making processes within institutions, organisations, society and government structures.

These features of a participatory democracy are evident from the sentiments captured in the White Paper on Education and Training,³³⁹ which provides as a principle that:

- 2(g) State involvement in school governance should be at the minimum required for legal accountability, and should in any case be based on participative management.
- 2(h) The decision-making powers of governing bodies should reflect their capacity to render effective service.
- 2(i) A capacity-building programme should go hand-in-hand with the assignment of powers to governing bodies. This should be supplemented by management programmes for principals and inspectors, to ensure a smooth transition to the new school governance system.

The preamble of the *National Education Policy Act*³⁴⁰ echoes these views and the *Schools Act*³⁴¹ gave effect to them in its provisions on the composition and functions of the SGB, on which parents constitute the majority members.³⁴²

Smit and Oosthuizen³⁴³ warn that the Department is retracting from the original ideals of participatory democracy and that the recent amendments to legislation are indicative of a

see DBE 2012f for details on the National Support Pack, which includes the details of the planned roll-out of the CSTL programme.

³³⁷ Smit & Oosthuizen 2011:60.

³³⁸ 2011:60.

³³⁹ DoE 1995:ch 12, par 29(2).

³⁴⁰ 27/1996.

³⁴¹ 84/1996.

³⁴² 84/1996:s 16(1). See ch 3, par 5.3 for a discussion on the composition and functions of the SGB.

recentralisation of decision-making powers. They refer to amendments such as provisions regarding the appointment of staff,³⁴⁴ the levying of school fees,³⁴⁵ and the utilisation of school funds.³⁴⁶ They are of the opinion that the position has deteriorated to such an extent that, although the formal structures are designed for cooperation and negotiation between the national and provincial governments of education, the current centralising tendencies and policies of national government have resulted in a position where it is “little more than a one-way traffic system” at present. They claim that the state has in practice done away with any real partnership or power-sharing due to the extent of the prescriptive regulations and interventions concerning a number of issues.

In addition to curbing the powers of the SGB, there are examples of the real misuse of power by the different departments of education, such as interference in the appointment of educators,³⁴⁷ in language policies of schools,³⁴⁸ in the admission of learners³⁴⁹ and in the way in which disciplinary matters are dealt with. With regard to the latter, there are examples of HoDs

³⁴³ 2011:67.

³⁴⁴ *Employment of Educators Act 76/1998:s 6.*

³⁴⁵ *Schools Act 84/1996:s 39.*

³⁴⁶ *Schools Act 84/1996:s 37.*

³⁴⁷ *Laerskool Gaffie Maree and Another v Member of the Executive Council for Education, Training, Arts and Culture, Northern Cape, and Others* 2003 (5) SA 367 (NC); *Observatory Girls Primary School and Another v Head of Department of Education, Gauteng* 2003 (4) SA 246 (W); *Head of the Western Cape Education Department and Others v Governing Body of Point High School and Others* [2008] 3 All SA 35 (SCA). The SGB is allowed to appoint educators. One can therefore assume that it would appoint the most suitable candidate for the position, taking into account what it believes would be in the best interests of the children of the school. However, the Department has to approve the appointment. This it has refused to do in a number of instances, claiming that transformation goals should be taken into account. Thus the appointment of the preferred candidate was not approved in such case. Consequently, the SGB's decision as to what is in its opinion in the best interests of the school and of the learners of the school has to yield to the transformation goals of the Department. Thus far, however, the Department has not succeeded in overturning an SGB's decision as far as an appointment is concerned.

³⁴⁸ *Head of Department, Mpumalanga Department of Education, and Another v Hoërskool Ermelo and Others* 2010 (3) BCLR 177 (CC); *Governing Body of the Mikro Primary School and Another v Western Cape Minister of Education and Others* [2005] 2 All SA 37 (C); *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA); *Hoërskool Ermelo en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* [2007] JOL 19629 (T); *High School Ermelo and Another v Head of the Department and Others* [2008] 1 All SA 139 (T); *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* 2003 (4) SA 160 (T). As far as the language policies of schools are concerned, the position is somewhat different. Although the courts have found on more than one occasion that the Department has no right to interfere in the language policies of schools or that the Department has not followed the correct procedures, the courts have ordered that the children who have been enrolled by the Department should stay in the particular schools and that they should be taught in their preferred language. Owing to time delays, the courts have found that it would not be in the children's best interests to enrol them at such a late stage in another school. However, it was ruled that the Department was not at liberty to compel the schools to take in new enrolments of other children and to teach them in their preferred language. These cases will be discussed in more detail in chapter 4, par 8.3 herein dealing with the best interests of the child.

³⁴⁹ *Governing Body of Rivonia Primary School and Another v MEC for Education, Gauteng Province, and Others* – unreported case in the Supreme Court of Appeal: case 161/12; judgment delivered on 30 November 2012.

refusing to expel learners where there is justification for the expulsion, delaying decisions and misusing appeal processes to enforce the departments' will on schools.³⁵⁰ This unlawful conduct of the different provincial departments of education undermines the authority of the SGB, thereby creating the impression that they are endeavouring to remove SGBs' decision-making powers with regard to what is deemed by the particular school community as appropriate and inappropriate behaviour.

Smit and Oosthuizen,³⁵¹ however, indicate that the concept of democracy is open to different interpretations and can take on different forms. They argue that the Constitution provides for a representative and participatory democracy; incorporating the concepts of accountability, transparency and public involvement.³⁵² The undue exercise of power by the different provincial departments of education can, they state, be attributed to misconceptions about what democracy entails. They³⁵³ argue that the misconception that democracy entails a "winner-takes-all" approach explains the many bureaucratic decisions which are taken to enforce the government and ruling party's transformation aims. In their study,³⁵⁴ they found that 57% of respondents (principals, SGB chairpersons, and senior officials of the relevant department of education) were unaware of the principles of participatory and deliberative democracy as measures to deal with diversity and to accommodate multiculturalism. The respondents favoured a bureaucratic method to manage multiculturalism, often without due regard for fundamental rights and the requirements of legality. They argue that there is no proper distinction between political and participatory forms of democracy. This should be a cause for concern if there is a real risk that a bureaucratic approach will prevail instead of an approach where participation, community engagement, rationality, consensus, equality and freedom play an important role. The question inevitably arises whether a bureaucratic approach, as opposed to a participatory approach, would be able to ensure that the best interests of all learners will be of paramount importance as far as disciplinary issues are concerned.

8.2 Disciplinary problems associated with parents

Although this study will not specifically focus on the role of parents in determining the best interests of their children in the disciplinary context, their role in the social background to school discipline still needs to be included in the discussion to ensure a holistic view of the situation.

³⁵⁰ See chapter 3, par 5.9.1 herein for a detailed discussion.

³⁵¹ 2011:59.

³⁵² Smit & Oosthuizen 2011:60.

³⁵³ Smit & Oosthuizen 2011:62-63.

³⁵⁴ Smith & Oosthuizen 2011:62. Their study was limited to 19 districts in the North-West province.

8.2.1 Uninvolved parents

Parental involvement can be defined as the active and significant involvement of the parent in all aspects of the child's formal education, non-curricular as well as curricular.³⁵⁵ Pandor, a former Minister of Education, correctly complained about uninvolved parents as a contributing factor to the unacceptable state of education.³⁵⁶

Researchers and educators stress the importance of parental involvement, and of the necessity to develop strategies to improve involvement, because there is a clear correlation between the level of parental involvement and disciplinary problems. The more involved the parents, the fewer disciplinary problems that are reported.³⁵⁷ However, some parents are of the opinion that it is the school's responsibility to discipline children; hence they delegate their responsibility to the school.³⁵⁸

On the other hand, there are parents who want to be involved in the education of their children but who claim (in order of importance) that they are uninvolved because they lack the time, feel they have nothing to contribute, do not know how to become involved, lack support structures to take care of their children while they attend school functions, feel intimidated, are not available during the time the school arranges functions, and do not feel welcome at the school.³⁵⁹ Other reasons for parental uninvolvedness are fear of divulging conflicts at home, panic over the child's possible failure, guilt about the lack of parental skills, reluctance to interfere in the educator's work, the belief that they would not know how to participate, and the belief that the educator is trying to shift responsibility.³⁶⁰ To address many of these issues would require careful management on the part of the school, because such issues eventually impact on learner discipline. For instance, what can the school and the SGB do to make parents feel welcome, appreciated, needed, and worthy to contribute to the school community?

8.2.2 Undesirable home environment

Research indicates that children who grow up in a home with love, understanding, trust, confidence, warmth and acceptance are well adjusted. They develop a positive self-esteem, and

³⁵⁵ Ndamani 2008:182.

³⁵⁶ Pandor 2007:3.

³⁵⁷ Wolhuter & Van Staden 2008:397; Coetzee, Van Niekerk & Wydeman 2008:131; Badenhorst, Steyn & Beukes 2007:310, 314, Wolhuter & Steyn 2003:530-531; SAHRC 2008:12; Froyen 1988:5; Wolhuter, Oosthuizen & Van Staden 2010:171; Rossouw 2003:426.

³⁵⁸ Ndamani 2008:181; Badenhorst, Steyn & Beukes 2007:311; Rossouw 2003:426; Van Wyk 2001:198.

³⁵⁹ Coetzee, Van Niekerk & Wydeman 2008:133; see also Badenhorst, Steyn & Beukes 2007:310-311.

³⁶⁰ Coetzee, Van Niekerk & Wydeman 2008:133.

are diligent, obedient and responsible learners in the classroom.³⁶¹ In a recent study conducted by Lessing and De Witt,³⁶² 83% of the educators blamed learners' undesirable home environments for the learners' unacceptable conduct. They claimed that parents expected the school not only to educate their children, but also to take sole responsibility for the upbringing of the children. They averred that parents abdicated their responsibility in this regard. Furthermore, 99,2% of educators were of the opinion that there was a deterioration in the exercise of parental power.³⁶³

Many learners are subjected to an undesirable home environment, which is often characterised by conflict, alcohol and drug abuse, poverty, physical and emotional abuse, harsh physical disciplinary measures, lack of love and care, and domestic violence. Exposure to this is very traumatic for children and often results in disruptive behaviour at school. Children exposed to these conditions react differently, but common behaviour includes becoming anxious and depressed, withdrawal, eating and sleeping disorders, lack of concentration, truancy, loss of interest in social activities, low self-esteem, avoidance of peer relations, rebelliousness and the display of oppositional-defiant behaviour at school.³⁶⁴

The composition of some families is not ideal and there are many single-parent (mostly single mothers) families, families where learners grow up with grandparents or foster parents or families comprising child-headed households. Most of the time, many children are unsupervised at home owing to their parents' working conditions. There is a clear correlation between children with serious behavioural problems in schools and neglect or rejection. Neglect can vary between the extremes of physical punishment or abuse and permissiveness.³⁶⁵

8.2.3 Parents not supporting discipline enforced by the school

Parents are contributing to the overemphasis of children's rights by unduly challenging the discipline enforced by the school on the basis of alleged infringements of the learner's human rights. In addition, educators are often humiliated by parents in front of learners. Parents openly undermine the authority of educators by defending the misbehaviour of learners and even blame the educators for the misbehaviour, claiming that the educators did not properly

³⁶¹ Ndamani 2008:183.

³⁶² 2011:410.

³⁶³ Lessing & De Witt 2011:412.

³⁶⁴ Le Roux & Mokhele 2011:322-323; Pahad & Graham 2012:7-8; Ndamani 2008:182-184, 194-195; Badenhorst, Steyn & Beukes 2007:311; De Wet 2003a:86; Rossouw 2003:426; SAHRC 2008:19-20; Van Wyk 2001:198; Lessing & De Witt 2011:410.

³⁶⁵ Wolhuter & Steyn 2003:534; Van Wyk 2001:198.

supervise learners. A possible consequence of this is that the learner may play the school and the parents off against each other.³⁶⁶

Parents often set unacceptable examples for their children. Parents with social standing and material welfare are often guilty of looking down on educators.³⁶⁷ These parents will also defend their social standing and good name at any cost and will not tolerate any accusation that their children might be guilty of misconduct. If their children are disciplined, they often threaten the school with legal action.³⁶⁸ Overprotective parents are also mentioned as contributing to disciplinary problems, because they refuse to believe that their children have in fact misbehaved.³⁶⁹

8.3 Disciplinary problems associated with school management and educators

8.3.1 Unacceptable examples set by educators

Oosthuizen³⁷⁰ rightly argues that one of the consequences of the constitutional dispensation is that respect for a person in authority cannot be forced on learners. In the past, respect was often earned through fear. More than ever before, the saying that respect must be earned is true in education.

Thus, if the educator's value system is flawed or not worthy of imitating, he or she will not gain the respect of learners and will find it difficult, if not impossible, to maintain discipline without reverting to force. The importance of the educator role-modelling acceptable conduct is emphasised by a number of authors. Educators will be unable to guide learners to self-discipline if they do not model it for them.³⁷¹

Unfortunately, there are examples of unacceptable conduct on the part of educators which include educator absenteeism,³⁷² child abuse, sexual harassment and sexual abuse of

³⁶⁶ Ndamani 2008:180-181; Wolhuter, Oosthuizen & Van Staden 2010:171; Badenhorst, Steyn & Beukes 2007:310; Rossouw 2003:426; Froyen 1988:8; Bloch 2009:80.

³⁶⁷ Badenhorst, Steyn & Beukes 2007:310.

³⁶⁸ See the examples of cases where parents unduly approached the courts for assistance with regard to their children's sanctions for misconduct. Cost orders were made against the parents in all these instances for pursuing the cases or for appealing against the court's ruling: *Tshona v Principal, Victoria Girls High School, and Others* [2006] JOL 18445 (E); *Mose (Legal Guardian of Luzuko Mose) v Minister of Education, Provincial Government of the Western Cape, Gabru and Others* [2008] JOL 22623 (C).

³⁶⁹ Pahad & Graham 2012:8.

³⁷⁰ 2006:5.

³⁷¹ De Klerk & Rens 2003:360; Van Wyk 2001:199.

³⁷² See the discussion below in par 8.3.3.

learners,³⁷³ violence,³⁷⁴ intimidation and vandalism during protracted strikes,³⁷⁵ misappropriation of school funds, drug and alcohol abuse, and lack of a work ethic.³⁷⁶

8.3.2 Underprepared and unprepared educators

There is a strong correlation between the educator's general competencies and the learner's behaviour. These competencies include subject knowledge, the ability to conduct classes and to hold the learner's attention, and the ability to manage a group of learners.³⁷⁷ Oosthuizen³⁷⁸ found that the professional functioning of the educator is the most important factor in establishing an effective education and training environment.

Unfortunately, many educators do not have the necessary subject knowledge to teach effectively. Taylor³⁷⁹ provides details of a number of tests given to educators on the work they have to present to learners. Some of the results are that grade 3 educators scored an average of 67% for a grade 6 mathematics test. In the language test, the majority of the educators scored between 29% and 50% for the test. A study of secondary educators on grade 12-type questions revealed that the educators had a mean score of 32,4% for the test. The Department of Education revealed in May 2010 that more than 1 700 educators teaching science did not have the required qualifications to present the subject.³⁸⁰ The overall conclusion is that the subject knowledge of many educators is substandard.

In addition, many educators do not prepare for their classes. Underprepared and unprepared educators are unable to educate with confidence, lack the ability to present their classes in an interesting way, and fail to hold the attention of learners. This leads to learners losing interest and inevitably also results in disciplinary problems.³⁸¹

³⁷³ Maphosa & Mammen 2011:191-192. See also the discussion in par 5.1.1.2 above.

³⁷⁴ See, for instance, the discussion above in par 5.1.1.1.1 on the unlawful use of corporal punishment and other undesirable forms of violence, such as verbal violence against learners.

³⁷⁵ Coetzee 2009:5; Serrao 2009:4; Fleish 2009:6; Van Gass 2007:4; Makwabe & Govender 2007:10; Maqhina 2007:4.

³⁷⁶ De Wet 2003:113-119; Fleish 2009:6; Serrao 2009a:2; Mhlongo 2008:3; Van Wyk 2001:198; Jack 2008:5; Bloch 2009:80; Maphosa & Mammen 2011:191-192; see also the discussion in par 5.1.1.2 above; and see Mgwangqa & Lawrence 2008:28 on learners' comments on the example set by educators.

³⁷⁷ Wolhuter & Steyn 2003:527; Wolhuter, Oosthuizen & Van Staden 2010:170; Oosthuizen 2010:230-231; Lessing & De Witt 2011:413.

³⁷⁸ 2010:237.

³⁷⁹ 2008:11-12; Fredericks 2012:4.

³⁸⁰ Dlodlo 2010:4; Bloch 2009:82-83.

³⁸¹ Oosthuizen 2006:5.

Mabasa³⁸² investigated the preparedness of student teachers to deal with disciplinary issues in schools and concluded that universities do not prepare student teachers adequately to deal with the challenges of school discipline. In fact, these students are exposed to the unacceptable methods employed by teachers and no suitable alternatives to the unconstitutional and uneducational methods employed by the teachers are provided in a structured way during the course.

8.3.3 Educator absenteeism and late-coming

When educators are absent from classes, disciplinary problems are more likely to occur. A study conducted by the Community Agency for Social Enquiry (CASE) and the Joint Education Trust (JET) found that educator absenteeism is often a bigger problem than learner absenteeism.³⁸³ Educators are absent from classes because of, *inter alia*, mere tardiness, too many extracurricular duties, union activities during school hours, and HIV/Aids-related illness.³⁸⁴ Research indicates that, on average, educators spend less than half of school time (46%) on teaching.³⁸⁵

The perception may be created that educator absenteeism is only due to their indiscipline and laziness. However, a study conducted by Ntuta and Schurinck³⁸⁶ indicates that this perception may be unfounded or that the reasons for the absenteeism might be totally different. They found that the educators in their study were not very well qualified and academically strong. The Department of Basic Education had introduced the new curriculum, but did not provide adequate training for the educators to implement it. Educators' confidence and self-esteem therefore dwindled. Conflict escalated among staff, because the educators were unwilling to teach the subjects in the new curriculum, and subject allocation became a thorny issue. One of the consequences was an escalation of educator absenteeism. This inevitably had an impact on the rest of the staff and on the culture of teaching and learning, because the number of unsupervised learners at school increased, with a consequent increase in disciplinary problems.

The absence or an insufficient number of educators supervising learners on the playgrounds was highlighted at the SAHRC public hearings as a factor contributing to school violence.³⁸⁷

³⁸² Mabasa 2011:1541-1552; see also Badenhorst, Steyn & Beukes 2007:313.

³⁸³ Taylor 2008:6-9; Tau 2008:4; Van Rooyen 2008:2.

³⁸⁴ Rossouw 2003:425; Sedibe & Fraser 2012:156.

³⁸⁵ Taylor 2008:8; Ward 2007:22; Motala & Dieltiens 2010:3.

³⁸⁶ 2010:6-7.

³⁸⁷ SAHRC 2008:21.

This is in line with research indicating that the greater the number of educators supervising, the lower the level of bullying.³⁸⁸

8.3.4 Ineffective school and classroom management

Ward³⁸⁹ indicates that successful schools have the following characteristics:

Schools that promote academic competence usually have a clear mission, high-quality instruction, monitor student's progress and emphasise staff development. These characteristics speak to a school's ability to model and reward pro-social behaviour and to assist children to feel able to develop pro-social norms and behaviours.

Many of these prerequisites for the development of pro-social behaviour can be linked to the quality of management.³⁹⁰ Although schools might have the same socio-economic, racial and ethnic profile, the level of criminal activity and disciplinary problems at the schools may differ vastly. Higher levels of criminal activity and disciplinary problems can be attributed to the organisational features of the school, to a lack of clear communication, to a lack of planning, to a lack of motivation on the part of educators, and to the management style of the principal. More training in management skills is thus needed.³⁹¹

The need for urgent action to address management skills is illustrated by Taylor,³⁹² who found that it is statistically highly possible that the SACMEQ scores of poor schools would increase by 20% and those of other schools by 15% if the issue of educator absenteeism is addressed. The correlation between educator absenteeism and the level of school discipline was highlighted above, as was the correlation between the improvement of school discipline and academic achievement.³⁹³

To address the lack of management skills, the Department of Basic Education introduced the IQMS. Moderators were appointed in 2008 to evaluate educators and management at schools with regard to several aspects. By the end of the 2011/2012 financial year, 87% of schools had been visited and some had been visited more than once, especially underperforming schools. It is conceded by the Department that the impact of this strategy may not be significant in the

³⁸⁸ Mestry, Van der Merwe & Squelch 2006:57.

³⁸⁹ 2007:21.

³⁹⁰ De Wet 2003a:86; Wolhuter & Steyn 2003:529; Ward 2007:21-22; Wolhuter, Oosthuizen & Van Staden 2010:170; Van Wyk 2001:199-200.

³⁹¹ Van Wyk 2001:199-200; De Wet 2003a:86; Wolhuter & Steyn 2003:529; Ward 2007:21-22; Wolhuter, Oosthuizen & Van Staden 2010:170; Pahad & Graham 2012:9-10.

³⁹² 2008:6.

³⁹³ See the discussion in par 8.3.3 above.

short term, but it maintains that there is already visible progress with the system. For instance, the matric results showed some improvement in 70,8% of the underperforming schools visited by the monitoring teams. In 38% of these schools, there had been a 60% and higher improvement since 2010.³⁹⁴ The monitoring team emphasised that it was worrying that 9% of principals were not at school during visits and pointed out that the absence of the principal impacts negatively on management, teaching and learning at the school.³⁹⁵

8.3.5 Low morale

Many educators are overwhelmed by large classes and by learners who are disrespectful towards them. The principal's hands are often tied when it comes to dealing speedily and effectively with disciplinary problems. In addition, educators hardly ever receive any public appreciation and support. They thus soon become unmotivated and display low morale.³⁹⁶ This results in them not giving enough attention to school discipline, which contributes to the deterioration of discipline.³⁹⁷

8.4 Disciplinary problems associated with learners

8.4.1 Challenging authority

Learners' perceptions of discipline have changed over time and are largely influenced by the emphasis placed on dignity and the rights of the child by politicians, psychologists, sociologists and pedagogues.³⁹⁸ Educators experience problems with learners, who do not have respect for them, refuse to take responsibility, are disobedient, are aggressive, and challenge authority.³⁹⁹

It is argued by De Klerk and Rens⁴⁰⁰ that learners fail to take responsibility for order and structure in the classroom. Since learners prefer to focus on their own rights owing to the overemphasis of human rights (self-value), they neglect the values of order and discipline (i.e. of obedience to rules and regulations of other people rather than of the self). Thus learners prefer to do things that suit themselves.

³⁹⁴ DBE 2012d:8, 47.

³⁹⁵ DBE 2012d:46.

³⁹⁶ See the discussion in par 7.6.

³⁹⁷ See also the discussion in par 7.7.

³⁹⁸ Lessing & De Witt 2010:22.

³⁹⁹ Lessing & De Witt 2010:22.

⁴⁰⁰ 2003:358.

8.4.2 Peer pressure

There is a clear link between learners' sense of belonging and connectedness to a school and school discipline. Ward⁴⁰¹ found that:

[c]hildren who achieve poorly at school, who drop out of school, who are not committed to school, who have low educational aspirations, and who change schools often are more likely to engage in violent behaviour. Conversely, attachment to school protects against youth violence.

Everyone has a need to belong. This need is even more profound in adolescents, who want to conform to their peers' expectations and want to avoid rejection. This opens the door for peer pressure, which can be either positive or negative. In schools with disciplinary problems, negative peer pressure is more prevalent.⁴⁰²

8.4.3 Gang activities

In some parts of the country, gang activities have a profound impact on school discipline. Gang activities are often also criminal in nature and include violent assaults, robberies and mugging. Being a member of a gang often provides learners with a sense of belonging, power and status. Gang activities also include drug and alcohol trading and use. Easy access to drugs and weapons in general contributes to the violence in schools. Gang wars often create fear and anxiety in communities, resulting in educators not showing up for classes and in parental reluctance to send learners to school.⁴⁰³ It is also disturbing to note that, in some instances, gang members are regarded as successful people in their communities and become the role models for children, who start to aspire to become part of the world of the gangsters.⁴⁰⁴

8.4.4 Lack of values

Numerous researchers have indicated that lack of positive values is one of the factors, if not the biggest factor, contributing to disciplinary problems.⁴⁰⁵ The lack of a value-based society contributes to the spirit of permissiveness and disdain for authority. Self-interest at the expense of the generally accepted norms and values is typical of the post-modern era and manifests itself in several ways. For example, lack of respect for human dignity often manifests itself in

⁴⁰¹ 2007:21; Leoschut & Bonora 2007:103.

⁴⁰² Rossouw 2003:425; Ndamani 2008:181; Mgwangqa & Lawrence 2008:28-29; see Ward 2007:22; Leoschut & Bonora 2007:95-97 for a discussion on the impact of peer pressure on violence and delinquency.

⁴⁰³ Ndamani 2008:181; SAHRC 2008:19; Bloch 2009:79.

⁴⁰⁴ Leoschut & Bonora 2007:92.

⁴⁰⁵ Rossouw 2003:415, 425, 430-431; Badenhorst, Steyn & Beukes 1970:311-312; De Klerk & Rens 2003:354-355. Lessing & De Witt 2011:411-412. In the latter study, more than 20% of schools indicated that the lack of values were the cause of disciplinary problems.

victimisation and bullying of younger learners, the use of unacceptable language towards educators, assault, and the use of unacceptable and demeaning disciplinary measures by educators.

This accords with the recommendations of the SAHRC⁴⁰⁶ report on school-based violence which states:

There is a need for the transformation of discipline models in schools in South Africa to models that reflect and promote constitutional values of equality, dignity and respect for others. This can be achieved by allowing learners to make choices, and by creating caring communities within their classrooms. Discipline and values need not be dealt with in isolation of each other as values are easier to impart if there are set boundaries.

There is thus a need to develop learners' reasoned respect for rules and the rights of others, for educators' legitimate authority; for the enhancement of learners' sense of responsibility for their own behaviour, and for their responsibility to contribute to the moral community of the classroom.⁴⁰⁷

8.4.5 Lack of hope and vision for the future

Considering the poor results of the education system in general, as well as the low prospect of obtaining a matric certificate, it is understandable that learners might question the value of attending school.⁴⁰⁸ Masitsa⁴⁰⁹ highlights the high unemployment rate (about 25%) in South Africa and indicates that some learners are of the opinion that what they are taught at school is irrelevant and that the curriculum does not contribute to the attainment of useful skills which will result in gainful employment. Learners are therefore unwilling to follow the educator's instructions, fail to do their homework, and cause disciplinary problems in class. This eventually contributes to high dropout rates. Furthermore, the impact of affirmative action on the perceptions of some learners, and on their future prospects of successful employment and selection for specific courses, must also be kept in mind.⁴¹⁰

⁴⁰⁶ SAHRC 2008:21.

⁴⁰⁷ De Klerk & Rens 2003:361.

⁴⁰⁸ See par 2 above and par 8.4.6 below for a discussion on the background of the education system and of the low throughput rate of the system.

⁴⁰⁹ 2006:178; Motala & Dieltiens 2010:9. In this study, 10% of learners indicated that education was uninteresting and useless.

⁴¹⁰ Bantjes & Niewoudt 2011:41, 51, 56.

It is questionable whether it is reasonable to expect learners to behave and to contribute to an environment conducive to teaching and learning when they do not really have any real prospect of benefiting from education or if they believe that they will not benefit from education in the long term. Learners, particularly from less-affluent communities, often do not hold out much hope for the future and have no long-term vision for their lives. They tend to live for the moment, contrary to the need to have some inner drive towards excellence.⁴¹¹

In contrast, learners who do not succeed academically experience a sense of failure and lose interest in school. This is one of the factors contributing to youth crime, which, in turn, impacts on school discipline.⁴¹² It is thus clear that there is a positive correlation between academic success and positive future prospects on the one hand and school discipline on the other, and that this works cyclically, that is, if the one improves, the other one will also improve.

8.4.6 Overage learners

The Government Notice, Age Requirements for Admission to an Ordinary Public School,⁴¹³ provides for a specific statistical age norm per grade, namely the grade number plus 6. For example, Grade 1 + 6 = age 7 implies that a child in grade 1 should be 7 years of age; or Grade 12 + 6 = age 18 means that a learner in grade 12 should be 18 years of age. Thus, children should ordinarily finish school at the age of 18 years.

However, section 30 of the Government Notice, Admission Policy for Ordinary Public Schools, provides:

A learner who has repeated one or more years at school in terms of this policy is exempt from the age grade norm, except that, if a learner is three years older than the norm age per grade, the Head of Department must determine whether the learner will be admitted to that grade.

Thus, if a learner has repeated a grade twice, he or she will still be eligible to remain in the school. This effectively gives young people an opportunity to stay in school until they are 20 years of age, without a determination by the HoD. Despite this, the HoD can still permit the

⁴¹¹ Rossouw 2003:431; Zulu *et al.* 2004:174; see also Pahad & Graham 2012:6. Participants in this study indicated that some learners had an “angry” attitude. Learners were frustrated and angry and thus resorted to violence to deal with their frustrations. Educators in this study indicated that these angry and frustrated learners had no interest in obtaining an education and that they bullied other children.

⁴¹² De Wet 2003a:84-85.

⁴¹³ GN 2433/1998:s 3.

learner to continue his or her education in a school even if a learner is three years older than the grade cohort.

It should be kept in mind that the curriculum for each grade is developed with the specific pedagogical developmental stage and age of the child in mind. Allowing children of different ages and developmental stages in the same class creates several challenges for learners and for educators, who are not properly trained to deal with this heterogeneity.⁴¹⁴

Despite the provisions regarding age-grade norms and the admission of learners three years above the age-grade norm only with the permission of the HOD, the reality in schools is disturbing, as appears from table 1 below.

Table 1 is relevant in the following two respects: Firstly, there are a considerable number of adult learners in schools together with children. However, the best-interests-of-the-child provision is applicable only to those under the age of 18 years. Secondly, the table also reveals that there is a wide range of children of different ages in the same class.

The impact of these age differentials on school discipline has not been studied in depth. In 2004, reference was made to the negative impact of the large percentage of overage learners on school discipline, but this topic has not been explored in any depth in other research since then.⁴¹⁵

Maphosa and Mammen⁴¹⁶ indicate that, in a specific school in the Eastern Cape, the number of disciplinary hearings conducted by the SGB increased from 10 in 2002 to more than 50 in 2007. What is of significance is the escalation of ill-discipline, especially among senior-phase learners. An interview with a respondent also confirms the increased level of problems with senior learners. The educator claims that “senior boys” smoke, drink alcohol at school and are involved in drug abuse.

By contrast, in a study conducted in Alexandra, educators were of the opinion that learners in grade 8 and 9 were the most violent, and that only a few in grade 10, 11 and 12 were violent.⁴¹⁷ However, educators in this study explicitly linked disciplinary problems with the age differentials among learners in the same class. One educator responded as follows:

⁴¹⁴ Social Surveys Africa 2010:16.

⁴¹⁵ Zulu *et al.* 2004:172.

⁴¹⁶ 2011:187, 190.

⁴¹⁷ Pahad & Graham 2012:6.

You teach different levels in one class ... [and] sometimes I can't control [an] older one. ... So the younger ones will take ... advantage. I [then] won't have control of the class.⁴¹⁸

There are numerous reasons for learners being overage, such as learners who start their schooling late, learners being absent from school for a year or more in order, for instance, to take care of someone, and learners repeating grades.⁴¹⁹ The repetition rate in South African schools is alarmingly high compared with international trends. In 2009, 9% of all learners were repeating the grade they were in the previous year. This is in sharp contrast to the average of 5% for developing countries and 1% for developed countries.⁴²⁰

It is further disquieting to note that the number of learners above the age of 18 years is increasing. In 2008, there were 687 608 (5,72%) learners above the age of 18 years in ordinary schools. This number increased in 2009 to 718 347 (5,96%) and to 858 093 (7,1%) in 2010.⁴²¹ The number of learners complying with the age-grade norm in terms of the above-mentioned regulation is highlighted in dark grey in table 1. The numbers highlighted in light grey may include learners who might be under the aged-grade norm but who were admitted to school at five years of age, but before they turned six.⁴²² The numbers of learners under and above the age-grade norm is evident from the number above and beneath the highlighted blocks.

In another table provided by the Department, reference is made only to percentages of learners of a specific age in a grade and the table does not refer to percentages under 1%.⁴²³ The data was recalculated to determine compliance with the prescriptions of the regulations and is shown in table 2. The data for 2010, used for this study, is in line with the trends presented in data provided by the Department in previous years, as well as the other studies referred to above.⁴²⁴

⁴¹⁸ Pahad & Graham 2012:6.

⁴¹⁹ Social Surveys Africa 2010:2-16.

⁴²⁰ DBE 2011a:33.

⁴²¹ DBE 2010:47-48; DBE 2012b:34. At first glance, the reliability of the data provided by the Department of Basic Education appears questionable. For instance, it is highly unlikely that a four-year-old will be enrolled in grade 9. If this is a true reflection of enrolment, regulations are not being closely followed in some instances. However, the data as presented by the Department of Basic Education paints a troubling picture, even if it is not a 100% correct. Despite questions about the accuracy of the data, the data cannot be completely wrong and too unreliable to use, because other studies indicate the same trends depicted by the data of the Department. Compare DBE 2011c:46-48 for the 2008 and 2009 data, which displays the same trends but is open to the same criticism.

⁴²² *Schools Act 84/1996:s 3(4)*.

⁴²³ DBE 2012b:19.

⁴²⁴ DBE 2011c:27, 48. The 2008 and 2009 data reveal the same trends; see also Social Surveys Africa 2010.

Table 1: Number of learners per grade in 2010

Year	Gr R	Gr 1	Gr 2	Gr 3	Gr 4	Gr 5	Gr 6	Gr 7	Gr 8	Gr 9	Gr 10	Gr 11	Gr 12	Total
4 Years	46 293	1 224	15	20	15	10		77	34	8				47 696
5 Years	362 771	23 645	84	33	24	7	6	56	76	34	1			386 737
6 Years	288 951	436 124	19 334	1 321	346	189	120	72	36	105	93	35	2	746 728
7 Years	14 449	512 300	299 995	18 890	1 454	304	91	199	100	45	162	122	41	848 152
8 Years	1 499	112 686	450 945	256 564	18 422	1 816	378	251	264	173	102	83	66	843 236
9 Years	345	21 320	152 405	419 864	230 256	18 730	2 086	407	336	285	118	59	47	846 262
10 Years	176	6 387	43 913	177 812	412 999	215 106	18 541	1 716	275	310	220	172	56	877 722
11 Years	58	1 885	12 245	57 969	191 395	376 177	192 911	14 698	1 325	469	318	203	170	849 820
12 Years	26	775	4 218	20 038	80 426	186 846	365 194	165 456	12 851	1 395	392	275	186	838 078
13 Years	22	320	1 626	7 510	34 535	96 898	200 918	387 199	138 570	13 368	1 266	304	230	882 766
14 Years	19	190	742	3 121	14 881	43 925	107 256	204 954	389 993	121 694	9 665	925	286	897 689
15 Years	38	103	318	1 203	6 012	19 046	47 739	106 374	216 540	377 896	84 300	9 117	1 185	869 871
16 Years	34	67	136	455	2 624	7 901	20 875	51 365	122 621	220 675	344 138	77 672	11 919	860 482
17 Years	8	62	51	196	855	2 690	7 859	20 979	59 440	129 336	226 945	256 444	92 543	797 408
18 Years	5	12	26	66	303	1 027	2 824	8 372	27 580	71 940	161 594	181 822	195 783	651 354
19 Years		27	37	63	159	402	882	2 727	10 841	34 232	99 656	128 084	116 359	393 469
20 Years	1	7	4	40	84	179	349	945	4 212	14 753	57 030	84 378	72 387	234 369
21 Years	1	1	2	13	36	53	136	293	1 219	5 249	24 870	47 593	41 140	120 606
22 Years		1	7	4	31	37	59	152	458	1 876	10 776	23 529	21 452	58 422
23 Years	1	2			5	18	56	156	237	656	3 881	10 469	10 238	25 719
24 Years	1	2	2	3	3	11	19	87	230	262	1 558	4 214	4 332	10 744
25 Years	1				4	14	11	25	125	311	642	1 711	1 924	4 768
26 Years	1 146	1 135	696	646	514	192	216	245	205	391	974	1 683	1 953	9 996
Total	7 19 016	1 118 347	986 837	965 885	995 400	971 590	968 570	967 065	987 575	995 486	1 023 705	828 894	572 338	121 057 010

Table 2: Percentage of underage and overage learners in different grades in 2010⁵⁹⁹

	Learners on the age-grade norm	Total learners over age-grade norm	Learners over age-grade norm plus one year	Learners over age-grade norm plus two years	Learners more than two years over the age-grade norm	Highest number of years above age-grade norm	Learners under age-grade norm	Highest number of years under age-grade norm	Age difference between the youngest and oldest learners in the grade
Gr 1 7 years	45,8%	12,9%	10,1%	1,9%	0,9%	5 yrs	41,2%	3 yrs	8 yrs
Gr 2 8 years	45,7%	21,7%	15,4%	4,4%	1,9%	6 yrs	32,4%	2 yrs	8 yrs
Gr 3 9 years	43,5%	27,7%	18,4%	6%	3,3%	6 yrs	28,7%	3 yrs	9 yrs
Gr 4 10 years	41,5%	33%	19,2%	8,1%	6%	7 yrs	25,1%	3 yrs	10 yrs
Gr 5 11 years	38,7%	36,9%	19,2%	7,7%	7,7%	7 yrs	24,2%	3 yrs	10 yrs
Gr 6 12 years	37,7%	40,1%	20,7%	11,1%	8,3%	7 yrs	22%	3 yrs	10 yrs
Gr 7 13 years	40%	41%	21,2%	11%	8,8%	7 yrs	18,8%	3 yrs	10 yrs
Gr 8 14 years	39,5%	44,7%	21,9%	12,4%	6%	7 yrs	15,4%	3 yrs	10 yrs
Gr 9 15 years	38%	48,1%	22,2%	13%	12,9%	8 yrs	13,6%	3 yrs	11 yrs
Gr 10 16 years	33,5%	57,2%	22,1%	15,7%	19,4%	10yrs*	9,2%	3 yrs	13 yrs*
Gr 11 17 years	30,9%	58,3%	21,9%	15,5%	20,9%	9 yrs*	10,6%	3 yrs	12 yrs*
Gr 12 18 years	34,2%	47%	20,3%	12,6%	14,1%	8 yrs*	18,5%	3 yrs	11 yrs*

Table 2 reveals that, from grade 1, less than 50% of learners are adhering to the age-grade norms, and it shows a steady decline until grade 11. It is also clear that almost 50% of learners

⁵⁹⁹ Asterisks in table indicate learners above compulsory school going age.

drop out of school from grade 10 to 12. The high dropout of learners before they reach grade 12 explains the increase in the number of grade 12 learners on the appropriate age-grade norm. Furthermore, table 1 indicates the steady decline in enrolments in the last three grades. It is also evident that the number of learners who are above the age-grade norm steadily increases as the learners move through the system. Table 2 also indicates the increase in the age differentials in classes as learners move through the system. The potential maximum age differential between the oldest and youngest learners in a class is disturbing. Taking into account that figures of less than 1% are excluded, the difference can be eight years as early as grade 1. This figure increases to 13 years by grade 10, which implies that it would be possible to have an adult in a class together with a child at the beginning of puberty in the same class if the age differential is, for instance, 8 to 13 years.

The data provided by the Department is corroborated by other studies. A 2010 study by researchers from the Consortium for Research on Educational Access, Transitions and Equity (CREATE) confirms an overenrolment rate of 108% in grade 1. It also indicates that, in 2007, it took an average of 7,3 learner years to complete primary school (grade 7), 12,4 learner years to finish grade 11, and a staggering 19,2 learner years to finish grade 12. The average learner years to finish grade 12 was 60% more than the minimum of 12 years.⁶⁰⁰

The Access to Education in South Africa submission to the Parliamentary Portfolio Committee on Basic Education disclosed the results of a nationally representative household study conducted at the end of 2007.⁶⁰¹ According to this survey, access to education was not an issue, but rather the slow rate at which learners progressed through the different grades. Consequently, many learners who were between 16 and 18 years of age had not completed grades 1 to 9, which is regarded as the basic education phase, resulting in a gross enrolment rate of 110.5% in this phase.

The survey further found that 51,5% of all 19-year-olds were still in school, which correlates with the finding that every second grade 12 learner had repeated a grade at least once, that is, that 50% of grade 12 learners were above 18 years of age.⁶⁰² What is more disturbing are the numbers of people older than 19 years who were still in school and had not yet necessarily reach grade 12. This is illustrated by the following table presented in the survey report.⁶⁰³

⁶⁰⁰ Taylor, Mabogoane, Shindler & Akoobhai 2010:7-8.

⁶⁰¹ Social Surveys Africa 2010:1-20. The results were only presented to the Department of Basic Education in December 2009 and January 2010, and to Parliament in February 2010.

⁶⁰² Social Surveys Africa 2010:9.

⁶⁰³ Social Surveys Africa 2010:13.

Table 3: Learners in and out of school above 19 years of age

AGE (GHS 2007)	19	20	21	22	23	24	25
Out of school	31,2%	36,5%	39,0%	40,9%	51,2%	55,6%	56,4%
In school	51,5%	31,4%	20,0%	9,9%	4,9%	3,7%	0,7%
Completed matric/diploma	17,3%	32,1%	41,0%	49,2%	43,9%	40,8%	42,9%

This table reveals that, of all 19-year-olds, 31,2 % dropped out of school, 51,5% were still in school, and only 17,3% had successfully completed grade 12 or an equivalent diploma. One in five 21-year-olds were still in school and 41% of them had obtained a matric certificate. Almost 10% of 22-year-olds were still in school, and almost 1% of 25-year-olds were still in school. The level of dysfunctionality and the low quality of output of the education system are evident from the fact that, despite the excessive accommodation of adults in schools – for up to seven years after they have attained majority – only 38% of youths aged 19 to 25 years of age obtained a matric certificate or equivalent qualification. It is alarming that 17% of youths between the ages of 19 and 25 years were still attending schools.⁶⁰⁴ These figures also raise serious questions concerning the implementation of the provision that the HoD should determine whether a learner who is three years older than the age cohort should be admitted to the grade.⁶⁰⁵

The data provided in table 3 regarding the number of 19-year-olds in schools is in line with the results of the 2011 GHS⁶⁰⁶ indicating that there were 14 114 000 learners in schools and 72 000 learners attending Adult Basic Education and Training (ABET) centres. The following table provides a breakdown of these figures into age categories:

⁶⁰⁴ Social Surveys Africa 2010:13; see also Taylor *et al.* 2010:8.

⁶⁰⁵ GN2432/1998:s 30.

⁶⁰⁶ Statistics South Africa 2012a:70.

Table 4: Learners attending schools and ABET centres by age

AGE GROUP	LEARNERS ATTENDING SCHOOLS	LEARNERS ATTENDING ABET CENTRES	LEARNERS ATTENDING FURTHER EDUCATION AND TRAINING (FET) COLLEGES
5-6 years	1 496 000	Nil	
7-15 years	8 853 000	2 000	
16-20 years	3 352 000	7 000	91 000
21-25 years	379 000	17 000	102 000
26+ years	34 000	46 000	52 000
Total	14 114 000	72 000	245 000

These figures unfortunately do not draw a distinction between learners under and above 18 years of age. What is alarming is the fact that there were more 21- to 25-year-olds attending schools than the combined figure for learners in this age category attending ABET centres and FET colleges. There were 379 000 learners in this age category attending schools and 119 000 attending ABET centres and FET colleges. Thus, for about every 3 adults between 21 years and 25 years of age in school, only one adult was attending either an ABET centre or an FET college. This data also discloses that 0,2% of learners in school were older than 26 years of age.

The 2010 CREATE study undertaken by Taylor *et al.* confirms learners' slow progress through the system and reveals that only 62% of learners in grade 4 were appropriately aged, while 35% were already overage after only 4 years of education.⁶⁰⁷ Motala, Dieltiens and Sayed⁶⁰⁸ did a comparative study between two districts on, *inter alia*, overage learners. In the Ekurhuleni District, only 65% of learners were of the appropriate age when they reached grade 9, while, in the Dutywa District, only 36% of the children were of the appropriate age.

⁶⁰⁷ Taylor *et al.* 2010:11.

⁶⁰⁸ 2009:257. The one district, Ekurhuleni, was in Gauteng and had more schools in higher quintiles than the other district, Dutywa, in the Eastern Cape. The socio-economic conditions in the Gauteng district were, in general, better than those in the Eastern Cape district.

Overage learners experience reduced self-esteem, impaired relationships with classmates, and a negative attitude towards the school. Repetitions lead to increased class sizes, increased class heterogeneity and diversity, decreased learner motivation, and classroom management challenges.⁶⁰⁹ According to 10% of the learners who dropped out of school, they left school due to repetitions and difficulties experienced as a result of being older than their classmates. These difficulties include being humiliated by educators and problems in adjusting to their peer groups.⁶¹⁰

It is clear from the above that overage learners constitute a huge problem which affects a large number of children from the beginning of their school careers until many eventually drop out without obtaining matric. The impact of overage learners on discipline in schools should therefore not be underestimated. Not only are overage learners affected, but also learners on the appropriate age-grade norm as well as educators.

8.4.7 Underage learners

The *Schools Act*⁶¹¹ provides that a learner may be admitted to school at the age of five, turning six by June. In contrast, the Age Requirements for Admission to an Ordinary Public School⁶¹² regulations are clear that a child may only be admitted to school prior to the year in which he or she turns seven, with the permission of the HoD. The HoD must be convinced that the learner is ready to meet the challenges of formal education and that admission is in the best interests of the child.⁶¹³ These contradictions in the legislation and regulations will be discussed at length in chapter 3.⁶¹⁴

The number of underage learners is worrying. These include learners as young as four years. A startling 460 993 learners under the age of seven years were in grade 1 in 2010.⁶¹⁵ It is questionable whether these learners were assessed properly for school readiness, whether they received the required permission from the HoD in terms of the regulations or that all of them turned six before June in terms of the legislation. Taking the disproportionately large number of learners who repeat grade 1 into account, it would be fair to conclude that underage learners clog the education system in the foundation phase. These learners contribute to larger classes.

⁶⁰⁹ Social Surveys Africa 2010: 20.

⁶¹⁰ Social Surveys Africa 2010:15.

⁶¹¹ 84/1996:s 4.

⁶¹² GN 2433/1998:s 3-4(A).

⁶¹³ GN 2433/1998: s 4(A).

⁶¹⁴ See ch 3, par 5.1.3.1 herein.

⁶¹⁵ See table 1 above.

Consequently, educators have to spread their attention among more children, impacting negatively on the time available to spend individual time with learners and to address their needs appropriately. The academic foundation of learners is unduly compromised, which will eventually impact on repetition rates and the eventual overage scenario depicted in table 1 above.

The position of underage learners in schools will hopefully change in the near future with the inclusion of grade R in schools to serve as a bridging year between pre-school and grade 1. The aim is to address the unpreparedness of children entering grade 1. The number of schools offering grade R increased from 13 964 in 2008 to 18 400 in 2010.⁶¹⁶

8.4.8 Lack of learner accountability

Educators feel despondent because learners are not held accountable for misconduct, even if they commit crimes. The educators are prevented from reporting crimes to the police owing to pressure from parents and school management, who insist that such matters should be dealt with internally.⁶¹⁷

Furthermore, learners do not have to take responsibility for their own academic performance, because the Department insists on promoting learners to the next grade despite the fact that they have not achieved the required outcomes.⁶¹⁸ Respondents in the Alexandra study averred that some educators left the profession due to the decrease in performance of learners and schools.⁶¹⁹ The lack of learner accountability is also related to the overemphasis of learners' rights and the perception that they only have rights but no responsibilities.⁶²⁰

8.5 Disciplinary problems associated with unions

Unionists are accused of protecting educator job security at all costs, often at the expense of the best interests of the child. Efforts on the part of some of the departments of education to deal effectively with dysfunctional schools have been met with resistance from unions.⁶²¹ Bloch claims that unions have ensured that almost all forms of educator accountability have been sacrificed on the altar of labour rights with, for instance, the abolition of an inspectorate.⁶²²

⁶¹⁶ DBE 2010:13-14; DBE 2012b:8.

⁶¹⁷ Pahad & Graham 2012:10.

⁶¹⁸ See the detailed discussion in ch 3, par 6.11 herein.

⁶¹⁹ Pahad & Graham 2012:9.

⁶²⁰ See the discussion above in par 8.1.5.

⁶²¹ Serrao 2009:6; Bloch 2009:106-109; Smit & Oosthuizen 2011:64.

⁶²² Bloch 2009:100, 106-109; see also Van Wyk 2001:200.

Union actions and the values portrayed by the unions are unfortunately often very negative and have a bearing on discipline.

Other examples of the resistance to educator accountability, driven by the unions, include the serious criticism by the South African Democratic Teachers Union (SADTU) when the SACE decided to publish the names of educators who were guilty of child abuse. The union was of the opinion that this step would ruin the careers of the guilty educators. This raises serious questions about the priority given to the protection of educators with a record of child abuse at the expense of children's safety.

To introduce and maintain proper discipline in a school is a difficult task which requires skill and experience. Yet, SADTU wanted to dispense with the criteria for the appointment of educators to positions or principal. Currently, managerial experience coupled with at least seven years of teaching experience is required for the position of principal. The proposal to change the criteria was sparked after educators went on strike. The union wanted to appoint level-one educators with as little as six months of teaching experience. It was alleged that the candidates were family members of the district executive of the union.⁶²³

During the protracted strikes in 2007 and 2008, the interests of learners were not considered by the unions or their members. There are currently debates on possibly excluding educators, or at least principals and senior staff, from the right to strike. The unions are vehemently opposing these proposals.⁶²⁴ This strengthens the idea of only protecting one's own interests without considering the needs and interests of others.⁶²⁵ Self-interest is often the cause of misconduct in schools and the example set by unions is therefore unacceptable in a democratic dispensation.

8.6 Disciplinary problems associated with SGBs

Educators (91%) were overwhelmingly in favour of the involvement of the SGB in maintaining school discipline, according to a survey conducted by Van Wyk.⁶²⁶ They argued that the SGB should be involved since it is responsible for the drafting of the code of conduct and for formal disciplinary proceedings. Most importantly, the SGB represents the parents of the learners and the particular community. Educators were much more enthusiastic about the involvement of the

⁶²³ Chuenyane 2009:10; Serrao 2009a:2.

⁶²⁴ See Hirsten & La Grange 2012:509-538 for an analysis of balancing educator's right to strike and, *inter alia*, the best interests of the child; see also Mbabela 2010: 7; Blaine 2010: 4.

⁶²⁵ Editor 2007:11.

⁶²⁶ 2004:52.

SGB in learner disciplinary matters than other matters concerning the school, such as the appointment of educators (74%), discipline of educators (73%), and management of finances (47%). Despite the support for the involvement of SGBs in school discipline, they are often criticised for a number of reasons, which are discussed below.

8.6.1 Insufficient knowledge and skills

The relationships between the SGB and the school are very complex owing, *inter alia*, to the dual roles of the principal, the overlapping of management and governance roles, and the different levels of competencies and involvement of the different SGBs. Specific expertise and skills are needed to be an effective SGB. However, initial research informing White Paper 2 on the Organisation, Governance and Funding of Schools⁶²⁷ and more recent research indicate that there are still huge disparities in the competencies of SGBs.⁶²⁸ A vast array of competencies are available on different SGBs, ranging from very effective SGBs comprising professionals with the necessary financial, legal and managerial skills and enough experience, to less effective and ineffective SGBs that lack skills and experience. Other challenges facing SGBs are issues of accountability, the lack of a shared vision and clearly defined goals, and the composition and structure of the SGB.⁶²⁹ The criticism levelled at SGBs is mainly due to their inexperience, uninvolvement, insufficient training, and the literacy levels of members of the SGB.⁶³⁰ Parental participation in SGBs has improved over time, but the principal continues to play a dominant role. A 2002 longitudinal study by Karlsson⁶³¹ indicates that, although participation improved from 1997 onwards, educators and the principal remained the main actors in the governance process, and that there were no significant changes in the power relations at schools.

However, the SGB has to play a leading role in the governance of the school, which includes the drafting of a code of conduct and conducting disciplinary hearings.⁶³² It is imperative that the SGB has proper knowledge of the legal framework of school education in general, and it should have a sound understanding of the nature and consequences of the code of conduct and of disciplinary hearings in particular.⁶³³ However, the majority of the members of SGBs are lay people with inadequate legal knowledge who often do not even have access to legal sources.⁶³⁴

⁶²⁷ DoE 1996:par 1.6.

⁶²⁸ Joubert 2007:41; Squelch 2001:138, 142; Karlsson 2002: 333.

⁶²⁹ Joubert 2007:42. Van Wyk 2004:50-54; see also Van Wyk 2001:200; Mashau, Steyn, Van der Walt & Wolhuter 2008:415.

⁶³⁰ Van Wyk 2004:50-54; Van Wyk 2001:200; Mashau *et al.* 2008:415; Karlsson 2002:332. 2002:333.

⁶³² *Schools Act 84/1996*:s 8(1) & (7).

⁶³³ Bray 2005:133.

⁶³⁴ Karlsson 2002:332.

In addition, to act in the best interests of every child adds to the level of expert knowledge and skills required of the SGB.⁶³⁵

If SGBs are not properly trained, they run the risk of not following the correct procedures in disciplinary hearings, and then the best interests of learners might be at risk. Training is also important to ensure a more uniform application of rules and interpretation of what constitutes serious misconduct. The need for continuous training is highlighted by the fact that SGBs are selected every three years, except for learner representatives on the SGB who are elected every year.⁶³⁶

Despite the criticism of SGBs, Van Wyk⁶³⁷ indicates that the election of SGBs has been the single-most important stabilising factor in education. However, this stabilising factor is at risk, since SGBs are often overpoliticised owing to different perceptions on the content of the concept of democracy in the South African context.⁶³⁸

8.6.2 Overpoliticisation of the SGB

The overpoliticisation of SGBs is also cause for concern. Smit and Oosthuizen⁶³⁹ indicate that many SGB members misunderstand the role of the SGB and equate the SGB with a political forum where political rights are exercised. This results in schools becoming a political playing field to further the political ambitions of individuals. If self-centred ambitions are the focus of the SGB, it is highly unlikely that the best interests of the child will prevail in all matters concerning children.

8.7 Disciplinary problems caused by society

Many of the causes of deteriorating discipline originate in society. What happens in schools is often a reflection of the state of society. Schools are not islands, but are an integral part of the community. Therefore, the community environment impacts directly on schools.⁶⁴⁰

⁶³⁵ See ch 4 for a detailed discussion on the concept and its complexities.

⁶³⁶ *Schools Act 84/1996*:s 31.

⁶³⁷ 2001:200.

⁶³⁸ See also the discussion above in par 8.6.1.

⁶³⁹ 2011:66.

⁶⁴⁰ Rossouw 2003:426; SAHRC 2008:16; Burton 2008:15; Wolhuter, Oosthuizen & Van Staden 2010:171.

8.7.1 Socio-economic background of learners

The unfavourable socio-economic background of learners can also contribute to disciplinary problems. This includes exposure to dreadful living conditions and poverty, communities afflicted by violence and crime, the prevalence of gangs and organised crime syndicates, and lack of transport.⁶⁴¹ Parents' literacy levels impact on their ability to assist learners with schoolwork, and the availability of financial means impacts on the availability of school material. The destabilising effect of HIV/AIDS on the lives of learners should also not be underestimated. In 2010, 8,3% of learners' fathers were deceased, 4,85% had lost their mother and 3,95% had both parents deceased. In total, 2 082 224 children had lost one or both of their parents.⁶⁴² The 2010 GHS points out that there was a steady increase in the percentage of learners orphaned since 2002 (2,7%) to 6,7% in 2010. Although the HIV/AIDS pandemic is not the only cause of deaths, it should be kept in mind that it not only impacts on the number of orphans, but also the responsibilities of children and the dropout of children, since they have to take care of others owing to the illness or death in the family.⁶⁴³

It was found that children from the lower socio-economic strata were more exposed to unfavourable material and emotional conditions. Children subjected to these conditions are often traumatised by their circumstances. The incidence of misbehaviour among children from lower socio-economic strata tends to be higher than that of children from the middle and upper socio-economic strata.⁶⁴⁴

8.7.2 Diversity

In a study conducted by Badenhorst, Steyn and Beukes⁶⁴⁵ in previously Afrikaans schools with Afrikaans-speaking educators, it was found that race did not play any role in disciplinary problems in schools. However, there is also research, as well as media reports, indicating that diversity is one of the factors contributing to conflict in schools. Conflict, which impacts on order

⁶⁴¹ Bloch 2009:75. At least 25% of learners sometimes, or always, go hungry. This percentage rises to 40% in some parts of the Eastern Cape – DBE 2010. In 2008, 2 605 661 (21,4%) learners in ordinary schools received social grants – DBE 2012:30. This figure escalated to 3 110 688 (25,5%) in 2010. DBE 2012e:26, 38 indicates that approximately 8 million learners benefitted from the National School Nutrition Programme in 2011.

⁶⁴² DBE 2012b:28; see also DBE 2010:2, 37. In 2008, 8,4% of learners' fathers were deceased, 5,1% had lost their mother, and 3,95% had both parents deceased. A total of 2 143 269 learners were in the situation where either one or both of their parents were deceased.

⁶⁴³ DBE 2012e:39. Social Surveys Africa 2010:8 indicates that 2,3% to 4,7% of learners miss a year or more of school because they have to take on care or work responsibilities, which include taking care of those who are affected by AIDS.

⁶⁴⁴ Rossouw 2003:426; De Wet 2003:86; Wolhuter & Steyn 2003:530; SAHRC 2008:18; Bloch 2009:75.

⁶⁴⁵ 2007:309.

in the school, is often related to racial, gender, cultural, religious or class differences.⁶⁴⁶ These factors combined with mainstreaming disabled learners increase the demands on often overworked and underprepared educators to maintain discipline.⁶⁴⁷

8.7.3 The media

Examples of violence, racism, sex, foul language and disrespect for authority are cited on a daily basis in newspapers, on the television, in electronic games and in the movies. The extent of this exposure was captured in a study in the United Kingdom which found that learners spent 1 200 hours in school per year and watched an average of 1 000 hours of television a year. In view of all the time spent on video games and in watching television, children learn fewer social skills. There are indeed indications that there are increasing levels of intolerance among children, and that they more readily resort to violence to solve their problems. The potential impact of the above-mentioned unsuitable influences on the discipline and behaviour of learners is thus a real concern. Without proper guidance, learners who feel hopeless will then, for instance, resort to violence to deal with their frustration and anxiety. In addition, some learners are allowed to watch television well into the night and are not properly rested for the next day at school.⁶⁴⁸

8.7.4 Uninvolvement of society

Educators also point out that not only are parents uninvolved in the education of learners, but so is the community at large. They claim that, lately, the responsibility for educating children is the responsibility of educators only, and that the community does not support educators in this task. For instance, community members may see that children are not at school or are buying drugs, but they merely turn a blind eye. Yet, in the end, the educators are blamed for the poor results in schools.⁶⁴⁹

8.7.5 The legacy of apartheid

Van Wyk⁶⁵⁰ indicates that poor discipline in some schools can be attributed to a lack of self-discipline and to a poor work ethic among educators. It is shown that educators resorted to disrupting schools during the liberation struggle and are now not used to working long hours or

⁶⁴⁶ Badenhorst, Steyn & Beukes 2007:309. See, for example, *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).

⁶⁴⁷ Froyen 1988:5.

⁶⁴⁸ Wolhuter & Steyn 2003:531; Ward 2007:25; SAHRC 2008:20; Froyen 1988:6-8; Pahad & Graham 2012:11.

⁶⁴⁹ Pahad & Graham 2012:10.

⁶⁵⁰ 2001:198-199.

preparing properly for classes. It is clear that some educators have not come to terms with their new role in post-apartheid South Africa. During interviews, these educators admitted that they are ill-prepared and that they resent rules forcing them to sign in at school and prohibiting them from leaving the school premises.

The use of violence and the destabilisation of township life was part of the strategy to overthrow the apartheid regime. Black youths were therefore continuously exposed to violence and it became a part of everyday life in many communities. A culture of violence was thus created and became part of the male and female identity.⁶⁵¹

Kipperberg⁶⁵² argues that, despite the fact that there is acknowledgement that children suffered more human rights violations during the struggle, the Truth and Reconciliation Commission (TRC) did not properly accommodate children, denying them the opportunity for debriefing and healing and excluding them from access to individual reparation grants and individual psychosocial rehabilitation. These children grew up and did not receive the necessary support to deal with the aftermath of their involvement in the struggle and the accompanying violence. They were never taught any alternatives to violent solutions to solve problems. Twenty years after the end of apartheid, they are the parents of the next generation. She claims that the levels of depression, post-traumatic stress disorder, anxiety and psychosomatic symptoms experienced by these people are sufficiently high to affect their everyday functioning. She furthermore avers that some former combatants have problems with alcohol and drug abuse, suffer a lack of trust, and have difficulties entering into relationships, thus experiencing a sense of isolation. Some experience bitterness, social problems, insecurities, aggression and make themselves guilty of violent behaviour such as domestic violence. Apart from the fact that they struggle to deal with their past, the ingrained patterns of violence and the consequences of their unhealed past are transferred to the next generation, which will eventually impact on the level of violence in society at large and in schools.

9. CONCLUSION

The education system faces numerous challenges. Many of these challenges have an impact on school discipline, while the lack of school discipline is, in many instances, contributing or exacerbating the problems. The problems related to school discipline are mostly systemic in nature and no single factor can be isolated as the most important, or only, reason for the current unacceptable state of affairs.

⁶⁵¹ Jefthas & Artz 2007:41-42.

⁶⁵² 2008:69-86.

The nature and extent of disciplinary problems depend on numerous factors and care should at all times be taken not to overgeneralise. On one side of the scale there are schools which have profound problems and are totally dysfunctional. On the other, there are well-functioning schools with hardly any disciplinary problems. The nature of ill-discipline varies in the same way, ranging from serious crimes such as murder, assault and sexual crimes to low frequencies of low-impact misconduct. The impact of school discipline also varies from learners suffering from post-traumatic stress disorder, depression and anxiety to almost no real effect on learners and educators.

Learners and educators' perceptions on the state and impact of discipline depend largely on their own experiences and the type of school they are connected to. These perceptions range from acceptable and tolerable levels of discipline to some experiencing the position as being out of control and a crisis or that drastic measures are necessary to prevent a crisis. All the stakeholders in the education system play some role in the current situation and are to some extent to blame for it.

It is important to remember that not all schools are affected to the same extent and that not all schools have the same type or level of problems. There is a vast range of levels of discipline. Yet, one should not be pacified into the belief that the lack of discipline is, in general, not really a major issue, that only a small number of schools are really seriously affected by ill-discipline, and that the extent of the ill-discipline is exaggerated. To deliver acceptable academic results, compatible with international standards, in an undisciplined school environment would be impossible. It would therefore be hard to argue convincingly that the state of discipline in schools is generally under control, taking into account that 80% of secondary schools are currently considered to be highly ineffective.⁶⁵³

⁶⁵³ Taylor 2008:2-3; NPC 2011:282.

CHAPTER 3

LEGAL BACKGROUND TO SCHOOL DISCIPLINE IN SOUTH AFRICA

1. AIM OF CHAPTER

The social context as described in the previous chapter provides the backdrop for the development of the existing legal framework for school discipline. Since not all social issues affecting the state of school discipline can be resolved through legislation, it is necessary to focus on those issues that can be influenced by the law. In addition, the focus of this study is the best interests of the child, and therefore legal issues relating to such concept will be discussed in more detail in this chapter.

The main aims are therefore to give a very brief overview of the development of the legal framework for education law in South Africa, with specific reference to school discipline. This will be followed by a description of the current legal position regarding school discipline, in which the Constitution, legislation, case law and guidelines will be referred to. In the final instance, attention will be given to the legal issues arising from the legal framework, and, specifically, those pertaining to the best interests of the child. The chapter will conclude by identifying issues arising from the legal position that may impact on the best interests of the child. Possible solutions to these issues will be sought in the chapters to follow.

2. INTRODUCTION

Before the new democratic dispensation came into operation in 1994, South Africa was a very fragmented society owing to the apartheid laws. This fragmentation was also evident in the education field, with different systems applying to different race groups, resulting in a wide range of separate legislative provisions and separate departments of education. This contributed to racial inequality and segregation in the education system. The White Paper on Education and Training¹ ("White Paper"), published in 1995, and Education White Paper 2 on the Organisation, Governance and Funding of Schools² ("White Paper 2"), published in 1996, were some of the first documents indicating the new direction envisaged for education by the

¹ DoE 1995.

² DoE 1996.

new democratic government. A complete reorganisation of the education system was inevitable.³ Some of the major changes included the dissolution of the different departments of education and the establishment of a single, national education system. One of the features of the new system was a move away from separate autocratic systems to a national, transformed and democratic system based on the new democratic and constitutional values and principles.⁴

In the new government structure, authority is distributed vertically at different levels of government, namely in the national, provincial and local spheres of government. Despite the existence of the different spheres, the relationship between them is one of cooperation.⁵ The same structure applies to the governance of education.⁶ Since education was previously seen as primarily the responsibility of the state, concerted efforts were necessary to change this perception and to ensure that all other stakeholders in the education sphere, namely parents, educators, learners and the local communities, were properly empowered to take responsibility jointly for school education.⁷ White Paper 2 stresses the importance of the partnership between a provincial department of education and the local community.⁸ The principle that the stakeholders in the education sphere are in a partnership and are co-responsible for advancing education was stressed in subsequent legislation and case law.⁹

Other important values and principles pertaining to education policy were identified and included equity, transparency, non-discrimination, fairness, quality, participation, cooperation, access, restoration, accountability, development, freedom of choice, redress, school-based decision-making and financial sustainability.¹⁰ Most of these principles presuppose cooperation among stakeholders.¹¹ In addition, these values and principles are applicable to school discipline and should be reflected in legislation and in the implementation of school disciplinary measures.

In what follows, the constitutional rights applicable to school discipline will be mentioned briefly and the state's obligation to respect, protect, promote and fulfil rights will be discussed, as well as the existing lack of content of the best-interests-of-the-child concept within the context of

³ DoE 1995:ch 3, par 11-12.

⁴ DoE 1995:ch 1, par 4; ch 3; ch 9; ch 12, par 1-26; DoE 1996:par 2.4-2.8; Bray 2005:133.

⁵ Rautenbach & Malherbe 2004:73.

⁶ Van Rooyen & Rossouw 2007:15.

⁷ DoE 1996:par 2.7, 2.8.

⁸ DoE 1996:par 2.7, 2.8, 2.9(1), 3.12, 3.13.

⁹ *Schoonbee and Another v MEC for Education, Mpumalanga, and Another* 2002 (4) SA 877 (T):883; Oosthuizen, Rossouw & Smit 2009:277; Joubert & Prinsloo 2008:74; Bray 2005:133.

¹⁰ DoE 1995:ch 3, par 13, 16; ch 4; DoE 1996:1.1-1.4.

¹¹ Van Rooyen & Rossouw 2007:13.

school discipline. The discussion will continue with a brief reference to the Minister's discretion to determine national policy, as well as with an extensive discussion of the existing legislative and policy provisions with regard to discipline. The chapter will conclude with an analysis of the existing legislative provisions and of the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners¹² ("Guidelines") to illustrate the lack of focus on the best interests of the child displayed in the existing legal framework. This latter discussion will provide the backdrop to, and point of departure for, giving content for the best-interests-of-the-child concept in the context of school. This exploration will start in chapter 4, and will continue in chapter 5. The aim of the exploration will be to find possible solutions to the problem areas identified in this chapter.

3. THE CONSTITUTION AND SCHOOL DISCIPLINE

Section 7(2) of the Constitution provides, in line with international law,¹³ that the state has an obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. To "respect rights" means that the state has an obligation not to violate rights or to limit rights unlawfully. In the context of school discipline, this would mean that the state, organs of state and employees of the state should not infringe on the rights of learners and others, such as educators. To "protect rights", on the other hand, requires the state to prevent the violation of rights; hence measures such as legislative provisions must be put in place to prevent the infringement of rights. To "promote and fulfil rights" means that the state must take active steps to make it possible to exercise rights and to prevent the infringement of rights.¹⁴ This implies that the state must put measures in place to ensure that, while discipline is maintained, rights are promoted and fulfilled.

An example of the state's duty to promote rights can be found in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*.¹⁵ Here, the court found

¹² GN 776/1998.

¹³ ICESCR 1966:a 1(3), 2(1); ICCPR 1966:a(1)(3), a 2; CEDAW 1979:a 2; CRC 1989:a 2; ACHPR 1981:a 1, 2; ACRWC 1990:a 1.

¹⁴ Rautenbach & Malherbe 2004:300.

¹⁵ 2001 (4) SA 938 (CC). In this case, the applicant claimed damages from the state for injuries incurred in a brutal attack by a person who had a previous record of indecent assault. At the time of the assault, the attacker was out on bail on a charge of rape, had been sent to a psychiatric hospital, had been found snooping at the applicant's house and had made threats. The applicant had approached the prosecutor and investigating officer more than once and had claimed that the attacker was a danger to society. Yet, bail was not opposed and all the relevant information was not placed before the court. Eventually, the applicant was assaulted. The High Court and the Supreme Court of Appeal dismissed the claim because not all the elements of the common law delictual claim could be proven. Yet, the Constitutional Court found that the common law should have been developed in accordance with the Constitution. The case was referred back to the High Court to develop the common law accordingly and to decide the case anew on the basis of such developed common law. The common law should have been developed to give due recognition to the right

that the common law of delict should be developed to accommodate claims where the state not only has a duty to protect rights through legislation, but also, indeed, has a duty of care to ensure that infringements of human rights do not occur. Thus, it is not enough to have legislation in place to prevent infringements, but active steps by the state are in some instances necessary to ensure that these infringements do not occur.

In the context of school discipline, this would mean that state organs and employees may not use corporal punishment (i.e. must respect human rights). The state therefore has an obligation to prevent infringements through the prohibition of corporal punishment (i.e. to protect human rights), and has an obligation to promote human rights by taking active steps to ensure that corporal punishment is not used. The state's duty of care in this regard would thus entail that active steps should be taken to ensure that educators do not use corporal punishment. The lack of promotion of human rights in the school disciplinary context is seen in the almost unabated prevalence of corporal punishment in schools,¹⁶ in the lack of steps taken by the different provincial departments of education to discipline offending educators,¹⁷ and in the lack of proper training and support regarding constitutionally compliant disciplinary measures for educators.¹⁸

It is quite clear from case law, the Guidelines¹⁹ and academic works²⁰ that, in the context of school discipline, the focus is mainly on respect for, and the protection of, specific human rights. Educators and administrators are mostly cautioned as to what not to do in enforcing discipline in schools. For example, corporal punishment is outlawed because it infringes the right to dignity,²¹ constitutes cruel, inhuman and degrading treatment or punishment, infringes the right to personal security,²² and infringes everyone's right to bodily and psychological integrity.²³ As far as searches and seizures are concerned, the focus is on preventing the infringement of the right to privacy.²⁴ Care should also be taken not to infringe on learners' rights to freedom of religion, belief and opinion,²⁵ their cultural rights²⁶ or their right to freedom of expression,²⁷ as

to life, human dignity, and freedom and security of the person. It should also have reflected the constitutional values of dignity, equality and freedom.

¹⁶ See ch 2, par 5.1.1.1 herein.

¹⁷ See ch 2, par 8.1.2 herein.

¹⁸ See ch 2, par 8.1.4 herein.

¹⁹ GN 776/1998.

²⁰ Rossouw 2007:84-85; Joubert & Prinsloo 2001:120-122; 2008:108-109; Oosthuizen, Roos, Smit & Rossouw 2009:31-57; Oosthuizen, Rossouw & De Wet 2004:16-22.

²¹ Constitution 1996:s 10; GN 776/1998:4.2, 4.4.3; *MEC for Education, KwaZulu Natal, and Others v Pillay* 2008 (1) SA 474 (CC).

²² Constitution 1996:s 12(1)(c)-(e); GN 776/1998:4.4, 4.4.1; *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC).

²³ Constitution 1996:s 12(2); GN 776/1998:4.4; *S v Williams* 1995 (3) SA 632 (CC).

²⁴ Constitution 1996:s 14; GN 776/1998:4.3.

²⁵ Constitution 1996:s 15; *MEC for Education, KwaZulu Natal, and Others v Pillay* 2008 (1) SA 474 (CC).

well as the right to equality even while discipline is maintained in a school.²⁸ School governing bodies (SGBs) and schools are constantly reminded by the Department not to infringe on a misbehaving learner's right to education.²⁹ The majority of school disciplinary cases deal with just administrative action, in particular suspensions and expulsions.³⁰ The school environment should also be safe and should not be harmful to learners' health or well-being.³¹ A safe school can be defined as:

One that is free of danger and possible harm; a place in which non-teachers, teachers and learners can work, teach and learn without fear of ridicule, intimidation, harassment, humiliation and violence. Therefore, a safe school is a healthy school in that it is physically and psychologically safe. Indicators of safe schools include the presence of certain physical aspects such as a secure wall, fencing and gates; buildings that are in a good state of repair; and well maintained school grounds. Safe schools are further characterised by good discipline, a culture conducive to teaching and learning, professional teacher conduct, good governance and management practices and an absence, or low level, of crime and violence.³²

It is evident from the above-mentioned cases that the courts have been approached on a number of occasions in cases related to school discipline. Nevertheless, in all these cases, bar one,³³ the courts referred to the above-mentioned rights, but did not refer to the best interests of the child. School discipline unquestionably concerns every school-going child, and his or her best interests should therefore be considered to be of paramount importance. This inevitably

²⁶ Constitution 1996:s 30, 31; GN 776/1998:4.3.

²⁷ Constitution 1996:s 16; GN 776/1998:4.5; *Antonie v Governing Body, Settlers High School, and Others* 2002 (4) SA 738 (C).

²⁸ GN 776/1998:4.7; *MEC for Education, KwaZulu Natal, and Others v Pillay* 2008 (2) BCLR 99 (CC):par 45-47, 73.

²⁹ Constitution 1996:s 29; GN 776/1998:4.7. See also the discussion in ch 5, par 2 herein; *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government and Others* – unreported case in the Eastern Cape Division: case 454/08; *George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province and Others* [2010] JOL 26363 (ECB).

³⁰ Constitution 1996:s 33; *Maritzburg College v Dlamini NO and Others* [2005] JOL 15075 (N); *Pearson High School v Head of the Department, Eastern Cape Province and Others* [1999] JOL 5517 (Ck); *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government and Others Eastern Cape Provincial Division*: unreported case 454/08; *St Michael's School for Girls and Others v The Head of the Free state Education Department and Others Free State Provincial Division*: unreported case 5597/2008; *Tshona v Principal, Victoria Girls High School and Others* [2006] JOL 18445 (E); *Mose (Legal Guardian of Luzuko Mose) v Minister of Education, Provincial Government of the Western Cape, Gabru and Others* [2008] JOL 22623 (C).

³¹ Constitution 1996:s 24; GN 776/1998:4.6.

³² Squech 2001:138, 140.

³³ *George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province and Others* [2010] JOL 26363 (ECB).

raises the question why matters relating to school discipline are resolved with reference to some of the above-mentioned rights and not the best interests of the child.

The Constitution, as the supreme law of the country, provides the benchmark for school discipline. This is captured in section 28(2) of the Constitution, which provides:

A child's best interests are of paramount importance in every matter concerning the child.

Since the benchmark of the best interests of the child does not feature prominently in school disciplinary matters, the education system is at risk of employing policies and practices that are not compatible with the requirement that the best interests of the child should be respected, protected, and promoted and fulfilled. Therefore, one of the aims of this study is to determine the content of this benchmark and to evaluate whether current legislation and practices meet the requirements set by the Constitution. In what follows, adherence to and enforcement of the best interests of the child will be investigated in legislation and case law and in guidelines relating to the school disciplinary context.

Since the advent of the new democracy, efforts have been made to create a new national system for schools aimed at addressing the injustices of the past. The *South African Schools Act*³⁴ ("Schools Act") and the *National Education Policy Act*³⁵ are some of the first pieces of legislation to establish a new, single national system for school education with a set of uniform norms and standards for education and for the organisation, governance and funding of schools.³⁶ These Acts will be discussed below.

4. NATIONAL EDUCATION POLICY ACT 27 OF 1996

The main aim of the *National Education Policy Act*³⁷ is to facilitate the democratic transformation of the education system. National policies must be determined through proper consultation and must further be published, implemented, monitored and evaluated.³⁸ The Minister is obliged to determine specific national policies and may also determine national policy on, *inter alia*, the "control and discipline of learners at education institutions".³⁹

³⁴ 84/1996 – came into operation on 1 January 1997.

³⁵ 27/1996. – came into operation on 24 April 1996.

³⁶ *Schools Act* 84/1996:preamble.

³⁷ 27/1996.

³⁸ *National Education Policy Act* 27/1996:s 2.

³⁹ *National Education Policy Act* 27/1996:s 3(4)(n).

Thus, although the Minister is obliged to determine, *inter alia*, national policy for the management and governance of the education system, he or she has a discretion to determine national policy regarding school discipline.

If the Minister decides to determine a national policy for school discipline, it should, *inter alia*, be directed toward the advancement and protection of the rights contained in the Bill of Rights and must be aligned with ratified international conventions.⁴⁰ It should further guide schools in ensuring that school discipline contributes to the personal development of every learner and to the nation's moral, social, cultural, political and economic development. This policy should also promote democracy, human rights and peaceful conflict resolution.⁴¹ A national school disciplinary policy should also contribute to equitable educational opportunities, should encourage independent and critical thought, should foster a culture of respect for teaching and learning in schools, and must be directed towards the cost-effective use of education resources and sustainable implementation of education services.⁴² Despite these and a number of other prescriptions indicating the direction that national policies should follow, there is no specific requirement in the Act indicating that school education policies should be aligned with the best interests of children.

5. SOUTH AFRICAN SCHOOLS ACT 84 OF 1996

In what follows, the provisions of the *Schools Act* relevant to discipline will be discussed so as to provide the necessary legal background. This discussion will be supplemented by referring to relevant case law, to the Guidelines, as well as to commentators. The discussion will focus on the following issues: the application of the *Schools Act*, the status of a public school, the governance and management of a school, the general requirements for the drafting of a code of conduct, provisions regarding formal disciplinary hearings and the legislative position with regard to informal disciplinary proceedings, sanctions that can be imposed for misconduct, searches and seizures, and the admission requirement for learners which impacts on school discipline.

5.1 Application of the *South African Schools Act*

The *Schools Act* is applicable to all school education.⁴³ The Member of the Executive Council (MEC) responsible for education in a specific province and the Head of Department (HoD) for

⁴⁰ *National Education Policy Act 27/1996:s 4(a).*

⁴¹ *National Education Policy Act 27/1996:s 4(b).*

⁴² *National Education Policy Act 27/1996:s 4(c)(i), (j), (n).*

⁴³ *Schools Act 84/1996:2(1).* In terms of the definitions of the Act, "school" means "a public school or an independent school which enrolls learners in one or more grades from grade R (Reception) to twelve". In

such portfolio in that province must exercise any power conferred upon them in terms of this Act.⁴⁴ In exercising their powers, they must ensure that they act within the parameters of the applicable national policies provided for in the *National Education Policy Act*.⁴⁵ Provincial legislators are allowed to enact legislation relating to school education on a provincial level, on condition that it is in accordance with the constitutional provisions as well as the *Schools Act*.⁴⁶ As a result, all the provinces have enacted their own provincial legislation providing for education, which includes provisions on discipline.⁴⁷

5.2 Legal status of a public school

Every public school is a juristic person with legal capacity to perform its functions in terms of the *Schools Act*.⁴⁸ The school is thus a separate legal entity which is independent of its members. To be able to perform its legal duties properly, it is entitled to perform legal acts in its own name. The school can therefore be held responsible for its acts, and can sue and be sued as a separate entity.⁴⁹ The rights and responsibilities of this juristic person are exercised by the SGB.⁵⁰

Schools are also part of the state administration and are therefore classified as an organ of state, because they exercise public power and perform public functions.⁵¹ In addition, the school is a statutory institution, established in terms of the *Schools Act*.⁵² The school's relationship with the state is one of decentralisation, since certain powers and functions are transferred to the school as an independent body. Although independent, the school can only exercise those

terms of the *National Education Policy Act 27/1996*, "school" means "a pre-primary, primary or secondary school".

⁴⁴ *Schools Act 84/1996:2(2)*.

⁴⁵ 27/1996.

⁴⁶ 84/1996:2(3).

⁴⁷ *Western Cape Provincial School Education Act 12/1997; Western Cape Provincial School Education Amendment Act 7/2010; Free State School Education Act 2/2000; Eastern Cape Provincial Education Act 1/1999; Eastern Cape Provincial Education Amendment Act 5/2004; Northern Cape School Education Act 6/1996; Mpumalanga School Education Act 8/1995; Mpumalanga School Education Amendment Act 7/1998; KwaZulu-Natal School Education Act 3/1996; North West Schools Education Act 3/1998; Limpopo Province School Education Act 9/1995*.

⁴⁸ 84/1996:s 15.

⁴⁹ *Despatch High School v Head, Department of Education, Eastern Cape and Others* 2003 (1) SA 246 (CKH):par 13-15; Visser 2004:151-152.

⁵⁰ Squelch 2001:139; Van Rooyen & Rossouw 2007:17; Bray 2005:133-134.

⁵¹ *Constitution 1996:s 239; Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA):par 20; Squelch 2001:139; Van Rooyen & Rossouw 2007:13; Bray 2005:133; Roos 2003a:505-506.

⁵² Squelch 2001:139.

powers and functions specifically transferred to it through legislation.⁵³ If the SGB exceeds the authority delegated to it, such an act will be illegal and *ultra vires*.⁵⁴

The autonomy of the SGB has been confirmed in a number of cases relating to the language policies of schools,⁵⁵ the management of school funds and school property,⁵⁶ discipline,⁵⁷ admission policies,⁵⁸ and the appointment of educators.⁵⁹ In each instance, the court found that the education department concerned had unduly interfered in the decision-making powers of the SGB. The relevant department had thus transgressed the powers allocated to it in terms of national legislation. This transgression of the SGB's decision-making powers was also viewed as a departure from the original point of departure spelled out in the various White Papers that all stakeholders, including parents, should play a significant part in education.

5.3 Governance of the school through the School Governing Body

The SGB is the structure through which parents, educators, non-educators and learners are brought together in partnership to govern public schools within the parameters of the Constitution and legislation.⁶⁰ The governance functions include, *inter alia*, determining the mission of the school, the school rules, and the character and ethos of the school, as well as

⁵³ Squelch 2001:139.

⁵⁴ Van Rooyen & Rossouw 2007:6; Bray 2005:134.

⁵⁵ *Hoërskool Ermelo & 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere* [2007] JOL 19629 (T); *High School Ermelo and Another v Head of the Department and Others* [2008] 1 All SA 139 (T); *Hoërskool Ermelo and Another v Head, Department of Education, Mpumalanga, and Others* 2009 (3) SA 422 (SCA); *Head of Department, Mpumalanga Department of Education, and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC); *Governing Body of Mikro Primary School and Another v Western Cape Minister of Education and Others* [2005] 2 All SA 37 (C); *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA); *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* 2003 (4) SA 160 (T):177.

⁵⁶ *Schoonbee and Others v MEC for Education, Mpumalanga, and Another* 2002 (4) SA 877 (T); see also *Despatch High School v Head, Department of Education, Eastern Cape and Others* 2003 (1) SA 246 (CKH) dealing with disciplinary proceedings against a principal who stole school property. The court confirmed, on a point in limine, the locus standi of the SGB to act on behalf of the school in the matter.

⁵⁷ *Maritzburg College v Dlamini NO and Others* [2005] JOL 15075 (N):18; *Governing Body, Tafelberg School v Head, Western Cape Education Department* 2000 (1) SA 1209 (C):1215-1218; *Welkom High School and Another v Head, Department of Education, Free State Province, and Another* 2011 (4) SA 531 (FB):par 25-35, 44-46, 50-51, 61.

⁵⁸ *Governing Body of Rivonia Primary School and Another v MEC for Education, Gauteng Province, and Others* – unreported case in the Supreme Court of Appeal: case 161/12, judgment delivered on 30 November 2012.

⁵⁹ *Laerskool Gaffie Maree and Another v Member of the Executive Council for Education, Training, Arts and Culture, Northern Cape, and Others* 2003 (5) SA 367 (NC):par 14; *Observatory Girls Primary School and Another v Head of Department of Education, Gauteng* 2003 (4) SA 246 (W):257; *Head, Western Cape Education Department and Others v Governing Body, Point High School and Others* 2008 (5) SA 18 (SCA).

⁶⁰ DoE 1996:3.8; Joubert 2007:43.

the drafting of policies, which includes the drafting of a code of conduct.⁶¹ The SGB should facilitate the proper functioning of the school and should ensure that the policies are appropriately implemented.⁶²

The SGB is obliged to act in accordance with the provisions of the Constitution, in particular section 7(2) dealing with the state's obligation to respect, protect and promote the rights contained in the Bill of Rights. The SGB has to ensure that school policies are aligned with this obligation.⁶³ Being a juristic person with specific functions in terms of the *Schools Act*, the SGB must also act in accordance with the provisions of section 33 of the Constitution and with the *Promotion of Administrative Justice Act*⁶⁴ (PAJA) to ensure compliance with the right to just administration.

The SGB is in a position of trust *vis-à-vis* the school and acts in a fiduciary capacity. It should act in good faith and should not engage in any unlawful conduct.⁶⁵ This implies that the SGB must fulfil its duties in the best interests of the school.

5.3.1 Composition and liability of the School Governing Body

The SGB comprises elected members, the principal *ex officio* and co-opted members where necessary.⁶⁶ The elected members of the SGB must be from the following categories: parents of learners at the school, educators at the school, other staff at the school who are not educators, and learners in grade 8 and higher.⁶⁷ The principle that parents are primarily responsible for the education of their children, and have the greatest stake in the teaching and learning of their children at a school, is given effect to, *inter alia*, by the provision that parents should always be in the majority on the SGB.⁶⁸ In addition, the chairperson of the SGB must also be a parent.⁶⁹

⁶¹ See DoE 1996:par 2.9(4), 3.7 and *Schools Act* 84/1996:s 16(1) and s 20(1) for a list of all the functions of the SGB. In *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA):par 5, the court confirmed the governance function of the SGB; see also Oosthuizen, Rossouw & Smit 2009:278-279; Joubert & Prinsloo 2008:74-75, 78; Bray 2005:134; Squelch 2001:140; Joubert 2007:41-45, 51-56.

⁶² Joubert 2007:49.

⁶³ Squelch 2001:139.

⁶⁴ PAJA 3/2000; Malherbe 2001:67.

⁶⁵ *Schools Act* 84/1996:s 16(2); *Schoonbee and Others v MEC for Education, Mpumalanga, and Another* 2002 (4) SA 877 (T):883.

⁶⁶ *Schools Act* 84/1996:s 23(1).

⁶⁷ *Schools Act* 84/1996:s 23(2).

⁶⁸ *Schools Act* 84/1996:s 23(9), (10); DoE 1995:ch 4, par 3; ch 12, par 2(a)(c); De Waal & Van Staden 2007:31; Joubert & Prinsloo 2008:75-76; Karlsson 2002:329.

⁶⁹ *Schools Act* 84/1996:s 29(2).

Community members can be co-opted to ensure that the SGB will be able to fulfil its functions properly.⁷⁰

In line with the provisions in the *Children's Act*⁷¹ on the right to participate, learners from grade 8 and higher can be elected by the Learners Representative Council (LRC) to serve on the SGB.⁷² Although they have voting rights in general, they cannot incur any liability and therefore have only limited voting rights in practice.⁷³ They cannot contract on behalf of the SGB, may not vote on any resolutions which would impose liabilities on third parties or on the school, and cannot incur any personal liabilities arising from any consequences of their membership of the SGB.⁷⁴ This implies that, although learner representatives may take part in disciplinary proceedings, they cannot vote on resolutions that would impose a liability on a third party, such as imposing a fine on an offending learner. They will also not be in a position to vote on a resolution to appoint an additional staff member to deal with the social problems of learners who misbehave at school.

Other members of the SGB, however, can incur personal liability if their actions are grossly negligent, are reckless or constitute fraud. Thus SGB members can be held personally liable for damages if a child sues the school because of the disciplinary measures applied in the school.⁷⁵ Members who act within the ambit of their legal authority, or *intra vires*, will not be held personally liable for such acts.⁷⁶

Parents, educators and non-educators elected to the SGB hold office for a period not exceeding three years, but are eligible for re-election. This has the advantage that experience and skills can be retained to the benefit of the school. Learners can only serve on the SGB for one year, but may be re-elected.⁷⁷

5.3.2 Functions of the School Governing Body

The legislator has granted SGBs extensive powers in respect of a wide range of matters in order to ensure the improvement of teaching and learning.⁷⁸ The general functions of all SGBs are provided for in section 20 of the *Schools Act*. Section 21 makes provision for additional

⁷⁰ *Schools Act 84/1996*:s 23(6).

⁷¹ 38/2005:s 10.

⁷² *Schools Act 84/1996*:s 23(4).

⁷³ De Waal & Van Staden 2007:32.

⁷⁴ *Schools Act 84/1996*:s 32.

⁷⁵ Joubert 2007:42. Public liability insurance is therefore recommended for SGBs.

⁷⁶ Joubert 2007:48.

⁷⁷ *Schools Act 84/1996*:s 31.

⁷⁸ Joubert 2007:43.

functions which can be performed by the SGB on application to the HoD, but none of the section 21 functions have any direct bearing on school discipline. The execution of these general functions requires specialised skills and knowledge. The governors of the SGB should therefore be developed in this regard. Consequently, the *Schools Act* provides that the HoD of each province should provide introductory training for newly elected SGBs.⁷⁹

In order to operationalise the functions of the SGB, it may establish various committees such as an executive committee, a financial committee and a disciplinary committee. The SGB may appoint people with specific expertise to these committees, on condition that, to facilitate proper feedback to the SGB, the chairperson of the committee is a member of the SGB.⁸⁰ Disciplinary committees are accordingly often established with co-opted specialists such as lawyers, social workers and psychologists.

In view of the fact that the SGB can only perform those functions specifically provided for in legislation,⁸¹ it is important to determine what the functions relating to discipline are. In addition, legislation does not define any of these functions in great detail; therefore, the ambit of these functions must be determined. The SGB's specific functions relating to discipline, namely to draft a code of conduct and to conduct formal disciplinary proceedings, will be discussed in detail below.⁸² General functions which have a bearing on discipline will also be highlighted.

5.3.2.1 Promoting the best interests of the school

Section 20(1)(a) of the *Schools Act* provides that the governing body of the public school must:

- (a) promote the best interest of the school and strive to ensure its development through the provision of quality education for all learners of the school.

Ensuring quality education for all learners can be regarded as the most important function of the SGB, since this function actually underpins all the other functions.⁸³ Therefore, the SGB, in cooperation with the School Management Team (SMT), should focus on the welfare of the school and of the learners in performing its duties. This emphasises the SGB's position of trust

⁷⁹ *Schools Act* 84/1996:s 19; Joubert & Prinsloo 2008:101.

⁸⁰ *Schools Act* 84/1996:s 30(1); De Waal & Van Staden 2007:33.

⁸¹ *Schools Act* 84/1996:s 16(1).

⁸² See par 5.5, 5.6, 5.7 herein.

⁸³ Joubert 2007:41.

vis-à-vis the school and the responsibility for ensuring proper relationships between the principal, educators, learners and the SGB.⁸⁴

In *Head of Department, Mpumalanga Education Department, and Another v Hoërskool Ermelo and Another*,⁸⁵ dealing with the school's language policy, the school argued that it was only responsible for considering the interests of current learners. The Constitutional Court, however, found that the school had to make decisions regarding its language policy with due regard for the constitutional rights and needs of the broader community in which the school was situated. This approach of the court broadened the responsibilities of the SGB in the process of balancing the competing rights of children in the school and those in the broader community.

5.3.2.2 Developing the mission statement of the school

The SGB is responsible for drafting a mission statement for the school.⁸⁶ In this regard, Joubert⁸⁷ indicates the importance of a vision and mission statement for a school in enabling it to give effect, ultimately, to its goals and objectives. The vision and mission statements are necessary to indicate the future direction of the school. The content of these statements should be subscribed to by the majority stakeholders in the school and should inspire everyone in the school to be proud of it and to support it. Sound values, informed by the Constitution, should form the foundation of these statements.⁸⁸ Oosthuizen, Rossouw and Smit⁸⁹ aver that the mission statement indicates the fundamental and unique aspirations of the school and is an enduring statement of the school's intent.

Xaba⁹⁰ proposes that the best way for an SGB to develop a mission statement is through the drafting of a school development plan. The aim of a school development plan is to successfully introduce change in a school in order, eventually, to improve the quality of teaching and learning in that school. Lack of discipline is often regarded as one of the factors contributing to the underperformance of schools. Therefore, discipline should be included in the mission statement and/or development plan of a school. However, he found that this exercise is often

⁸⁴ Joubert 2007:42.

⁸⁵ 2010 (3) BCLR 177 (CC):par 99. The court referred in particular to section 29(2) of the Constitution dealing with the right to receive education in the language of one's choice. In this regard, it stated, equity, practicability and the need to redress the wrongs of past discriminatory laws must be taken into account. It also referred to section 6(2) of the *Schools Act* which reminds SGBs to determine the language policy in accordance with the Constitution.

⁸⁶ *Schools Act* 84/1996:s 20(1)(c).

⁸⁷ Joubert 2007a:50.

⁸⁸ Joubert & Prinsloo 2008:80.

⁸⁹ Oosthuizen, Rossouw & Smit 2009:286.

⁹⁰ 2006:15-26.

futile because of a lack of knowledge and skills, the technical difficulty of the process, the low literacy levels of the parents involved, and the general apathy of uninvolved parents.⁹¹ Some SGBs will thus not only be unable to draft a code of conduct, but will also be unable to draft a mission statement and development plan in line with the legal standard set by a complex legal concept such as the best interests of the child.

5.3.2.3 Adopting a code of conduct for learners at the school

Section 8 and section 20(1)(d) of the *Schools Act* provide that the SGB should adopt a code of conduct for learners of a school, after consultation with learners, parents and educators of the school. The provisions of the code of conduct will be discussed in more detail below.⁹²

In adopting a code of conduct, the SGB is giving effect to its duty, in terms of section 24(a) of the Constitution, to ensure that learners receive education in a safe environment “not harmful to their health and wellbeing”. In addition, the SGB is primarily responsible for disciplinary hearings in accordance with the procedures set out in the code of conduct and the *Schools Act*.⁹³ The disciplinary hearing will also be discussed in more detail below.⁹⁴

5.3.2.4 Support function

The SGB is only responsible for governance and not the management of the school. In terms of section 20(1)(e) of the *Schools Act*, it is therefore obliged to:

- (e) support the principal, educators and other staff of the school in the performance of their professional functions.

The SGB is thus responsible for supporting educators in the execution of their professional functions.⁹⁵ These functions are captured in the seven roles assigned to the educator and include being: a learning mediator; an interpreter and designer of learning programmes and materials; a leader, administrator and manager; and a scholar, researcher and lifelong learner; fulfilling a community, citizenship and pastoral role; as well as acting as an assessor and distinguishing oneself as a learning area/subject/discipline/phase specialist.⁹⁶

⁹¹ Xaba 2006:15-26; see also ch 2, par 8.2, 8.6 herein.

⁹² See par 5.5 herein.

⁹³ 84/1996:s 8(7).

⁹⁴ See par 5.6 herein.

⁹⁵ Joubert 2007:43. She warns against SGBs overstepping their boundaries in this regard and states that an SGB should fulfil this obligation by infusing the values of honesty, loyalty, enthusiasm, willingness, wisdom, insight, commitment, interest and dedication into the management and leadership of the school.

⁹⁶ GN 82/2000:par 3.

The negative impact on educators of ill-discipline, learner violence perpetrated against them and the overemphasis of children's rights should therefore be taken into account by the SGB.⁹⁷ Although the SGB is only responsible for drafting the code of conduct, it still has an obligation to support the principal and educators in properly implementing the code of conduct, since school discipline has an impact on the professional execution of the functions of educators.⁹⁸

5.3.2.5 Encouraging voluntary service to the school

The SGB must also, according to section 20(1)(h) of the *Schools Act*:

- (h) encourage parents, learners, educators and other staff at the school to render voluntary services to the school.

Since the SGB can establish committees, a disciplinary committee can alleviate the workload of the SGB.⁹⁹ Apart from rendering services to the disciplinary committee,¹⁰⁰ expert volunteers such as social workers and psychologists can assist with disciplinary issues by providing expert advice on learners with behaviour problems. Alternatively, they can render professional services – where possible, free of charge – to these learners or assist the SGB to establish networks with service providers in this regard. The development of partnerships with non-governmental organisations and the relevant government departments in order to provide schools with the necessary assistance to deal with at-risk learners is very important and was highlighted in *Jacobs v Chairman, Governing Body, Rhodes High School, and Others*.¹⁰¹ Services to develop the professional skills of educators to deal more effectively with disciplinary issues are also necessary and can be attained through collaboration with skilled members of the community.¹⁰² Legal practitioners can be a useful resource in assisting with disciplinary hearings. Other services related to discipline could include volunteers willing to help with special disciplinary programmes or the supervision of learners who are subjected to disciplinary measures. These actions should not only be in the best interests of the school in general, but also in the best interests of the individual children involved.

⁹⁷ See ch 2, par 7.5-7.8 herein. Depression, anxiety, post-traumatic stress disorder and stress are some of the symptoms experienced by educators who are exposed to school violence; see also Oosthuizen, Rossouw & Smit 2009:293-294.

⁹⁸ Squelch 2001:141.

⁹⁹ *Schools Act* 84/1996:s 30(1)(b); Joubert & Prinsloo 2008:77.

¹⁰⁰ *Schools Act* 84/1996:s 30(1)(b).

¹⁰¹ 2011 (1) SA 160 (WCC):par 40-41.

¹⁰² Joubert 2007:44-45.

5.3.2.6 Adopting a constitution and adherence to the code of conduct for school governing bodies

An SGB must draft a constitution to direct its functions, and this constitution should be aligned with the minimum requirements determined by the MEC and set out in provincial legislation.¹⁰³ In addition, the MEC for each province should draft a code of conduct for SGBs¹⁰⁴ aimed at the establishment of a:

disciplined and purposeful school environment dedicated to the improvement and maintenance of a quality governance structure at a public school.¹⁰⁵

Disciplined conduct on the part of the SGB is thus regarded as a prerequisite for the SGB being able to ensure a disciplined school environment. The following principles are of importance to SGB members and should direct their actions and decisions: selflessness, integrity, objectivity, accountability, openness, honesty and leadership.¹⁰⁶

¹⁰³ *Schools Act 84/1996:s 18(1), 18(2)*; see also Joubert & Prinsloo 2008:77; Oosthuizen, Rossouw & Smit 2009:284-285 for a discussion on the requirements of the Constitution; see also Gauteng Provincial Notice on Determination of Minimum Requirements of Constitution and Standing Orders of Governing Bodies of Public Schools 993/1997.

¹⁰⁴ *Schools Act 84/1996:s 18A(1)*. Provincial provisions include the following: Free State Provincial Notice on Code of Conduct for Members of Governing Bodies of Public Schools 181/2005; Gauteng Provincial Notice on Determination of Minimum Requirements of Constitution and Standing Orders of Governing Bodies of Public Schools 993/1997; Gauteng Provincial Notice on Code of Conduct for Members of Governing Bodies of Public Schools 1182/2004; Eastern Cape Provincial Notice on Regulations Relating to the Governing Bodies of Public Schools (excluding Public Schools for Learners with Special Education Needs) 51/2003; Mpumalanga Provincial Notice on the Code of Conduct for Members of Governing Bodies 40/2011; KwaZulu-Natal Provincial Notice on the Code of Conduct for Members of Governing Bodies 331/2005.

¹⁰⁵ *Schools Act 84/1996:s 18A(2)*.

¹⁰⁶ Joubert 2007:41. Since the SGB plays a vital part in the school, care should be taken to elect people who are suitable for the position. De Waal & Van Staden 2007:36 aver that the Department indicates that a good SGB member should: be interested in the learners' education; be a good attendee of governing body meetings; be open-minded about decisions and actions taken; ask questions and be critical in a positive and constructive way; be convinced of the importance of taking his or her role seriously; be aware of what is happening in education; be prepared to learn to participate fully in meetings and to make contributions; be prepared to build a dedicated team; be able to respect the need for confidentiality; be prepared to make the effort to learn about becoming an even better governor; be prepared to put the good of the school before any personal interest; be independent and not be influenced by outside groups or organisations when appointing staff, awarding contracts or making recommendations, such as on the expulsion of learners; be accountable to the school and answer questions about his or her activities, including financial questions about money spent; be a leader by promoting and supporting school values, principles and programmes; and be knowledgeable about laws that have to do with school governance. It is thus clear that school governors should have a high standard of knowledge and have high moral values and principles. However, not all SGB members comply with these standards – see the discussion in ch 2, par 8.6.1 herein.

5.3.2.7 Acting in accordance with the Promotion of Administrative Justice Act

In exercising its functions, the SGB must pay due regard to the right to just administrative action.¹⁰⁷ Effect is given to this right through the *PAJA*¹⁰⁸ which is a codification of the common law position regarding administrative law, but also includes more expansive provisions.¹⁰⁹ The aim of the Act is to ensure and promote efficient administration and good governance and to foster a culture of accountability, openness and transparency in exercising administrative powers.¹¹⁰ Since the SGBs act as an organ of state, they must adhere to these provisions when carrying out their duty to draft a code of conduct and when conducting a disciplinary hearing.¹¹¹

SGB members must be impartial (*nemo iudex idoneus in propria causa est* – “no one is fit to be the judge in his or her own cause”) and any member with an interest in proceedings should withdraw. Prescriptions must be followed and must be fair, for instance there must be adherence to the *audi alteram partem* rule – “hear the other side”. The learner should be provided with enough information and time to enable him or her to prepare a proper defence or make representations. Decisions must be reasonable and reasons should be provided for such decisions.¹¹² The decisions should be in accordance with the law and should reflect an appropriate understanding and application of the law. Due regard should be given to all the relevant considerations and irrelevant considerations should not play a role. Decisions must not be taken arbitrarily or capriciously, and an ulterior motive or purpose should not influence decisions. SGB members must act honestly and rationally. Proper appeal and review procedures should be in place, and learners should be informed of their right to appeal decisions or to take decisions on review.¹¹³ This requires SGB members to have an appropriate level of knowledge and skills to ensure compliance with legislative and constitutional prescriptions.¹¹⁴

5.3.3 Failure by School Governing Body to perform functions

If the SGB fails to perform a function, or fails to perform all its functions, the HoD must appoint other people to perform the function or functions. These appointments are valid for a period not

¹⁰⁷ Constitution 1996:s 33.

¹⁰⁸ 3/2000.

¹⁰⁹ *Schoonbee and Others v MEC for Education, Mpumalanga, and Another* 2002 (4) SA 877 (T); Malherbe 2001:67; Beukes 2003:295.

¹¹⁰ Malherbe 2001:68; Beukes 2003:292.

¹¹¹ *Schools Act* 84/1996:s 8, 9.

¹¹² Bray 2005:136; Malherbe 2001:66-67; Beukes 2003:295.

¹¹³ *PAJA* 3/2000:s 4-8; *Schoonbee and Others v MEC for Education, Mpumalanga. and Another* 2002 (4) SA 877 (T):882-883; Bray 2005:136-137; Malherbe 2001:66-67.

¹¹⁴ See ch 2, par 8.6.1 herein for a discussion on the challenges posed by unskilled and illiterate SGBs.

exceeding three months, but can be extended for a maximum of one year.¹¹⁵ However, the HoD must ensure that the necessary capacity is built through training in order to enable the SGB to fulfil its obligations.¹¹⁶ It should be noted that the functions of an SGB can only be revoked if it is dysfunctional and not so as to force it to change legitimate policies that are contrary to the wishes of the HoD.¹¹⁷

If an SGB as a juristic person fails or omits to perform its duties, this may render the SGB delictually liable for damage or loss that may arise from such a failure or omission. However, such failure or omission must be *intra vires*.¹¹⁸ Furthermore, the *PAJA*¹¹⁹ provides that no person can be held criminally or civilly liable for anything done in good faith while exercising power or performing administrative actions. On the other hand, if this failure constitutes gross negligence, the SGB members can be held liable in their personal capacity.

The SGB must promote the best interests of the school and ensure the school's development. The adverse effects of corporal punishment and its contribution to school violence were discussed above. In view of this, it can therefore be argued that the SGB has a responsibility to take active steps to prevent the unlawful infliction of corporal punishment and other forms of unacceptable punishment that are not in the best interests of the school.¹²⁰ If the SGB negligently fails to take the necessary steps to stop the illegal use of corporal punishment, it can be held liable for damages.¹²¹ However, if these failures constitute gross negligence, SGB members can incur personal liability for their inaction and can also be held criminally liable as accomplices to assault.¹²²

5.4 Management of school through the principal

The management of the school is vested in the principal of the school, who acts under the authority of the HoD of a particular province.¹²³ The management of the school deals with day-to-day educational activities.¹²⁴

¹¹⁵ *Schools Act 84/1996*:s 25(1), (2).

¹¹⁶ *Schools Act 84/1996*:s 25(3), (4).

¹¹⁷ *Head of Department, Mpumalanga Education Department, and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC):par 85-86.

¹¹⁸ *Schools Act 84/1996*:s 15; Joubert 2007:48.

¹¹⁹ 3/2000:s 10A.

¹²⁰ See the discussion in ch 2, par 5.1.1.1.1 herein on the continued prevalence of corporal punishment and the discussion in ch 6, par 3 herein on the retributive approach to discipline.

¹²¹ See *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

¹²² Squelch 2001:141-142; Joubert 2007:48.

¹²³ *Schools Act 84/1996*:s 16(3); *Schoonbee and Others v MEC for Education, Mpumalanga, and Another* 2002 (4) SA 877 (T):883.

5.4.1 The legal status of the principal

The principal is first and foremost in an employer–employee relationship with the provincial department of education. Section 16(A) of the *Schools Act* provides that the principal, who is an *ex officio* member of the SGB, represents the HoD on the SGB.¹²⁵ However, in dealing with the Department, the principal has to promote the interests of the SGB too. This results in a dual obligation on the part of the principal whereby the principal has to ensure that everything reasonably possible is done to guarantee that the conduct of the SGB and of the Department (where he or she acts on the Department's behalf) is lawful, fair and reasonable.¹²⁶ Inevitably, this creates a difficult situation for the principal in terms of possible conflicts of interest.

Since the SGB is responsible for governance, it has to fulfil an oversight role; therefore, it has to delegate some of its powers. The obvious choice would be to delegate these powers to the principal to allow him or her to execute policy and strategy. Although the principal would not execute all the functions personally, he or she would remain the focal point of accountability and responsibility in the school. As far as professional functions are concerned, such as classroom teaching, the principal is accountable to the HoD.¹²⁷

5.4.2 Functions of the principal

The *Education Laws Amendment Act of 2007*¹²⁸ inserted an additional section in the *Schools Act*, clarifying the functions and responsibilities of the principal. Among the functions of the principal are the duty to draft an annual academic improvement plan for the school, to present it to the HoD, and to table it at an SGB meeting.¹²⁹ Since there is a positive correlation between the academic performance of a school and school discipline, one would assume that this plan should also include action plans to improve discipline in the school.

The principal is, *inter alia*, responsible for the implementation of policy and legislation.¹³⁰ He or she should therefore ensure that actions taken by him or her, and by the staff at the school, are not only in accordance with legislation and policy, but also with the provisions of the *PAJA*.¹³¹ There is also a general obligation on the principal to assist the SGB in performing its functions

¹²⁴ Joubert 2007:49.

¹²⁵ *Schools Act* 84/1996:23(1)(b), 24(1)(j).

¹²⁶ Joubert 2007:40; Joubert & Prinsloo 2008:74-75; Bray 2005:133.

¹²⁷ Joubert & Prinsloo 2008:103.

¹²⁸ 31/2007:s 8; *Schools Act* 84/1996:s 16A.

¹²⁹ *Schools Act* 84/1996:s 16A(1)(c)(i), (ii).

¹³⁰ 84/1996:s 16A(2)(a)(iv).

¹³¹ Malherbe 2001:66.

and carrying out its responsibilities.¹³² In addition, the SGB should be assisted “in handling disciplinary matters pertaining to learners”.¹³³ The latter responsibility, however, should be carried out on condition that it is not in conflict with the instructions of the HoD, with legislation or with policy, with obligations towards the HoD, the MEC or the Minister, or with specified legislation. In addition, the principal should inform the SGB about policy and legislation.¹³⁴ This obliges the principal not only to know the relevant legislation and policies, but also to stay abreast of legal developments. Since the members of the SGB are normally lay people, this is a crucial function and is relevant to school discipline, because the SGB is responsible for ensuring that the code of conduct is drafted and adopted in line with legal requirements and that disciplinary proceedings are conducted lawfully.¹³⁵ It is interesting to note that the legislation specifically provides that the principal's function is to assist the governing body. It is therefore stressed again that the responsibility for adopting the code of conduct and for dealing with disciplinary proceedings is primarily that of the SGB. The principal's duty is to assist, not to drive the process. This again highlights the important role parents, through the SGB, have to play in school discipline. Nevertheless, the practicality of these provisions is questionable in view of the fact that many parents on the SGB are lay people and that principals in general are also not well trained in legal issues.

5.5 The code of conduct: general requirements

Section 8 of the *Schools Act* lays down specific requirements relating to the drafting of a code of conduct and provides as follows:¹³⁶

- (1) Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school.
- (2) A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.
- (3) The Minister may, after consultation with the Council of Education Ministers, determine guidelines for the consideration of governing bodies in adopting a code of conduct for learners.
- (4) Nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct of the school attended by such learner.

¹³² 84/1996:s 16A(3).

¹³³ 84/1996:s 16A(2)(d).

¹³⁴ 84/1996:s 16A(2)(f).

¹³⁵ 84/1996:s 8.

¹³⁶ See also 84/1996:s 8(1), 16(1), 20(d).

The code of conduct is implemented under the management of the principal, who is subject to the authority of the HoD.¹³⁷

5.5.1 Guidelines for drafting a code of conduct

The Minister exercised a discretion to provide “guidelines for consideration”¹³⁸ by an SGB in drafting a code of conduct and published these in Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners¹³⁹ (“Guidelines”).

In *MEC for Education, KwaZulu-Natal, and Others v Pillay*¹⁴⁰ (“the Pillay case”), the Constitutional Court confirmed the status of guidelines as follows:

The guidelines are not mandatory but are exactly what they purport to be – a guide. ...they are for the “consideration” of schools; while some of the regulations are couched in mandatory language, the vast majority ... use the suggestive word “should”;...¹⁴¹

The Guidelines are thus provided to “assist” the SGB in adopting a code of conduct. It should thus be kept in mind that they are mere guidelines and that SGBs cannot be obliged to follow them. The Guidelines also specifically state that the SGBs *may* consider them in the drafting process.¹⁴²

5.5.2 Aim

The *Schools Act*¹⁴³ provides that the aim of the code of conduct is to establish a:

disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.

The legislator has thus recognised the importance of school discipline in realising the learner's right to education and reaffirms this right in the guidelines.¹⁴⁴ Oosthuizen¹⁴⁵ indicates that the code of conduct should focus on educational teaching. He argues that education is aimed at the

¹³⁷ *Schools Act* 84/1996:s 16(3).

¹³⁸ *Schools Act* 84/1996:s 8(3).

¹³⁹ GN 776/1998.

¹⁴⁰ 2008 (1) SA 474 (CC).

¹⁴¹ *Pillay case* 2008 (2) BCLR 99 (CC):par 34. See also Carnelley 2007:145-148 for a discussion on the High Court judgment.

¹⁴² GN 776/1998.

¹⁴³ 84/1996:s 8(2).

¹⁴⁴ GN 776/1998:1.1.

¹⁴⁵ Oosthuizen 2006:75.

development of character and personality, while, in teaching, the focus is on scholastic development and acquiring academic knowledge. The code of conduct should direct and equip learners with expertise, knowledge and skills to be able to conduct themselves in society as worthy and responsible citizens.¹⁴⁶ The purpose of the code of conduct is further to develop and promote civic responsibility, leadership, positive discipline and self-discipline among learners.¹⁴⁷ This is in line with the definition of discipline provided in chapter 2.¹⁴⁸

5.5.3 Some perspectives on the Guidelines

There are a number of important perspectives included in the Guidelines that should be kept in mind. Firstly, taking into account that corporal punishment was lawful until 1996 and that a very authoritarian and punitive approach was followed under the previous dispensation, the Guidelines aim to redirect educators' approach to discipline.¹⁴⁹ The Guidelines provide that the code of conduct should focus on positive discipline and should not "be punitive and punishment orientated". The code of conduct should rather facilitate constructive learning.¹⁵⁰

Secondly, the Guidelines acknowledge that positive discipline, self-discipline and exemplary conduct of learners are, *inter alia*, dependent on what they observe and experience while discipline is enforced.¹⁵¹ Thus the Guidelines provide that:

The purpose of the code of conduct is to promote positive discipline, self-discipline and exemplary conduct, *as learners learn by observation and experience*.¹⁵²

Although not explicitly stated, one can deduce that the drafters have acknowledged that the conduct of other stakeholders such as educators, parents and departmental officials has an impact on school discipline. Thus, how learners perceive and experience the implementation of the code of conduct will have an impact on the ultimate outcome of the disciplinary process.¹⁵³ Thirdly, the importance of constitutional values as the guiding beacons of a code of conduct is highlighted.¹⁵⁴

¹⁴⁶ GN 776/1998:1.4.

¹⁴⁷ GN 776/1998:1.4, 1.6.

¹⁴⁸ See ch 2, par 3.1 herein.

¹⁴⁹ *Schools Act 84/1996:s 10; Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC):par 39, 40, 50, 51; Roos 2003:482-483.

¹⁵⁰ Rossouw 2007:80.

¹⁵¹ GN 776/1998:1.6.

¹⁵² GN 776/1998:1.6. [My emphasis]

¹⁵³ In *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC):par 39, 40, 50, 51. The Constitutional Court remarked that it was unfortunate that the views of the children who were affected by their parents' insistence on the use of corporal punishment in those independent schools were not before the court.

¹⁵⁴ GN 776/1998:3.2; Rossouw 2007:80.

5.5.4 Participation

Recognising that the values, norms, religion, interests, priorities and practices in different communities may differ, the Guidelines indicate that a code of conduct should be drafted after consultation with parents, learners and educators of a school.¹⁵⁵ The code of conduct should be viewed as a consensus document and is a good example of democracy in action.¹⁵⁶

In the *Pillay* case,¹⁵⁷ the school drafted a code of conduct after extensive consultation with the different stakeholders. In addition, parents had to sign a declaration that they would ensure that their children complied with the code of conduct. Despite this, a learner, Sunali, had her nose pierced and wore a gold nose stud to school, in contravention of the school rules, but in compliance with her cultural and religious beliefs.

It was argued by Sunali that the school rules were discriminatory in nature, because they infringed on her cultural and religious rights. The school, in rebuttal, argued that the school rules were the product of extensive consultation and should therefore be adhered to. The Constitutional Court acknowledged the importance of consultation and democratic processes. The court, however, found that extensive consultation does not exempt a code of conduct from constitutional scrutiny and review. Owing to the remaining unequal power relations in many communities, it is more likely that local decisions might infringe on the rights of disfavoured groups. The court thus cautioned that a decision by the majority, after extensive consultation, might still constitute discrimination against certain individuals or groups.¹⁵⁸ The code of conduct should therefore be drafted not only in accordance with the will of all the stakeholders, but also in accordance with the constitutional imperatives.

By analogy, one could apply the above reasoning to the best-interests concept. For instance, although the majority of stakeholders might be of the opinion that certain conduct is in line with the best interests of the child, constitutional scrutiny might indeed reveal that it is not. One possible example would be that where many parents and educators are of the view that corporal punishment is in the best interests of children and should therefore be permitted. Yet, not only is it unlawful, but it also constitutes an infringement of several other constitutional rights

¹⁵⁵ *Schools Act 84/1996:s (8)(1)*; Oosthuizen 2006:75; Bray 2005:135.

¹⁵⁶ Rossouw 2007:82.

¹⁵⁷ 2008 (2) BCLR 99 (CC).

¹⁵⁸ *Pillay* case 2008 (2) BCLR 99 (CC):par 82-83.

of children.¹⁵⁹ In addition, physiological and psychological evidence indicates that it is very often detrimental to the development of children.¹⁶⁰

5.5.5 Content of the code of conduct

The code of conduct should not only reflect constitutional rights, but also the democratic values of human dignity, equality and freedom.¹⁶¹ It should contain school rules, regulations, sanctions and disciplinary procedures. The consequences of, or sanctions for, misconduct, with specific reference to suspensions and expulsions, should be clear. Particular attention should be given to complex issues such as criminal acts, drug peddling, drug testing, sexual harassment and other forms of abuse, bullying, pregnancy, possession of dangerous weapons, inappropriate relationships between educators and learners, and searches and seizures.¹⁶² The Guidelines are supposed to direct SGBs as to what should be included in the code of conduct. In what follows, the content of the Guidelines will be discussed and, where appropriate, analysed.

5.5.5.1 The preamble

The Guidelines suggest that the code of conduct should have a preamble which sets out the philosophy, ethos, moral values and principles of the school. It should emphasise that the education of the learners is not only the responsibility of the state, school, educators and parents, but that the learners also have responsibilities in this regard. The preamble should direct the code of conduct towards the creation of a culture of reconciliation, tolerance, teaching, learning and mutual respect.¹⁶³

5.5.5.2 School rules

It is suggested that the code of conduct should contain a list of things learners may not do or should do. This list should thus contain prescribed "behaviour that respects the rights of learners and educators".¹⁶⁴ It should also contain the school rules, which play an important part in school discipline.¹⁶⁵ The aim of school rules is to provide a written set of rules indicating acceptable behaviour and prohibiting unacceptable behaviour.¹⁶⁶ Otto¹⁶⁷ avers that school rules should have an educational aim, should be necessary, relevant and applicable, should be easily comprehensible, and should deal with all aspects of school life, such as academics, culture,

¹⁵⁹ *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC).

¹⁶⁰ See ch 2, par 7.2 herein.

¹⁶¹ Constitution 1996:s 7; GN 776/1998:1.3, 3.2.

¹⁶² Otto 1999a:8; Squelch 2001:141-142; Bray 2005:134.

¹⁶³ GN 776/1998:1.9, 2.3; Otto 1999a:8.

¹⁶⁴ GN 776/1998:3.3, 3.4.

¹⁶⁵ Bray 2005:133.

¹⁶⁶ GN 776/1998:3.3, 3.4.

¹⁶⁷ Otto 1999b:7.

sport, human rights, authority of the school, conduct inside and outside the school, as well as physical facilities and the school grounds. Roos¹⁶⁸ indicates that school rules should play a part in establishing moral values and a constructive and positive learning environment. They should be principle-oriented and should recognise human dignity, the different forms of freedoms learners have and the best interests of learners. The focus should not be on negative mechanisms to prohibit certain behaviour, but rather on positive formulations that encourage positive behaviour. In addition, the rules must be clear enough to enable a learner to determine with reasonable certainty what is prohibited. School rules should thus contribute to the creation of an orderly environment conducive to teaching and learning.

In *Antonie v Governing Body, Settlers High School, and Others* ("the *Antonie* case"),¹⁶⁹ the court set aside the suspension of a girl who wore dreadlocks and a cap to school in accordance with her religious beliefs. The court held that the SGB had not applied its collective mind properly to the case, because the code of conduct had specific provisions regarding girls' hair, but did not explicitly forbid the wearing of dreadlocks and a cap. Therefore, the school was unable to suspend her for contravening a rule that did not exist.¹⁷⁰

On the other hand, Otto¹⁷¹ asserts that school rules also include unwritten rules which can be deduced from the ethos of the school, because it is impossible to prescribe every possible aspect of human conduct. In this regard, he emphasises an important educational aim, namely that of self-discipline and self-education. At first glance, his opinion seems to contradict the judgment that learners can only be suspended for contravening a specific rule. However, the judgment should not be read in such a narrow sense. There should always be room for unwritten school rules to cover the impossibility of addressing all conduct. This underlines the important role of the values and ethos of the school and the compatibility of the unwritten school rules with constitutional values and rights. There is no underlying value or right to justify an unwritten rule against dreadlocks. In fact, even written rules in this regard will be unlawful and discriminatory.¹⁷² On the other hand, even if there is no specific rule which prohibits, say, gossiping or the spreading of false rumours, it would still be acceptable to take disciplinary action, because this conduct would be contrary to the values and ethos of the school, to

¹⁶⁸ Roos 2003:486-487.

¹⁶⁹ 2002 (4) SA 738 (C).

¹⁷⁰ *Antonie* case 2002 (4) SA 738 (C):par 12.

¹⁷¹ Otto 1999b:7.

¹⁷² See *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC). In this case, the Constitutional Court gave guidance on the wearing of religious symbols. The *Antonie* case 2002 (4) SA 738 (C) was decided before the *Pillay* case. In the latter case, the court opted to resolve the issue on the basis of a procedural aspect, while the Constitutional Court opted to address a similar issue in the *Pillay* case with reference to constitutional rights and values.

constitutional values and to constitutional rights such as the right to dignity. Any conduct must be in line with constitutional rights and values, and the absence of a specific school rule to prohibit conduct contrary to these rights and values can never justify such conduct or prohibit disciplinary action against it.

In line with the above-mentioned argument, the court furthermore found in the *Antonie* case¹⁷³ that the school should have paid more attention to the provisions of the Guidelines in drafting the code of conduct and quoted with approval from the Guidelines.¹⁷⁴ It held that more attention should have been given to the emphasis placed on positive discipline,¹⁷⁵ and to the need for a culture of reconciliation, teaching, learning and mutual respect.¹⁷⁶ The need to establish a “culture of tolerance and peace in all schools” was also highlighted, together with the need to acknowledge the “context of the democratic values of dignity, equality and freedom”. The court further highlighted the inherent dignity of every learner and the right to have his or her dignity respected, in the sense of mutual respect, including respect for one another’s convictions and cultural traditions.¹⁷⁷ Educators and learners were also encouraged to learn the importance of mediation and cooperation, to seek and negotiate non-violent solutions to conflict and differences, and to make use of due process of law.¹⁷⁸ It also referred to the definition of freedom of speech as contained in the Guidelines, which provides that this right “includes the right to seek, hear, read and wear”, and stated that it “extended to forms of outward expression as seen in clothing selection and hairstyles”.¹⁷⁹ The school was accordingly criticised for not including these principles in the code of conduct.

The court, however, continued and held that, even if the code of conduct had prohibited the wearing of dreadlocks and a cap, the suspension would have been untenable, because such a prohibition would have been contradictory to the values and principles set forth in the Guidelines “and would bring it into conflict with the justice, fairness and reasonableness which [underpin] our new Constitution and centuries of common law”.¹⁸⁰

¹⁷³ 2002 (4) SA 738 (C).

¹⁷⁴ *Antonie* case 2002 (4) SA 738 (C):par 14; see also Roos 2003:489.

¹⁷⁵ See GN 776/1998:1.4, 1.6.

¹⁷⁶ See also GN 776/1998:2.3.

¹⁷⁷ See also GN 776/1998:4.3.

¹⁷⁸ See also GN 776/1998:4.4.1.

¹⁷⁹ See also GN 776/1998:4.5.1.

¹⁸⁰ *Antonie* case 2002 (4) SA 738 (C):par 16.

This underlines the importance of evaluating the content of school rules to determine whether the prohibitions promote positive discipline and whether non-compliance with school rules warrants “punishment or some other form of sanction”. This evaluation should take place in:

a spirit of mutual respect, reconciliation and tolerance. The mutual respect, in turn, must be directed at understanding and protecting, rather than rejecting and infringing, the inherent dignity, convictions and traditions of the offender.¹⁸¹

5.5.5.3 Exemptions from school rules

The *Schools Act* provides that a learner cannot be exempted from the obligation to comply with the code of conduct.¹⁸² Learners are obliged to adhere to the provisions of the code of conduct, and nothing in the Act justifies any exceptions from compliance with the said provisions.¹⁸³ In this regard, one would assume that the code of conduct is in line with the provisions of the Constitution. However, if a learner transgresses provisions in the code of conduct which are not in line with the Constitution, it can be argued that the learner is justified in refusing to adhere to the provisions.¹⁸⁴

Although Sunali pierced her nose in contravention of the school rules in the *Pillay* case,¹⁸⁵ the principal had given her permission to wear the nose stud until the piercing had healed, but she

¹⁸¹ *Antonie* case 2002 (4) SA 738 (C); par 17.

¹⁸² *Schools Act* 84/1996:s 8(4); GN 776/1998:3.6.

¹⁸³ *Schools Act* 84/1996:s 8(4).

¹⁸⁴ Joubert & Prinsloo 2001:120.

¹⁸⁵ 2008 (2) BCLR 99 (CC); see also Carnelley 2007:148. She discusses the Canadian Supreme Court case of *Singh-Multani v Marguerite-Bourgeois (Commission scolaire)* 2006 SCC 6, J.E. 2006-508; 2006 Carswell Que 1368 dealing with a boy's claim that the school's refusal to allow him to wear a *kirpan* (a type of weapon resembling a dagger) in accordance with his orthodox Sikh religious belief was unreasonable. In this instance, the court also found that the prohibition of the wearing of the *kirpan* unduly infringed on his right to his religious beliefs, considering the fact that it was a seriously held belief and that, although it was a weapon capable of injuring someone, the prohibition was disproportionate and an unreasonable measure since it did not minimally impair the learner's rights. The court took into account that the particular learner was not violent, that no violence involving a *kirpan* had ever been reported in Canadian schools and that there were many other objects in the school, such as scissors, pencils and baseball bats, which could be used as weapons. In addition, the school's attitude did not respect the symbolic value Sikhs attached to the *kirpan* and did not give due regard to the Canadian value of respect for multiculturalism. The harmful effects of the school's decision, said the court, outweighed the beneficial effects and therefore the decision was not justifiable. The House of Lords, however, found in *R (on the application of Begun (by her litigation friend, Rahman)) v Head Teacher and Governors of Denbigh High School (House of Lords)* 2006] UKHL 15 that the learner's insistence on wearing a *hijab* to school in contravention of the school dress code was not justified. The school had drafted the dress code after proper consultation and had allowed the wearing of a *shalwar kameeze*, which is also acceptable in the Muslim community. The court found that the refusal to make an exception to the school rules on the grounds of religion was not unjustified because: the family had chosen to send the learner to an area outside its own catchment area; the school had taken extraordinary steps to draft the dress code and inform parents accordingly; the learner's sister had worn the *shalwar kameeze* to school; and there were three other schools in the area allowing the wearing of the

then continued to wear it. The school had a diverse composition and had taken huge strides in accommodating and dealing with diversity – to such an extent that it was lauded for it by the court.¹⁸⁶ One of the measures designed to deal with diversity in a school is the school's tradition to allow learners to apply for exemptions from the code of conduct. These exemptions are dealt with on a case-by-case basis. However, in the *Pillay* case, no specific standard or process existed according to which an exemption could have been granted.

Since the learner continued to wear the nose stud, the principal requested her mother to substantiate why she (Sunali) should be allowed to wear the nose stud. The mother indicated that it was in accordance with Sunali's South Indian Tamil Hindu culture. The school then approached experts in human rights and Hindu traditions, who declared that the wearing of the nose stud was not compulsory, but a personal choice. The SGB therefore refused the exemption. Although this case centred on cultural and religious rights, the court referred to exemptions and the code of conduct in particular and held as follows:

A properly drafted code which sets realistic boundaries and provides a procedure to be followed in applying for and the granting of exemptions, is the proper way to foster a spirit of reasonable accommodation in our schools and to avoid acrimonious disputes such as the present one.¹⁸⁷

The court thus found that, owing to the lack of exemption procedures, the code of conduct was inadequate. It held, in this regard, that the school was at liberty to “set strict procedural requirements for exemption”.¹⁸⁸

The court also determined that the refusal of an exemption would constitute discrimination on the ground of religion and/or culture if the refusal imposed a burden on the learner or withheld a benefit from him or her.¹⁸⁹ The fairness of such discrimination should then be determined. One of the aspects the court considered in determining the fairness of the discrimination was the reasonable-accommodation principle, which it explained in the following terms:

At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense

hijab. It is thus clear that there is no uniformity in international law on the implementation of exceptions to school dress codes based on the religious beliefs of learners.

¹⁸⁶ *Pillay* case 2008 (2) BCLR 99 (CC):par 185.

¹⁸⁷ *Pillay* case 2008 (2) BCLR 99 (CC):par 38.

¹⁸⁸ *Pillay* case 2008 (2) BCLR 99 (CC):par 110.

¹⁸⁹ *Pillay* case 2008 (2) BCLR 99 (CC):par 45-47.

in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.¹⁹⁰

It is thus clear that the reasonable-accommodation principle requires schools to “walk the extra mile” to ensure that learners are in a position to fully realise all their constitutional rights. To avoid discriminatory practices in schools, care should be taken to see to it that learners are reasonably accommodated through fine-tuning the school community to such an extent that “its structures and assumptions do not result in the relegation and banishment” of learners who contravenes the code of conduct. Since school rules have the potential to exclude those who depart from the norm, such as a minority religious group in the school, proper care should be taken to reasonably accommodate them, even if this means granting exemptions from the rules or that the rules or practices have to be changed.¹⁹¹

This inevitably raises the question as to how far the community should “lean over backwards” to accommodate those outside the mainstream. The court in the above-mentioned case found, for instance, that the approach which should be followed in South Africa, taking into account the spirit of the Constitution, was that “more than a mere negligible effort [be] required to satisfy the duty to accommodate”. However, the exact extent of the accommodation will be dependent on the particular context of each case, guided by the values and principles underlying the Constitution. Reasonable accommodation is therefore actually an exercise in proportionality depending on the facts of the case, which is an important factor in the determination of the fairness of discrimination.¹⁹² In this regard, the court held:

There may be circumstances where fairness requires a reasonable accommodation, while in other circumstances it may require more or less, or something completely different. It will depend on the nature of the case and the nature of the interests involved. Two factors seem particularly relevant. First, reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalising effect on certain portions of society. Second, the principle is particularly appropriate in specific localised contexts, such as an individual workplace or school where a reasonable balance between conflicting interests may more easily be struck.¹⁹³

¹⁹⁰ *Pillay case 2008 (2) BCLR 99 (CC):par 73.*

¹⁹¹ *Pillay case 2008 (2) BCLR 99 (CC):par 74-75; see also Oosthuizen 2006:75.*

¹⁹² *Pillay case 2008 (2) BCLR 99 (CC):par 76-77.*

¹⁹³ *Pillay case 2008 (2) BCLR 99 (CC):par 78.*

School rules should thus strike a proper balance between the interests of different individuals and groups of learners, accommodating the needs and interests of everyone as far as reasonably possible.

The school, in the *Pillay* case, argued that, if Sunali did not agree with the provisions of the code of conduct, she could simply move to another school. The court, however, found that this approach would only serve to marginalise religions and cultures, which was inconsistent with the values of the Constitution. Diversity should rather be regarded as “the primary treasure of our nation” and should therefore be embraced. The school should seize the opportunity to introduce its learners to multiculturalism – stressing the importance of different cultures co-existing – should teach them the constitutional values, and should promote these rights and values at the same time. This approach would also treat learners “as sensitive and autonomous people” capable of understanding the impact of some school rules on some of their fellow learners. On the other hand, stated the court, there might be occasions where the availability of another school could be a relevant consideration in searching for reasonable accommodation.¹⁹⁴

The court referred several times to the importance of recognising, respecting and promoting a learner’s identity in the process of drafting and implementing school rules. The learner’s identity, indicated the court, is linked to the development of a person’s full potential, self-worth, dignity, equality, and sense of belonging.¹⁹⁵ Thus, specific attention must be given to allowing the learner to be who she or he is.

Accommodating the learner is, however, just one aspect of the balancing process, and the effect of the accommodation of the learner must be weighed against its effect on the school. The question is whether the exemption would impact negatively on school discipline and would result, ultimately, in a reduction in the quality of education provided. Thus, it should be asked whether the exemption would impose too great a burden on the school.¹⁹⁶ The court in the *Pillay*, case provided useful guidance in determining this by separating the inquiry into its constructive parts, namely: “Is there a legitimate purpose? Does the limitation achieve the purpose? Are less restrictive means available to achieve the purpose?”¹⁹⁷

The court found that discipline as well as education are legitimate goals, but that care should be taken not to generalise the interests of the school. In this case, the wearing of the nose stud

¹⁹⁴ *Pillay* case 2008 (2) BCLR 99 (CC):par 92, 102, 104.

¹⁹⁵ *Pillay* case 2008 (2) BCLR 99 (CC):par 16, 53-54, 62-64, 85-86, 88, 90-91, 95, 144, 157, 161-162.

¹⁹⁶ *Pillay* case 2008 (2) BCLR 99 (CC):par 95-96.

¹⁹⁷ *Pillay* case 2008 (2) BCLR 99 (CC):par 97.

could never outweigh the general importance of ensuring a disciplined school environment.¹⁹⁸ The court thus recognised the importance of school rules and held as follows:

Rules are important to education. Not only do they promote an important sense of discipline in children, they prepare them for the real world which contains even more rules than the schoolyard.¹⁹⁹

However, to defend successfully a decision that an exemption to school rules is not justified, the school will have to prove that, by granting the exemption, there is a real threat that the school will be less disciplined. Alternatively, it should prove that the conduct has already had, or will have, a negative effect on the discipline of others and/or that the academic standards of the school are under threat.²⁰⁰

5.5.5.4 Rights and responsibilities of learners

The Guidelines provide that the code of conduct should not only stress the obligation of the state to provide education, but should also include the responsibilities of parents, learners and educators in realising the right to education.²⁰¹ The code of conduct should stipulate and promote the roles, rights and responsibilities of the various stakeholders in the school with reference to the creation of an environment conducive to proper learning.²⁰² This is particularly important where learners are the victims of criminal activities or misbehaviour.²⁰³

In realising the learners' right to education, the Guidelines further provide that learners have a responsibility to be committed to self-development so as to ensure successful education and learning, in addition to educators' dedication to education and teaching.²⁰⁴ Learners have the responsibility "to learn and develop their full potential" on different levels such as "academic, occupational, social, sport, spiritual, art and cultural" levels.²⁰⁵ This approach is in line with the provisions of the *Children's Act*,²⁰⁶ which provides that:

Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state.

¹⁹⁸ *Pillay case 2008 (2) BCLR 99 (CC)*;par 97-98.

¹⁹⁹ *Pillay case 2008 (2) BCLR 99 (CC)*;par 100.

²⁰⁰ *Pillay case 2008 (2) BCLR 99 (CC)*;par 101, 114.

²⁰¹ GN 776/1998:2.2.

²⁰² See also GN 776/1998:1.10.

²⁰³ *Squelch 2001*:141.

²⁰⁴ GN 776/1998:4.7.4.

²⁰⁵ GN 776/1998:5.5.

²⁰⁶ 38/2005:s 16.

Learners further have a responsibility to participate actively in the learning and decision-making process in their school, and should utilise opportunities to air their problems.²⁰⁷ In the *Pillay* case, the court stressed the importance of learners' responsibility not only to take part in the drafting of school rules, but also to obey school rules and held:

Schools belong to the communities they serve and that ownership implies a responsibility not only to make rules that fit the community, but also to abide by those rules.²⁰⁸

Observing rules is regarded as the "first step towards establishing civility in an institution".²⁰⁹ In addition, in the majority judgment, the court briefly stressed the role of learners in applying for exemptions from the code of conduct, stating that, if learners are old enough, they should be required to explain in writing why they want an exemption.²¹⁰ Judge O' Regan, in the minority concurring judgment, stated that it was unfortunate that the child's voice was not heard in this case, because only the mother had testified. She held:

A fifteen-year-old learner who is seeking an exemption from school rules should as part of a fair exemption process be required to set out in writing or orally her reasons for seeking an exemption. As citizens of a diverse society we need to be able to explain to the other members of society why it is that our cultural practices require protection. An exemption process in a school environment, particularly where one is dealing with learners in their teens, should require learners to take responsibility for the exemptions they are seeking by setting out their reasons for requiring the exemption. Such a process contributes to an enhancement of human dignity and autonomy.²¹¹

The emphasis on learners' responsibilities found in the Guidelines, the *Children's Act*, the Bill of Responsibilities²¹² as well as in this Constitutional Court judgment discussed above, should be highlighted, since there is growing concern that children believe that they only have rights and no responsibilities.²¹³

²⁰⁷ GN 776/1998:5.5.

²⁰⁸ *Pillay* case 2008 (2) BCLR 99 (CC):par 100.

²⁰⁹ *Pillay* case 2008 (2) BCLR 99 (CC):par 184.

²¹⁰ *Pillay* case 2008 (2) BCLR 99 (CC):par 110.

²¹¹ *Pillay* case 2008 (2) BCLR 99 (CC):par 177.

²¹² DBE 2012:101. See the discussion herein in ch 2, par 8.1.5 and ch 5, par 6.2.2.6.

²¹³ Oosthuizen 2006:4; Rossouw 2003:424; SAHRC 2008:22.

5.5.5.5 Enforceability of a code of conduct

The code of conduct is enforceable only as against the learners and not other persons.²¹⁴ While a learner is at school or is attending a school function, a school excursion or any school-related function, the educators have the same rights as a parent to control and discipline the learners.²¹⁵ The educator is thus not only responsible for the safety of the learners, but is also in the same position as the parent and can discipline the learner in accordance with the *in loco parentis* (“in the place of a parent or guardian”) principle.²¹⁶

The *Employment of Educators Act*²¹⁷ contains extensive provisions as to what constitutes misconduct and serious misconduct on the part of educator, as well as procedures for dealing with such misconduct. Although the code of conduct is directed specifically at learners, the Guidelines emphasise the importance of the commitment of all stakeholders to upholding the code of conduct.²¹⁸ Despite this directive, the possibility exists that one set of rules and values may be applicable to educators and another to learners, which can be confusing to learners, who often follow the examples set by adults. The code of conduct is supposed to stipulate the available mechanisms for holding learners accountable for misconduct. Yet, the mechanisms for holding educators accountable are not so well known.²¹⁹ This creates an intolerable situation where educators in a position of authority and power can enforce accountability, but where the learners and parents themselves are not in the same position of being able to insist on accountability on the part of misbehaving educators.

5.5.5.6 Procedural rules

The code of conduct should also indicate the communication channels to be followed, the grievance procedures, and the due-process rules in relation to a disciplinary hearing.²²⁰ The procedural rules pertaining to formal disciplinary proceedings – for instance, relating to cases of serious misconduct – are prescribed in the *Schools Act* and are discussed in detail below.²²¹

²¹⁴ *Schools Act* 84/1996:s 8(1); GN 776/1998:1.9; Rossouw 2007:80.

²¹⁵ GN 776/1998:3.7.

²¹⁶ Roos, Oosthuizen & Smit 2009:126.

²¹⁷ 76/1998.

²¹⁸ GN 776/1998:1.7.

²¹⁹ See discussion in ch 2, par 8.1.2 herein on the ineffective action taken against offending educators.

²²⁰ GN 776/1998:3.4.

²²¹ See par 5.6 below.

5.6 Formal disciplinary proceedings regarding serious misconduct

5.6.1 The nature of formal disciplinary proceedings

The SGB is responsible for conducting disciplinary proceedings in instances of serious misconduct.²²² In determining what constitutes serious misconduct, regard should be had to the definitions of serious misconduct provided in provincial legislation.²²³ Serious misconduct will generally include: trading in test or examination question papers; bribing someone with regard to test or examination question papers; fraud; theft; possession of, consumption of or dealing in any illegal substance or illegal drug; possession of a dangerous weapon; assault; murder; rape; malicious damage to property; continuous disruption of, or threats to disrupt, teaching and learning; continuous infringements of the dignity of others; sexual harassment; public indecency; hate speech; acting in a disgraceful, improper or unbecoming manner; offensive or oppressive behaviour; fighting; falsely identifying oneself; possession of pornographic material; conviction by a criminal court; repeated absence from school; or being under the influence of alcohol.

In the *Antonie* case,²²⁴ schools were warned to take proper notice of what constitutes serious misconduct before steps are taken to expel a learner. A learner can be expelled only if found guilty of serious misconduct. In this case, the court found that the wearing of dreadlocks was not in line with the context of what constitutes serious misconduct in terms of the provincial regulations. The court further found that, even if the learner's growing of dreadlocks can be construed as defiance of authority, it would still be "a far cry from 'serious misconduct'".

The *Schools Act*,²²⁵ in the relevant section, envisages that these disciplinary proceedings will be adversarial in nature, because the terms typically used in an adversarial context are used in the rest of the section. These terms include "witness", "testify", "evidence", "examination, cross-examination and re-examination", "fair hearing", "found guilty", and "appeal against a decision". A provision, similar to that of the *Criminal Procedure Act*,²²⁶ concerning the appointment of an intermediary is also included. This contributes to the impression that these proceedings are very similar to a court case. In view of the fact that disciplinary proceedings are very adversarial in

²²² *Schools Act* 84/1996:9(1), (1A),(1C).

²²³ For example Gauteng Provincial Notice on Misconduct of Learners at Public Schools and Disciplinary Proceedings 6903/2000; Eastern Cape Provincial Notice on Regulations and Rules – Behaviour by Learners in Public Schools Which May Constitute Serious Misconduct, the Disciplinary Proceedings to be Followed and Provisions of Due Process Safeguarding the Interests of the Learner and Any Party Involved in Disciplinary Proceedings 32/1999.

²²⁴ 2002 (4) SA 738 (C):par 19.

²²⁵ 84/1996:s 8(7)-(9).

²²⁶ 51/1977.

nature, the legislator added and refined some protective measures in 2002 and 2007 to assist and protect learners involved in disciplinary proceedings.

5.6.1.1 Due process and the interests of the perpetrator and others

One of the protective measures is included in section 8(5)(a) of the *Schools Act* and provides as follows:

A code of conduct must contain provisions of due process safe-guarding the interests of the *learner* and any other party involved in disciplinary proceedings.²²⁷

“Due process” in this context refers to procedural due process, which deals with the application of fair procedures. In addition, it also includes substantive due process, which relates to the appropriateness and fairness of rules.²²⁸

The process should encourage fairness, reasonableness and justice. The learner should therefore be granted sufficient time and be given sufficient information to prepare for the hearing. Moreover, proper notice should be given to the learner containing information on the complaint, on the date, time and place of the hearing, as well as on the right to representation.²²⁹ Effect should further be given to the general rules of natural justice as well as to the provisions of the Constitution²³⁰ and the *PAJA*²³¹.

The provision also stipulates that the interests of the *learner* and the interests of others involved in the proceedings should be safeguarded. This can thus be interpreted to mean that the interests of the victims of misconduct and of third parties to the misconduct must be safeguarded during the disciplinary proceedings. This provision was not included in the original version of the Act and was only included in the legislation in 2007 by way of the *Education Laws Amendment Act*,²³² which came into force on 31 December. This is clearly a step in the direction of acknowledging the importance of the best interests of all the learners involved in disciplinary proceedings.

²²⁷ *Schools Act* 84/1996:(8)(5)(a).

²²⁸ Joubert & Prinsloo 2008:130.

²²⁹ Oosthuizen 2006:75; Oosthuizen, Smit & Roos 2009:162-165.

²³⁰ 1996:s 33.

²³¹ 3/2003.

²³² 31/2007.

5.6.1.2 Support measures and parental involvement in disciplinary proceedings

Another protective measure is included in section 8(5)(b) of the *Schools Act* and provides as follows:

The code of conduct must also provide for support measures or structures for counselling a *learner* involved in disciplinary proceedings.²³³

The question arises whether the phrase “a *learner* involved in disciplinary proceedings” in section 8(5)(b) refers only to the learner who is accused of misconduct or whether it also includes learners who are victims of, or third parties to, misconduct. It seems as though “a *learner*” refers to the accused learner, because, in section 8(5)(a), reference is made to the “*learner* and any other party involved in disciplinary proceedings”.²³⁴ Thus, a clear distinction is made between the accused *learner* and other parties, since the accused *learner’s* and any other party’s interests must be safeguarded in the disciplinary proceedings. Furthermore, in all the other subsections of section 8, the word “learner” is not in italics, while it is italicised in sections 8(5)(a) and (b). The context of all the other subsections is also indicative of a reference to all the learners in general, while subsection (5) specifically refers to the learner involved in the disciplinary proceedings and is open to the interpretation that is the accused learner being referred to here.

It should be noted that, while section 8(5)(a) prescribes that the *learner* and any other party’s interests must be safeguarded through due process, section 8(5)(b) refers only to a *learner*. It is thus clear that the support measures and counselling structures must be available for the accused learner. These services are not compulsory for the learners who are victims of, or third parties to misconduct, because the subsection does not refer to other parties but to “a” learner only and not to “and any other party involved” as is done in the previous subsection. This confusion is strengthened by the italicisation of the word “learner” in this particular subsection and not the other subsections of section 8.

Another measure to ensure some support for the learner is the legislative prohibition that the SGB is in general not allowed to continue with disciplinary proceedings against a learner unless the learner is accompanied by his or her parent or a person designated by the parent. Proceedings can only continue in the absence of a parent or designated person if the governing

²³³ *Schools Act* 84/1996:s 8(5)(b).

²³⁴ See also par 5.6.1.1 above.

body can show good cause for such a continuation.²³⁵ In this subsection, the word “learner” is not italicised, indicating that any learner, whether the accused or a witness, must be accompanied. The specific role parents are supposed to play, or may play, is not prescribed by law, except that they have to accompany the learner.

5.6.1.3 Role of the intermediary in disciplinary proceedings

The SGB has a discretion to appoint an intermediary, if practicable, to assist a witness under the age of 18 years while such witness testifies at disciplinary proceedings. This will include the accused learner and any other child who is called on to testify. An intermediary may be appointed if the child will be exposed to undue mental stress and suffering while testifying.²³⁶ All the examination, cross-examination or re-examination of a witness must be directed to the witness through the intermediary, except questioning by the governing body.²³⁷ The intermediary may convey the general purport of questions to the witness, unless directed otherwise by the governing body. In addition, the governing body can determine that the evidence will be given in a child-friendly place which is informally arranged so as to put the witness at ease. This will include an arrangement to ensure that any person who might upset the witness will be out of the sight and hearing of the child. On the other hand, the arrangement must be of such a nature that the governing body and any other person whose presence is required at the proceedings will be able to hear the testimony by way of any electronic or other devices.²³⁸ This can be done by using one-way mirrors or closed-circuit television.²³⁹

5.7 Informal disciplinary measures relating to misconduct

Despite the fact that the frequency of less serious misconduct which will not result in suspensions or expulsions from the school is much higher than that of serious misconduct, the legislator has not included any prescriptions in this regard in the *Schools Act*.²⁴⁰ It is consequently in the discretion of the SGB to determine which conduct will be regarded as

²³⁵ *Schools Act 84/1996:s 8(6)*.

²³⁶ *Schools Act 84/1996:s 8(7)*.

²³⁷ *Schools Act 84/1996:s 8(8)*.

²³⁸ *Schools Act 84/1996:s 8(9)*.

²³⁹ Reyneke & Kruger 2006:87-89. These measures are used with success in trials involving child victims of sexual crimes.

²⁴⁰ Joubert & Prinsloo 2001:134-142, 2008:130-136; Rossouw 2007:79-92; Oosthuizen, Smit & Roos 2009:158-172. These commentators on the Act also interpret the Act as referring only to proceedings related to serious misconduct where the SGB is involved in a formal disciplinary hearing. In their explanations of the Act, they focus on the general due-process rules and then the steps to be followed at a disciplinary hearing; thus, how to notify the parties of the proceedings, how to constitute the hearing, the necessity of taking an oath and of minutes of the hearing, the progress of the hearing, and the roles the different parties have to play. See ch 2, par 6.1.3 herein for a discussion of the frequency of serious misconduct and of continuous, low-impact misconduct.

misconduct in the school and what disciplinary actions should be taken to address such misconduct.²⁴¹

5.8 Background to sanctions and consequences of misconduct

Before the Constitution came into force, the use of corporal punishment was legitimate and was regarded as a normal practice in schools. This position changed after the adoption of the Constitution, but it is questionable whether the use of some of the other punitive measures currently applied in schools are in line with constitutional standards. It is therefore important to investigate the prescriptions provided by the Constitutional Court and the legislative response to the abolition of corporal punishment in the Guidelines.

5.8.1 Impact of the Constitution

School discipline is typically authoritarian and punitive in nature.²⁴² The Constitution²⁴³ has undoubtedly had a profound impact on school discipline, and the importance of several human rights is often discussed in this context.²⁴⁴ The enforcement of these rights has introduced a number of legal changes to school discipline. The most significant is the prohibition of corporal punishment.

5.8.2 Prohibition of corporal punishment

In 1995, in *S v Williams*,²⁴⁵ the constitutionality of juvenile whipping was challenged and ultimately found to be unconstitutional, since it was held to infringe on the offender's right to dignity and to constitute a cruel, inhuman and degrading punishment.

The education sector soon followed the precedent set with regard to corporal punishment that was enforced in the public domain and outlawed corporal punishment in schools. The *National Education Policy Act*,²⁴⁶ which provides for the determination of national education policy, came into operation in 1996 and provides as follows:

No person shall administer corporal punishment, or subject a student to psychological or physical abuse at any educational institution.

²⁴¹ See the *Schools Act* 84/1996:s 8(1) on the SGB's responsibility for drafting the code of conduct.

²⁴² See ch 6, par 3 herein for a discussion of retributive discipline.

²⁴³ 1996.

²⁴⁴ See the discussion above in par 3.

²⁴⁵ 1995 (3) SA 632 (CC).

²⁴⁶ 27/1996:s 3(4)(n).

In response, section 10 of the *Schools Act* provides:

- (1) No person may administer corporal punishment at a school to a learner.
- (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.

Despite the national Department's intentions to steer school discipline on a non-violent and constitutionally acceptable path, its efforts were met with resistance.²⁴⁷ The constitutionality of the prohibition of corporal punishment was challenged in *Christian Education SA v Minister of Education* (hereafter "the *Christian Education*" case).²⁴⁸ Christian Education SA claimed that this prohibition was an infringement of religious and cultural freedom, since "corporal correction" of children was a "vital element of the Christian religion". The High Court had, however, found that the legislative provision was not unconstitutional.²⁴⁹

Christian Education SA then appealed to the Constitutional Court, which held that: although the restriction on corporal punishment was not in line with the religious beliefs of the parents concerned, the court still had a duty to promote respect for the dignity and physical and emotional integrity of all children,²⁵⁰ that language, culture and religion cannot shield practices that are unconstitutional;²⁵¹ that an exemption, even on religious grounds, would not be in line with the equality clause,²⁵² that upholding corporal punishment would disturb the symbolic, moral and pedagogical purpose of the prohibitive measure²⁵³ and would undermine the state's duty to protect people from violence.²⁵⁴

The prohibition of corporal punishment, stated the court, is designed to transform national civic consciousness in a major way. In this regard, it held that the broad community has an interest in reducing violence wherever possible and in taking active steps to protect children from harm.²⁵⁵

²⁴⁷ See also ch 2, par 5.1.1.1.1.1 herein on the existing prevalence of corporal punishment in schools despite the prohibition.

²⁴⁸ *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC). The applicant was an association representing 196 independent schools which maintained "an active Christian ethos by providing an environment where their learners [could] learn in keeping with their Christian faith".

²⁴⁹ *Christian Education SA v Minister of Education* 1999 (4) SA 1092 (SE).

²⁵⁰ *Christian Education* case 2000 (4) SA 757 (CC):par 15, 43-46.

²⁵¹ *Christian Education* case 2000 (4) SA 757 (CC):par 25.

²⁵² *Christian Education* case 2000 (4) SA 757 (CC):par 42.

²⁵³ *Christian Education* case 2000 (4) SA 757 (CC):par 42, 50.

²⁵⁴ *Christian Education* case 2000 (4) SA 757 (CC):par 40, 47.

²⁵⁵ *Christian Education* case 2000 (4) SA 757 (CC):par 15.

In addition, it considered the best interests of the child to be of paramount importance. Parents' religious beliefs, it said, could not limit children's best interests, and, if parents' beliefs are not in the child's best interests, the child should be protected, even if this means infringing the parents' religious beliefs.²⁵⁶

The need to transform the education system with regard to discipline was highlighted by the court, which held:

[T]he prohibition of corporal punishment is part and parcel of a national programme to transform the education system to bring it in line with the letter and spirit of the constitution. The creation of uniform standards for all schools, whether public or independent, is crucial for educational development. A coherent and principled system of discipline is integral to such development.²⁵⁷

... Parliament wished to make a radical break with an authoritarian past. As part of its pedagogical mission, the Department sought to introduce new principles of learning in terms of which problems were solved through reason rather than force. In order to put the child at the centre of the school and to protect the learner from physical and emotional abuse, the Legislature prescribed a blanket ban on corporal punishment.²⁵⁸

The court also held:

The outlawing of physical punishment in the school ... represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.²⁵⁹

The Constitution obliges the departments of education and educators to evaluate existing practices and to bring these in line with the new constitutional dispensation, with a clear focus on the physical and emotional integrity of the learner. Furthermore, the court drew attention to the fact that the pedagogical purpose of discipline should be kept in mind in the methods applied. It is thus clear that there should be a proper alignment between the disciplinary measures applied and the educational outcome one seeks to achieve.

²⁵⁶ *Christian Education* case 2000 (4) SA 757 (CC):par 41.

²⁵⁷ *Christian Education* case 2000 (4) SA 757 (CC):par 39.

²⁵⁸ *Christian Education* case 2000 (4) SA 757 (CC):par 50.

²⁵⁹ *Christian Education* case 2000 (4) SA 757 (CC):par 50.

The court referred to past practices where protesting youths were met with force and not reason, and to the extent of child abuse in society, and emphasised that the state has a duty to change this situation.²⁶⁰ It highlighted the importance of using reason in maintaining discipline as opposed to the punitive application of force. The above-mentioned quotations contain laudable objectives indeed. The question, however, remains whether these objectives have taken root in legislation and policies and whether they are in fact being implemented.

5.8.3 Provisions of the Guidelines

In addition to the provisions of the *Schools Act* discussed above, SGBs have the Guidelines provided by the former national Department of Education for adopting a code of conduct. In what follows, the Guidelines will be scrutinised to determine whether, and to what extent, the ideals set out in the *Christian Education* case have found application in these Guidelines. It should be noted that the Guidelines were included in the legal framework in 1998, while this case was heard only in 2000. However, no amendments have been made to the Guidelines since then.

5.8.3.1 Punishment as opposed to the educational purpose of discipline

Despite a few references in the Guidelines to positive discipline,²⁶¹ the fact that discipline should be educative and developmental in nature rather than punitive,²⁶² and that corporal punishment is prohibited,²⁶³ the Guidelines still focus primarily on punishment, although the word “punishment” is sometimes replaced by “corrective measure”.²⁶⁴ The term “corrective measure” could possibly be interpreted as having a wider meaning than mere punishment and could include corrective educational steps to develop the child. However, in the context of the Guidelines, this is not the overarching impression created by the term “corrective measure”. Examples from the Guidelines follow to illustrate the predominant focus on punishment in order to maintain discipline, rather than on developing the learner in the process.

- 3.5 Learners must understand that action can be taken against them if they contravene the Code of Conduct. When action is taken against learners they should be informed why their conduct is considered as misbehaviour or

²⁶⁰ *Christian Education* case 2000 (4) SA 757 (CC):par 49.

²⁶¹ GN 776/1998:1.4, 1.6.

²⁶² GN 776/1998:1.4, 1.6, 1.8, 7.2.

²⁶³ GN 776/1998:8.2.

²⁶⁴ References to punishment found in GN 776/1998:3.5, 4.7.3.

misconduct and why they are to be disciplined or punished. The punishment must suit the offence.²⁶⁵

Although the provision attempts to convey the message of educating the learner in the process, the punitive connotation and authoritarian undertone remain. Phrases such as “must understand” and “action can be taken against them” are indicative of a power-driven relationship. Another strong word, “offence”, is used to describe misconduct, highlighting the disdain with which children’s conduct is perceived. In another paragraph, the term “corrective measure” is, for example, used in the context of punishment:

7.6 Any corrective measures or disciplinary action must be commensurate with the offence/infraction. *Corrective measures may become more severe with subsequent repeated infractions.* Suspensions or expulsion may follow. Learners should not think that they cannot be suspended or expelled simply because it is their first offence or infractions of a rule or policy, but such decisions should be taken by the right authority.²⁶⁶

The emphasised part of the provision indicates that “corrective measures” are to be used in a narrow sense, synonymous with that of punishment, which may become more severe if the learner continues to disobey the rules and which can ultimately result in the most extreme forms of punishment, namely suspensions and expulsions. In considering the formulation of these Guidelines, for instance “learners should not think...”, a clear, authoritarian undertone can be detected. Again, strong words such as “offence” and “infractions” are used. This trend continues in paragraph 8, which provides:

8. PUNISHMENT

8.1 Punishment is a corrective measure or a penalty inflicted on an offender who has to suffer the consequences of misconduct in order to maintain the orderly society of the school.²⁶⁷

In providing a definition for the term “corrective measure”, the primary impression created is that the aim of the corrective measure is not to correct the inappropriate behaviour, but rather to make the learner *suffer* because he or she has misbehaved. Misbehaving learners are also called “offenders”, which gives the impression that these learners are basically criminals who should be punished, and not children who should be educated and guided towards appropriate

²⁶⁵ GN 776/1998:3.5.

²⁶⁶ GN 776/1998:7.6. [My emphasis]

²⁶⁷ GN 776/1998:8.1.

behaviour. The inappropriateness of referring to transgressing learners as “offenders” is further highlighted by the fact that not all misconduct constitutes a crime. The next paragraph, though, prohibits corporal punishment:

8.2 Corporal punishment shall not be administered.²⁶⁸

The former national Department of Education published a booklet, *Alternatives to Corporal Punishment: the Learning Experience*, which was distributed to educators after the abolition of corporal punishment. According to the Department’s definition in the booklet, corporal punishment is:

[a]ny deliberate act against a child that inflicts pain or physical discomfort to punish or contain him/her. This includes, but is not limited to, spanking, slapping, pinching, paddling or hitting a child with a hand or with an object; denying or restricting a child’s use of the toilet; denying meals, drink, heat and shelter, pushing or pulling a child with force, forcing the child to do exercise.²⁶⁹

Read together with 8.2 above, the impression is created that any conduct that makes the learner suffer the consequences of misconduct, but which does not fall within the ambit of the definition of corporal punishment, will be acceptable. The focus of this definition is on physical pain only, and no reference is made to any form of psychological harm that the child may be exposed to, such as sarcasm, name-calling or belittling.

The following paragraph of the Guidelines is intended to give guidance on alternatives to corporal punishment:

10. PREVENTION, PROACTIVE ADVICE, COUNSELLING, PENALTIES AND CORRECTIVE MEASURES

10.1 In case of minor offences corrective measures may be applied. These measures could include one or more of the following:

- a. verbal warning or written reprimand by an educator or a principal;
- b. supervised school work that will contribute to the learner’s progress at school, the improvement of the school environment, provided that the parents are timeously informed and the security of the child is assured;
- c. performing tasks that would assist the offended person;
- d. agreed affordable compensation;

²⁶⁸ GN 776/1998:8.2.

²⁶⁹ DoE 2000:6.

- e. replacement of damaged property; and
- f. suspension from some school activities, e.g. sport, cultural activities.²⁷⁰

10.2 Suspension should only be considered after every effort has been made to correct the behaviour of the learner.²⁷¹

Despite the heading indicating alternative disciplinary measures such as prevention, proactive advice and counselling, the provision in the end deals only with corrective measures, which are all punitive in nature. This again illustrates the drafters' inclination towards punishment.

Taking the context of the Guidelines into account, it seems as though paragraph 10.2 dealing with suspensions is open to the interpretation that every other possible form of punishment should have been tried before a learner can be suspended. Nothing explicit is mentioned about counselling to help the learner deal with the problem.

More emphasis could have been given in paragraph 10.1 to the promotion of preventative measures, to proactive advice and to counselling, especially if one considers the very authoritarian and punitive history of the education system up until that time. It should also be remembered that the Guidelines were published in 1998, a mere two years after the new Constitution came into operation. In view of the authoritarian history of schools up until then, the Guidelines and legislation should have been much more directive in nature so as to properly guide schools away from a punitive system towards a system more compatible with constitutional rights and values. Special attention should have, for instance, been given to guidelines and legislation on a disciplinary system in line with the right to education and with the best interests of the child.

In addition, even first-time transgressors are at risk of being suspended or expelled as a punitive measure:

The governing body may suspend a learner as a punitive measure if due process has been followed.²⁷²

The *Schools Act* also provides, in section 9(1)(a), that a child may be suspended "as a precautionary measure" before the disciplinary hearing, and as a sanction after the disciplinary

²⁷⁰ GN 776/1998:10.1.

²⁷¹ GN 776/1998:10.2.

²⁷² GN 776/1998:4.7.3.

hearing.²⁷³ A previous version of the *Schools Act* provided that a learner could be suspended as a “correctional measure”. This was changed in 2005.²⁷⁴

Currently, neither the Guidelines nor the *Schools Act* explicitly states that one of the aims of suspension or expulsion is to provide the child with an opportunity to be developed and to gain the necessary skills to refrain from the unacceptable behaviour in future. This narrow approach can lead to anomalies such as suspending the learner as punishment for not attending school regularly, or suspending the learner for assaulting another child at school, as punishment, without addressing the root causes of the misconduct.

5.8.3.2 Positive discipline

The Guidelines prescribe positive discipline:

- 1.4 ...The main focus of the Code of Conduct must be positive discipline; it must not be punitive and punishment orientated but facilitate constructive learning.²⁷⁵
- 1.6 The purpose of a Code of Conduct is to promote positive discipline, self-discipline and exemplary conduct, as learners learn by observation and experience.²⁷⁶

Yet, as was pointed out above, on more than one occasion the use of corrective measures or punitive measures is permitted. It seems as though the drafters are contradicting themselves by commending positive discipline, but not providing any description of what positive discipline entails, and of what is, and is not, permitted.²⁷⁷

Schools and SGBs therefore have to provide their own content for the term. Not only can this lead to different interpretations, but there is also the risk that content which is irreconcilable with constitutional rights and values can be created. One of the possible interpretations is that “positive discipline” means prevention strategies and the employment of an acceptable form of punishment. Yet, the constitutionality of other forms of punishment, such as detention, exclusion from class, and doing work as punishment has as yet not been tested.²⁷⁸

²⁷³ *Schools Act 84/1996*:(1C)(a).

²⁷⁴ *Education Laws Amendment Act 24/2005*:s 2.

²⁷⁵ GN 776/1998:1.4.

²⁷⁶ GN 776/1998:1.6.

²⁷⁷ See ch 6, par herein 6 for a detailed discussion on the lack of a definition of positive discipline.

²⁷⁸ See also ch 6 herein for a discussion on the different approaches to discipline and ch 7 herein for an evaluation of the different approaches to discipline.

The same lack of guidance as to what positive discipline entails is also to be found in international law in General Comment 13 on the Implementation of the International Covenant on Economic, Social and Cultural Rights,²⁷⁹ which provides as follows under the heading, "Discipline in schools":

In the Committee's view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual. Other aspects of school discipline may also be inconsistent with human dignity, such as public humiliation. Nor should any form of discipline breach other rights under the Covenant, such as the right to food. A State party is required to take measures to ensure that the discipline which is inconsistent with the Covenant does not occur in any public or private educational institution within its jurisdiction. The Committee welcomes initiatives taken by States parties which actively encourage schools to introduce "positive", non-violent approaches to school discipline.

In addition to failing to provide proper guidance on what positive discipline and discipline in the human rights context entail in practice, the Comment also fails to explicitly link school discipline with the development of the child and with the fact that such discipline primarily entails a teaching and learning process.²⁸⁰

5.8.3.3 Reconciliation, peace and tolerance

The Guidelines provide as follows with regard to reconciliation, peace and tolerance:

- 2.3 The preamble should direct the Code of Conduct towards a culture of reconciliation, teaching, learning and mutual respect and the establishment of a culture of tolerance and peace in all schools.²⁸¹

- 4.4.1 Every learner has a right not to be treated in a cruel, inhuman, degrading manner. Corporal punishment has been abolished. Educators and learners have to learn the importance of mediation and co-operation, to seek and negotiate non-violent solutions to conflict and differences and to make use of due process law.²⁸²

Although reconciliation, respect, peace and tolerance are mentioned as the direction the code of conduct is supposed to follow, the Guidelines provides no insight into how this should be

²⁷⁹ CESCR 1999a General Comment 13:par 41.

²⁸⁰ See definition used in this thesis in ch 2, par 3.1.

²⁸¹ GN 776/1998:2.3.

²⁸² GN 776/1998:4.4.1.

done in schools. SGBs are thus left in the dark to find their own solutions in order to steer the school towards reconciliation, respect, tolerance and peace as far as discipline in the school is concerned. On the other hand, specific examples are provided of acceptable forms of punishment.

5.8.3.4 Discipline and the development of the child

The Guidelines provide that constitutional rights and values should be reflected in the code of conduct, including the right to education:

- 4.7.5 The right to education includes the right to attend all classes, to learn and be taught in all approved subjects, to be informed regularly about school progress, to make use of all school facilities, and to have the potential of all learners fully developed.²⁸³

In this regard, the responsibilities of learners are also stressed:

- 5.5 Learners have the responsibility to learn and develop their full potential, i.e. academic, occupational, social, sport, spiritual, art and cultural potential. They should actively participate in the learning process and decision making and have the opportunity to talk about their problems.²⁸⁴

Although it is clear that learners' full potential should be developed, including through the way that they are disciplined, the Guidelines are silent on how this should be achieved. The Guidelines only state:

- 7.2 The disciplinary process must be expeditious, fair, just, corrective, consistent and educative. Where possible the parent should be informed and involved in the correction of the learner's behaviour. Learners should be protected from abuse by adults or other learners.²⁸⁵

This gives rise to the question: What is the difference between corrective discipline and educative discipline? Again, it seems that the term "corrective discipline" might have a rather punitive element to as opposed to being part of an educative process. The Guidelines further state that every educator is responsible for discipline at the school and for school-related activities, and that educators have the authority and responsibility to "correct the behaviour of

²⁸³ GN 776/1998:4.7.5.

²⁸⁴ GN 776/1998:5.5.

²⁸⁵ GN 776/1998:7.2.

learners wherever such correction is necessary”.²⁸⁶ Furthermore, the “corrective measure or disciplinary action” must be proportionate with the offence.²⁸⁷ It must also be kept in mind that there are some who regard punishment as educational, because, according to them, it teaches children to behave properly.²⁸⁸

The provision on the proportionality of punishment for a transgression creates another challenge. In the absence of any guidance as to what will be proportional, the educator has an almost unfettered discretion as to what he or she perceives to be proportional. The lack of guidance on what constitutes proportional punishment also makes it difficult to evaluate the fairness and appropriateness of punishment after the fact, especially if the punishment is not clearly an infringement of human rights.

Although reference is made to the development of the child’s full potential in the Guidelines, no direction is provided as to how to implement discipline in schools without reverting to punishment as the default position for misconduct, and as to how to develop the child’s full potential in the disciplinary process.

Corporal punishment and other unacceptable measures are still administered in many schools and the negative effect of these has been recorded.²⁸⁹ It is unlikely that children will be in a position to develop their full potential if they are exposed to these types of disciplinary measures. Porteus, Vally and Ruth²⁹⁰ point out that:

[c]orporal punishment most often masks the “heart of the problem”. The large majority of behavioural problems in children are rooted *in the practical problems faced by these children*. These are often problems relating to their life circumstances – learning difficulties, problems at home, victimisation and trauma, and feelings of being misunderstood. There may be problems relating to the classroom – the relevance of the curriculum, boredom, the pace of teaching, other learners and the teaching method. By resorting to a behavioural “quick fix” we often miss the opportunity to uncover and address the “heart” of the problem.

Thus, although the Guidelines provide that the learner’s full potential should be developed, the disciplinary measures applied by many educators are not conducive to attaining this goal.

²⁸⁶ GN 776/1998:7.5.

²⁸⁷ GN 776/1998:7.6.

²⁸⁸ See the discussion in ch2, par 3.3 herein on the distinction between punishment and discipline.

²⁸⁹ See ch 2, par 5.1.1.1.1, 7.2 herein.

²⁹⁰ Porteus, Vally & Ruth 2001:11.

5.9 Sanctions for, and consequences of, misconduct after formal disciplinary proceedings

Apart from suspending a learner or recommending his or her expulsion, the SGB can impose any other suitable sanction contemplated in the code of conduct after a formal disciplinary hearing.²⁹¹ In what follows, the legislative provisions and relevant case law with regard to suspensions and expulsions will be discussed.

5.9.1 Suspensions

The original 1996 version of the *Schools Act* provided that, as a correctional measure, an SGB could, for serious misconduct and after a fair hearing, suspend a learner from attending school for a maximum period of one week.²⁹² The legislation did not indicate what was considered to be a "correctional measure". In addition, a learner could be suspended pending a decision of the HoD on the expulsion of the learner, but only in consultation with the HoD. These provisions, which were subject to any applicable provincial law, were amended after judgment was handed down in *Maritzburg College v Dlamini NO and Others*.²⁹³ In this instance, the school recommended the expulsion of two learners and suspended the learners pending the decision of the HoD. The HoD, however, failed, for more than two months, to consult with the SGB on the suspension of the learners pending his decision on the expulsion. He then confirmed the expulsion, but claimed that the school had acted unlawfully in suspending the learners and that the school had failed to consult with him. The court, however, found that the school was not at fault, since it had made numerous efforts to try to consult with the HoD, but he was unwilling to consult with it. His claim that it was unreasonable for the school to expect him to make a decision within two months was found to be totally unreasonable, since his conduct:

not only ignores the obligations on the Governing Bodies to maintain discipline and good standards at schools, but more importantly disregards the rights of the pupils who stand in the shadow of expulsion. They have a right to know expeditiously whether they are going to be expelled so that they may be taken up in another school.²⁹⁴

The school in question also highlighted a history of similar problems with the Department, indicating that it had sometimes waited for decisions on expulsions for up to 21 months. The HoD had also failed to take cognisance of provincial legislation which actually prevailed over the *Schools Act*. Such provincial legislation explicitly provided that the SGB was at liberty to

²⁹¹ *Schools Act* 84/1996:s 9(1C)(a), (b).

²⁹² *Schools Act* 84/1996:s 9(1)(a); GN 776/1998:12.1.

²⁹³ [2005] JOL 15075 (N).

²⁹⁴ *Maritzburg College v Dlamini NO and Others* [2005] JOL 15075 (N):18.

suspend the learner pending the expulsion decision. The HoD preferred to ignore this provision *in toto*. The displeasure of the court with the HoD's attitude was followed by a punitive cost order and the court warned that, if public servants failed to carry out their duties, they should be held liable for the costs in their personal capacity.²⁹⁵

It is clear from the attitude of the HoD and the Department that the interests of the school, the SGB and suspended learners were not a concern, let alone being of paramount importance. It was therefore necessary for the national legislator to amend the *Schools Act*.²⁹⁶

The provision now provides that the SGB can suspend a learner, on reasonable grounds, as a precautionary measure pending disciplinary proceedings for serious misconduct. The learner can only be suspended after he or she has been afforded a reasonable opportunity to make representations with regard to such a suspension.²⁹⁷ The Guidelines, however, still provide that the SGB may suspend a learner as a "punitive measure", on condition that there has been due process.²⁹⁸

In addition, the disciplinary proceedings must be conducted within seven school days of the precautionary suspension, failing which the SGB must obtain the permission of the HoD for the continuation of the suspension.²⁹⁹ The amendment also repealed the original provision that the provisions of the *Schools Act* were subject to provincial legislation.

If the learner is found guilty at the subsequent disciplinary proceedings on a charge of serious misconduct, the SGB may, as a punitive sanction, suspend the learner for a maximum period of seven school days or may impose any other sanction provided for in the code of conduct of the particular school.³⁰⁰ If the SGB is of the opinion that the transgression is of such a serious nature that it warrants an expulsion, it can make a recommendation to the HoD to expel the learner from the school.³⁰¹ The HoD must decide on the expulsion of the learner within 14 days of receiving the recommendation in this regard from the SGB. The SGB may suspend the

²⁹⁵ *Maritzburg College v Dlamini NO and Others* [2005] JOL 15075 (N):19.

²⁹⁶ The legislative provision was amended in 2005 by the Education Laws Amendment Act 24/2005:s 2 which came into operation on 26 January 2006.

²⁹⁷ *Schools Act* 84/1996:s 9(1).

²⁹⁸ GN 776/1998:4.7.3.

²⁹⁹ *Schools Act* 84/1996:s 9(1A), (1B).

³⁰⁰ *Schools Act* 84/1996:s 9(1C)(a).

³⁰¹ *Schools Act* 84/1996:s 9(1C)(b).

learner or may extend the precautionary suspension for a maximum of 14 days pending the decision of the HoD.³⁰²

5.9.2 Expulsions

As mentioned above, the provisions regarding expulsions were also amended and specific time limits were included.³⁰³ The HoD now has to consider, and make a decision on, the recommendation of the SGB with regard to the expulsion of a learner within 14 days of receiving the recommendation.³⁰⁴ The legislation again does not stipulate what procedures should be followed if the HoD does not respond within 14 days. Consequently, the implications of section 9(1) and (2) of the *Schools Act*³⁰⁵ are that the school will have to accommodate the learner again after the 14 days have expired.

A learner can thus only be expelled from a public school by the HoD after such learner has been found guilty of serious misconduct at a disciplinary hearing which complies with the legal requirements set out in this regard.³⁰⁶ An expelled learner, or parent of the learner, can appeal to the MEC, within 14 days of receiving the notice of expulsion.³⁰⁷

If an expelled learner is subjected to compulsory school attendance, the HoD must make an alternative arrangement for the placement of the learner in another public school.³⁰⁸ The HoD is also responsible for alternative education pending an appeal decision if the learner or parent has decided to appeal to the MEC.³⁰⁹ In determining a suitable alternative placement, the HoD must take reasonable measures to protect the rights of the other learners and may consider an alternative method of providing education for the expelled learner.³¹⁰ Placement options in an alternative school setting in instances of expulsions include: reassignment to another class, correctional education under supervision after school hours,³¹¹ and a special school for learners with behavioural disorders. These options may be considered in conjunction with a psychologist or a social worker.³¹²

³⁰² *Schools Act 84/1996:s 9(1E).*

³⁰³ *Education Laws Amendment Act 24/2005:s 2(a).*

³⁰⁴ *Schools Act 84/1996:9(1D).*

³⁰⁵ 84/1996.

³⁰⁶ *Schools Act 84/1996:s 9(2)* amended by Act 24/2005:s 2(a), (b); see also *Schools Act 84/1996:s 8* on the legal requirements.

³⁰⁷ *Schools Act 84/1996:s 9(4).*

³⁰⁸ *Schools Act 84/1996:s 9(5).*

³⁰⁹ *Schools Act 84/1996:s 9(6).*

³¹⁰ *Schools Act 84/1996:s 9(7).* Access to education thus includes alternative methods of providing education.

³¹¹ This term is not defined in the Guidelines and can possibly mean additional classes in order to catch up.

³¹² GN 776/1998:4.7.3.

If the HoD decides not to confirm the recommendation of the SGB to expel a learner, he or she can, after consultation with the SGB, impose a suitable sanction.³¹³ The SGB is obliged to impose this sanction.³¹⁴ Alternatively, the HoD can refer the matter back to the SGB to impose an alternative sanction, excluding expulsion.³¹⁵

Apart from HoDs not recognising the importance of speedy decisions on expulsions, schools are also faced with HoDs unduly refusing to expel learners. Current trends regarding expulsions in schools have created the perception that HoDs are unwilling to assist schools in maintaining discipline, because they frequently refuse to confirm the expulsions recommended by SGBs. Some schools have therefore approached the courts to review the decisions of HoDs not to expel learners, and, in all instances, have been successful.³¹⁶

In 1999, in *Pearson High School v Head of Department, Eastern Cape Province, and Others*,³¹⁷ the SGB found a learner guilty of buying marijuana on school premises and recommended his expulsion. Less than three months earlier, he had also committed another serious offence and had been asked to leave the school, but, after a commitment that he would cooperate and respect the ethos of the school, was granted another chance. More than two months after the SGB's recommendation to expel the learner for the second offence, the HoD refused to expel him. The MEC overturned the HoD's decision, but the SGB still approached the court to set the HoD's decision aside, because the legislation did not make provision for the setting aside of decisions by the MEC, but only for appeals to the MEC.

The court found that the HoD had not applied his mind to the matter, because he was of the opinion that, since the learner had not smoked the marijuana on school premises, the transgression was not so serious and that the staff had the necessary skills to deal with learners with drug problems. The Department did not defend the matter and the court found that the HoD had confused the facts of the case by finding that there was no smoking of marijuana, while there was indeed smoking of the drug on the premises. In addition, the school's ideal not to allow drugs on the premises was, said the court, valid and it was therefore improper to indirectly

³¹³ *Schools Act 84/1996:s 9(8)*.

³¹⁴ *Schools Act 84/1996:s 9(10)*.

³¹⁵ *Schools Act 84/1996:s 9(9)*.

³¹⁶ See the discussion in par 5.9.1 above. *Maritzburg College v Dlamini and Others* [2005] JOL 15075 N; *Pearson High School v Head of Department, Eastern Cape Province, and Others* [1999] JOL 5517 (Ck); *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government, and Others* – Eastern Cape Provincial Division: unreported case 454/08; *St Michaels School for Girls and Others v The Head of the Free State Education Department and Others* – Free State Provincial Division: unreported case 5597/2008.

³¹⁷ [1999] JOL 5517 (Ck).

allow drugs at the school and then expect the educators to deal with the problem. It was thus clear, in the court's opinion, that the HoD had not properly applied his mind to the matter and the decision was thus set aside. The HoD's assumption that educators do have the necessary skills to deal with learners with drug problems is also in sharp contrast to findings that educators are not properly trained to deal with disciplinary matters.³¹⁸

In 2008, in *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government, and Others* ("Queens College case"),³¹⁹ the school also approached the court to review the HoD's failure to expel learners. It should be noted that this case dealt with incidents that happened after the 2005 amendments of the *Schools Act* came into operation.

The four incidents concerned occurred within the space of a month, and every case was dealt with individually, with its own disciplinary proceedings and recommendations to the HoD. The incidents involved: the use of liquor at a sports derby at another school; gross insubordination and conduct which portrayed "absolute insolence and disrespect" towards the principal in town and before other learners and the public; the use of alcohol at the hostel; and the smoking of marijuana at the school residence. Some of the learners were involved in more than one incident, and some had a poor disciplinary record at the school and had been suspended on previous occasions. In other instances, it was the learners' first transgression.

In justifying her decisions to refuse the expulsions, the following themes were repeated in the HoD's reasons: expulsion would infringe on the learners' rights to education; expulsion was very harsh and should be used only as a last resort; there was a duty on the school to rehabilitate the learners and not to punish them; counselling and parental involvement were necessary; the incidents did not happen on school premises/happened at an extra-curricular activity; the incidents had not disrupted the education process; the incidents did not endanger the safety of other learners; and the incidents were not so serious.

In one of the instances, she provided her reasons within three weeks, but, in case of the other three instances, it took her more than three months to make a decision, and this despite the legislative requirement that decisions should be made within 14 days.

³¹⁸ See ch 2, par 8.1.4 herein.

³¹⁹ Eastern Cape Provincial Division: unreported case 454/08.

The court found that, although the reasons provided by the HoD might, when viewed individually, justify the arguments presented by the applicant, a more reasonable reading of the reasons was possible, taking the context into account.³²⁰ The court also highlighted the fact that the court's task was not to determine whether the best, wisest or correct decision had been taken by the HoD, but merely to determine whether the decision had been in line with that of a "reasonable decision-maker". Therefore, on the basis of the more reasonable reading provided by the court, it found that the decision not to expel the learners for the consumption of liquor at a sports derby at another school had been reasonable.³²¹

However, since all the incidents had happened within a month, and because the school had written a letter to the HoD concerning the dissatisfaction of parents with the state of discipline at the school, she was well aware of the fact that discipline was deteriorating at the school and that it was experiencing difficulty in curbing the trend. The SGB had further requested an interview with her, but she did not respond.

Therefore, in view of this, the court found that a less critical reading of the reasons became more difficult to justify, taking into account that the HoD was at this stage aware of the disciplinary problems at the school. When the HoD had received the first recommendation, it could be argued that she had acted reasonably in urging the SGB to use less extreme sanctions. However, as far as the last three recommendations of expulsion were concerned, the same reasons put forward by her became less rational.³²²

The court therefore found that, in the last three instances, there were sufficient grounds for review. Firstly, the HoD had failed to explicitly address the concerns of the SGB that, at least in its mind, her refusal of the expulsions was undermining the school's ethos of discipline and respect, and, further, had not indicated this concern of the SGB in her court papers.³²³ Secondly, said the court, if the availability of support measures and structures, as prescribed by section (5)(b) of the *Schools Act*³²⁴ was a real concern, she should have enquired about these.³²⁵ She had, however, failed to obtain the necessary information regarding the school's rehabilitation programmes and had made her decision without this knowledge.³²⁶ Thirdly, she had not reacted to the SGB's request for a meeting. This fact, the court indicated, should also be viewed in

³²⁰ *Queens College* case 454/08:par 22.

³²¹ *Queens College* case 454/08:par 22.

³²² *Queens College* case 454/08:par 28.

³²³ *Queens College* case 454/08:par 28.

³²⁴ 84/1996.

³²⁵ *Queens College* case 454/08:par 28.

³²⁶ *Queens College* case 454/08:par 28, 30.

conjunction with her failure to address, in the court papers, the school's concerns about the deteriorating discipline. Fourthly, she had delayed her decisions on the expulsions in the last three instances for about three months, despite legislative provisions prescribing a response within 14 days.³²⁷

The court consequently found that these factors were indicative of a failure to take a legitimate factor into account and of a failure on the part of the HoD to properly apply her mind to the matters, with the result that she had failed to make a reasonable and rational decision. Therefore, the last three incidents were open for review.

The court continued and highlighted the fact that, in the marijuana incident, the HoD had been guilty of an irrational decision or, even worse, had found that smoking of marijuana did not constitute serious misconduct, despite the regulations explicitly determining that the possession or use of drugs constituted serious misconduct in the *Schools Act* regulating search and seizure procedures in respect of drugs.³²⁸

The court reminded schools and the Department that they had a mutual responsibility to govern schools in partnership with each other. The governance of schools included the maintenance of discipline, which also included expulsions in instances of serious misconduct. Further, the court warned that a proper balance should be struck. Therefore, on the one hand, the school should consider rehabilitative options, even for serious misconduct, but, on the other hand, the HoD had a responsibility to give due regard to the fact that expulsion is an appropriate sanction in order to maintain discipline in instances of serious misconduct. The court therefore held that the HoD's failure to give due regard to expulsion as a legitimate sanction for serious misconduct and her failure to consider the negative effect of the refusal of a recommendation to expel a learner in a progressively worsening disciplinary situation might nullify a decision not to expel. In this instance, the HoD had failed in these material respects and had therefore acted unlawfully. Consequently, the refusal to expel the said learners was set aside. Although the court did not award punitive costs, it awarded the applicant costs that included the costs of two counsel.

In evaluating the judgment, the following issues arise. Firstly, no reference was made to the best interests of the child. Although the best interests of the child are a constitutional right, the HoD only referred to the infringement of the learners' right to education.

³²⁷ *Queens College* case 454/08:par 29.

³²⁸ *Schools Act* 84/1996:s 8A.

Secondly, the HoD adopted a very narrow interpretation of what this right to education entails. For instance, she overlooked the fact that the expulsion of a learner does not imply that the learner cannot attend any other school, but only implies that the learner cannot return to a particular school. If the learner is of compulsory school-going age, then it is up to the HoD to ensure that the learner is placed in another public school.³²⁹ If not of school-going age, the learner will be allowed to find an alternative school on his or her own. In addition, the Constitution provides that a learner has the right to basic education, not a right to have access to a particular public school. Since there are other modes of delivering education, such as home schooling,³³⁰ distance learning through the internet, private schools and colleges, the question arises whether the learner's right to education should play such a prominent role in the decision to expel or not. However, it would then be necessary to determine the content of the right to basic education in the South African socio-economic context as far as children of compulsory school-going age are concerned.³³¹ In addition, the right to continued and uninterrupted education of other children should also be considered. Although expulsions are an extreme measure for dealing with misconduct, one should be careful not to overemphasise the right to education to the detriment of overall discipline in a school.

Thirdly, the HoD's claim of protecting the right to education of learners by refusing expulsion is especially unconvincing in urban areas where there are numerous schools in relatively close proximity. It rather seems as though the HoD might have been using the learner's right to education as a smoke screen to avoid the responsibility of finding the expelled learner an alternative placement. This highlights the lack of consideration for the interests of the school and other learners in particular. The prudence of the provision of burdening the HoD with the responsibility to find alternative placement for expelled learners therefore comes to the fore. The role of parents in finding an alternative placement for their children should be explored, with a possible added support function on the part of HoDs to assist parents in this endeavour.

Fourthly, it seems as though the HoD had a very narrow interpretation of what education entails. The impression created is that she only considered what happens in the classroom, on school premises and during school hours as part of the education of learners.³³² Her claim that

³²⁹ *Schools Act 84/1996:s 9(5); GN 776/1998:4.7.2.* The Guidelines remind SGBs that the learner's right to education cannot be taken away when the learner is expelled from school.

³³⁰ The *Schools Act 84/1996:s 3* provides that every child of compulsory school-going age must attend a school. However, parents can apply to the HoD for permission to home-school a child – see *Schools Act 84/1996:s 51*.

³³¹ See ch 5, par 2 herein for a discussion on the right to education.

³³² In the first case involving the consumption of alcohol at a sports derby, she found, *inter alia*, that “the incident occurred at an extra-curricular activity and did not disrupt the education process or [endanger] the

the forms of serious misconduct concerned did not disrupt education or schooling was also not in line with the legislative provision, which clearly defines school activity as:

any official educational, cultural, recreational or social activity of the school within or outside the school premises.³³³

The legislator has thus given a very wide interpretation to school activities, while the HoD apparently wanted to limit these to ostensibly academic activities on the school premises, since she was of the opinion that the activities at the school sports derby at another school “did not disrupt the education process”.

Fifthly, it seems as though the HoD also gave a narrow interpretation to what would constitute danger to other learners. She argued that, since the other learners’ safety was not directly jeopardised, the conduct in question did not justify the expulsion of the said learners. The impression created is that danger only involves direct physical harm and does not include the risks of being exposed to harm and undesirable circumstances. For instance, it is a well-known fact that alcohol is often a contributing factor in the case of violence and abuse. Thus other learners were exposed to this risk, yet the HoD was of the opinion that it did not endanger other learners. She did not consider the fact that one of the incidents happened at another school and might have impacted negatively on not only the learners of the school in question, but also the learners of the other school. This attitude does not indicate that she regarded the exposure of learners to fellow drinking learners as harmful and not in their best interests. She also did not consider the smoking of marijuana as dangerous to other learners who might inhale the smoke or be exposed to illegal drugs. There is thus a real danger that HODs can disregard the seriousness of misconduct and that their personal views on the degree of seriousness can impact their decisions to expel or not. This can have a detrimental impact on the interests of other learners.

safety of other learners”. Her response regarding the gross insubordination charge, where a direct instruction was ignored, was similar and she again ruled that, since the incident had not happened on the school premises but in town and had not disrupted the schooling process or put the other learners at risk, an expulsion order should not be granted. In the third instance, namely that of consuming alcohol and smoking marijuana at a school hostel, she found, on the drinking charge, that it did not happen during school hours or on the school premises and had not placed the safety of other learners at risk. As far as the smoking of dagga at the residence was concerned, she found that the conduct had not disrupted learning and teaching at the school or affected the safety of the learners. In this instance, one assumes that she was referring to the safety of other learners, for, if read literally, it would mean that she was of the opinion that marijuana is not a dangerous substance.

³³³ Definition as in the *Schools Act 84/1996*.

Sixthly, it is clear that the HoD did not consider the consequences of her message to the rest of the learners by refusing to expel the learners. Instead, she conveyed the message that the use of alcohol and drugs was not so serious and that there would not be serious consequences following upon these transgressions. This is in sharp contrast to the ideals set out in the Guidelines that learners should be guided towards responsible adult life. The abuse of alcohol and drugs has serious consequences, and, if it is downplayed by those in positions of authority, one can hardly imagine learners developing into responsible adults. Although she rightly insisted on rehabilitation and counselling for the perpetrators, she failed to consider the best interests of the other learners by downplaying the seriousness of the transgressions. This is even more relevant in the instances where some of the perpetrators were repeat transgressors.

Seventhly, although the school approached the HoD after the first incident and asked to discuss the deteriorating state of discipline in the school she did not respond to the request. However, three months later, she refused to expel the learner on the drinking charge and argued, *inter alia*, that the SGB did not take sufficient steps to rehabilitate and assist the learner after the learner had been found guilty on a previous occasion. She also argued in the other cases that parental involvement and counselling were suitable alternatives for dealing with disciplinary problems and should rather be considered. Since the Department and a school are supposed to administer the school in partnership, one would assume that proper guidelines should be provided for schools to indicate what their responsibilities are regarding counselling and support measures. The school asked for help, but was ignored, and yet the Department wanted to enforce the legislative provisions of support and counselling³³⁴ without any clear guidance on how far the school's responsibilities go in this regard. This raises another issue, namely what the Department's responsibilities would be if one takes into account especially the fact that the majority of schools do not have the necessary resources available to provide this support and counselling. In addition, if educators do not even have the necessary skills to deal with discipline in general, it would be unfair to expect them to deal with difficult issues such as drug and alcohol abuse and dependency, as well as children with serious behaviour problems, without proper training.³³⁵

Eighthly, although the learner's conduct in one of the incidents was described as "absolute insolence and disrespect", the HoD found that this did not constitute misconduct of a very serious nature. This attitude on the part of the HoD strengthens the perception that educators

³³⁴ *Schools Act 84/1996:s 8(5)(b).*

³³⁵ See ch 2, par 8.1.4.

do not have rights, while learners' rights must be protected at all costs.³³⁶ It is important to ensure that a proper balance is struck between the rights of educators and learners. It is hard to imagine that educators will be able to create an environment conducive to teaching and learning and to maintaining discipline when they are unable to enforce their own constitutional rights.

5.10 Sanctions for, and consequences of, misconduct after informal disciplinary measures

It was mentioned above that the legislator has not provided any guidance on informal disciplinary measures. It is thus in the discretion of the SGB to prescribe, through the code of conduct, the disciplinary measures to be used in the particular school.

Apart from the guidance provided by the courts in the case law discussed above, the court also provides some direction in *Western Cape Residents' Association v Parow High School*.³³⁷ In this case, the school had refused to invite a learner to the matric farewell owing to continuous misbehaviour on her part. The school had made it clear that an invitation to the farewell was a privilege and dependent on good behaviour and academic merit. Early in the year, a number of learners were warned that they would not be invited. However, some of them ignored the warning and their unacceptable behaviour continued. In addition, the learner in question had a history of misconduct since entering the school in grade 8. When she did not receive an invitation, she approached the court and claimed that the school was infringing on her rights to equality, dignity and freedom of expression by refusing to invite her.

Although the case revolved round procedural issues and *locus standi*, the court nevertheless made the following *obiter* remark:

[T]wo of the important lessons that a school must teach its learners are discipline and respect for authority.³³⁸

One of the acceptable tools available to schools to realise these goals is by granting privileges as a reward for good behaviour. To withhold such a privilege can therefore not be regarded as an infringement of a right to equality or to dignity. On the contrary, granting privileges to learners who do not earn them can constitute an infringement of the rights to equality and dignity of learners who in fact earn the privilege. It is important to note that the court explicitly referred to balancing the rights of other learners in the process of maintaining discipline.

³³⁶ See ch 2, par 8.1.5.

³³⁷ 2006 (3) SA 542 (C).

³³⁸ *Western Cape Residents' Association v Parow High School* 2006 (3) SA 542 (C):545.

The court also emphasised that good behaviour is rewarded in all walks of life and that it is therefore beneficial for learners to learn its value from a tender age. The court thus did not find anything unconstitutional in the application of a reward system.³³⁹

5.11 Searches and seizures

The use of dangerous weapons and illegal drugs is a real concern in many schools. Therefore, in 2007, section 8A was inserted in the *Schools Act*³⁴⁰ to make provision for searches and seizures as well as drug testing by the principal or his or her delegate.³⁴¹ What is of importance in this context is the reference to the best interests of the child in subsection 3(a)(i), which provides:

- (3) (a) A search contemplated in subsection (2) may only be conducted after taking into account all relevant factors, including –
 - (i) the best interest of the *learners* in question or of any other *learner* at the *school*;
 - (ii) the safety and health of the *learners* in question or of any other *learner* at the *school*;
 - (iii) reasonable evidence of illegal activity; and
 - (iv) all relevant evidence received.

The provision does not elaborate on what factors should be taken into account to determine whether a proposed search would be in the best interests of the learners. It is couched in broad terms and is the only reference to the best interests of learners in the *Schools Act* in the context of school discipline. As was mentioned in chapter 1, the issue of searches and seizures falls outside the scope of this thesis.

5.12 Provisions regarding repetition by learners

The extent and impact of overage and underage learners on the school system were discussed in chapter 2.³⁴² It is evident from the data provided by the Department and other researchers that the repetition rate is higher than the international average for developing countries. The repetition rate is also escalating considerably after grade 9, which signals the end of the compulsory school-going phase. High repetition rates lead to high numbers of overage learners and this, combined with the high number of underage learners, results in high age differentials among learners in a class. A positive correlation has been established between overage

³³⁹ Carnelley 2007:144-145.

³⁴⁰ 84/1996.

³⁴¹ *Education Laws Amendment Act 31/2007:s 7.*

³⁴² See ch 2 par 8.4.6, 8.4.7.

learners and disciplinary problems. It is thus appropriate to examine the provisions with regard to grade repetition.

Section 30 of the Admission Policy for Ordinary Public Schools³⁴³ provides:

A learner who has repeated one or more years at school in terms of this policy is exempt from the age grade norm, except that, if a learner is three years older than the norm age per grade, the Head of Department must determine whether the learner will be admitted to that grade.

Thus, a learner is not supposed to be three years or more above the age-grade norm and can only progress to another grade after a determination is made by the HoD in this regard. Table 1 in chapter 2 clearly illustrates the large numbers of learners who exceed this limitation and it is questionable whether all the learners who are three years above the age-grade norm have approached the HoD for a determination in this regard. Table 2 in chapter 2 also indicates the excessive age differentials per grade. This clearly illustrates the extreme levels of non-compliance with the regulations.

In addition, sections 31 and 31 of the Admission Policy for Ordinary Public Schools³⁴⁴ provides that learners should, in principle, progress with their age cohort and declares that grade repetition “seldom results in significant increases in learning attainment and frequently has the opposite result”. Consequently, learners are allowed to repeat only one grade per school phase.³⁴⁵ It is stated that this norm is not intended to result in the practice of automatic promotion and that every learner’s needs should be addressed by his or her educators, with support from the learner’s family and peers.³⁴⁶

5.13 Admission requirements relevant to school discipline

In terms of the definitions in the *Schools Act*, a “school” means “a public or independent school which enrolls learners in one or more grades from grade R to grade 12”. The Minister of Education exercised the discretion to determine national policy for the age of admission to

³⁴³ GN 2432/1998.

³⁴⁴ GN 2432/1998.

³⁴⁵ School phases include the foundation phase (grade 1-3); intermediary phase (grade 4-6); secondary phase (grade 7-9). This is followed by the non-compulsory, further education and training phase (grade 10-12).

³⁴⁶ Without elaborating on the merits of the provisions or their proper implementation, one can only refer to the poor academic outcomes discussed in ch 2, par 2 herein in order to question the appropriateness of the provisions and/or their implementation.

schools.³⁴⁷ Accordingly, the Age Requirements for Admission to an Ordinary Public School Policy³⁴⁸ was published in 1998. It provides for a specific statistical age norm per grade, namely the grade number plus 6. For example, Grade 1 + 6 = age 7 years implies that a child in grade 1 should be 7 years of age; and Grade 12 + 6 = age 18 years implies that a learner in grade 12 should be 18 years of age. The conclusion that can thus be drawn from this is that the intention is that schools should provide for the education of learners from grade R³⁴⁹ to grade 12, and that these learners should be between 6 years of age and 18 year of age.

On basis of the above reasoning, a learner will be eligible for admission to a school if he or she is between 6 years (entering grade R) or 7 years (entering grade 1) and 18 years. Despite these provisions, table 1 in chapter 2 indicates that there are numerous learners in schools under 6 years of age, and even more learners above 18 years of age.

The *Schools Act*³⁵⁰ as well as the Admission Policy for Ordinary Public Schools³⁵¹ provide that the SGB is responsible for a school's admissions policy. This policy must be consistent with the Constitution and provincial law. The HoD must coordinate all admissions in conjunction with the SGB and must ensure that there are enough schools for all eligible learners.

It is thus clear that there is a vast difference between reality and the initial intention of the legislator to ensure that there are not underage or overage learners in schools.

5.13.1 Admission of learners under the age-grade norm

One of the reasons for the overenrolment of learners and subsequent large classes and high repetition rates is the high number of learners under the age-grade norm. It is thus apposite to investigate the legal requirements with regard to the admission of learners.

Section 5 of the *Schools Act* provides for admission to a public school. It stipulates that the age of admission to grade 1 is five years, turning six by 30 June in the year of admission. Section 3 deals with compulsory school attendance and provides that a learner is compelled to attend a school from the first school day of the year in which he or she turns 7 until the last day of the year in which the learner turns 15 years of age or finishes the ninth grade, whichever comes first. If these two provisions are read together, they imply that, if a learner turns six before 30

³⁴⁷ *National Education Policy Act 27/1996*:s 3(4)(i).

³⁴⁸ GN 2433/1998.

³⁴⁹ Grade R is also indicated as grade 0, thus 0 + 6 = 6 years of age.

³⁵⁰ *Schools Act 84/1996*:s 5(5).

³⁵¹ GN 2432/1998:s 7.

June, he or she can be admitted to the school, but the learner must start to attend school in the year he or she turns seven. Thus learners turning six before 30 June have a choice to start schooling in the year they turn six or seven.

Thus, despite the national policy regarding the age-grade norms, the *Schools Act* makes provision for the lawful admission of learners under the age-grade norm, without requiring any proof that the child is indeed ready to cope with the demands of grade 1. Furthermore, learners who are under five years of age and who do not turn six by 30 June may apply to the HoD for admission to grade 1. In considering such an application, the HoD must take cognisance of the availability of suitable school places and other educational resources, and may only admit a learner if good cause be shown and if the criteria set by the Minister are met.³⁵² “Good cause” in this context means that:

- (i) it can be shown that *exceptional circumstances* exist which *necessitate* the admission of an underage learner because admission would be *in his or her best interest*; and
- (ii) the refusal to admit that learner would be *severely detrimental* to his or her development.³⁵³

The *Schools Act*³⁵⁴ provides that the Minister has the discretion to determine the criteria for the admission of underage learners and *may*, by regulation, lay down such criteria. In a footnote to these provisions in the Act, the following criteria are laid down:

It is acknowledged that criteria for admission of an underage learner are complex and take some considerable time to develop. The criteria must be reliable and effective and their proper implementation will require the training of evaluators. The criteria must be based on an educationally sound basis in order to ensure that –

- (a) learners are admitted on an equitable basis;
- (b) there is no unfair discrimination to learners;
- (c) the admission is fair to the individual learner as well as other learners in the classroom;
- (d) recognition is given to the diversity of language, culture and economic background;
- (e) notice is taken of the differences between urban and rural environments; and
- (f) the physical, psychological and mental development of the child is taken into account.

³⁵² *Schools Act* 84/1996:s 5(4)(b).

³⁵³ My emphasis.

³⁵⁴ 84/1996:s (5)4(b).

It is disturbing to realise that the above-mentioned criteria for admission to a public school were amended in 2002, but that the footnote was added to the legislation only on 1 July 2009. Thus the HoDs still have to use their own discretion and criteria to admit underage learners, because the Minister has not yet provided an official policy document, but merely guidelines in a footnote to legislation.

The Age Requirements for Admission to an Ordinary Public School Policy³⁵⁵ adds further insult to injury and serves to highlight the contradictions between the legislation and the policies. Sections 4 and 4.(A) of the policy state:

4. A learner must be admitted to grade 1 if he or she turns seven in the course of that calendar year. *A learner who is younger than this age may not be admitted to grade 1.*

- 4.(A) Despite paragraph 4, the Head of Department may allow a learner who wants to be admitted to grade 1, but who will not be turning 7 during the year of such admission, to be admitted at a lower age. This deviation by the Head of Department may only occur if, in the opinion of the Head of Department, reasonable grounds exist to show that such a learner is, based on educational principles, school ready for Grade 1 and it is in the best interest of such a learner to be admitted as an underage learner to a public school. The parent of the learner must show that the refusal to be admitted to a school will have a detrimental effect on the child's development.

In 2010, almost 25 000 learners were five years of age and younger, and more than 480 000 grade 1 learners were under the age-grade norm.³⁵⁶ The question regarding the appropriateness of the provisions in allowing large numbers of children under the age-grade norm to start with grade 1 becomes more pressing once the progression to grade 2 is taken into account. Taking only the number of learners into account who were one year under the age-grade norm, one can see that the data in table 1 in chapter 2 reveals that there were 436 124 underage learners in grade 1, but only 299 999 underage learners in grade 2 in the same year. This is indicative of the vast number of grade 1 learners repeating the grade.

It would thus be fair to conclude that large numbers of these learners are set up for academic failure from the moment they are admitted to school as learners under the age-grade norm. This is exacerbated by the policy that learners may only repeat a grade once in every phase. Consequently, a learner who is not ready for school and fails grade 1 may not fail another grade

³⁵⁵ GN 2433/1998:s 3.

³⁵⁶ See ch 2, table 1 herein.

until he or she reaches grade 4, which is the beginning of the next phase. This learner is thus passed through the system for the next three years without having to meet the educational outcomes for a particular grade, because he or she is not allowed to repeat another grade. Furthermore, not only is the learner subjected to unnecessary large classes, but he or she is also not really afforded an opportunity to have his or her academic foundation laid properly. This eventually catches up with learners when they reach grade 10, and the eventual dropout is to be seen in table 1 in chapter 2. The impact of failing learners on a school's discipline was also discussed in chapter 2.

5.13.2 Admission of learners above the age-grade norm

Apart from the admission of learners under the age-grade norm, learners can also be admitted above the age-grade norm. The Admission Policy for Ordinary Public Schools³⁵⁷ provides that children should be admitted to schools in accordance with the age-grade norms. However, if a child above the age-grade norm is admitted to a school, he or she must be placed in a fast-track facility or with his or her peer group, on condition that it is in his or her educational interest. If it is not suitable to place the child with his or her age cohort, he or she must be placed in an accelerated programme designed for the specific learner to enable him or her to catch up with his or her peer group. The practical feasibility of implementing fast-tracking or accelerated programme for learners is doubtful, taking realities such as large classes,³⁵⁸ the possibility of multigrade classes,³⁵⁹ the reality of a wide spread in age differentials,³⁶⁰ as well educators' general lack of preparedness³⁶¹ into account. No research could be found on whether fast-tracking is implemented in schools, and on the level of its successful implementation if in fact implemented.

The policy further provides that a learner over the age of 16 years who enters the education system for the first time or who did not make sufficient progress together with his or her peer group at school "must be advised to enrol at an Adult Basic Education and Training (ABET) centre".³⁶² This provision poses two problems. Firstly, it is unclear what would constitute "insufficient" progress. In the context of the whole policy it would, at the very least, mean a learner who repeats grades twice and/or is three years older than the age cohort.³⁶³ Furthermore, the learner must be "advised" to enrol at an ABET centre. It is therefore not

³⁵⁷ GN 2432/1998:s 26, 27.

³⁵⁸ See ch 2, par 8.1.6 herein.

³⁵⁹ See ch 2, par 8.1.6 herein.

³⁶⁰ See ch 2, tables 1, 2 herein.

³⁶¹ See ch 2, par 8.3.2 herein.

³⁶² GN 2432/1998:s 29.

³⁶³ See the discussion above in par 5.12 regarding repetition of grades.

compulsory for the learner to leave the school. Thus, even if a person has turned 18 years of age and is even above 20 years of age, he or she will not be obliged to enrol at an ABET centre.³⁶⁴ On a practical level, the lack of ABET facilities must also be taken into account, especially in rural areas. Furthermore, children under the age of 18 years are still entitled to the protection of the provisions of section 28(2) regarding their best interests. This thus poses a real challenge in providing education.

The net result is that the *Schools Act*, read together with the accompanying Government Notices, allows children and adults to attend school simultaneously, without any provisions in the legislation to explicitly safeguard the best interests of the children as a vulnerable group.

5.14 Parental involvement in school discipline

In line with international instruments such as the CRC,³⁶⁵ the White Paper³⁶⁶ acknowledges the important role of parents in the education of learners, which is captured to some extent in the *Schools Act*. Parents are indirectly involved in school discipline through consultation with the SGB, which is responsible for the drafting of the code of conduct.³⁶⁷ They are also directly involved in formal disciplinary proceedings, since they should be present at such proceedings if their child is involved.³⁶⁸ However, as was indicated in chapter 1, the role of parents will not be explored in detail in this thesis.

6. LACK OF FOCUS ON THE BEST INTERESTS OF THE CHILD WITHIN THE LEGAL FRAMEWORK ON DISCIPLINE

The nature and extent of disciplinary problems were highlighted in chapter 2. Many of these problems are due to social issues and cannot be addressed only through law reform. Lack of discipline is a multifaceted phenomenon which calls for intervention on several levels. It would be naïve to think that law reform alone will be able to solve all the problems associated with school discipline. However, law reform can, and should, play an important part in addressing the issue.

In addition the lack of focus on the best interests of the child within the legal framework plays an important role and should also be addressed. In what follows, the lack of focus on the best interests of the child and other deficiencies in the existing legal framework will be highlighted. If

³⁶⁴ The discussion on the policy on repetition of grades (par 5.12 above) and on international repetition rates will not be repeated here, but is relevant to the discussion.

³⁶⁵ CRC 1989:a 3(2), 5, 18, 27.

³⁶⁶ DoE 1995:ch 4, par 3-5.

³⁶⁷ *Schools Act* 84/1996:s 8(1), (6).

³⁶⁸ *Schools Act* 84/1996:s 8(6).

these flaws in legislation and national policies in particular are not suitably remedied, the law will not be able to play its full part in addressing the multiple issues related to school discipline.

The best interests of the child are set as the benchmark for this study, but it is conceded at this point that this benchmark is not clear. Therefore, in what follows, the *prima facie* non-compliance of the legislation and policies discussed with this standard will be identified as the point of departure for the remainder of the study.

The content of the best-interests-of-the-child benchmark will be explored in chapter 4 and will be further developed in chapter 5. Where appropriate, the identified issues will be addressed in those discussions as well as in the discussion of the application of the benchmark in chapters 7 and 8.

6.1 Ineffective inclusion of children in the process of drafting the code of conduct

Section 8(1) of the *Schools Act* provides that the code of conduct should be drafted by the SGB after consultation with, *inter alia*, the learners of the school. Every child has a material interest in the content of the code of conduct and should be afforded the opportunity to influence it. The Guidelines, which are not enforceable, provide that consultation should take place when the code of conduct is “reviewed annually or when any amendments are made”.³⁶⁹ This poses a few problems. Firstly, there is nothing in the legislation to oblige the SGB to review the code of conduct regularly. It is therefore possible that the code of conduct could have been adopted by the SGB after the legislation came into operation, and that it has not been reviewed since then. Thus scores of children could finish their education in a particular school without ever having been afforded the opportunity to take part in any consultation process to adopt or review the school’s code of conduct. The need for regular revision of the code of conduct is further highlighted by the changing composition of learners in many schools. Since 1994, the composition of many schools has changed, and is still changing, due, *inter alia*, to changed language policies, the migration of learners from township schools to inner-city schools, and urbanisation. The levels of diversity in schools have also increased and schools’ codes of conduct should ideally reflect the needs and challenges brought about by these constant changes. Since the legislation does not prescribe regular review, children’s best interests are at risk of not being given due cognisance.

Secondly, since every child is affected by the code of conduct, the question arises whether every child should not take part in the consultation process or have his or her representative

³⁶⁹ GN 776/1998:1.5.

take part in the process on his or her behalf. The practicability of including every child in the process should be considered and weighed against the child's best interests. In addition, the extent of consultation and the weight accorded to children's views will differ among different age groups. No guidelines exist in this regard and the entire matter is left to the discretion of the SGB.

A number of issues arise with regard to representation. Learners have official representation on the SGB from grade 8. However, as far as those in grades 1 to 7 are concerned, there is no legally enforceable representation on the SGB. Many primary schools do have LRCs, but some primary schools prefer not to have an LRC. The question that arises here is whether children who are on the LRC of a primary school have the necessary capacity to convey the needs and interests of younger learners to the SGB. In addition, do the SGB members have the necessary knowledge and skills to properly elicit the views of very young learners. Even if older children have the necessary capacity to convey the needs of other learners to the SGB, a clear distinction should be made between learners who are members of the SGB and learners who are members of the LRC. In practice, some of the members of the LRC are also the learner representatives on the SGB. The different roles of these learners should be kept in mind. Thus, can one consult the LRC members on the SGB and claim that the SGB has consulted the learners? How legitimate would the consultation process be if the same learners wear two hats? In addition, the *Pillay*³⁷⁰ case has illustrated the risk of not accommodating the needs of vulnerable and minority groups despite extensive consultation.³⁷¹

The role of parents should also be kept in mind. The legislation is clear that both parents and learners should be consulted. Children's views should be considered separately from their parents' views, thus leaving room for opposing views. Therefore, both groups are afforded a proper opportunity to be heard. Furthermore, a careful balance should be struck between the views of all the parties³⁷² involved in the drafting of the code of conduct and due weight should be accorded to these views.³⁷³

Thirdly, the term "consultation" is also very vague. The acceptable extent and form of consultation are unclear. A few questions should be answered in this regard. Should all the learners vote on issues or should they merely be given an opportunity to raise their concerns about the content of the code of conduct? Should the SGB make a concerted effort to ensure

³⁷⁰ 2008 (2) BCLR 99 (CC).

³⁷¹ See the detailed discussion in par 5.5.1 above.

³⁷² Educators and support staff included.

³⁷³ See ch 5, par 6 herein on the child's right to participate.

that consultation takes place? How much weight should be accorded to learners' opinions? What procedures and structures should be in place to enable learners to raise their concerns and take part in the consultation process? Are there structures and procedures in place to enable learners to initiate the consultation process when they feel consultation is necessary or should they wait for the SGB to initiate the consultation process?

A vast range of complex issues should be included in the code of conduct, such as how to deal with criminal acts, bullying, procedural issues, and searches and seizures. The question thus arises to what extent, if at all, children should be consulted regarding complex issues and who should decide whether an issue is too complex for children to be consulted in that regard.

There are thus a number of issues at stake in drafting a code of conduct in line with the best interests of the child. These include the frequency and extent of consultation with the different role players, age-appropriate measures to illicit the views of children, the role of child representatives, the weight to be accorded to the views of children, balancing opposing views of parents, educators and learners, and the complexity of disciplinary issues. To address these challenges and to ensure that effect is given to the best interests of children, skilled and knowledgeable SGBs are a prerequisite, which is not always the reality. At this stage, SGBs have to solve these complex dilemmas without any guidance from the legislator, thereby placing the best interests of the children at risk.

6.2 Overemphasis of the rights of the transgressor

The majority of South African schools employ a retributive approach to discipline.³⁷⁴ Some schools have also implemented positive disciplinary measures, but once a learner commits an act of serious misconduct, formal disciplinary proceedings will normally follow. It is also clear that these formal disciplinary proceedings are adversarial in nature.³⁷⁵

A retributive approach to misconduct and the implementation of an adversarial process to deal with it inevitably lead to a focus on the transgressor. The primary aim is to find the transgressor guilty and to punish him or her accordingly.³⁷⁶ However, misconduct impacts on the best interests of victims of, and third parties to, misconduct. A narrow focus on the transgressor therefore only constitutes an undue dilution of the constitutional obligation to respect, protect, promote and fulfil the best interests of all the children concerned in a matter. The overemphasis

³⁷⁴ Wolhuter & Van Staden 2008:396; De Wet 2003:116; SAHRC 2008:13; Burton 2008:28-30.

³⁷⁵ See par 5.6.1 above.

³⁷⁶ See ch 6 for a detailed discussion on the different approaches to school discipline.

on the interests of the transgressor, often at the expense of the victims and third parties to misconduct, is evident from legal prescriptions and practice.

The only explicit reference to the interests of other parties involved in disciplinary proceedings is to be found in section 8(5)(a) of the *Schools Act*, which deals with their due-process interests. The provision distinguishes between the transgressor and “other parties”, but does not distinguish between the interests of adult “other parties” such as educators and children as “other parties”. One would expect there to be a difference between the levels of safe-guarding the interests of children as opposed to the interests of adults. In addition, the paramount-importance requirement is only applicable to children and not to adults.

The impact of undisciplined conduct on other learners is often ignored or underplayed and should be properly considered in disciplinary measures to ensure that the best interests of all the learners are served. The existing legal framework does not, however, explicitly direct decision-makers accordingly, thereby risking overemphasis of the best interests of the transgressing learner to the detriment of other children.

6.3 Narrow focus on the procedural and academic interests of learners

Section 8(5) deals with the requirement that the code of conduct must contain provisions of due process safeguarding the interests of the transgressor and other parties. “Due process” here refers to procedural due process, which deals with the application of fair procedures. Substantive due process refers to the appropriateness and fairness of rules.³⁷⁷ This section thus only ensures that a fair process is followed and that the rules must be fair. It does not oblige the SGB to ensure that all the other interests of all the learners in the school are also safeguarded and treated as of paramount importance during the disciplinary proceedings. There are a few points of contention to be highlighted regarding this provision.

Learners have more needs and interests than due-process needs and interests, which include emotional, physical, psychological, educational and developmental needs. Due-process measures cannot address these needs of children and do not ensure the protection and promotion of these interests of all learners during and after disciplinary proceedings. Case law also illustrates that some of the HoDs have a very narrow view of what children need and often equate this with the right to education.³⁷⁸ The refusal of HoDs to confirm expulsions is indicative of an attitude that, as long as a child is in a school attending classes, his or her educational

³⁷⁷ Joubert & Prinsloo 2008:130.

³⁷⁸ See discussion on the *Queens College* case 454/08 in par 5.9.2 above.

needs and interests are being met, and that, if a child is not in a school attending classes, the child's right to education is being infringed upon. This approach of HoDs fails to recognise that the above-mentioned other needs of children should often also be addressed before they will be in a position to engage meaningfully with academic content.³⁷⁹

6.4 Support measures or structures for counselling

Section 8(5)(b) of the *Schools Act* prescribes that the code of conduct must provide for "support measures or structures for counselling a learner involved in disciplinary proceedings". This section is also open to criticism. Firstly, there is some uncertainty with regard to the question whether "a learner" refers to the transgressor only or to other learners involved in the disciplinary proceedings as well, as discussed above.³⁸⁰

Secondly, the obligation to provide for support measures or to provide counselling structures "for learners involved in disciplinary proceedings" is technically applicable only to instances of serious misconduct, because a disciplinary hearing is held only in instances of serious misconduct.³⁸¹ This is cause for concern, because support measures and counselling structures are essential in the prevention of misconduct. Thus learners have to misbehave before legislation requires the SGB to ensure that these services are available. In addition, it also only makes provision for learners *involved* in the disciplinary proceedings. This implies that these services are only compulsory for those learners who are part of the disciplinary process and do not include learners who are not directly involved in the disciplinary proceedings, but who are affected by the misconduct. Apart from being discriminatory, this is an infringement of the rights of child victims and third parties to have their best interests respected and protected, and, most importantly, promoted through support and counselling.

Thirdly, the ambit of the phrase "support measures or structures for counselling" is not clear.³⁸² It is indeed laudable that the code of conduct must include provisions regarding support measures or structures for counselling a learner involved in disciplinary proceedings, but no guidelines are provided to indicate the extent of the support measures or structures for counselling that is required. "Extent" here refers to the level of intervention, for example support by a life-orientation educator only or the appointment of a full-time professional counsellor. It is thus in the discretion of the SGB to determine the extent of available support measures or

³⁷⁹ Constitution 1996:s 7(2).

³⁸⁰ See par 5.6.1.2 above for a detailed discussion.

³⁸¹ *Schools Act* 84/1996:s 8(5)(b), 9(1A).

³⁸² See par 5.6.1.2 above.

structures for counselling. This inevitably opens the door for decisions which might not be in the learner's best interest.

Fourthly, there is no indication in the legislation of what constitutes support measures and of what constitutes counselling. In addition, neither the Act nor the guidelines provide guidance on which instances require mere support measures for learners and which instances require professional counselling. Also, no indication of what types of training and expertise are required before counselling can be provided for learners. Interventions by lay people might not be in the best interests of learners and might even be detrimental to them.

Fifthly, the word "or" is used. Thus, provision for either support measures or structures for counselling is compulsory. If the SGB decides to provide support measures, but counselling is required in a specific instance, will support measures suffice? And who should provide the support or counselling? If educators should provide it, are they properly trained for these purposes? Counselling structures should probably also include access to the services of professionals. To what extent, therefore, will the SGB be responsible for providing for support measures or counselling services in the code of conduct if such measures or services are not readily available, for instance in rural areas. In addition, it is not clear why the code of conduct should only make provision for either one or the other. It would be in the best interests of learners if both were compulsory and readily available. It is thus unclear why the legislator has granted SGBs the discretion to provide only one of them.

Sixthly, although an SGB might be in favour of support measures or structures for counselling, financial constraints and the scarcity of skilled people and proper structures in order to provide counselling might have a negative impact on the provisions eventually included in the code of conduct. In view of these practical problems, the SGB might only include the most basic of support measures in the code of conduct. However, these measures might not be enough to address the needs of the learners and thus be inadequate to promote their best interests. This raises the question of the liability of the state, and of provincial departments of education in particular, to ensure that the necessary support measures and structures for counselling are available. Apart from the fact that the lack of these will not be in the best interests of the learners of a particular school, such lack of measures and structures is also a form of unfair discrimination, because some essential support measures and counselling structures may be available for some children while not being available for other children.³⁸³

³⁸³ See the discussion in ch 2, par 8.1.8 herein on the scarcity of professionals.

This issue is further complicated by the provisions of section 28(1)(c) of the Constitution, which provides:

Every child has the right to basic nutrition, shelter, basic health care services and social services.

Unlike other socio-economic rights, this section does not provide that the child has a right to “access”, but that she or he has a direct right. In addition, these rights of children are not subjected to the progressive realisation of the rights. Furthermore, children are the only group that has a constitutional right to social services.³⁸⁴ Yet, it should be kept in mind that, despite the lack of an internal qualifier regarding the availability of resources and despite the progressive realisation of rights found in other socio-economic rights³⁸⁵ provisions, this provision is still subject to the reasonable and proportional limitation of rights found in the limitation clause.³⁸⁶ However, if rights cannot be reasonably limited, “the absence of any internal limitation entrenches the rights as unqualified and immediate”.³⁸⁷

³⁸⁴ Section 27 of the Constitution makes provision for access to healthcare services, including reproductive healthcare, to sufficient food and water, and to social security and social assistance. These rights are also subjected to their progressive realisation. A clear distinction should be drawn between the terms “social security”, “social assistance” and “social services”. In terms of the definitions of the *South African Social Security Agency Act 9 of 2004*, the term “social security” includes both social assistance and social insurance. “Social assistance” refers to social grants provided by the state in terms of the *Social Assistance Act 13 of 2004* and includes, *inter alia*, the child-support grant, care dependency grants and disability grants. “Social insurance” means any contribution-based benefit payments designed to secure the income of people, such as contributions to funds such as a workman’s compensation fund and an unemployment fund.

³⁸⁵ See s 26 (right to housing), 27 (right to healthcare, food, water, and social security) of the Constitution 1996, which provide that one only has a right to *access* these services and facilities, and, furthermore, that the state must make them available within the available resources and that effect should be given progressively to these rights.

³⁸⁶ Constitution 1996:s 36. See also *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T):227. In this case, the Centre for Child Law approached the High Court for an order directing the Department of Education to, *inter alia*, provide the learners at the school with sleeping bags as a matter of urgency, since it was in the middle of winter and the building in which they were housed was in a dilapidated state with broken windows. The bedding provided for the learners was totally inadequate according to the evidence put before the court by the applicants. The Department of Education acknowledged that the bedding was inadequate, but contended that it would be expensive to provide 111 sleeping bags and that the budget was stretched. It further contended that granting the order would open it up to claims by other similarly placed schools for sleeping bags. Yet, the evidence suggested that there was only one other school of industry in the particular province, and that this school had only 38 learners. Thus, at worst, the Department would be liable for buy 149 sleeping bags. The court rightly indicated that the costs of defending the claim probably amounted to more than the costs of the sleeping bags.

³⁸⁷ *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T):227.

The courts normally refrain from interfering in budget allocations. However, in *Centre for Child Law and Others v MEC for Education, Gauteng, and Others*,³⁸⁸ the court held as follows with regard to the provision of sleeping bags for learners placed in a school of industry:

Insofar as polycentric issues may arise from courts becoming involved in budgetary or distribution matters, our Constitution recognizes, particularly in relation to children's rights and the right to a fair trial, that budgetary implications ought not to compromise the justiciability of the rights. Each case must be looked at on its own merits, with proper consideration of the circumstances and the potential for negative or irreconcilable resource allocations. The minimal-costs or budgetary-allocation problems in this instance are far outweighed by the urgent need to advance the children's interests in accordance with our constitutional values.³⁸⁹

Thus, as far as children's rights are concerned, the courts will be more inclined to interfere with budgetary allocations, particularly where such allocations are minimal. In the same case, the applicant also sought an order that psychological and therapeutic services should be provided at the school, especially since the learners concerned had been removed from their parents. The learners had been removed from their parents for the purpose of care and rehabilitation and to "develop the children to best advantage by means of skilled intervention". Yet, there were no psychologists or social workers at the school. In this instance, the Department again claimed that there was a lack of resources, but the applicant was merely seeking the deployment of the existing capacity in the Department's psychological services unit so as to attend to the urgent needs of the school. The court found that the costs would be minimal and were far outweighed by the potential benefits.³⁹⁰

This raises a number of questions: What do social services comprise in general and in the school disciplinary context in particular? Which social services must be guaranteed by government to ensure that every child is in a position to enforce this right in the school disciplinary context? Are the departments of education at liberty to require schools to provide social services for learners, without financial assistance, in order to shoulder this responsibility of the state?

³⁸⁸ 2008 (1) SA 223 (T):227.

³⁸⁹ *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T):228.

³⁹⁰ *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T):229; see also the discussion herein on the need for social support services in ch 5, par 2.2.4.1.5, 4.3.1, 4.3.2, and see *Jacobs v Chairman, Governing Body, Rhodes High School, and Others* 2011 (1) SA 160 (WCC).

6.5 Role of the intermediary

Section 8(7) of the *Schools Act* provides that, if a child under the age of 18 years will be exposed to undue mental stress or suffering while testifying at disciplinary proceedings, the SGB “may, if practicable, appoint a competent person” to act as an intermediary.

Research pertaining to the impact of the criminal justice system on child witnesses and child victims of crime indicates that being a witness and/or a victim in an adversarial system is very traumatic for a child. In addition, children find it difficult to state their case.³⁹¹ Different factors such as language development, suggestibility, age and developmental stage, the child's personality, and the trauma caused during the incident play a role in the quality of the evidence provided by a child. Expert knowledge is thus necessary to elicit, understand and interpret the evidence of a child, especially that of younger children exposed to traumatic experiences.³⁹² Therefore, special measures,³⁹³ such as the appointment of an intermediary, were put in place in the criminal justice system to support and assist the child during a trial and to prevent secondary victimisation as far as possible.

It is clear from case law³⁹⁴ and criminal law regulations³⁹⁵ that the appointment of intermediaries is a complex issue with several constitutional implications, and that issue should therefore be properly regulated. Yet, there are no regulations with regard to the appointment, qualifications, experience, duties or training of intermediaries in the context of school disciplinary proceedings. Even more alarming is the fact that properly trained legal experts adjudicate the appointment of intermediaries in the criminal justice system, while these decisions are left to lay people in the school disciplinary context, without any guidance from the legislator. The best interests of children are therefore clearly at risk.

Another alarming aspect of the provision is that an intermediary may be appointed “if practical”. This opens the door for discrimination against learners in, for instance, rural areas where there

³⁹¹ Clark, Davis & Booyens 2003:43-44; Hollely 2002:14-15; Müller 2003:2-9; Cassim 2003:70-72.

³⁹² Louw 2005a:19-28; 2005b:18-27; 2004a:3-15; 2004b:16-24.

³⁹³ *Criminal Procedure Act* 51 of 1977:s 170A(1): evidence through an intermediary; s 153: *in camera* proceedings; s 158(5):use of closed-circuit television or similar electronic media; s 164(1): oath and affirmation; see also Cassim 2003:70-72; Hollely 2002:14-15; Davis & Saffy 2004:17-23 on the effectiveness of court-support and court-preparation measures.

³⁹⁴ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (4) SA 222 (CC); *Klink v Regional Court Magistrate NO and Others* 1996 (3) BCLR 402 (SE); *S v Mathebula* [1996] 4 All SA 168 (T); *S v Nagel* [1998] JOL 4098 (T); *Stefaans v S* [1999] 1 All SA 191 (C); *S v Francke* [1999] JOL 4451 (C); *S v T* 2000 (2) SACR 658 (CK); *S v Hartnick* [2001] JOL 8576 (C); *S v Malatji* [2005] JOL 15716 (T); *Motaung v S* [2005] JOL 16071 (SE); *Dayimani v S* [2006] JOL 17745 (E); Van Rooyen v S [2006] JOL 16675 (W); *S v Mokoena* 2008 (5) SA 578 (T); *Ndokwane v S* [2011] JOL 27316 (KZP).

³⁹⁵ GN R 1374/1993; GN R597/2001.

are fewer professional people available. Teachers and former teachers can act as intermediaries in terms of the criminal law regulation. Thus professionals will be available, but the impracticability lies in the fact that they will probably not be appropriately trained to act as an intermediary. Apart from the lack of training, there are also no guidelines to assist educators on what is expected from them in such a situation. The absence of a closed-circuit television (CCTV) system or a one-way mirror can also make it futile to use an intermediary.³⁹⁶ No child should be exposed to undue mental stress and suffering while testifying. Nevertheless, the legislation or regulations do not make any provision as to how to ensure that this is practicable.

To appoint an intermediary can prolong the hearing significantly. Those responsible for conducting the hearing are mostly SGB members and other volunteers with other personal responsibilities. They thus have a personal interest in not prolonging the proceedings, which can seriously jeopardise the administrative fairness of the decision. Another point of contention is whether they have the necessary training and knowledge to determine whether the child would be exposed to undue mental stress and suffering.

6.6 Limitation of the School Governing Body's ability to appeal decisions of the Head of Department

If the HoD decides to expel a learner, the learner or parent of the learner can appeal to the MEC.³⁹⁷ The SGB, on the other hand, may only take the decision of the HoD not to expel on review to the courts, since the legislation does not provide for the possibility of the SGB appealing to the MEC.

To take decisions on review to the courts is much more expensive than appealing to the MEC. This limits the SGB's ability to ensure that the decisions of the HoD are correct and in the best interests of all the learners at the school. In addition, on appeal, the correctness of a decision can be determined, while, on review, the court can only determine whether the HoD has made a reasonable decision, not whether the decision is the most appropriate in the circumstances. Thus the outcome of a case may be that a reasonable decision was made despite the fact that the HoD's decision was not in the best interests of the transgressor or in the best interests of the other learners.

³⁹⁶ Reyneke & Kruger 2006:87-89.

³⁹⁷ *Schools Act 84/1996:s 9(4)*.

6.7 Responsibility of the Head of Department for finding alternative placement for certain expelled learners only

If a learner of compulsory school-going age is expelled from school, the HoD is obliged to arrange an alternative placement for the learner.³⁹⁸ There are currently no legislative criteria for the alternative placement of the learner. It is left to the discretion of the HoD to ensure that the alternative placement is in the best interests of the learner.³⁹⁹

The HoD's obligation to ensure an alternative placement is only applicable to learners of compulsory school-going age. This raises a question regarding the position of learners between 15 and 18 years of age. While the Constitution provides that the best interests of every child under 18 years are of paramount importance, there is apparently a lacuna in the legislation regarding the interests of children between 15 and 18 years who pose disciplinary problems.⁴⁰⁰

Further, if one assumes that the right to basic education coincides with the compulsory school-going age, one could argue that the right to further education of the learner is applicable to learners between 15 and 18 years. The right to further education is subjected to the provision that it must be made progressively available. The state can therefore, on account of a lack of specialised facilities and a lack of capacity to deal with learners who pose disciplinary problems, lawfully limit the right to further education of such learners. This is in sharp contrast to the provisions of section 28(2), which provide that the best interests of every child under the age of 18 are of paramount importance. One should thus consider whether these children's rights to further education are unduly limited, taking the best interests of the child into account alternatively, whether these learners' best interests are duly limited.

6.8 Best interests of the child as opposed to the best interests of the school

The *Schools Act* provides that the SGB's function is to promote the best interests of the school,⁴⁰¹ while the Constitution provides that the best interests of the child are of paramount importance in every matter concerning the child.⁴⁰² This clearly creates a possible conflict between the interests of the school with all its learners on the one hand, and the best interests of an individual child, or group of children, on the other hand. A possible tension that may arise as far as discipline is concerned is that where the misconduct of a learner or learners infringes on the rights of, for instance, the majority of learners' rights. Currently, there are no guidelines

³⁹⁸ *Schools Act* 84/1996:s 9(5).

³⁹⁹ Constitution 1996:s 9(5).

⁴⁰⁰ Constitution 1996:s 28(2), (3).

⁴⁰¹ *Schools Act* 84/1996:s 20(1)(a).

⁴⁰² Constitution 1996:s 28(2).

to assist SGBs in determining a proper balance between the different interests. This problem is exacerbated by the fact that the constitutional imperative is that the best interests of every child are of paramount importance. Thus the SGB has an obligation to ensure that every child's interests are considered as of paramount importance in any disciplinary matter. This would therefore include the interests of the offender, the child victim, and third parties to misconduct.

6.9 Lack of prescriptions ensuring that sanctions serve the best interests of the child

Despite strict procedural prescriptions regarding the suspension and expulsion of learners, there are no prescriptions as to what should happen to the learner while he or she is suspended or awaiting expulsion. In practice, this will mean that learners who are suspended or are awaiting the decision of the MEC on their expulsions will not be attending school, but will be legally staying at home. There are no legislative prescriptions that these learners should attend, for instance, anger management classes or counselling sessions. Thus they are out of school for some time, and then, where applicable, return to school without any obligatory intervention to address the underlying problems or to enhance their best interests. Disciplinary measures are thus focused on punishment only. Troubled children need help, yet none is offered or prescribed.

The same applies to instances of a less serious nature where formal disciplinary proceedings are not held. Learners are often sent out of class, have to go to detention, have to do community service or have other forms of punishment imposed without the underlying reasons for the misconduct being addressed. It is questionable whether these practices are in the best interests of learners, and therefore whether they are constitutionally sanctioned.

6.10 Lack of focus on informal discipline

As far as school discipline is concerned, the *Schools Act* only deals with the drafting of the code of conduct,⁴⁰³ formal disciplinary hearings,⁴⁰⁴ search and seizures,⁴⁰⁵ the suspension and expulsion of learners after serious misconduct,⁴⁰⁶ and the prohibition of corporal punishment.⁴⁰⁷

There are no legislative provisions regarding informal discipline⁴⁰⁸ in schools. Taking into account the fact that most educators are still inclined to apply a punitive and retributive

⁴⁰³ *Schools Act 84/1996*:s 8(1), (2), (3), (4), (5).

⁴⁰⁴ *Schools Act 84/1996*:s 8(6), (7), (8), (9).

⁴⁰⁵ *Schools Act 84/1996*:s 8(A).

⁴⁰⁶ *Schools Act 84/1996*:s 9.

⁴⁰⁷ *Schools Act 84/1996*:s 10.

⁴⁰⁸ "Informal discipline" refers to any disciplinary measure taken by educators and/or prescribed by the SGB in order to enforce school discipline, but excludes any formal disciplinary proceedings prescribed by the

approach to discipline, the question arises whether this approach is in the best interests of learners. If it is not in the best interests of learners, the legislator should provide educators with the necessary guidance to implement other approaches to discipline which *will be* in the best interests of learners. A proper investigation is thus necessary to determine which approaches to discipline are followed in schools, and whether these approaches are in line with the best-interests-of-the-child standard.

6.11 Admission policies and policy on repetition of grades

The discussion on admission policies and the repetition of grades policy and its implementation revealed that such policies have resulted in large classes, in numerous overage learners, and in large numbers of learners who are much older than 18 years of age in schools. The detrimental effects of these policies and their implementation on school discipline are not in children's best interests and need urgent attention.

Furthermore, children under the age of 18 years are entitled to the protection of section 28(2) of the Constitution. Yet, there are no indications in the legislation or the policies that children's interests will be, or should be, prioritised in balancing the interests of adult learners and learners under the age of 18 years, which is clearly disregard for the provisions of section 28(2) of the Constitution.

Provisions with regard to the repetition of grades also raise questions about children's responsibilities. Since the current policy prohibits the repetition of more than one grade in a phase, there is a real risk that there is incentive for learners to pay attention in class, to do homework or to participate in learning activities, because they know they will be promoted to the next grade. This will obviously impact on school discipline and will influence the teaching and learning environment negatively.

6.12 Insufficient content of the best-interests-of-children concept in school discipline: the need for a contextualised list of factors

The above-mentioned issues illustrate that the best interests of the child are not a primary focus in legislation pertaining to school discipline. Furthermore, court decisions often do not even refer to the best interests of the child in resolving issues related to education. For instance, in both the *Pillay*⁴⁰⁹ case and the *Antonie*⁴¹⁰ case, school rules and their enforcement were

Schools Act in terms of section 9. It thus refers to the everyday disciplinary measures applied by educators in their classes and in the school to create a disciplined environment conducive to teaching and learning.

⁴⁰⁹ 2008 (2) BCLR 99 (CC).

⁴¹⁰ 2002 (4) SA 738 (C).

challenged. The best interests of the children involved in these cases should have been regarded as of paramount importance, yet the courts did not even refer to the concept. This inevitably raises the question whether it was considered by the court at all. In both these cases, the disputes were resolved by focusing on other rights, such as the right to dignity and religion. This poses the further question whether the preferred process to be followed is to focus rather on possible infringements of other constitutional rights and to use the best-interests-of-the-child concept only as a measure of last resort that acts as a safety net to be used only in instances where existing rights are unable to properly protect the rights of children involved in the disciplinary issue.

Another reason for the courts' apparent failure to refer to the best interests of the child is that there is currently no proper content given to the concept within the school disciplinary context. It would thus be up to either the legislator or the courts to give content to it and to develop the best-interests concept in this context. It is difficult to enforce and implement a right without proper content. The courts thus probably fail to refer to the best interests of the child because they can resolve matters without taking it upon themselves to develop the best-interests concept within the school disciplinary context. This would inevitably force the legislator to pay more attention to providing content for the best interests of the child, but leave it to the courts to determine whether the content given to the concept is in line with the constitutional imperatives. This approach would also be in line with the doctrine of separation of powers.

Since the legislator is in a better position than the courts to develop and put implementation mechanisms in place, it (the legislator) in fact has a constitutional duty to ensure that the content of the concept is incorporated in legislation as a matter of urgency. The legislator's constitutional duty would stem from the provisions of section 7(2) of the Constitution which provides that the state has an obligation to respect, protect, promote and fulfil the rights contained in the Bill of Rights. By enacting legislation outlining the content and application of the best-interests concept, effect can be given to this obligation of the state.

The "best interests of the child" is a technical concept which needs proper and specific interpretation in any given context. In the next chapter, some of these technicalities and content issues will be discussed in more detail. Suffice it to say that there is currently no specific content given to this concept in the context of school discipline, which endangers the proper implementation thereof.

Since no proper content is given to the best interests of the child, it is understandable that there are no easily accessible guidelines to assist those responsible for the implementation of the

concept in school discipline. The need for proper legislative guidance is further highlighted by the fact that lay people, such as educators and SGB members, are mostly responsible for the implementation of this right in schools. Understandably, it is difficult for them to determine, on their own accord, the proper content of the complex concept, and to stay abreast of the latest developments in respect of this evolving concept. In addition, the best-interests concept should, as far as possible, be standardised on a national level so as to ensure its equitable implementation.

The usefulness of a contextualised list of factors indicating the best-interests standard is further highlighted by the fact that, although members of the community can be appointed to committees of the SGB to provide expertise in a specific field, specialists are not necessarily readily available. There are communities, such as those in remote rural areas, which do not have access to these experts, and are most probably communities that might need the expertise the most. The best interests of children in these schools are equally important, and these SGBs should be assisted in other ways, even if only through legislative guidelines.⁴¹¹

6.13 Lack of guidance on an approach to discipline which meets the best-interests-of-the-child standard

Despite attempts by the legislator to move away from a punitive and retributive disciplinary system, the legislation and Guidelines do not really give proper guidance on what an acceptable alternative to a punitive system should look like. Furthermore, the examples of acceptable disciplinary measures provided in the Guidelines are still punitive in nature, and formal disciplinary proceedings are also very adversarial in nature. Legislation and the Guidelines should be more directive as to what would constitute alternative disciplinary measures complying with the best-interests-of-the-child standard.

7. CONCLUSION

This chapter commenced with a broad overview of the development of the legal framework with regard to education and school discipline and proceeded with a discussion on the provisions of legislation, case law and the Guidelines applicable to school discipline. This provided the background for the identification of a number of issues which are indicative of the fact that the current legal framework for school discipline is *prima facie* not properly aligned with the best interests of the child. Some of the issues highlighted include: the lack of child participation in

⁴¹¹ A good example of such a national standard relating to the best-interests concept is to be found in the *Children's Act 38/2005*. It contains a list of factors which should be considered in determining the best interests of a child whenever provisions of this Act should be applied. However, this list of factors is not suitable for application in the school disciplinary context.

drafting the code of conduct, the overemphasis on the rights of the transgressor, a narrow focus on what constitutes children's interests, and the lack of support measures and structures for counselling. Insufficient guidance on the role of the intermediary, the SGB's limited capacity to oppose the decisions of the HoD, and the HoD's responsibility to find alternative placement for only some learners were also highlighted. The lack of guidance on what should happen to learners while they are suspended or awaiting a decision on their expulsion, as well as when informal disciplinary measures are called for, also highlights not only the fact that educators are supposed to find their own way with regard to school discipline, but also the lack of focus on addressing the lack of focus on the best interest of the child.

These apparent deficiencies in the current legislation will be addressed in the chapters to follow. However, to remedy these deficiencies, proper care should be taken to ensure that any amendments are in line with the best interests of the child. Thus, before recommendations can be made on how to address the apparent lack of compliance with the best-interests-of-the-child standard, proper content should be given to this concept.

In what follows, the development of the concept in the South African law as well as international law context will be investigated. Content will be given to the concept with reference to other rights and a list of factors indicating the best interests of the child will be compiled to guide possible amendments to the existing legal framework.

CHAPTER 4

THE CONSTITUTIONAL FRAMEWORK FOR THE BEST-INTERESTS-OF-THE-CHILD PRINCIPLE

1. INTRODUCTION

There can be no keener revelation of a society's soul than the way in which it treats its children.

Nelson Mandela

The best-interests-of-the-child concept represents the legal standard for giving effect to the ideal of a society that treats its children in a just, fair and equitable way. This concept has been internationally accepted and developed over time. However, the concept is regarded by some as indeterminate.¹ Nevertheless, the best-interests-of-the-child principle is a useful benchmark once it has proper content.

The process of giving content to this concept will commence in this chapter and will continue in chapter 5. This chapter will start off by providing an overview of the development of the best-interests concept in international law and in the South African constitutional dispensation. This will be followed by a textual analysis, which is one of the methods employed to give content to the concept.² Furthermore, the broad functions and operation of the concept will be investigated, as well as its application, challenges and strengths. Attention will also be given to the importance of measures to ensure that it is applied appropriately.

2. DEVELOPMENT OF THE BEST-INTERESTS CONCEPT IN INTERNATIONAL LAW

It is important to investigate the development of the best-interests-of-the-child concept in the international law context to elucidate and inform the development and content of the concept within the South African context. In what follows, the international development of children's rights in general, and the best-interests-of-the-child concept in particular, will be discussed briefly so as to indicate the dramatic changes in the way that children are perceived.

¹ Davel & De Kock 2001:274; Bekink & Bekink 2004:22; Clark 2000:15; Malherbe 2008:269.

² See ch 1, par 4.1.1 herein.

For many centuries, children were part of the patriarchal system and were not considered as individuals with rights. All through antiquity and the Middle Ages, they were regarded as incomplete and miniature adults, and, in many instances, as the property of their parents. Children were at first seen as mere objects, and then as objects of protection. Now they are viewed as a subject of rights. The focus has thus shifted from the child as an object to a position of protecting her or him against harm, to a position of ensuring the general welfare of the child – which has a much broader scope and includes autonomy and participation rights. The child is now finally seen as the bearer of fundamental rights and basic liberties.³ Prest and Wildblood⁴ indicate two major shifts in the development of children's rights. Firstly, obligations concerning children "moved from being the responsibility of adult citizens to being the responsibility of States themselves". Secondly, the position of children also changed from being basically the objects of international law, requiring legal protection, to being independent subjects who are recognised as individual rights bearers.

In the early 20th Century, when the world was still suffering from the devastating effects of the First World War (1914-1918), the plight of children was raised on the international level by several officials and agencies.⁵ This resulted in the adoption of the first international declaration, the Geneva Declaration of the Rights of the Child, by the General Assembly of the League of Nations in 1924.⁶ Also known as the Geneva Declaration, it was very limited in its scope, with only five clauses, but was described as an aspirational document,⁷ since it was not formulated in terms of the rights of children. Rather, it was a declaration of the duties of the adults of the world. According to Detrick,⁸ the impact of the First World War was very clear in the formulation of the Declaration, which focused largely on the material needs of the child. The Geneva Declaration was further seen as paternalistic and welfare-oriented in nature, with the emphasis on the child's vulnerability and on measures to protect the child.⁹

The Declaration contained the notion of the best interests of the child, although this was not referred to as such. The heart of the document was to be found in the preamble, which, in the first paragraph, contained the phrase: "men and women of all nations, recognizing that mankind

³ Zermatten 2003:3-3; Lopatka 1996:254; Tobin 2005:88; Quennerstedt 2009:164.

⁴ Prest & Wildblood 2005:129; see also Lopatka 1996:256; Tobin 2005:88.

⁵ Marshall 1999:105. These agencies and offices include: the British Foreign Office, the Canadian Council of Child Welfare, the Save the Children International Union, and the International Committee of the Red Cross – Prest & Wildblood 2005:129; Detrick 1999:13.

⁶ Marshall 1999:103-106.

⁷ Freeman 2007:10.

⁸ Detrick 1999:13; Wallace & Dale-Risk 2001:137.

⁹ Fottrell 2000:2.

owes to the Child the best that it has to give...".¹⁰ The Declaration is of significance, since it formed part of the initial steps taken at an international level to set legal standards regarding the rights of children.¹¹ Yet, it was non-binding and was incorporated in the domestic law of only a limited number of states. Being a document which was basically of moral and political significance, its impact on states and international organisations was limited to mere symbolic and inspirational value.¹² Despite the initial limited impact, the Declaration was the forerunner of a second important international document adopted much later, namely the United Nations Declaration on the Rights of the Child of 1959¹³, which culminated in the United Nations Convention on the Rights of the Child (CRC)¹⁴ in 1989.

The changed attitude to children was to be noticed throughout the 20th Century until a stage was reached where there was formal recognition of the rights of children. Although human rights were mostly a national concern at first, the position changed after the Second World War (1939-1945) and human rights were increasingly internationalised, which led to the adoption and enforcement of numerous international instruments. The adoption of these various international instruments signalled the above-mentioned changed in attitude to children.

After the establishment of the United Nations (UN), the Economic and Social Council of the UN was mandated to establish different commissions in the social and economic fields to promote human rights.¹⁵ One of these commissions, the Human Rights Commission, drafted the Universal Declaration of Human Rights¹⁶ (UDHR), which was adopted in 1948. The UDHR is seen as a "Declaration on the Essential Rights of Man" and was proposed even before the United Nations (UN) was established. The UDHR provides for general principles of human rights, and the two covenants that flowed from this provide for binding commitments by member states.¹⁷ The two covenants are the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁸ and the International Covenant on Civil and Political Rights (ICCPR).¹⁹

¹⁰ Marshall 1999:129; Freeman 2007:10. The five clauses deal with welfare issues and provide for the requisite means for normal development, both materially and spiritually (clause 1); hunger, health, help for "backward" children and neglected children (clause 2); preferential treatment for children in times of want (clause 3); to earn a living and to be protected from exploitation (clause 4); and to be brought up to be subservient to humanity (clause 5).

¹¹ Detrick 1999:13.

¹² Fottrell 2000:2; Lopatka 1996:257.

¹³ UN 1959. The General Assembly of the UN adopted the United Nations Declaration on the Rights of the Child by way of Resolution 1386(XIV) on 10 December 1959.

¹⁴ CRC 1989.

¹⁵ Charter of the United Nation 1945:a 68; see also Van Genugten 2012:206.

¹⁶ UDHR 1948; see also Van Genugten 2012:206.

¹⁷ McDougal, Lasswell & Chen 1980:180. The interpretative value of the UDHR is globally acknowledged.

¹⁸ ICESCR 1966. This was adopted on 16 December 1966 and came into force on 3 January 1976.

¹⁹ ICCPR 1966. This was adopted on 16 December 1966 and came into force on 23 March 1976.

The word “children” is used only once in the UDHR, and that is to distinguish between children born in and out of wedlock, but the Declaration applies to both adults and children.²⁰ Children are included in general terms or are indirectly referred to. An indirect reference to children is found in articles 25 and 26. Article 25 provides for special care and assistance for “motherhood and childhood”, without any indication when childhood ends. In terms of article 26, everyone is entitled to education, and it should be free in the “elementary and fundamental stages” and also compulsory in the elementary phase. The UDHR does not have any legally binding effect, but some provisions provide valuable principles and others “represent elementary considerations of humanity”.²¹ The exclusion of children’s rights in the Declaration is an indication of the position children held at that stage in society.

The General Assembly of the United Nations proclaimed the United Nations Declaration on the Rights of the Child on 20 November 1959, 9 years after the UDHR and 35 years after the Geneva Declaration.²² This was the second declaration by the United Nations with a pertinent focus on the rights of the child.

The United Nations Declaration on the Rights of the Child contains a preamble and 10 principles. The preamble recognises the rights set forth in the UDHR and reaffirms the sentiments of the Geneva Declaration that “mankind owes to the child the best it has to give”. The child’s physical and mental immaturity are acknowledged and the consequent need for special protection is confirmed. The United Nations Declaration on the Rights of the Child focuses not only on the material needs of the child, but also on his or her immaterial needs. Furthermore, the principles in this declaration are stated in terms of children’s rights.²³

The United Nations Declaration on the Rights of the Child is the first international human rights document to refer specifically to the “best interests of the child”.²⁴ Principle 2 provides:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of law for this purpose, the best interests of the child shall be the paramount consideration.

²⁰ Detrick 1999:14.

²¹ Brownlie & Goodwin-Gill 2006:23.

²² League of Nations 1924.

²³ Detrick 1999:14. See principle 3, which recognises the child’s civil right to a name and nationality.

²⁴ Freeman 2007:15; Prest & Wildblood 2005:129.

The Declaration endeavours to give content to the best-interests standard. A very high standard is set in respect of the child's best interests, namely that these should be "the paramount consideration".²⁵ The Declaration refers to education too and, in this context, again uses the best-interests standard. Principle 7 reads as follows:

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.²⁶

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities, shall endeavour to promote the enjoyment of this right.

Although this declaration sets a very high standard and seeks to give content to the best-interests principle, it can be regarded merely as an inspirational document.²⁷ Binding international instruments, such as the ICCPR of 1966 and the ICESCR of 1966, followed. However, it is clear that children are not a primary focus of the ICESCR. The best-interests principle, or any other child-oriented guiding principle, is not included in this instrument.²⁸ The

²⁵ Freeman 2007:25 points out that the best-interests-of-the-child standard is more expansive than being one or the first of the considerations, or being the most important consideration.

²⁶ See ch 2, par 3.1 herein for a definition of discipline.

²⁷ Lopatka 1996:257; Freeman 2007:15. The CRC, which is a binding document, eventually superseded it.

²⁸ Freeman 2007:15-16. Children are regarded as part of the human family and therefore the Covenant would also be applicable to them (preamble). Although not the focus of the Covenant, it in fact refers to children specifically. This includes protection and assistance for the family in order to provide for special care and education for dependent children (a 10(1)). Special measures of care and protection should be afforded to children in general, and specifically against economic and social exploitation (a 10(3)). Children also receive special attention in article 12, dealing with physical and mental health, as far as the reduction of the stillbirth rate, the reduction of infant mortality, and the healthy development of the child are concerned (a 12(1)(a)). Reference to a child's education is made with regard to the parent's right to choose education for a child in line with his or her own convictions in instances where education is provided by private institutions (a 13(3)). Although article 2 provides for non-discrimination, there is no specific reference to age as a prohibited ground, and this should be inferred indirectly *via* the prohibition of discrimination on the grounds of "other status". Article 3 deals with equality and provides that men and women have equal rights to the enjoyment of all the economic, social and cultural rights embodied in the Covenant, with no reference to children or the attainment of majority. Article 10 provides an excellent opportunity to

best-interests principle is also absent in the ICCPR, but there is reference to specific rights for children.²⁹

Fottrell³⁰ indicates that the early “international efforts to protect children were aspirational and perhaps even tokenistic with the child’s rights being framed in broad terms”. The movement for recognising children as individual rights bearers started to gain momentum only in the 1970s. This movement was an attempt to recognise the child in the political, civil and social contexts and to move away from the paternalistic and welfare-oriented approaches.³¹ The recognition of children’s rights as human rights necessitated an independent international treaty and led to the adoption of the United Nations Convention on the Rights of the Child (CRC) on 20 November 1989, which convention entered into force on 2 September 1990. The CRC represents an elaboration on human rights standards for children.³²

The aim of the CRC is to improve the status of the child through “worldwide promotion and protection of the child’s needs, interests, rights, and liberties”. The CRC is thus an international “standard-setting instrument” providing for the minimum standard. It is of universal character, granting every child in every state rights and liberties regardless of the “economic or political development or orientation” of a particular state. Despite its universal character, the CRC still recognises the realities of economics and levels of development, and the importance of traditions and cultural diversity in the development and protection of the child.³³ It is therefore a “significant legal and political achievement”.³⁴ The fact that the CRC has been ratified by almost

distinguish between adults and children, but this provision does not contain any prohibition on child marriages. It merely states that both parties should consent to the proposed marriage.

²⁹ Again, the child is included in the Covenant through membership of the “human family”. The Covenant prohibits the death penalty for “persons below eighteen years of age” (a 6(5)). There are also references to the detention of juveniles (a 10(2)9(b) & 10(3)), and to judgments in public in juvenile trials and in matrimonial and guardianship disputes (a 14(4) & 18(4)). Article 18(4) protects the parents’ right to ensure the “religious and moral education of their children in conformity with their own convictions”. Children should also be protected in divorce matters (a 23). The family is regarded as the “natural and fundamental group unit of society and is entitled to protection by society and the State”. Men and women of marriageable age have a right to enter voluntarily into a marriage. Again, no reference to an appropriate age is made. The only other reference to children in this article provides for the protection of children in cases of divorce of their parents, but children are not defined. Article 24 deals explicitly with the child’s right to protection without any discrimination, as well as the right to a registered name immediately after birth and to acquire a nationality. Article 26 provides for the prohibited grounds for discrimination, but age is not included as a prohibited ground.

³⁰ Fottrell 2000:2.

³¹ Fottrell 2000:2-3.

³² Zermatten 2003:3; Tobin 2005:88; Brownlie & Goodwin-Gill 2006:429. It came into force after the 20th state ratified it.

³³ Lopatka 1996:253 & 256.

³⁴ Fottrell 2000:1.

all states members is often referred to as “almost universal ratification”.³⁵ This almost global ratification, provides it with further moral force to act as a yardstick to protect and promote the rights of children.³⁶

The most important difference between the CRC and earlier international human rights documents on children’s rights is that the earlier treaties did not recognise the autonomy of the child and the importance of listening and giving due weight to the child’s views. The CRC addresses the child’s welfare as a justice issue and not a mere charity issue; thus, there is a move away from focusing only on child welfare to a focus on different aspects of the child’s citizenship.³⁷ In this regard, it should be noted that the best interests of the child and the right to be heard are part of the four foundational provisions of the CRC.³⁸

The CRC is not above criticism. Owing to the spirit of cooperation, inclusion and accommodation used as a basis by the drafters of the CRC, important issues were not included, such as a prohibition on corporal punishment. Thus, although human rights and children’s rights norms were initially developed at a universal level, it did not address the specific needs of all children. Consequently, the Assembly of the Heads of State and Government of the Organization of African Unity was of the opinion that the African child’s needs were not adequately addressed in the CRC, and therefore the African Charter on the Rights and Welfare of the Child (ACRWC) was adopted as a regional instrument, which was eventually ratified by South Africa³⁹ The ACRWC⁴⁰ makes provision for the best interests of the child and provides that these interests will be “*the*” primary consideration, thus setting a higher standard than the CRC’s “*a*” primary consideration.⁴¹

³⁵ Van Genugten 2012:205-236 rightly cautions against the dangers of regarding “universality of human rights” and, for that matter, children’s rights, in a simplistic way. He warns that universality of human rights should not be equated with uniformity. He highlights the fact that due regard should be had to the so called “margin of appreciation” which states have with regard to the achievement of human rights.

³⁶ Lopatka 1996:261; Alderson 2000:44. UNICEF 2005:sp. Only two countries, the United States of America (USA) and Somalia have not ratified it. It is the Convention ratified by most countries.

³⁷ Quennerstedt 2009:164.

³⁸ CRCGC 5 2003:par 12.

³⁹ Viljoen 2000:215.

⁴⁰ ACRWC 1990. This Charter, as the first regional treaty on the rights of the child, was adopted on 11 July 1990 at the 26th Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity held in Addis Ababa, Ethiopia. It entered into force on 29 November 1999.

⁴¹ ACRWC 1990:a 4(1). South Africa ratified the Charter on 7 January 2000. See also the discussion on the meaning of “paramount” importance as opposed to a “consideration” in paragraph 5.3 below.

2.1 Impact of international law on the development of the best-interests concept

It is common cause that social perceptions have changed since the drafting of the CRC and that an extension of rights and liberties for children has been seen.⁴² The CRC also provides a legal framework for international cooperation and agreements.⁴³ Thus it makes provision for the establishment of the Committee on the Rights of the Child which aims, *inter alia*, at guiding and assisting states parties to implement the provisions of the CRC. The effect of the advisory, rather than confrontational, role of the committee is that long-term goals, rather than the short-term goals of protection and promotion of children's rights, are achieved.⁴⁴ Yet, the work of the Committee on the Rights of the Child shows that the provisions of the CRC are taking effect.⁴⁵ For instance, Hodgkin and Newell⁴⁶ provide guidance on the implementation of the CRC and often refer to periodic reports of states parties⁴⁷ to the Committee on the Rights of the Child. In their reply to the states parties the Committee in the Rights of the Child often express concern at the non-compliance with the provisions of the CRC. In addition, states parties are also often commended for the implementation of measures in order to comply with the CRC provisions. States parties are also urged, in these comments, to take further steps than those that have been implemented. The reports by many states parties indicate, at the very least, their recognition of the importance of children's rights and show that steps are often taken over time to address issues of non-compliance. The comments of the Committee in the Rights of the

⁴² See Dennis 2000:789-796 for a discussion on the adoption of two additional protocols to the CRC, namely the Protocol on Involvement of Children in Armed Conflict and the Protocol on the Sale of Children, Child Pornography and Child Prostitution. These protocols were adopted to "strengthen and enforce the norms for the protection of the most vulnerable children, who desperately need the world's attention".

⁴³ Lopatka 1996:262. Examples of international agreements in line with the CRC provisions are agreements on intercountry adoptions.

⁴⁴ Kilkelly 2000:88.

⁴⁵ Fottrell 2000:1; Kilkelly 2000:88.

⁴⁶ 2007:7-8: (commending measures taken and recommending further steps to protect children against discrimination on the grounds of sexual orientation in the United Kingdom – Isle of Man); 10: (commending measures taken and recommending further steps regarding the age of criminal capacity in Cyprus); 21-22: (commending measures taken and recommending further steps on the equal status of, and non-discrimination with regard to, children in Lebanon and voicing concern about the position regarding discrimination affecting children in Zimbabwe and Nigeria); 37-39: (commending measures taken and voicing concern about the consideration of the best interests of children in Albania and Canada); 89-90: (expressing concern about the violation of the right to life and about violence against children in Burundi, Colombia, Iraq, Mozambique, Nigeria, Brazil and the United Kingdom); 150-152: (expressing concern and or commending steps taken with regard to children's right to be heard in Chile, Burkina Faso, Morocco, India, Algeria, Hungary, Republic of Tanzania, Mexico, Iceland and Belgium); 412: (expressing concern about, commending measures taken and/or recommending further steps on, the child's right to education and the aims of education in respect of issues such as equal opportunities for education, high dropout rates, availability and accessibility of education, and too much pressure on children in schools). Several country reports are discussed by the authors with reference to these and other issues.

⁴⁷ CRC 1989:a 43 (on the role of the Committee on the Rights of the Child), 44 (on states parties obligation to report to the Committee on the Rights of the Child).

Child on the periodic reports further reveal that some states parties have made significant strides in giving effect to children's rights, while others still have a long way to go.

Tobin⁴⁸ found that the constitutions of member states reflected three categories of approaches to the treatment and status of children. These approaches were further in line with the historical and social context during the drafting and adoption processes in respect of the states parties' constitutions and with the general recognition of children's rights by the international community. He describes the three categories of constitutions as follows: "the 'invisible child' constitution in which children are neither seen nor heard and are accorded no special treatment or recognition;⁴⁹ the 'special protection' constitution in which children are given special recognition within the text because of their vulnerability and need for care and special protection;⁵⁰ and the 'children's rights' constitution in which the special recognition of children is addressed in terms of children's rights rather than the welfare approach that characterises their treatment under 'special protection' constitutions".⁵¹

By 2005, only a few members of the UN had made explicit provision for the best-interests principle in their constitutions.⁵² The other states parties have to rely on the incorporation of international instruments in their domestic law, in national legislation and in national policies in order to include the best-interests-of-the-child principle in their legal systems. There are a number of states that actually include the best-interests principle indirectly in their constitutions by providing that children will enjoy those rights that are recognised and enshrined in ratified international instruments.⁵³

The different states parties are obliged to enforce the provisions of the instruments in their own countries, but they remain accountable to the international community. State parties give effect to their international obligations through the enactment and implementation of national legislation and policies. Thus, the international instrument becomes a gravitational force

⁴⁸ Tobin 2005:86-126.

⁴⁹ Tobin 2005:94. The older constitutions are more likely to fall into this category and are most likely to make no significant mention of children.

⁵⁰ Tobin 2005:94. These constitutions were most likely adopted after the Second World War, but before the finalisation of the CRC. They generally take some account of children, but from a protective or welfarist perspective.

⁵¹ Tobin 2005:94. The constitutions adopted after the finalisation of the CRC are most likely to have adopted a child rights approach.

⁵² Tobin 2005:113. He indicates that the following states parties included the best-interests principle in their constitutions: Ecuador; Ethiopia; Gambia, Namibia, South Africa and Uganda.

⁵³ Tobin 2005:86.

drawing states parties towards complying with the global norms, which include the best-interests-of-the-child concept.⁵⁴

The best-interests concept developed from a mere international aspiration in the 1924 Geneva Declaration to an internationally acknowledged principle in the almost universally ratified CRC. Since South Africa has ratified the CRC, it is bound by its provisions.⁵⁵ The move away from a welfare orientation and the protection of children to the recognition of children's rights should therefore be reflected in the content given to the best-interests-of-the-child concept and its application to the school discipline context. In what follows, the development and content of this concept in South African law will be discussed with reference to international law, where applicable.

3. DEVELOPMENT OF THE BEST-INTERESTS CONCEPT IN SOUTH AFRICAN LAW

The best interests of the child developed over time in South African law as well, but this process was catalysed by the advent of the new constitutional dispensation. In what follows, the developments before and after the adoption of the interim Constitution in 1994 will be discussed.

3.1 The best interests of the child before 1994

The best-interests principle was introduced in South African law in *Fletcher v Fletcher* in 1948.⁵⁶ Since then, there have been ample references in case law to the best interests of children, indicating that the concept "best interests of the child" constitutes a principle, although different terms are used. The following terms are used to refer to the best-interests concept: There are no "hard and fast rules, except for the 'one guiding rule' ... that the interests of the child or children are paramount";⁵⁷ "best interests of the child is the 'guiding or determining factor";⁵⁸ "guiding criterion";⁵⁹ "main or paramount consideration";⁶⁰ "... the principles which in my view bear on the question what would be in the child's best interest";⁶¹ "...paramount question .. is the best interests"⁶²; "it is trite law that the test to be applied is: What would be in the best

⁵⁴ Olivier 2000:199-200; Viljoen 2000:215.

⁵⁵ South Africa ratified the CRC on 16 June 1995.

⁵⁶ 1948 (1) SA 130 (A);par 145.

⁵⁷ *Venton v Venton* 1993 (1) SA 763 (D):766.

⁵⁸ Heaton 1990:95.

⁵⁹ Palmer 1996:98.

⁶⁰ Palmer 1996:99; *Van Oudenhove v Gruber* 1981 (4) SA 857 (A):867.

⁶¹ *French v French* 1971 (4) SA 298 (W):298.

⁶² *Bailey v Bailey* 1979 (3) SA 128 (A):142.

interests of the three children”⁶³; “...there is substantially one norm to be applied, namely the predominant interests of the child”⁶⁴; “...the interests of the children is a golden thread which runs throughout the whole fabric of our law relating to children”⁶⁵.

The concept “best interests of the child” is mostly used in relation to custody and access cases. Since 1948, the court has given content to this concept.⁶⁶ Over the years, several factors were identified to guide the determination of the best interests of a child in divorce matters. These included economic, social, moral and religious considerations, ties of affection, and, where appropriate, consideration of the wishes of the child.⁶⁷ The courts have given a very wide interpretation to the concept “best interests of the child”. In 1971, the court went further in *French v French*⁶⁸ and assigned a hierarchical order to the different considerations. On 24 January 1994, only three months before the inception of the interim Constitution, King J provided an expansive list of factors to determine which parent would promote and ensure the physical, moral and emotional welfare of the child in custody matters in *McCall v McCall* (“the *McCall* case”).⁶⁹ These are not fixed principles or rules, but serve merely as guidelines and aids

⁶³ *Van Oudenhove v Gruber* 1981 (4) SA 857 (A):868; see also *Shawzin v Laufer* 1968 (4) SA 657 (A):666 where the court referred to the “true test”.

⁶⁴ *Shawzin v Laufer* 1968 (4) SA 657 (A):662.

⁶⁵ *Kaiser v Chambers* 1969 (4) SA 224 (C):228; Heaton 2009:2.

⁶⁶ Palmer 1996:99 & 102.

⁶⁷ *Deijl v Deijl* 1966 (4) SA 260 (R):261H.

⁶⁸ 1971 (4) SA 298 (W). The court held as follows:

In respect of a young child its sense of security should be preserved and protected above all. The child must feel that it is welcome, wanted and loved. 2. After applying the primary test as to how the sense of security of the child will be best preserved, the suitability of the proposed custodian parent is to be tested by enquiring into his or her character, and by enquiring into the religion and language in which the children are to be brought up. 3. Even when the suitability of the proposed custodian parent is settled and the psychological security of the child is ensured, material considerations relating to the child’s well-being will also be considered. 4. Finally, the wishes of the child will be taken into account – with young children as a constituent element in the enquiry into whether they will attain a sense of security – and, with more mature children, a well informed judgment, albeit a very subjective judgment, of what the best interests of the child really demand.

⁶⁹ 1994 (3) SA 201 (C):205B-G. These factors are:

- (a) the love, affection and other emotional ties which exist between parent and child and the parent’s compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child’s needs and desires;
- (c) the ability of the parent to communicate with the child and the parent’s insight into, understanding of and sensitivity to the child’s feelings;
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called “creature comforts”, such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development;

in order for the court to come to some decision as to which alternative is most likely to best serve the interests of a child.⁷⁰ Numerous cases refer to this list of factors provided for custody matters and it has provided practitioners with valuable guidance.⁷¹

Not only has case law reflected the importance of the best-interests-of-the-child concept, but, as time has gone by, several pieces of legislation started to refer to it explicitly. Early indications of the legislature's intentions to give effect to the common law concept of best interests of the child can be found in the 1979 *Divorce Act*⁷² and the 1983 *Child Care Act*.⁷³ In 1987, the Office of the Family Advocate was established in terms of the *Mediation in Certain Divorce Matters Act*⁷⁴ to investigate and facilitate the process of determining the best interests of children affected by divorce proceedings and to make recommendations to the court in this regard.

Despite the legislative imperative that the best interests of the child should be considered in divorce proceedings, there were no legislative guidelines or framework available to guide the courts and practitioners in determining the best interests of children. The courts thus continued to develop the concept and to give content to it until the comprehensive list of factors was finally provided in the *McCall* case discussed above.

-
- (h) the mental and physical health and moral fitness of the parent;
 - (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
 - (j) the desirability or otherwise of keeping siblings together;
 - (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
 - (l) the desirability or otherwise of applying the doctrine of same-sex matching, particularly here, whether a boy of 12 [this is with reference to the particular boy, Rowan, in this instance] should be placed in the custody of his father; and
 - (m) any other factor which is relevant to the particular case with which the Court is concerned.

⁷⁰ Heaton 1990:98.

⁷¹ The Juta Law Reports have reported 18 other cases referring to the *McCall* case since 1996. The last case was reported in 2008, shortly after the new *Children's Act 38/2005* came into operation. Currently, section 7 of the *Children's Act* contains a list of factors to be taken into account in applying the best interests of the child.

⁷² 70/1979:s 6 Safeguarding of interests of dependent and minor children:

- (1) A decree of divorce shall not be granted until the court –
 - (a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances;

⁷³ 74/1983:s 18(4) Adoption of children

- (4) A children's court to which application for an order of adoption is made in terms of subsection (2), shall not grant the application unless it is satisfied –

...

- (c) that the proposed adoption will serve the interests and conduce to the welfare of the child; ...

⁷⁴ 24/1987:s 4 Powers and duties of family advocates.

In conclusion, in common law, the concept is mainly used in family law. The High Court acts as the upper guardian of all children and has used the common law best-interests-of-the-child concept to ensure that children's interests are properly protected. However, following international trends, some authors have recommended legislative guidance to determine the best interests of children.⁷⁵

3.2 The best interests of the child in the new constitutional dispensation

South Africa went through huge political change in the early 1990s, including the eventual adoption of a new Constitution, which included a Bill of Rights.⁷⁶ Apart from all the rights afforded to everyone, the Constitution also explicitly makes provision for children's rights and includes the best-interests-of-the-child concept. This is an indication that the other provisions on fundamental rights are not regarded as being sufficient to ensure the adequate protection and promotion of children's interests.⁷⁷ South Africa is one of the only six countries in the world to have included the concept in its Constitution, with both the interim⁷⁸ and final Constitution containing the concept.⁷⁹ The final version of the paramountcy of this principle is captured in section 28(2) and reads as follows⁸⁰:

⁷⁵ Clark 2000:20.

⁷⁶ Constitution 1996:ch 2.

⁷⁷ Visser 2007:459.

⁷⁸ The *Constitution of the Republic of South Africa 200/1993* provides as follows in section 30(3):
For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.

⁷⁹ Tobin 2005:113.

⁸⁰ Constitution 1996:s 28(1) which provides:

- (1) Every child has the right –
- (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that –
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

- (2) A child's best interests are of paramount importance in every matter concerning the child.

In section 28(3) of the Constitution, it is further stated that "child" means a person under the age of 18 years.

Section 28(2) is an expansive response to South Africa's international obligations under the CRC.⁸¹ At first, the inclusion of the best-interests-of-the-child concept in the Constitution caused a great deal of confusion with regard to the actual status of the concept. Since 1999, a number of Constitutional Court judgments have, however, referred to the best interests of the child. Some of the judgments have referred to it as a principle,⁸² a standard,⁸³ a guarantee,⁸⁴ or a right,⁸⁵ and, in some instances, the court has referred to it as both a right and a principle.⁸⁶ In certain instances, the inference can be drawn that it is a right, because the court has referred to the limitation of section 28(2).⁸⁷ The court has also found a legislative provision unconstitutional, because it was in conflict with section 28(2).⁸⁸ These ostensible conflicting pronouncements have undoubtedly caused uncertainty with regard to the question whether section 28(2) is a legal principle, whether the common law principle has been elevated to a constitutional right or whether it is a constitutional right as well as a constitutional principle.

In *S v M*,⁸⁹ the Constitutional Court clarified the confusion and confirmed, with reference to apparently conflicting previous judgments in *De Reuck v Director of Public Prosecutions*,

⁸¹ *S v M* 2007 (2) SACR 539 (CC):par 6.

⁸² *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC):fn vii; *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC):par 22.

⁸³ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC):par 18.

⁸⁴ *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC):par 29.

⁸⁵ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC):432.

⁸⁶ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC):par 17-18; *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC):par 41.

⁸⁷ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC):par 20; *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC):par 29; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC):432.

⁸⁸ *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC):par 22.

⁸⁹ 2007 (2) SACR 539 (CC):par 14 & 21. This case was initially reported as *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC) (26 September 2007). It can be regarded as the *locus classicus* on the best interests of the child and is widely reported in different law reports, and includes the following references: *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC); 2007 (2) SACR 539; 2007 (12) BCLR 1312; *M v S (Centre for Child Law as Amicus Curiae)* 2007 (12) BCLR 1312 (CC); [2007] JOL 20693 (CC). It should be noted that the latter references are actually a better indication of who the parties were before the Constitutional Court. M indeed appealed to the Constitutional Court and was actually the applicant in that particular court. However, for purposes of this thesis, the first-mentioned reference will be used.

Witwatersrand Local Division, and Others,⁹⁰ *Sonderup v Tondelli and Another* (“the *Sonderup* case”)⁹¹ and *Minister of Welfare and Population Development v Fitzpatrick and Others* (“the *Fitzpatrick* case”)⁹² that:

section 28(2), read with section 28(1), establishes a set of children's rights that courts are obliged to enforce.⁹³

The court further explicitly explained the perceived discrepancies in the judgments and stressed the fact that it had already referred to section 28(2) as a right in the *Fitzpatrick* case and held: “It will be noted that he [Goldstone J in *Fitzpatrick*] spoke about a right and not just ... a guiding principle.”⁹⁴ The dual nature of the best-interests concept was further highlighted in *S v M*,⁹⁵ where the court held:

In our new constitutional order, however, the scope of the best interests principle has been greatly enlarged.

In the *Sonderup* case, the Constitutional Court referred to section 28(2) as an “expansive guarantee”. The court, in *S v M*,⁹⁶ however clarified its position by stating that, since section 28(2) is a substantive right, it had referred to section 28(2) as an “expansive guarantee” in the *Sonderup* case. It is clear, through these explanations of the Constitutional Court, that the best interests of the child constitute both a constitutional right and a principle.

As stated earlier, the best-interests-of-the-child principle was predominantly applied in custody matters before 1994. Since the new Constitution, however, it has been applicable to “every matter concerning the child” and has been applied in other cases such as review proceedings with regard to a protection order in terms of the *Domestic Violence Act*,⁹⁷ in maintenance matters, in succession matters, in decisions regarding the medical treatment of children, and in the religious upbringing of children.⁹⁸ The concept has also been used in a number of cases

⁹⁰ 2003 (2) SACR 445 (CC):par 54-55.

⁹¹ 2001 (1) SA 1171 (CC):par 29; also reported as *LS v AT and Another* 2001 (2) BCLR 152 (CC):par 29.

⁹² 2000 (7) BCLR 713 (CC):par 17.

⁹³ *S v M* 2007 (2) SACR 539 (CC):par 14.

⁹⁴ *S v M* 2007 (2) SACR 539 (CC):par 22.

⁹⁵ *S v M* 2007 (2) SACR 539 (CC):par 12.

⁹⁶ 2007 (2) SACR 539 (CC):par 22.

⁹⁷ 116/1998.

⁹⁸ Davel 2007:2-9.

related to language issues in education,⁹⁹ to the provision of adequate facilities and proper living conditions in a reform school,¹⁰⁰ and to the eviction of a school located on private property.¹⁰¹

One of the most recent and profound developments regarding the best-interests concept is that the legislator has heeded the calls of authors and has followed international trends regarding a list of factors indicating the best interests of the child. The new *Children's Act*¹⁰² includes an expansive list of factors to be taken into account in determining the best interests of the child.

A similar list of factors should be drafted to indicate the best interests of the child in the context of school discipline, since the list provided in the *Children's Act* is not completely suitable for school discipline. However, the best-interests concept in this context needs to be given content. The content-giving process will therefore start with a textual analysis.

4. TEXTUAL ANALYSIS OF SECTION 28(2) OF THE SOUTH AFRICAN CONSTITUTION

The process of textual analysis entails a generous and purposive approach to interpretation and includes the compulsory consideration of international law and the discretionary consideration of foreign law.¹⁰³ Therefore, in what follows, section 28(2) of the Constitution will be broken down into different phrases, and every phrase will then be interpreted with reference to article 3 of the UN's CRC. Article 3(1) of the CRC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

4.1 "A child"

Section 3(1) of the CRC states that, "in all actions concerning *children* ... the best interests of the *child* shall be a primary consideration".¹⁰⁴ Thus the provision refers to both the individual

⁹⁹ *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* 2003 (4) SA 160 (T):176; *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA):par 59.

¹⁰⁰ *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223(T):230.

¹⁰¹ *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* (the "Juma Masjid case") 2011 (8) BCLR 761 (CC).

¹⁰² 38/2005:s 7. This section and a few others came into operation on 7 July 2007, and the remainder of the Act came into operation on 1 April 2010.

¹⁰³ Constitution 1996:s 39(1); see also ch 1, par 4.1 herein. Du Plessis 2008:32-176 indicates that the consideration of international law does not make all international law binding to the extent that it "must be observed as law, but that it is binding to the extent that "due regard must be had to it".

¹⁰⁴ My emphasis.

child and to children as a collective. In contrast, the Constitution refers only to “[a] *child’s* best interest ... in every matter concerning the *child*”.¹⁰⁵ At first glance, this creates the impression that section 28(2) is applicable only to individual children, while, in international law, the best-interests-of-the-child concept refers to individual as well as groups of children, and to children in general. The question therefore arises whether section 28(2) refers only to the interests of individual children or whether it also includes children as a group or children generally.

Couzens¹⁰⁶ argues that a proper reading of the Constitution provides a similar outcome as article 3(1) of the CRC. Section 8(1) of the Constitution provides as follows:

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

This is in line with the provisions of article 3(1) of the CRC. She further argues that, although section 28(2) does not refer to groups of children or to children in general, read in conjunction with section 8(1), the conclusion can be drawn that section 28(2) refers to groups of children and children in general. This is because the decision-makers mentioned in section 8(1) normally make decisions for groups of children or children in general and not only individual children. This is also true in school education, where most official decisions are made that affect groups or categories of children.¹⁰⁷ Hammarberg¹⁰⁸ indicates that, since the concept is applicable to individual children as well as groups of children, it makes it even more relevant in political and policy terms.

The latest legislation referring to the best interests of the child that focuses primarily on the interests of individual children¹⁰⁹ is the *Children’s Act*,¹¹⁰ which explicitly provides in section 6:

- (1) The general principles set out in this section guide –
- (a) the implementation of all legislation applicable to *children*, including this Act; and
 - (b) all proceedings, actions and decisions by any organ of state in any matter

¹⁰⁵ My emphasis.

¹⁰⁶ Couzens 2010:274.

¹⁰⁷ Visser 2007:46.

¹⁰⁸ Hammarberg 2008:2.

¹⁰⁹ *Children’s Act* 38/2005:s 7. This section refers only to individual children and not to groups of children or to children in general. The *Child Justice Act* 75/2008 refers to the best interests of children in the preamble, but the sections refer to the best interests of the child. See also sections 35(i) & 65(2) of the *Child Justice Act* 75/2008. Sections 39(1) & (5) of the latter Act refer to the simultaneous assessment of a group of children if it is in the best interests of all the (individual) children concerned.

¹¹⁰ 38/2005. [My emphasis]

concerning a *child or children in general*.

- (2) All proceedings, actions or decisions in a matter concerning a child must –
- (a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;...¹¹¹

Thus the general principles are also applicable to legislation pertaining to the education of children. Section 6(1) of the *Children's Act*, read with section 6(2)(a), provides that, in proceedings, actions and decisions by any organ of state, the rights contained in the Bill of Rights must be respected, protected, promoted and fulfilled. Taking into account that section 28(2) constitutes a right, all organs of state must respect, protect, promote and fulfil the best interests of a child or children in general.¹¹²

Furthermore, there are quite a number of examples in case law where the courts have applied the best-interests concept to groups of children¹¹³ and children in general.¹¹⁴ In the latter

¹¹¹ The remainder of section 6 provides as follows:

...

...

- (a) ...
- (b) respect the child's inherent dignity;
- (c) treat the child fairly and equitably;
- (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
- (e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and
- (f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has.
- (3) If it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child.
- (4) In any matter concerning a child –
- (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
- (b) a delay in any action or decision to be taken must be avoided as far as possible.
- (5) A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

¹¹² See the discussion in ch 3, par 5.3 herein on the role of the SGB as an organ of state.

¹¹³ In *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere* 2003 (4) SA 160 (T) and *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 (10) BCLR 973 (SCA), the court found that it was not in the best interests of a group of English-speaking learners to be removed from the school, despite the illegal conduct of the Department which had enrolled them contrary to the language policies of the respective schools. In *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T), the court found that the appalling conditions at a school of industry were infringing on several rights of learners, including s 28(2). In the *Juma*

instance, the court has often had to rule on an individual case, but in the judgment has dealt not only with the matter at hand, but also with what the position of other children in a similar situation would be. In *S v M*,¹¹⁵ the Constitutional Court clarified any doubt in this regard and held:

Individually and collectively all children have the right to express themselves as independent social beings.

Couzens¹¹⁶ argues that none of the cases dealing with the best interests of the child explicitly discuss whether the term “a child” also includes children. Still, the perception is created that the courts are arguing from the assumption that what is best for a child is best for all children, and vice versa. It seems as though the criteria applied to individual children are also applied to groups of children and children in general and include criteria such as stability, long-term interests, and compliance with constitutional and other statutory provisions. Therefore, to give a narrow textual interpretation to the phrase “child” will not only limit the application of the best-interests-of-the-child concept to individual children, but is also not in line with a generous and purposive interpretation of the text as prescribed in *S v Makwanyane*.¹¹⁷ Furthermore, it would

Musjid case, the court found that the High Court had not properly considered the best interests of the learners in the school when it granted an eviction order.

¹¹⁴ In *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC), the court had to decide on the constitutionality of provisions in the *Child Care Act 74/1983* which prohibited foreigners from adopting South African children. The court found that, to suspend the unconstitutionality order would not be in the best interests of similarly situated children and that the existing legislation was adequate to secure their interests. In *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC), the court found that provisions in the *Child Care Act 74/1983* prohibiting the joint adoption of children by a same-sex couple was unconstitutional and was not only contrary to section 28(1)(b) of the Constitution, but also failed to accord paramountcy to the best interests of children, and are thus infringing section 28(2). In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 4 SA 222 (CC), the court had to investigate the compatibility of provisions in the *Criminal Procedure Act* relating to the protection of child victims and witnesses. Many of these children are victims of sexual offences. Thus the court regarded them as one of the most vulnerable groups in society and as having a constitutional right “to have their best interests considered as of paramount importance”. The court further found that, although the particular child in question had had to testify without the aid of an intermediary, owing to a misinterpretation of the law by the court *a quo*, the Constitutional Court’s decision “will have an impact on many others whose cases are pending in courts and those who will [are] complainants of sexual abuse in the future”. In *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T), the court found that different state departments were infringing on the rights of unaccompanied foreign children in repatriation camps. The court thereupon made specific orders regarding the children already in detention, as well as regarding any children that might be detained in future.

¹¹⁵ *S v M* 2007 (2) SACR 539 (CC):par 19.

¹¹⁶ 2010:281.

¹¹⁷ 1995 (3) SA 391 (CC); see also ch 1, par:4.1.1, 4.1.6 herein.

not be in line with international law, which must be considered in the interpretation of constitutional provisions.¹¹⁸ Such a narrow interpretation would result in a diluted application.

4.2 “Best interests”

Alston¹¹⁹ avers that the Working Group responsible for the drafting of the CRC did not really spend time on discussing the meaning of the phrase “best interests of the child” in article 3(1). According to him, in 1988, some discussions took place on the meaning of the phrase, but no conclusive answers were reached and, at best, it was agreed that the:

phrase was inherently subjective and that its interpretation would inevitably be left to the judgment of the person, institution or organisation applying it.

Van Bueren¹²⁰ argues that, under the CRC, the concept “best interests of the child” is actually a new one because it “has been transformed by the Convention beyond its original concept of discretionary welfarism”. She indicates that the concept started out as a “principle of compassion” and a “self-imposed limitation on adult power”. However, in the South African context, it has been developed into an enforceable constitutional right, which is a far cry from mere welfarism or self-imposed limitation of adult power.

Owing to the apparent lack of focus on what “best interests” meant in the original drafting process and the alleged shift in its meaning, several dimensions of the best-interest concept will be explored in this textual analysis. These include a determination of which children’s best interests are included in this provision, of what “the interest of children” constitutes, of the variability of children’s interests, of the short-, medium- and long-term interests of children, and of the implications of referring to the “best” interests of the child.

4.2.1 Which children’s best interests?

In *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)*,¹²¹ the Constitutional Court took the initiative and appointed a *curator ad litem* in an application for the adoption of children by a same-sex couple to represent the interests of the children who were the subject of this application, and also of other children born and unborn who might be affected by the court’s order.

¹¹⁸ Constitution 1996:s 39(1)(b).

¹¹⁹ Alston 1994:10-11.

¹²⁰ Van Bueren 2000:204.

¹²¹ 2003 (2) SA 198 (CC):par 2.

Consequently, the court considered not only the interests of the children who were directly affected by the outcome of the case, but also any other children, even those not yet born. This clearly creates the impression that, whenever decisions are made where children's interests are at stake, a broad approach addressing the needs of as many children as possible, is preferred.

In the context of education, the duties of the School Governing Body (SGB) are set out in section 20(1) of the *South African Schools Act* ("Schools Act")¹²² and include, *inter alia*, that the SGB must:

- a) promote the best interest of the school and strive to ensure its development through the provision of quality education for all learners at the school.

In *Head of Department, Mpumalanga Department of Education, and Another v Hoërskool Ermelo and Another*,¹²³ the Constitutional Court acknowledged the fiduciary relationship that existed between the school and the SGB, but emphasised that the SGB's responsibilities were not limited to the learners of the school. It therefor held:

However, a school cannot be seen as a static and insular entity. Good leaders recognise that institutions must adapt and develop. Their fiduciary duty, then, is to the institution as a dynamic part of an evolving society. The governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time but also in the interests of the broader community in which the school is located and in the light of the values of our Constitution.

The SGB thus has to take the interests of the broader community into account in its decisions. This will inevitably include the children in such community. In this instance, the matter was actually about the educational needs of children. The school offered education only in Afrikaans and refused to change its language policy to become a parallel-medium school. The court also stressed the importance of constitutional values in decisions made by the SGB.

¹²² 84/1996.

¹²³ 2010 (3) BCLR 177 (CC):par 80.

4.2.2 What constitutes the interests of children?

Eekelaar defines best interests as:

Basic interests, for example [in] physical, emotional and intellectual care; developmental interests [in entering] adulthood as far [as] possible without disadvantage; autonomy interests, especially the freedom to choose a lifestyle of their own.¹²⁴

Zermatten¹²⁵ indicates that the phrase “best interests” means that the “ultimate goal is the ‘wellbeing’ of the child, as defined throughout the Convention [the CRC], in particular the preamble”. Visser¹²⁶ argues that “‘interest’ means an advantage, benefit or concern”. He explains that:

[t]he reference to “best interests” in section 28(2) should mean that whenever necessary, all the relevant interests in a given situation must be ascertained on the basis of evidence, including naturally the interests of the child, and a judgment made on what the child’s best interests in [a] given situation are – in other words, the child’s most advantageous position practically possible and desirable in view of the relevant law. The best interests of a child clearly depend upon a proper evaluation of the facts of every case. However, only interests falling under express or implied rights of a child should be considered as they alone are accepted by the legal order as worthy of protection.

The South African Constitution refers to the paramouncy of the best interests of the child and not the paramouncy of the rights of children. A distinction should therefore be drawn between the interests of children and the rights of children. The question arises as to what would constitute children’s interests, as to what the relationship between rights and interests is, and as to how one should determine children’s interests.

In this regard, Alston¹²⁷ indicates that the CRC provides more guidance in determining the best interests of the child than domestic statutes, because the extensive range of rights provided for in the CRC has the effect of providing at least a starting point in distinguishing primary interests (in the form of rights) from other types of interests.

Thus, there will inevitably be an overlap between children’s rights and their interests. If children’s rights are regarded as the point of departure and the minimum benchmark in order to

¹²⁴ In Freeman 2007:27.

¹²⁵ 2003:7.

¹²⁶ 2007:461.

¹²⁷ 1994:11-12.

satisfy international standards regarding human rights for children, children's interests might represent something more than mere adherence to minimum human rights standards. On the other hand, children might have an interest in a matter even though it is not regarded as worthy of legal and human rights protection. Although a child might not be able to claim the realisation of a human right, for instance the right to housing, owing to the progressive-realisation provisions, he or she still has an interest in having a place to stay. In this instance, the child's right to housing is rightfully limited, but it does not nullify his or her interest in housing. Thus the child should be afforded the best possible alternative housing or other form of shelter in the circumstances. On the other hand, the minimum requirements for compliance with a specific right might have been reached, but something more than what is required is available. For instance, the Department funds a specific number of positions for educators at a particular school, meeting the minimum standard for the provision of basic education. Yet, parents might be of the opinion that the educator:learner ratio is still too high. Therefore, they might agree to pay school fees to ensure the appointment of additional staff to lower the educator:learner ratio, which would be in the best interests of the children in the school. In this instance, the minimum standard for basic education is met by the state, but the parents are willing and able to provide more resources to improve education, which is in the best interests of their children.

Thus the interests of children can be something more or something less than what another specific human right affords the child. The-best-interests-of-the-child concept thus provides a mechanism for respecting, protecting, promoting and fulfilling the interests of children that are not regarded as constitutionally entrenched rights and that can also serve to respect, protect, promote and fulfil interests of children above and beyond that which is the minimum constitutional requirement for the fulfilment of rights.

4.2.3 Variability of children's interests

The circumstances and needs of different children will vary. There are numerous factors that might impact on the different interests of children, such as family life, culture, religion, availability of financial means, living conditions, the level of development of the country, and political stability in the country.¹²⁸ The best interests of children in general and of individual children should be determined on a case-by-case basis. There can never be a one-size-fits-all approach to determining the best interests of a child or of children in general.

Furthermore, to determine the best interests of the child or a group of children in the field of education requires a holistic approach that takes due cognisance of the interrelatedness of the

¹²⁸ Lopatka 1996:253 & 256.

relevant articles dealing with education in, and the general principles of, the CRC. Since the best interests of the child constitute one of the general principles, the concept should thus be applied in conjunction with the principles of non-discrimination, maximum survival and development, and respect for the views of the child.¹²⁹

4.2.4 Short-, medium- or long-term interests

Clark¹³⁰ indicates that best interests are often determined with the future best interests of the child in mind, but that the future is unsure. Furthermore, the child has short-, medium- and long-term interests.¹³¹ This poses a number of problems. Van Bueren¹³² stresses the inability of any legal system to control or supervise interpersonal relationships. This results in an inability to make dependable long-term decisions.¹³³ Zermatten¹³⁴ warns that one should be aware of the importance of futurology when one takes the child's views into account and ensure that the focus is not only on the immediate needs of the child.

The indeterminate nature of the best-interests principle thus includes a tension and interplay between the short- and long-term best interests of the child. This raises questions such as: What should be regarded as the most important – the short- or long-term happiness of the child? How much weight should be assigned to the short-, medium- or long-term benefits of the child?¹³⁵ Should the most weight be attached to that which will immediately benefit the child or to that which will serve his or her interests best once he or she has reached adulthood? Or should attention be paid to what that child as an adult looking back on his or her youth would have chosen for himself or herself?¹³⁶ Despite the challenges posed by these questions, Heaton¹³⁷ correctly submits that the short-, medium- and long-term consequences should be taken into account to determine what would probably be in the best interests of the child, keeping in mind that the impact of decisions remains indeterminate.

¹²⁹ Hodgkin & Newell 2002:42.

¹³⁰ 1992:394.

¹³¹ Bekink & Bekink 2004:37. An example of this dilemma can be found in *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) where the Supreme Court of Appeal had to determine if the short-term best interests of a child can be overridden by the long-term best interests of the child. The court found that, to make an order to send an abducted child in a custody matter back to his or her original jurisdiction might not be in the child's best short-term interests, but would be in the child's long-term best interests. The court therefore had to decide if the child's short-term best interests can be limited.

¹³² 2000:204-205.

¹³³ Van Bueren 2000:204-205. Proper review procedures are thus essential.

¹³⁴ 2003:12.

¹³⁵ Heaton 1990:96.

¹³⁶ Heaton 1990:96.

¹³⁷ 1990:97.

In the *Sonderup* case,¹³⁸ the Constitutional Court had to decide a matter concerning the abduction of a child and the state's obligation to return the child to its country of origin under the Hague Convention on the Civil Aspects of International Child Abduction. In this case, the court was faced with deciding whether it would be justified in limiting the child's short-term best interests in order to ensure the child's long-term best interests. The mother, who had abducted the child, alleged serious incidents of domestic violence and did not want to return to the country of origin. However, these allegations were mostly untested. The court held that the court in the country of origin is in a better position to determine what would be in the best interests of the child regarding the custody of the child. It found that the aims of the international convention and that the facts of this matter indeed justified the return of the child to the country of origin. The child's short-term best interests were thus limited to ensure that effect was given to international obligations and to secure the long-term best interests of the child.

The court further found that the aim of the international convention is to ensure the best interests of the child, and that the relevant provisions were adequate to ensure these best interests. However, in granting an order to return the child to the country of origin, the court made a comprehensive list of conditions which should be met before the child could be returned. This included an order that the child would only be returned if certain orders of the South African court were made and an order of the court in British Columbia to ensure the safety and maintenance of the child while in the country of origin. The court thus effectively secured the short- and long-term best interests of the child.

4.2.5 Implications of “best” interests

Visser¹³⁹ indicates that the child's best interests mean the “most advantageous position practically and desirable”. In determining what is in the child's best interests, one should thus determine not only what is good and acceptable, but also what is best and most desirable and practicable in the situation. It is indeed this determination of these best interests that creates a problem in applying this principle.¹⁴⁰

If the word “best” is used as a superlative, this would imply that, whenever a child is a party to a particular situation or has an interest in a particular situation, his or her interests should always trump the rights and interests of persons older than 18 years of age.¹⁴¹ This position would be

¹³⁸ 2001 (1) SA 1171 (CC):par 28-29.

¹³⁹ 2007:461.

¹⁴⁰ Alston 1994:11.

¹⁴¹ See also the related discussion on “paramount importance” in par 5.3 below.

untenable and is not in line with the provisions of article 5 of the CRC and reality in general.¹⁴² Children remain part of a family and community and cannot be elevated to an untouchable individual with unrestricted rights.¹⁴³

This position is also stressed by Hodgkin and Newell¹⁴⁴ with regard to the relationship between the best-interests principle and other provisions of the CRC. They state:

Interpretations of the best interests of the child cannot trump or override any of the other rights guaranteed by other articles in the Convention. The concept acquires particular significance in situations where other more specific provisions of the Convention do not apply. Article 3(1) emphasizes that governments and public and private bodies must ascertain the impact on children of their actions, in order to ensure that the best interest of the child [is] a primary consideration, giving proper priority to children and building child-friendly societies.

They highlight the important role of the best-interests-of-the-child concept, particularly where there are no other explicit provisions to protect the interests of the child.¹⁴⁵ The best interests of the child are thus applied as an additional safety net to ensure that the child's interests are adequately protected in all circumstances, and especially in those not captured in other provisions of the CRC.

4.3 Paramount importance

In drafting the CRC, some of the delegations to the UN Working Group of the Commission on Human Rights were uncomfortable with the wide ambit of the 1959 Declaration on the best interests of the child, in particular with the best-interests standard being set as "the paramount consideration". Although the Polish proposal provided children with more protection, a much more restricted provision was finally adopted.¹⁴⁶ Owing to possible competing rights and interests, the less decisive phrase "a primary consideration" was adopted. The child's best interests will normally not be the only consideration in decision-making processes. Nevertheless, these should be among the first aspects to be considered and due weight should

¹⁴² CRC 1989:a 5. This article provides as follows:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardian or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

¹⁴³ Zermatten 2003:7.

¹⁴⁴ Hodgkin & Newell 2002:39.

¹⁴⁵ Hodgkin & Newell 2002:39.

¹⁴⁶ Freeman 2007:26; McGoldrick 1991:136; Alston 1994:10 & 12; Hammarberg 2008:3.

be given to them in all decisions affecting children.¹⁴⁷ Reference to “a primary consideration” in the CRC is furthermore in line with the context of article 3(1), which acts as an umbrella provision. Firstly, it should be applicable to a very wide range of situations, and, secondly, it should be flexible enough to accommodate competing interests.¹⁴⁸

However, there are other provisions in the CRC and in other international instruments where the paramourcy of the child’s best interests is still the benchmark. It is the applicable standard in defined circumstances within clearly defined relationships, for instance between parents and children. For instance, article 18(1) of the CRC provides that the child’s best interests will be the parent’s “basic concern”,¹⁴⁹ while article 5(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁵⁰ provides that states parties must ensure that parents are educated to understand that the best interests of the child are their “primordial consideration”. In addition, parents have equal rights, responsibilities and guardianship with regard to their children. In this regard, CEDAW includes the following dictum: “[I]n all cases the interests of the children shall be paramount.”¹⁵¹ It is thus clear that the family and parents are bound by the higher standard of paramourcy.

With regard to the term “consideration”, Alston¹⁵² is of the opinion that:

[w]hile it [the term “consideration”] has the same meaning as “element” or “factor”, it also has the additional significance of emphasizing that the child’s best interest must actually be considered. Such consideration must be genuine rather than token or merely formal and must ensure that all aspects of the child’s best interests are factored into the equation.

Considering the best interests of children in all actions concerning them implies that positive steps must be taken to consider their interests. Therefore, active measures should be built into national plans and policies to ensure the consideration of the best interests of children at all governmental levels. States parties are obliged to assess the impact of actions on children and to ensure that the results of these assessments are reflected in the development of legislation, policies and practice.¹⁵³

¹⁴⁷ Hammarberg 2008:3.

¹⁴⁸ Alston 1994:12-13.

¹⁴⁹ Parents are jointly responsible for the upbringing and development of the child, assisted by the state where needed.

¹⁵⁰ CEDAW 1979. Adopted by the General Assembly of the UN on 18 of December 1979 and came into force on 3 September 1981.

¹⁵¹ CEDAW 1979:a 5(b) & 16(d) & (f).

¹⁵² 1994:13.

¹⁵³ Hodgkin & Newell 2002:39 & 42.

The phrase “the paramount” consideration in the 1959 Declaration was gradually diminished in effect in the drafting of the CRC. The best-interests principle was substantially curtailed from “the paramount” consideration in the initial Polish proposal to “*the primary*” consideration, and, finally, to merely “a primary” consideration in the final version of the CRC.¹⁵⁴

Ferreira¹⁵⁵ refers to the *Oxford Student's Dictionary* and indicates that “primary” is defined as “of the first importance; chief”, while “paramount” means “more important than anything else”. The word “primary” is used in the CRC¹⁵⁶ and the ACRWC,¹⁵⁷ which refer to the child’s best interests as being of primary importance, which is weaker than the South African constitutional reference to paramount importance.

Bekink and Bekink¹⁵⁸ refer to the *Oxford English Dictionary* and argue that, since the word “paramount” is defined as “supreme” or of “chief importance”, a “great deal of constitutionally sanctioned importance must be accorded to the child’s interest in a given situation. It could therefore be argued that the use of the term “paramount” means that in weighing up competing interests, the scales must tip in favour of the child.”

However, it is claimed that the replacement of “*the*” consideration with “*a*” consideration in the CRC does not weaken the principle, but rather affords the principle an appropriate application and flexibility.¹⁵⁹ States parties are obliged to take account of this principle in all decisions, but, since the best-interests principle is a consideration, it leaves room for other rights and values to compete with this value, with an inevitable weighing of different and often competing interests. There might be instances where the interests of justice or the interests of society at large might be equal or even of more importance than the interests of the child.¹⁶⁰ Hodgkin and Newell¹⁶¹ indicate therefore that article 3(1):

emphasizes that governments and public and private bodies must ascertain the impact on children of their actions, in order to ensure that the best interests of children are a primary consideration, giving proper priority to children and building child-friendly societies.

¹⁵⁴ McGoldrick 1991:136; Alston 1994:10; Freeman 2007:26.

¹⁵⁵ 2010:206.

¹⁵⁶ CRC 1989:a 3(1).

¹⁵⁷ ACRWC 1990:a 4(1).

¹⁵⁸ 2004:26.

¹⁵⁹ Zermatten 2003:7; Detrick 1999:91; Freeman 2007:26 & 45; McGoldrick 1991:136; Alston 1994:12.

¹⁶⁰ Hodgkin & Newell 2002:39.

¹⁶¹ 2002:39.

Zermatten¹⁶² warns that unduly elevating the child's interests to being of paramount importance could result in undesirable ends that would put the child at risk of not receiving the necessary protection and would "irremediably cause the disappearance of the rights of the child. The reference to a consideration thus acts as a balancing factor." Therefore, the interests of the child are a primary consideration, but not the paramount, overriding or determinative consideration.

In contrast, the South African Constitution provides that the best interests of the child are of paramount importance in every matter concerning the child. Thus the best interests of the child are not one of the important factors to be considered among all the other factors, but are of paramount importance. Unlike the position under the international provisions, the concept is also not restricted to specific relationships, such as between parents and children only. The ambit of this provision is thus much wider than that of the CRC provision and raises the question whether it is an overriding and determinative consideration, as suggested by some of the authors' literal analyses of the text.

With regard to the paramount importance of children's interests, the High Court found as follows in 2003 in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others*:¹⁶³

The fact that the Constitution regards a child's best interests of paramount importance must be emphasised. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable.

It also held:

I have referred to the paramount rights of children. Where one deals with a hierarchy of values, the child's rights and interests are the most important. This is made clear by s 28(2) of the Constitution. In a system where no rights are absolute, certain rights must yield to others. When several constitutional rights are vying for position and consequent protection, a balancing of the relevant values is necessary but the rights of children will always be deferred to.¹⁶⁴

¹⁶² 2003:7.

¹⁶³ 2003 (3) SA 389 (W);par 10..

¹⁶⁴ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 389 (W);par 45.

However, in 2004 on appeal, the Constitutional Court held that the court of first instance had erred in finding that section 28(2) “trumps” other provisions of the Bill of Rights and stated:

I do not agree. This would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and from a single constitutional value system. This Court has held that s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36.¹⁶⁵

The court emphasised that there is no hierarchical order of rights, with children’s rights at the top end of the hierarchy. Thus all the rights in the Bill of Rights are equally important. In *S v M*,¹⁶⁶ the court held that the best-interests principle would lose its effectiveness if “it is spread too thin”. It could thus become devoid of meaning, instead of promoting the rights of children.¹⁶⁷ The court found that the paramountcy principle does not mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations.

If the paramountcy principle is spread too thin, it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating, rather than promoting, the objective of section 28(2).¹⁶⁸

From the above it appears, therefore, that, although the South African Constitution makes provision for the paramount importance of the child’s interests, the Constitutional Court has to a large extent interpreted the concept in line with international trends, namely that children’s rights do not trump other rights and that other rights and interests can be of equal or even more importance in specific circumstances. On the other hand, the court has also stressed the fact that the word “paramount” is emphatic” and notably stronger than the phrase “primary consideration” used in the CRC and the ACRWC.¹⁶⁹

Thus, although the phrase “paramount consideration” is stronger than the international standard of primary consideration, it still does not justify any automatic overriding or trumping of other rights and interests. This inevitably raises the question: What, then, is the significance of the phrase “paramount importance”.

¹⁶⁵ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC):432.

¹⁶⁶ 2007 (2) SACR 539 (CC):par 25.

¹⁶⁷ Erasmus 2010:128.

¹⁶⁸ *S v M* 2007 (2) SACR 539 (CC):par 25.

¹⁶⁹ *S v M* 2007 (2) SACR 539 (CC):par 25.

Friedman, Pantazis and Skelton¹⁷⁰ indicate that the paramountcy of the best interests of the child entail the following three things: Firstly, it indicates that, in every matter where the child's best interests are "(substantially) involved, those [interests] must be taken into account".¹⁷¹ Secondly, the child's best interests are of paramount importance, and no one else's. Therefore, the concept cannot be used to create rights and entitlements for others.¹⁷² Thirdly, it involves a process of weighing up the different interests of children to ensure their best interests. They add the following important statement:

In addition, a child's interests have a leg up *vis-à-vis* other rights and values. That said, it is important to remember that the Final Constitution does not say that ... children's interests are "paramount". They are of "paramount importance".

On the basis of the reasoning of the Constitutional Court in *S v M*¹⁷³ regarding the sentencing of a primary caregiver, in all instances where decisions are made which will impact on children,

¹⁷⁰ Friedman, Pantazis & Skelton 2009:47-45.

¹⁷¹ The authors criticise the judgment in *J v Director General, Home Affairs* 2003 (5) SA 621 (CC) in which the court decided that the constitutionality of legislative provisions pertaining to who the parent of a child is who is the result of artificial insemination where a lesbian couple is involved. The court decided the case on the unlawfulness of discrimination on the ground of sexual orientation and held that it was therefore unnecessary to consider other rights. The authors are of the opinion that the Constitution is clear that the best interests of the child should be considered in every matter concerning the child.

¹⁷² In *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC);par 71, the court highlighted the fact that children cannot be used as stepping stones to realise rights for their parents.

¹⁷³ 2007 (2) SACR 539 (CC);par 32, 33, 36. The Constitutional Court held:

[32] The *curator* emphasised that s 28(2) of the Constitution should be read with s 28(1)(b) which provides that every child has a right to family or parental care, or appropriate alternative care when removed from the family environment. Taken together, he contended, these provisions impose four responsibilities on a sentencing court when a custodial sentence for a primary caregiver is in issue. They are:

- To establish whether there will be an impact on a child.
- To consider independently the child's best interests.
- To attach appropriate weight to the child's best interests.
- To ensure that the child will be taken care of if the primary caregiver is sent to prison.

[33] These appear to me to be practical modes of ensuring that s 28(2) read with s 28(1)(b), is applied in a sensible way.

[36] There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity of principle, consistency of treatment and individualisation of outcome.

(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.

(b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also

the following process should be applied to give effect to the paramouncy principle. Firstly, the decision-maker has to determine whether the decision that he or she is about to make will impact on a child or more than one child. Secondly, if a child or children will be affected by the decision, the decision-maker has to consider the interests of every child independently.¹⁷⁴ Thus the interests of every child and/or group of children involved should be investigated independently from the interests of adults, a particular group of children or other individual children. Once all the information regarding the different interests of the different children is gathered, the decision-maker should attach an appropriate weight to the interests of the different children. The Constitutional Court has held that “focused and informed attention should be given to the interests of the children at appropriate moments”.¹⁷⁵ This implies that proper attention should be given to the interests of the children, without their interests subsuming the whole process and distracting the focus and aim of the original process. Thus children’s interests should be placed deliberately on the agenda whenever their interests are at stake, but should not unduly distract the process and its outcomes.

Although children cannot be shielded from the negative consequences of the actions of their parents and others, decision-makers have a responsibility to pay appropriate attention to the interests of the children in the specific circumstances and to take appropriate steps to minimise the harm suffered by the children. In this regard, the court held that there is a responsibility on the state to take the necessary steps to ensure that legislation makes the “best efforts to avoid” harm to the child, to ensure that state agencies do not contribute to the harm suffered by children in the process of dealing with the situation, and that, if children are harmed, do not cause secondary trauma, and, lastly, that positive conditions are created to facilitate repair. There is thus not only an obligation to protect children from harm, but also a responsibility to

ascertain the effect on the children of a custodial sentence if such a sentence is being considered.

- (c) If on the Zinn-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
- (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
- (e) Finally, if there is a range of appropriate sentences on the Zinn approach, then the court must use the paramouncy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

¹⁷⁴ *S v M* 2007 (2) SACR 539 (CC):par 30. In the context of this case, children are not a mere personal circumstance of the convicted mother, but are individuals with needs and interests independent from those of the mother.

¹⁷⁵ *S v M* 2007 (2) SACR 539 (CC):par 33.

“maximise opportunities for them to lead productive and happy lives”.¹⁷⁶ This illustrates the extent of the state’s responsibility to promote children’s rights.

This is also in line with Alexy’s¹⁷⁷ approach to the application of the proportionality principle whenever different constitutional rights are pitted against one another. However, to apply the principle of proportionality requires that one presuppose that constitutional rights have the structure of principles or optimisation requirements.¹⁷⁸ He contends that the proportionality principle consists of three subprinciples, namely the principles of suitability, necessity,¹⁷⁹ and proportionality in the narrow sense.¹⁸⁰ These principles culminate in the idea of optimisation. He argues as follows:

Interpreting constitutional rights in light of the principle of proportionality is to treat constitutional rights as optimization requirements, that is, as principles, not simply as rules. As optimization requirements, principles are norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities.

¹⁷⁶ *S v M* 2007 (2) SACR 539 (CC); par 20.

¹⁷⁷ Alexy 2005:572-573; Alexy 2009:2.

¹⁷⁸ Legal rules tend to be inflexible and result in a black or white, right or wrong, answer, while principles lead to more flexible outcomes, while still optimising the principle. For example, the legal rule is that you are not allowed to exceed 60km per hour in urban areas. The principle underlying this rule is the safety of people. Thus, if only the principle is applied, one would be allowed to drive more than 60km per hour in an urban area on condition that it is safe. Therefore, in certain circumstances it would be acceptable to drive at 70km per hour in an urban area if it is still safe to do that without breaking the law. The legal rule, however, does not allow for this flexibility, and therefore the consequence would be that you would probably be fined if you did drive at 70km per hour in an urban area, despite the fact that it was still safe to do that in that particular circumstance. Legal rules do not make provision for the particular circumstances in which you are speeding. In applying the legal rule, it does not take into account that there was an accident on the way to the destination, and that the driver, for instance the superintendent of a children’s hospital, was going to miss an important meeting which would have had dire consequences for the budget allocations of the children’s hospital. This would inevitably have implications for children’s right to proper healthcare. The legal rule focuses only on one question, namely did the driver exceed the limit or not. If he did, the consequence will be a fine. Legal principles, on the other hand, are more flexible and make it possible to optimise the safety of people who might be affected by the actions of the driver and the healthcare interests of the children in the hospital in such a way that it would be justifiable to allow the driver to safely exceed the speed limit to ensure that the superintendent would be in time at the meeting to ensure a proper budget allocation for the hospital. It is with the above-mentioned effect in mind that Alexy 2005:572-573; 2009:2 argues that constitutional rights should be seen as legal principles, and not only as legal rules with a black and white answer, where the application thereof would result in the maximisation of the benefits for all the parties involved who may have conflicting constitutional interests.

¹⁷⁹ Alexy 2005:573. The principles of suitability and necessity concern optimisation in relation to what is factually possible.

¹⁸⁰ Alexy 2005:753. The principle of proportionality in its narrow sense refers to the optimisation of what the legal possibilities are. The legal possibilities are mainly captured in the competing principles. In the balancing process, effect should be given to the optimal realisation of all the competing principles. Proportionality in the narrow sense is therefore captured in the following rule: “The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.”

The Constitutional Court follows a similar approach of optimisation in applying the best-interests-of-the-child concept. This is done by giving due consideration to the paramountcy requirement in the best-interests provision. In *S v M*,¹⁸¹ the court warned that due consideration:

does not necessitate overriding all other considerations. Rather it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.

In practice, this would mean that decision-makers should consider all the facts of a matter and properly weigh all the rights of everyone involved in the matter. Once it is clear what the appropriate solution to the problem is, the decision-maker should make the decision accordingly. Justifiable decisions can be made which are not in the best interests of children, for example to give a primary caregiver a custodial sentence. However, despite the fact that a decision may not be in the best interests of the child involved, the decision-maker still has an obligation to investigate the impact of the decision on the interests of the child and optimise and secure his or her best interests within the circumstances. Thus, apart from the original decision that the decision-maker has to take, he or she now has an additional obligation to ensure that the best interests of the child involved are secured during and after the process. Decision-makers should be emphatically aware of the interests of the children and should ensure the paramountcy of their interests by giving “focused”, “well-informed”, and “specific” attention to their needs.¹⁸²

There are a number of examples where the court optimised the best interests of children after having made another decision which impacted negatively on the best interests of the child. To mention just two: In *Howells v S*,¹⁸³ a mother, the primary caregiver, was sentenced to direct imprisonment after conviction on a fraud charge. The High Court found on appeal that, despite the fact that the children would probably end up in alternative care such as foster care, the children’s best interests could not override the community interests in this particular case. However, the court optimised the best interests of the children by ordering the Registrar of the Court to request the Department of Welfare and Population Development to ensure that the children were well cared for in all respects while the mother was imprisoned, that the children

¹⁸¹ 2007 (2) SACR 539 (CC):par 42.

¹⁸² *S v M* 2007 (2) SACR 539 (CC):par 33, 36-39.

¹⁸³ [1999] 2 All SA 233 (C):par 240. See, for example, the other cases discussed in this chapter such as: *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* 2003 (4) SA 160 (T) and *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 (10) BCLR 973 (SCA) (language-of-instruction cases); *S v M* 2007 (2) SACR 539 (CC) (sentencing of primary caregiver).

had regular contact with their mother, and that proper reunification services be delivered. In *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae (the “Juma Masjid case”))*,¹⁸⁴ the Constitutional Court overturned an eviction order of the High Court and ordered that, although the eviction order was justified, the eviction of a public school from private property could not continue until the court was satisfied that all the children were satisfactorily accommodated in other schools.

If the decision-maker is undecided as to the proper solution to a problem, he or she should use the paramountcy principle as an important guide in the decision-making process.¹⁸⁵ Thus the paramountcy of the best interests of the child is not used in the general course of decision-making to sway decisions in favour of children and trump the rights of others. It is used only as the decisive factor if the decision-maker is undecided as to what an appropriate decision should be in the circumstances. However, the best interests of the child should be expressly considered in the decision-making process and should be optimised in all circumstances.

It is clear throughout the judgment in *S v M*¹⁸⁶ that section 28(2) imposes additional responsibilities on decision-makers and that they have a duty to “go the extra mile” to make the necessary enquiries and to weigh information to ensure that the best interests of children are properly considered.¹⁸⁷

The court explained that this approach places an additional responsibility on the courts, but that it is not too onerous in the circumstances. The approach taken by the court took account of the fact that there were not very many cases dealing with the sentencing of primary caregivers and that the prescribed approach took into consideration the pressures under which courts work. Furthermore, the Constitutional Court referred to *Sanderson v Attorney General, Eastern Cape*¹⁸⁸ and held that systemic problems cannot be an excuse to escape constitutional responsibilities. In *S v Jaipal*,¹⁸⁹ the Constitutional Court referred to the state’s obligation to provide specific resources, but also highlighted the fact that all the individuals who are responsible for the administration of justice must purposefully take reasonable steps to ensure maximum compliance with constitutional obligations, even under difficult circumstances. Thus the additional responsibilities placed on decision-makers will be subjected to a reasonableness

¹⁸⁴ 2011 (8) BCLR 761 (CC);par 66-72.

¹⁸⁵ *S v M* 2007 (2) SACR 539 (CC);par 39.

¹⁸⁶ 2007 (2) SACR 539 (CC).

¹⁸⁷ *S v M* 2007 (2) SACR 539 (CC);par 48.

¹⁸⁸ 1997 (12) BCLR 1675 (CC);par 35.

¹⁸⁹ 2005 (1) SACR 215 (CC);par 55-56.

test, which implies that decision-makers are not required to meet an unreasonable standard in this regard. What constitute reasonable steps will depend on the circumstances of every case.

In conclusion, although the best-interests-of-the-child concept does not automatically trump other rights and interests, the child's best interests remain of paramount importance. Thus even though the rights and interests of others might lawfully limit the rights and interests of children, children's interests remain of paramount importance and should be optimised. Therefore, explicit measures must be taken to ensure the realisation of the best interests of the child.¹⁹⁰ Furthermore, decision-makers have a duty to take reasonable steps to ensure that the best interests of the child are optimised. They are therefore required to take the initiative where necessary, even in difficult circumstances, to ensure this.

4.4 "In every matter concerning the child"

The best-interests-of-the-child concept must be applied to every matter concerning the child and will therefore include all direct and indirect actions. In what follows, attention will be given to the different types of actions that should be considered, and to what extent indirect actions, in particular, should be considered in the determination of the best interests of the child.

4.4.1 Actions and matters concerning children

The CRC provides that the best interests of the child should be considered in all actions concerning the child, while the South African Constitution provides that the best interests of the child are of paramount importance in every matter concerning the child.

The word "actions" is not defined in the CRC. However, it is rightly argued that a purposeful interpretation of the CRC should be followed and that "actions" should thus also include any omissions. For example, an omission to establish a much-needed child and youth care centre¹⁹¹ for the secure care of children¹⁹² would constitute an "action" which is not in the best interests of

¹⁹⁰ See also Erasmus 2010:128-129.

¹⁹¹ This would include what were formerly known as reform schools, to which youths were sentenced for criminal behaviour, and schools of industry for children with serious behaviour problems. These two terms were replaced by the term "child and youth care centre". See the *Children's Act 38/2005*:s 191 for a comprehensive definition of a child and youth care centre, and s 196(1)(d) & (e) on the change in terminology.

¹⁹² In terms of the *Children's Act 38/2005*, "secure care" means physical confinement in a safe and healthy environment for:

- (a) children with behavioural and emotional difficulties; and
- (b) for children in conflict with the law;

the children in a particular area.¹⁹³ “All actions” further suggests a wide application of the best-interests principle.¹⁹⁴

4.4.2 Direct and indirect actions or matters concerning children

A prerequisite for the application of the best-interests concept to any action is that the action should “concern” children. It is clear that, if actions have a direct impact on children, they will be included in this provision. On the other hand, actions that have an indirect impact on children seem to be more problematic, since it certainly seems that certain actions are too indirect to have an impact on a specific child.

In interpreting section 28(2), the Constitutional Court has also given a wide interpretation to its application and has held that the best-interests standard must not only be considered in matters referred to in section 28(1), but must also be applied to every matter concerning the child.¹⁹⁵ In *S v M*,¹⁹⁶ the Constitutional Court held:

The word paramount is emphatic. Coupled with the far-reaching phrase “in every matter concerning the child”, and taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them.

Thus this principle or standard is also applicable to other rights and circumstances related to children. There is hardly anything that does not have some impact on children, and which therefore does not concern children. This ranges from global warming, to healthcare, to road safety, to safety in shopping malls, to development of land, and to pesticides used in the farming of fruit and vegetables.¹⁹⁷ In the current context, the best interests of children must also be considered in relation to their right to education and discipline, despite the fact that these are not specifically mentioned in section 28(1).¹⁹⁸

The use of the plural “children” in article 3 of the CRC indicates an intention to apply the principle to all decisions affecting children. One should therefore avoid being overly restrictive in interpreting the word “concerning”. The use of the plural “children” is in contrast with the normal

¹⁹³ Freeman 2007:45; Alston 1994:13-14.

¹⁹⁴ Detrick 1999:90.

¹⁹⁵ Bekink & Bekink 2004:22; *S v M* 2007 (2) SACR 539 (CC):par 21.

¹⁹⁶ 2007 (2) SACR 539 (CC):par 25.

¹⁹⁷ Visser 2007:460; Hammarberg 2008:2.

¹⁹⁸ Constitution 1996:s 29.

use of the principle referring to the “child’s best interests” in the singular and is indicative of the preferred broad application.¹⁹⁹

Although a broad application of the best-interests principle is accepted, there is no clarity on exactly what the ambit and reach of the phrase “concerning children” are as far as indirect actions are concerned. This is due not only to the wide range of issues that may impact on children, but also to the difficulty in determining the proximity between the child’s interests and the issue at hand. Visser²⁰⁰ indicates that there should be a reasonable link between the “matter” and the “child”. The link should be sensible and not too indirect or tenuous, otherwise section 28(2) will not be applicable. It is further contended that the extent of the impact of actions on children should determine whether actions concern them.²⁰¹

However, Couzens²⁰² warns that, if the net of the best interests of the child is cast too widely, it might become difficult to balance the paramountcy of best interests against other competing social interests. If it is applied too widely, an untenable situation can arise where all actions must be subjected to the best-interests-of-the-child criteria. This could unduly impact on decision-making processes and could also create an aversion to its application, with unintended negative consequences in meritorious cases. These warnings are in line with the warning of Sachs J in *S v M*²⁰³ that care should be taken not to spread the application of the best-interests concept too thin, because it might lose its effectiveness and become hollow rhetoric.

There have been several cases heard by the Constitutional Court in which children’s interests were the direct reason for the proceedings, although they were not necessarily the eventual parties before the court.²⁰⁴ There are also examples where the courts have opted to interpret “concerning the child” in a wide manner. In these instances, the interests of children were directly affected by the court proceedings, but they were only third parties to the proceedings before the court and their interests were therefore regarded as being only indirectly affected by

¹⁹⁹ Alston 1994:14; Detrick 1999:90.

²⁰⁰ 2007:460.

²⁰¹ Zermatten 2003:5-6; Van Bueren 2000:204; Detrick 1999:90.

²⁰² 2010:280.

²⁰³ 2007 (2) SACR 539 (CC);par 25.

²⁰⁴ *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* 2003 (4) SA 160 (T) (language of instruction); *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 (10) BCLR 973 (SCA) (language of instruction); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) (repatriation of foreign children); *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC) (adoption of a child by foreigners); *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) (adoption of child by lesbian couple); *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) (position of child witnesses).

the proceedings.²⁰⁵ For example, in *President of the Republic of South Africa v Hugo*,²⁰⁶ the constitutionality of a remission by the President to free mothers from prison who were the primary caregivers of children was challenged on the basis that it discriminated against males who were primary caregivers. The court found that:

the President intended by the special remission of the prison sentences of mothers to further the best interests of children.

The *S v M*²⁰⁷ case is another example that section 28(2) is not only applicable to instances where the child is a direct party to the proceedings, but is also affected by the decisions. This case dealt with the sentencing of a mother, who was the primary caregiver. The court found that sentencing the mother would have a profound impact on the interests of the children, despite the fact that they were not on trial. In this regard, the court held that the children were not merely a personal “circumstance” of the accused, but “individual[s] whose interests should be considered independently”.²⁰⁸ Despite the fact that the children were not direct parties to the trial, they would be affected by the sentence to be imposed on their mother. Therefore, their interests had to be considered independently from the considerations that normally play a role in determining an appropriate sentence for the mother.²⁰⁹ The court found that children’s interests can be affected as collateral consequences of actions and decisions that they have no control over and therefore that their interests should be considered as well. This would also be applicable to the discipline context where learners are affected not only as transgressors but also as victims and third parties to misconduct.

Once it is established that children’s interests have been affected, directly or indirectly, the “due consideration” and “appropriate weight” principles discussed above come into play. The ambit of the application of section 28(2) is thus widened.

Lundy²¹⁰ avers that the starting point in determining whether a matter affects children is to ask them and not to decide on their behalf. To ensure that children are included in all matters affecting them, it is also necessary to involve them at each stage at which decisions are made

²⁰⁵ *S v M* 2007 (2) SACR 539 (CC) (sentencing of primary caregiver); *Howells v S* [2000] JOL 6577 (A) (sentencing of primary caregiver); *Juma Musjid* case 2011 (8) BCLR 761 (CC) (eviction of school [represented by the SGB as a juristic person] from private property).

²⁰⁶ 1997 (4) SA 1 CC.

²⁰⁷ 2007 (2) SACR 539 (CC):par 12-26.

²⁰⁸ *S v M* 2007 (2) SACR 539 (CC):par 106.

²⁰⁹ *S v M* 2007 (2) SACR 539 (CC):par 30. In paragraph 106, Madala J held, in the minority judgment, that the courts are obliged to apply a child-centred approach in sentencing a primary caregiver.

²¹⁰ Lundy 2007:934.

in education. These stages include, firstly, instances where the decisions have an impact on an individual learner; secondly, instances where school and classroom policies are being developed; and, thirdly, instances where provincial or national policy or legislation pertaining to education is determined.

5. BROAD FUNCTIONS AND OPERATION OF THE BEST-INTERESTS CONCEPT

The best interests of the child act as a benchmark for all actions and decisions regarding children. Therefore, the concept gives content to other rights, is used to determine the ambit of other rights, and acts not only as a principle but also as a substantive right. The functions of the concept will be discussed in what follows.

5.1 The best interests of the child as a benchmark

General Comment 5 the Committee on the Rights of the Child²¹¹ provides that the best-interests-of-the-child principle should be applied to evaluate whether decisions and actions are aligned with children's rights and their best interests. It provides as follows:

Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.

South Africa heeded this international call for the application of the best-interests-of-the-child standard in order to evaluate decisions and actions and included section 28 and 28(2), in particular, in the Constitution. Further, the Constitutional Court underlined the important standard-setting role of section 28(2) in *S v M*.²¹² It referred with approval to the following statement by Sloth-Nielsen:

[T]he inclusion of a general standard ("the best interest of the child") for the protection of children's rights in the Constitution can become a benchmark for review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children's lives.

²¹¹ CRCGC 5 2003:par 12.

²¹² 2007 (2) SACR 539 (CC).

In *Centre for Child Law v Minister of Justice and Constitutional Development and Others*,²¹³ the Constitutional Court used quite strong terms to indicate the functions of section 28 pertaining to children's rights in general. Section 28(2) is included in this section and is therefore also applicable to this discussion. The court held:

Among other things section 28 protects children against the undue exercise of authority. The rights the provision secures are not interpretative guides. They are not merely advisory. Nor are they exhortatory. They constitute a real restraint on Parliament. And they are an enforceable precept determining how officials and judicial officers should treat children.

The best-interests-of-the-child concept must be applied to assist decision-makers to make decisions which will guide and ensure the child's physical, intellectual, moral, emotional and spiritual well-being and that the best possible solution is found for a problem. The principle should thus guide the overall implementation of the CRC and the Constitution with regard to matters concerning children.²¹⁴ The best-interests concept can also be seen as "the essential footbridge" between the rights of the child and sociological reality.²¹⁵

The best interests of the child operate as a substantive right, as a principle and, in some instances, as both in the South African legal framework.²¹⁶ It is thus important to distinguish between a legal right and a legal principle. A legal right is justiciable and enforceable, while a legal principle can be seen as something that a society holds to be important.²¹⁷ Within these main functions, several other objectives are achieved.²¹⁸ In what follows, the different ways in which the best-interests-of-the-child concept operate, will be discussed.

5.1.1 The best-interests-of-the-child concept interprets the provisions of section 28(1)

The best interests of the child are used to interpret the provisions of section 28(1), and vice versa.²¹⁹ Constitutional rights found in section 28(1), and relevant in the context of school discipline, are the child's right to social services and the child's right to be protected from maltreatment, neglect, abuse or degradation.²²⁰

²¹³ 2009 (6) SA 632 (CC):par 25.

²¹⁴ Hammarberg 2008:4.

²¹⁵ Zermatten 2003:11; Van Bueren 2000:204.

²¹⁶ *S v M* 2007 (2) SACR 539 (CC):par 25.

²¹⁷ Cowen 2001:47.

²¹⁸ Friedman, Pantazis & Skelton 2009:47-40–47-41.

²¹⁹ Friedman, Pantazis & Skelton 2009:47-40–47-41. See, for example, *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC):par 24-25 where the Constitutional Court found that the Supreme Court of Appeal had failed to give proper attention the best interests of the child provision in its determination regarding the payment of maintenance and its impact on the child's right to parental care in terms of section 28(1)(b).

²²⁰ Constitution 1996:s 28(1)(c).

5.1.2 The best interests of the child determine the ambit of other rights

Hammarberg²²¹ indicates that the Committee on the Rights of the Child often noted in its Concluding Observations on States Parties' Reports that the best-interests principle could be seen as a guide to ensure the proper interpretation and implementation of the CRC as a whole. In interpreting the CRC, cognisance should be taken of the fact that the Committee on the Rights of the Child seldom referred to a single article in its Concluding Observations on States Parties' Reports. Instead, the Convention is regarded as a comprehensive set of rules that is interdependent, with the best interests of the child as the umbrella provision.²²²

The definition of what is indeed in the best interests of the child is rooted in the substantive articles of the Convention itself.²²³

In the South African context, the best-interests principle should be applied in all matters concerning the child and should therefore be considered when any other constitutional or legal rights of the child are considered.²²⁴ It is thus not only a tool for the interpretation of section 28(1) of the Constitution, but is also a tool for establishing the scope of other constitutional rights and their potential limitations.²²⁵ The best interests of the child provide clarity and depth for other rights,²²⁶ and provide guidance when other rights seem to be in conflict with one another.²²⁷ This is also in line with the idea of the Constitution being a single and interrelated value system.

Zermatten²²⁸ indicates that this principle must be used to interpret all actions and inactions regarding children, and that it "confers a guarantee to children that their fate will be examined in accordance with this principle of interpretation". Visser²²⁹ argues along the same lines and indicates that:

²²¹ 2008:3.

²²² Hammarberg 2008:3; see also Friedman, Pantazis & Skelton 2009:47-41.

²²³ Hammarberg 2008:9.

²²⁴ Malherbe 2008:268.

²²⁵ Friedman, Pantazis & Skelton 2009:47-31–47-33.

²²⁶ Hammarberg 2008:3. For example, the CRC does not prescribe a minimum age for criminal capacity, but, in deciding on this age, states parties must be guided by the best interests of the child. In respect of the education sector, the CRC and the South African Constitution do not describe the content of the right to basic education. In determining the content of this right, the best interests of the child would play a significant role.

²²⁷ Hammarberg 2008:3. For example, if a child is bullied at school, the right to education might be in conflict with the right to be protected from cruel, inhuman and degrading treatment. In finding a solution to this conflict, the best interests of the child will be used to determine a suitable course of action.

²²⁸ 2003:12.

²²⁹ 2007:459.

the purpose of the principle is to promote the best interests of the child by acting as a directive (i) concerning the manner in which the rights of children should be interpreted and weighed up against other rights, and (ii) regarding the interpretation, limitation and application of the rights, competencies, functions and duties of others dealing with children.

5.1.3 The best interests of the child as a substantive right and principle

The development of the best-interests-of-the-child principle into a constitutional right was discussed above.²³⁰ With regard to the best interests of the child as a right, the Constitutional Court found on a number of occasions that the best interests of children had been violated. In most of the instances, the court found not only that the best interests of the child were violated, but also that other constitutional rights were violated. As a matter of fact, in most of these cases, the court discussed, and referred to, the violation of the other rights before it made a pronouncement on the violation of the child's best interests.²³¹ However, there are examples where the Constitutional Court found that the violation was based on section 28(2) and made no reference to other rights.²³² Visser²³³ argues that "section 28(2) by implication creates a right for a child to have his or her best interests given the fullest possible effect".²³⁴

Since the best interests of the child constitute a right, it is also subjected to limitation in terms of section 36. This limitation of the best interests of the child is due to the fact that, like all the other rights in the Bill of Rights, the operation of the best-interests provision has to take account of its relationship to other rights, which might require the limitation of its ambit.²³⁵ It is also important to note that, in the event of a state of emergency, section 28(2) is not protected by the provisions of section 37 of the Constitution²³⁶ dealing with non-derogable rights.

²³⁰ See par 3.2 above.

²³¹ *Peterson v Maintenance Officer and Others* 2004 (2) SA 56 (C): other constitutional rights – equality (s 9(3)), dignity (s 10), best interests 28(2); *Christian Lawyers South Africa v Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae)* 2005 (1) SA 509 (T): other constitutional rights – reproductive rights (s12(2)), right to healthcare service (s 27(1)(a)), dignity (s 10), privacy (s 14), non-discrimination on the ground of age (s 9(1)); *Heystek v Heystek* 2002 (2) SA 754 (T): duty of step-parent to pay maintenance pendente lite until a final divorce decree is granted to ensure effect is given to the children's right to parental care (s 28(1)(b)), basic nutrition, shelter, basic healthcare and social services (s 28(1)(c)), right to basic education (s 29(1)(a)), and the best interests of the child (s 28(2)); *Patel and Another v Minister of Home Affairs and Another* 2000 (2) SA 343 (D):350E-F – right to family life.

²³² *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC).

²³³ 2007:460.

²³⁴ See *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* 2003 (4) SA 160 (T).

²³⁵ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC):par 55; *S v M* 2007 (2) SACR 539 (CC):par 26.

²³⁶ Constitution 1996.

In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others*,²³⁷ the court found that the statutory provisions pertaining to the possession of child pornography constituted a violation of the applicant's rights to freedom of expression and privacy. It must therefore be determined whether the limitation of these rights is justifiable. The children's interests provided ample justification for the legitimate limitation of the rights of the appellant and the legislation was consequently found to be constitutional.

Friedman, Pantazis and Skelton²³⁸ indicate that the Constitutional Court did not use the best interests of the child to determine the ambit of the rights to freedom of expression and privacy, but used it to limit these rights. They argue that the approach followed by the Constitutional Court in this case may indicate that, if children's interest rights are considered in an analysis of a right not contained in section 28, the best interests of the child will be applied only during the process of the limitation of rights. However, if a child's right that is not contained in section 28 is under scrutiny, then the best interests of the child will be an integral part in determining whether the legislation or actions are in violation of the provisions of a subsection not contained in section 28.²³⁹

Children's best interests are sometimes limited because of the interests of other children, or of children generally, or of other parties such as the state, or a combination of these.²⁴⁰ In *Harris v Minister of Education*,²⁴¹ the court held that it was unconstitutional to prevent a child from attending school, if the child was ready for school, merely because the child had not reached the minimum age requirement of seven years. The court considered the impact of allowing underage children in the school system and also considered the fact that underage children tend to clog the system owing to high failure and repetition rates, with inevitable cost implications for the state. However, this case dealt with an independent school, and therefore the court found that the provision was unconstitutional. If the same application were brought in the context of a public school, the cost implications might have swayed the court to uphold the

²³⁷ [2003] 1 All SA 449 (W);par 59-70. Other examples of the limitation of the best interests of the child can be found in *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC);par 29-36; *Harris v Minister of Education* 2001 (8) BCLR 796:805-806 (T).

²³⁸ 2009:47-41.

²³⁹ In *Hay v B and Others* 2003 (3) SA 492 (W), the Constitutional Court had to determine whether the parents' right to religion should be upheld. The parents had refused a blood transfusion for their child on religious grounds. The court found that the child's right to life (non-s 28 provision), read with the paramountcy of the child's best interest, overrides the parents, religious rights and the court therefore ordered the blood transfusion to be done.

²⁴⁰ Friedman, Pantazis & Skelton 2009:47-44.

²⁴¹ 2001 (8) BCLR 796:805-806.

legislative provision pertaining to the minimum age for admission.²⁴² Although the child's interests can be limited, the importance of the "paramourty" principle and the optimisation of the child's best interests must always be kept in mind, as discussed above.²⁴³

6. APPLICATION OF THE BEST-INTERESTS CONCEPT

The discussion above of the development of the best-interests-of-the-child concept highlighted the increasing expansion of the concept's application in other spheres of law, apart from the traditional application in family law. This expansion of its application will be explored in more detail below.

6.1 Best-interests concept applied in public and private law

It is clear from the earliest international instruments that the best-interests concept is not restricted to a limited number of spheres. Article 3(1) of the CRC also prescribes in detail the institutions responsible for the application of the best-interests-of-the-child principle. These include "public or private welfare institutions, courts of law, administrative authorities or legislative bodies".²⁴⁴ The wide ambit of section 28(2) was clarified by the Constitutional Court in holding that the concept is applicable not only to instances covered by section 28(1) of the Constitution, but also in all circumstances.

Davel²⁴⁵ investigated the different types of cases where the best interests of the child were applied in South African law and found that the concept was used in divergent situations such as healthcare, adoptions and intercountry adoptions, divorces, different cases relating to education, court procedures, child abduction, trafficking, claims to socio-economic rights, sentencing of juveniles and family members of children, domestic violence cases and quasi-judicial acts. The concept is thus applied in private law and public law in different contexts.

In *Jooste v Botha*,²⁴⁶ the court had to decide whether it could compel a father to show love and affection for his child. Van Dijkhorst J held:

²⁴² See also Friedman, Pantazis & Skelton 2009:47-44.

²⁴³ See par 5.3 above.

²⁴⁴ Palmer 1996:98; *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC):par 17; Zermatten 2003:7 refers to the development of article 3 of the CRC and the possible differences between the English and French translations. He indicates that article 3(1) excludes parents and the private sphere from its operation. However, article 18 clearly stipulates that parents have the primary responsibility to act in the best interests of their children. In fact, the standard set for parents is higher than what is expected in article 3(1). Article 18 provides that the best interests of the child will be the parents' "basic concern".

²⁴⁵ 2007:2-9.

²⁴⁶ 2000 (2) SA 199 (T):210C-D/E.

The wide application [of section 28(2)] is ostensibly so all-embracing that the interests of the child would override all other legitimate interests of parents, siblings and third parties. It would prevent conscription or imprisonment or transfer or dismissal by the employer of the parent where that is not in the child's interest. That can clearly not have been intended. In my view, this provision is intended as a general guideline and not as a rule of law of horizontal application. That is left to the positive law and any amendments it may undergo.

The context of this pronouncement should be kept in mind, and the court's pronouncement that the best interests of the child have no horizontal application should not be used as a general rule. In this case, a child born out of wedlock sued his biological father for damages, because his father did not show him any affection and refused to have any contact with him. The father, however, paid maintenance. The court found that there is no legally enforceable obligation upon parents to love and cherish their children or to give them their attention and interest. No court can force anyone to love, and show affection for, the child. The court can merely enforce orders that secure the child's material needs as far as possible.²⁴⁷ The court also found that affection cannot be quantified, and therefore the claim for damages had to fail. Therefore, although it is in a child's best interests to be loved and cared for, the courts cannot enforce this. This judgment should therefore rather be construed to read that the best-interests-of-the-child right is horizontally applicable, but that it is not always possible to enforce it.

In contrast to the judgment that the best interests of the child do not constitute "a rule of law of horizontal application", the Constitutional Court found in *S v M*²⁴⁸ that the best interests of the child serve as a general guideline for the courts and establish a general set of children's rights which the courts are obliged to enforce. The courts are also obliged to adopt a child-sensitive approach in enforcing the law, in interpreting statutes and in developing the common law accordingly.²⁴⁹ The courts, then, must secure the best interests of the child in all matters, and not only in matters protecting the child from the power of the state.

Furthermore, the Constitution has relativised the distinctions.²⁵⁰ The horizontal application of rights confers rights and duties on private parties as far as possible. Section 8(2) of the Constitution therefore provides:

²⁴⁷ In *S v M* 2007 (2) SACR 539 (CC) in fn 13. The Constitutional Court had an opportunity to comment on, or confirm, this statement, but explicitly refrained from doing so, indicating that it was a difficult issue which it did not need to make a pronouncement on for purposes of this case.

²⁴⁸ 2007 (2) SACR 539 (CC):par 14-15.

²⁴⁹ Erasmus 2010:126.

²⁵⁰ Cheadle, Davis & Haysom 2002:28-29.

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the rights and the nature and duty imposed by the right.

The horizontal application of section 28(2) was confirmed in the recent *Juma Masjid* case.²⁵¹ In this case, a public school had been operated on the private property of a trust since 1997. The Department of Education had failed to comply with its obligation to enter into an agreement with the trust regarding the use of the property and regarding payment of expenses incurred by the trust to maintain the property. The Department had made several promises over a number of years relating to the agreement and to the payment of rent and expenses, but had failed to comply with the undertakings. Consequently, in July 2003, after several years of trying to resolve the issue, the trust notified the Department that it had to vacate the property by the end of 2004. Again, the Department failed to comply with the request. In 2007, the Department twice undertook to make back payments until 1998, but failed to make good on its promises. Furthermore, in 2007, the trust again requested the Department to indicate when it would vacate the premises. Instead, the Department again asked for a meeting. At long last, in July 2008, the trust approached the High Court for an eviction order, which was granted.

The school, the SGB and several parents then approached the Constitutional Court to set aside the eviction order, claiming that the High Court's eviction order, *inter alia*, did not pay due regard to the best interests of the learners. The Member of the Executive Council (MEC), on the other hand, did not oppose the eviction order on appeal and merely sought an order to suspend the execution of the eviction order to enable the Department to finalise the process of closing the school.²⁵²

However, the Constitutional Court came to another conclusion, provisionally set aside the eviction order, and made a provisional order on 7 September. The court held:

- (a) The Trustees (first to ninth respondents) have a constitutional duty to respect the learners' right to a basic education in terms of section 29(1) of the Constitution;
- (b) Having regard to all the circumstances of the case, including this obligation, the Trustees acted reasonably in seeking an order for eviction; and
- (c) In considering the Trustees' application in granting the order of eviction, the High Court did not properly consider the best interests of the learners under section 28(2) and their right to a basic education under section 29(1) of the Constitution.

²⁵¹ 2011 (8) BCLR 761 (CC).

²⁵² *Juma Masjid* case 2011 (8) BCLR 761 (CC):par 16-19.

In addition to the provisional eviction order, the Constitutional Court ordered the parties to engage meaningfully in order to resolve the issue. The Department was instructed to make alternative arrangements for all the learners and to report back to the court if the parties were unable to resolve the issue. The negotiations failed and the Department twice reported back to the court on the alternative arrangements made for the learners. Only after the Constitutional Court was satisfied that the children's rights to a basic education had been respected, did it grant an eviction order. Thus the court effectively set the eviction order aside to give the parties time to resolve the matter, and, when that failed, the court ensured that the best interests of the children involved were secured before it granted the final eviction order.²⁵³

The High Court found, in line with common law principles, that there was no constitutional obligation on the part of the trust towards the learners of the school and therefore granted the eviction order.²⁵⁴ However, the Constitutional Court held that this approach of the High Court did not reflect the obligations of the trust in terms of section 8(2) of the Constitution, and also did not consider the impact of an eviction order on the interests of the learners.

The court stressed that there was no positive obligation on the trust to provide education for the learners or to make its property available to the Department in terms of an agreement. However, since the trust had made the property available and had performed the public function of managing, conducting and transacting all affairs of the school on its property, to the benefit of the school, there was a negative duty on it not to impair the learners' existing access to basic education. The trust thus had a horizontal obligation not to interfere with, or diminish, the learners' rights to education.²⁵⁵

On the other hand, the trust was at liberty to approach the court for an eviction order, because the MEC had failed to conclude the agreement. The court therefore had to determine whether the trustees had acted reasonably and held:

In order to assess whether the Trustees acted reasonably in seeking an order for eviction, one has to be mindful that the primary obligation in respect of the learners' right to a basic education is that of the state. The Trust's obligation is secondary and, important to remember, arises only from its willingness to allow the property to be used as a public school and to enter into a section 14 agreement. It did not give up its rights of ownership of the property. *At most, the Trust's constitutional obligation*, once it had allowed the school to

²⁵³ *Juma Masjid* case:par 74.

²⁵⁴ *Juma Masjid* case:par 54.

²⁵⁵ *Juma Masjid* case:par 54-60.

be conducted on its property, was to minimise the potential impairment of the learners' right to a basic education.²⁵⁶

This approach of the court is in line with its previous pronouncements on the optimisation of children's rights, even if these rights are to be lawfully limited. The court found that all the past efforts of the trust to come to an agreement with the Department were indicative of its efforts to minimise the impairment of the rights of the learners. Consequently, the trustees had acted reasonably in seeking an eviction order.²⁵⁷ Yet, despite the reasonableness of the eviction order, the Constitutional Court found that the High Court did not properly consider the best interests of the learners in granting the eviction order.

It is clear from the case law that there is not only a vertical responsibility on the state to ensure the best interests of children, but also a horizontal obligation on natural and juristic persons to, at the very least, not limit the rights of children in instances where there is a primary responsibility on the state to promote and fulfil rights.

Educators and the SGB have to act in the best interests of the child, and as employees and organs of the state respectively are bound by the constitutional best-interests-of-the-child provisions.²⁵⁸ The question, however, arises whether there is a constitutional obligation on learners to consider the best interests of other learners at a school in the context of school discipline.

The Constitution does not confer only rights on people, but also concomitant responsibilities. Children are entitled to almost all the rights in the Constitution. Section 8(2) of the Constitution would thus be applicable to them as well, taking the nature of a particular right into account as well as the duty imposed by the right. To give effect to children's responsibilities in terms of the Constitution, the *Children's Act*²⁵⁹ explicitly refers to the responsibilities of children and provides:

Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state.

Emphasising children's responsibilities is one of the measures employed by the state to ensure that children do not unduly infringe on the constitutional rights of other children.

²⁵⁶ *Juma Masjid* case:par 62. [My emphasis]

²⁵⁷ *Juma Masjid* case 2011 (8) BCLR 761 (CC):par 64-65.

²⁵⁸ Constitution 1996:7(2). The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

²⁵⁹ 38/2005:s 16.

6.2 Applying section 28(2) independently of, or in conjunction with, other rights

Bonthuys²⁶⁰ argues that it would be incorrect to use the best-interests principle instead of using the other constitutional rights more closely related to an issue. Indeed, in most cases, the Constitutional Court refers to a number of constitutional provisions in conjunction with section 28(2) before it makes a finding regarding constitutionality.

However, in *Minister of Welfare and Population Development v Fitzpatrick and Others*,²⁶¹ the Constitutional Court found the provisions of section 18(4)(f) of the *Child Care Act*²⁶² regarding the prohibition of the adoption of South African born children by non-citizens unconstitutional without reference to any other constitutional provisions and made its determination in terms of section 28(2) only. In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* (“the *Director of Public Prosecutions* case”),²⁶³ the Constitutional Court determined the constitutionality of several provisions regarding child witnesses by referring to section 28(2) only.

Yet, in determining the best interests of the child in these cases, the court referred, in the *Fitzpatrick* case, in general to the other rights found in section 28. In the latter case, the court referred to the child’s right to protection in order to inform the best interests of the child. These references to other rights were only made so as to inform and substantiate the decisions which were ultimately made in terms of section 28(2). Although the court might have used the child’s right to family care or alternative care²⁶⁴ in the *Fitzpatrick* case, it preferred to use the best-interests-of-the-child right to make its decision. In the *Director of Public Prosecutions* case, the court might well have used the right to dignity and the right to personal security, and maybe even the right to equality. However, the court chose not to supplement these rights with excessive or extensive interpretations. Instead, it used only the child’s best-interests right to capture the essence of what was at stake, namely the protection of the child while part of an adversarial trial process.

Thus, although it is possible to make a decision on the constitutionality of provisions or conduct in terms of section 28(2) only, it is preferable to use other constitutional rights and values to inform a decision that conduct or legislation is not in accordance with the child’s constitutional

²⁶⁰ In Erasmus 2010:132.

²⁶¹ 2003 (3) SA 422 (CC).

²⁶² 74/1983.

²⁶³ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC).

²⁶⁴ Constitution 1996:s 28(1).

best-interests right. This approach minimises the arbitrary nature of the decision and the criticism of the indeterminacy of the concept. The approach also adheres to the principle of interrelatedness of rights.²⁶⁵

Therefore, if there are no other constitutional rights available to adequately respect, protect, promote and fulfil the rights and interests of the child, on their own or in conjunction with the best-interests-of-the-child principle, the best interests of the child, as a right, act as a safety net to ensure that the child's best interests will be respected, protected, promoted and fulfilled.

7. CHALLENGES POSED BY, AND STRENGTHS OF, THE BEST-INTERESTS CONCEPT

The best-interests-of-the-child concept has been criticised by many and its application sometimes poses challenges. However, it is also a useful tool to promote the interests of children and has laudable strengths. In some instances, the apparent weaknesses are indicated as the actual strengths of the concept. In what follows, these challenges and strengths will be discussed.

7.1 Indeterminate nature of the concept as a challenge

One of the biggest problems with this concept is that it is "indeterminate"²⁶⁶ and "vague".²⁶⁷ Mnookin and Szwed²⁶⁸ warn in this regard as follows:

The phrase is so idealistic, virtuous and high sounding that it defies criticism and can delude us into believing that its application is an achievement in itself. Its mere utterance can trap us into the self-deception that we are doing something effective and worthwhile. However, the flaw is that what is best for any child or even children in general is often indeterminate and speculative and requires a highly individualised choice between alternatives.

The expansiveness and vagueness of the paramountcy principle is also recognised by the Constitutional Court, which warns that the principle can potentially "promise everything in general while actually delivering very little in particular".²⁶⁹ Thus, it is regarded as indeterminate and actually provides little guidance for those who should use the principle. The court continues and quotes Van Heerden with approval:

²⁶⁵ See the discussion on indeterminacy below in par 7.1.

²⁶⁶ Heaton 1990:95; Clark 2000:15; Hammarberg 2008:4.

²⁶⁷ Davel & De Kock 2001:274; Bekink & Bekink 2004:22; Clark 2000:15.

²⁶⁸ In Malherbe 2008:269.

²⁶⁹ *S v M* 2007 (2) SACR 539 (CC):par 23.

The South African Constitution, as also the 1989 United Nations Convention on the Rights of the Child and the 1979 United Nations Convention on the Elimination of All Forms of Discrimination against Women, enshrine the “best interests of the child” standard as “paramount” or “primary” consideration in all matters concerning children. It has, however, been argued that the “best interests” standard is problematic in that, *inter alia*, (i) it is “indeterminate”; (ii) members of different professions dealing with matters concerning children (such as the legal, social work and mental health professions) have quite different perspectives on the concept “best interests of the child”; and (iii) the way in which the “best interests” criterion is interpreted and applied by different countries (and, indeed, by different courts and other decision-makers within the same country) is influenced to a large extent by the historical background to, and the cultural, social, political and economic conditions of, the country concerned, as also by the value system of the relevant decision-maker.²⁷⁰

In what follows, even more dimensions of the indeterminate nature of the best-interests concept will be highlighted. These include the contextual sensitivity of the concept, the uncertainty accompanying decisions impacting on the future of the child, unlimited choices and unpredictability of outcomes, and the subjective and objective approach to determining the best interests of the child.

7.1.1 The determination of the best interests of the child is context-sensitive

The vagueness of the concept is, *inter alia*, due to the fact that what should be regarded as in the best interests of a child is a factual question and depends on the specific circumstances of each case.²⁷¹ In addition, a lack of information can make it difficult to make a truly rational and adequate assessment of what would be in the child’s best interests.²⁷² The indeterminate nature of the best interests of the child is further underscored with more and new information becoming available on human behaviour. Changing societal norms, attitudes and customs contribute to the indeterminacy, because the best interests of children are perceived differently over time.²⁷³

²⁷⁰ *S v M* 2007 (2) SACR 539 (CC):par 23.

²⁷¹ Bekink & Bekink 2004:23 & 33; Palmer 1996:99; Clark 1992:395. Heaton 1990:98 indicates that the best-interests standard is not the only legal concept applied in law, despite being indeterminate. Another example is the *boni mores* which is often employed by the courts.

²⁷² Clark 2000:15; Visser 2007:463.

²⁷³ Clark 2000:15; Palmer 1996:102; Bekink & Bekink 2004:22. Examples in private law include the fact that, although children’s best interests always played an important and even decisive role in custody disputes, different trends could be seen over time. At first, custody was mostly awarded to the innocent party in the divorce action, but later the maternal preference rule was followed (see *Myers v Leviton* 1949 (1) SA 203 (T)). More recently, however, the court found that mothering is not dependent on one’s sex, but is rather a role that can be played equally successfully by males and females (see *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O)). The courts also normally awarded custody to only one of the parents to avoid confusing the children. In 1985, in *Willers v Serfontein en ‘n Ander* 1985 (2) SA 591 (T), the court found that children’s access to their father should be restricted to help them accept their parents’ divorce. The court also found that overfrequent visits to the non-custodian parent would be detrimental to their acceptance of the

In addition, although the concept “best interests of the child” is accepted globally, the content and application will differ owing to the values, culture,²⁷⁴ standards and status of children²⁷⁵ applicable in each country.²⁷⁶ The multitude of factors that may encroach on the child’s best interests thus makes a measure of indeterminacy inevitable.

7.1.2 The future-oriented focus of the best-interests concept

The concept’s vagueness and indeterminacy are further exacerbated by the impossibility of predicting the future accurately. Most of the decisions pertaining to the best interests of the child are aimed at the future of the child. In most other disputes, the court has to determine what happened in the past and then find a suitable solution to remedy the consequences of past actions, without the additional burden of ensuring that effect is given to the future best interests of the parties. The courts are normally only obliged to ensure that parties are financially in the same position as before the harm was caused. In criminal cases, the courts need only focus on finding the offender guilty and of determining an appropriate punishment.

divorce. In general, the courts were of the opinion that only one parent should have custody of children (see also *Pinion v Pinion* 1994 (2) SA 725 (D):730J). This was followed by a period in which joint custody was awarded more frequently to allow both parents to play a significant part in the lives of their children and to have as much contact as possible with the children (see *Kastan v Kastan* 1985 (3) SA 235 (C); *Venton v Venton* 1993 (1) SA 763 (D); *V v V* 1998 (4) SA 169 (C)). Currently, in most instances, both parents have parental responsibilities and rights in terms of the *Children’s Act* 38/2005:s 18-22, unless the court finds it is not in the child’s best interests. In certain circumstances, unmarried fathers will also not have automatic parental rights and responsibilities. Although the courts indicated that the child’s views should be considered in determining their best interests, specific trends were also identifiable. At first, the courts based their rulings on the numerical age of the child, but no consensus as to the specific ages existed. Then the courts started to consider the maturity of the children in deciding how much weight should be attached to their views (see *Horsford v De Jager* 1959 (2) SA 152 (N); *Greenshields v Wyllie* 1989 (4) SA 898 (W); *McCall v McCall* 1994 3 SA 201 (C)). The latest development can be found in the *Children’s Act* 38/2005. Section 10 of this Act provides that a child of such an age, maturity and level of development who is able to participate has a right to participate and his or her views should be given due weight. The impact of the parent’s sexual orientation on the interests of a child has also changed. Before the enactment of the Constitution, the court found in *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W) that it would not be in the children’s best interests to award custody to the lesbian mother. The court further found that homosexuality is abnormal and that the children should not be exposed to this abnormal behaviour of their mother. However, since the Constitution came into force, the court followed a different approach in *V v V* 1998 (4) SA 169 (C). Discrimination on the ground of sexual orientation is unconstitutional. The court found that the sexual orientation of the mother should only play a role in determining access and custody if her sexual orientation has an impact on the children, for instance if they are ridiculed because of her lifestyle. If there is no indication that her sexual orientation or lifestyle causes problems for the children or is not in their best interests, it cannot be used to disqualify her from having access to, or custody of, the children. Clark 2000:5 states that another important factor influencing the way in which the best interests of children are perceived is the shift from a focus on parental power to parental responsibility and children’s rights.

²⁷⁴ McGoldrick 1991:137.

²⁷⁵ Freeman 2007:55.

²⁷⁶ Zermatten 2003:12.

In contrast, as far as litigation pertaining to children is concerned, the court mostly has to make a decision to ensure that the child's future social, emotional, cultural and financial well-being is secured. In addition, decisions pertaining to children's best interests often involve an investigation into the person of the parties involved and do not focus only on a specific act or subject matter. Clark²⁷⁷ therefore contends that litigation in this regard is "person-orientated". This approach consequently poses difficulties for the judiciary and other decision-makers in the interpretation and evaluation of the personalities and character of the children and other parties involved and of the evidence produced to support their claims.²⁷⁸ Taking the additional evidence concerned into account can complicate decisions aimed at securing the best interests of the child.

In the school discipline context, the misconduct would be investigated to determine guilt. The focus is thus on the past. However, this conduct has consequences for the transgressor and other parties, often other children. The consequences of the unacceptable conduct of the child must still be determined and this therefore falls within the ambit of "all matters" that concern the child. The transgressor and the other children's (mostly future) interests remain of paramount importance in deciding a suitable punishment or other appropriate action after guilt has been established. This punishment or alternative measure must be in the best interests of all the children. The focus of the decision pertaining to the consequences of the unacceptable behaviour should rather be on the future best interests of the children and not only on the past unacceptable actions of the child.

7.1.3 The possibility of an unlimited number of choices and consequent outcomes

A number of authors²⁷⁹ have rightly indicated that it is impossible to determine with certainty what is best for a specific child or for children. To determine precisely what would be in a child's best interests, the following must be known: Firstly, all the options must be known and must be feasible. The number of options available to children is sometimes limited. In the education sector, an option would most probably be limited owing to resource constraints.²⁸⁰ Secondly, all

²⁷⁷ 1992:394.

²⁷⁸ Clark 1992:395.

²⁷⁹ Heaton 1990:95; Davel & De Kock 2001:274; Palmer 1996:102; Visser 2007:462.

²⁸⁰ *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T). The court acknowledged the lack of resources, but still held the Department accountable for providing for the basic needs of learners, in the form of sleeping bags, and for the redeployment of existing capacity so as to provide psychological services for children in a school of industry. See also *Centre for Child Law and Others v Minister of Basic Education and Another*: unreported case 1749/2012 – judgment delivered on 27 July 2012 in the Eastern Cape High Court. The Department of Education in the Eastern Cape is currently under administration owing to maladministration. It refused to declare teacher and non-teacher establishments for 2013. These declarations will force the Department to fill vacancies for teaching and non-teaching staff

the possible outcomes must be known. However, it is impossible to predict the possible outcomes of all options. According to Coons and Mnookin, in Heaton:²⁸¹

present day knowledge about human behaviour [including human reactions] provides no basis for the individualized prediction required by the best interest standard. There are numerous competing theories of human behaviour, based on radically different conceptions of the nature of man, and no consensus exists that anyone is correct. No theory is widely considered capable of generating reliable predictions about the psychological and behavioral consequences of alternative decisions for a particular child.

Thirdly, the probabilities of each outcome occurring must be known, and, fourthly, the value attached to each outcome must be known. Even if it were possible to determine all the possible outcomes, it would still be impossible to determine, accurately, the probability of each outcome occurring. It would be impossible to accurately assign values to the different possible outcomes.

Using the above-mentioned criteria, Heaton²⁸² is of the opinion that it is impossible to determine with absolute certainty what would be in a child's best interests. She is further of the opinion that the determination of the best interests of a child is largely dependent on speculation.

It is thus fair to conclude that the best-interests principle is often used in good faith, but does not guarantee the best results. It is only with hindsight that one is in a position to determine whether a specific decision was possibly the best option.

7.1.4 Subjective and objective approaches in determining the best interests of the child

The indeterminacy of the concept is further highlighted by some authors,²⁸³ who contrast an objective and subjective approach to determining the best interests of the child. If the best interests are determined on the basis of a subjective approach, the child's parents, the presiding officer in any judicial or administrative actions and other interested parties' subjective opinions would be determinative in what is in the best interests of the child. It is claimed that presiding officers act objectively and base their decisions on scientific knowledge, but there are examples of decisions based on the subjective opinion of the presiding officer. At the very least, there is the risk of decisions being made based on the subjective beliefs of the decision-

in several schools in the Eastern Cape in 2013 (see court order). The Department was also ordered to pay the outstanding salaries of temporary educators and to appoint them permanently (par 2).

²⁸¹ Heaton 1990:95.

²⁸² 1990:96.

²⁸³ Heaton 1990:97.

maker.²⁸⁴ Clark²⁸⁵ is therefore of the opinion that the “best-interest test is unpredictable and to some extent dependent on the subjective opinions of the judge”. If judged from an objective point of view, the view of the community at large should be used. This approach has an obvious pitfall, since there is hardly any community consensus on what is in a child’s best interests. He is also of the opinion that, since different people have different opinions on how to raise and educate a child, it would be very hard to construct a community norm from the diverse views.

Zermatten²⁸⁶ indicates that the best-interest criterion is “doubly subjective”.²⁸⁷ Apart from the parents’ views of what is in the best interests of children, society at large also has a subjective view of what is in the best interests of children. This constitutes a collective subjectivity, because “any given society, at any given moment in its history, creates an image of what the interests of the child [are]”.

Heaton²⁸⁸ argues that it is undesirable to choose between these approaches, and that a combination of these approaches should be used to determine best interests. The subjective points of view of the parents, child and other interested parties must be considered, but this must be done within the framework of what the community at large would consider to be in a child’s best interests as far as a community norm can be established on a particular point.

It should also be noted that the Constitution is regarded as the supreme law in the country and that any approach for determining the best interests of the child should be within the parameters of what is constitutionally acceptable and required. In addition, any approach should adhere to international standards.²⁸⁹ Thus any approach which attempts to determine the best interests of the child must be in line with the constitutional provisions.²⁹⁰

²⁸⁴ Zermatten 2003:12. For examples see *Greenshields v Wyllie* 1989 (4) SA 898 (W):899(D). In this judgment, Justice Flemming referred to his own four daughters. In *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), the court made a moral judgement about the mother’s lesbian relationship. See also Du Plessis 2008:32-45–32-51 on the impact of politics on judgments and regarding the fact that out-and-out neutrality is impossible.

²⁸⁵ 1992:395.

²⁸⁶ 2003:12.

²⁸⁷ Zermatten 2003:12.

²⁸⁸ 1990:96.

²⁸⁹ See, for example, CRC 1989.

²⁹⁰ Constitution 1996:s 1(c).

7.1.5 The best-interests concept is an evolving one with no exhaustive content

The expansion of knowledge and sensitisation with regard to children are continuing and it can be expected that the best-interests concept will evolve more over time. The Constitutional Court held in *Minister of Welfare and Population Development v Fitzpatrick and Others*²⁹¹ that the:

“best interests” standard appropriately has never been given exhaustive content in either South African law or in comparative international or foreign law.

This contributes to its indeterminacy. The best-interests standard should be flexible in order to take account of all the relevant circumstances of each case and to ensure that the final outcome is, in practice, in the best interests of the child or children concerned.²⁹²

Some of the courts ignore the fact that the best interests of the child have been elevated to a constitutional imperative, while other courts assume that the common law reflects the content of the best-interests rights correctly and therefore fail to investigate the constitutionality of the common law position and to develop it when necessary. Other courts face up to the challenge and investigate the constitutionality of the common law position, and revise or change the common law position to align it with the new constitutional imperatives.²⁹³

7.1.6 The role of the child’s views in determining the best interests of the child

In the initial drafting of article 3 of the CRC, the child’s right to be heard was incorporated in the provision regarding the best interests of the child. It was only towards the end of the drafting process that the decision was made to include the child’s right to be heard in a separate article.²⁹⁴ However, despite this separation, the close link between the child’s right to be heard and his or her best interests remains and is illustrated, *inter alia*, by the acceptance that these two principles are both part of the four foundational principles of the CRC.²⁹⁵

To find a proper balance between what decision-makers perceive to be in the child’s best interests and the child’s own views can pose a real challenge.²⁹⁶ Parents do not always know what is in the best interests of their children, and children’s views should therefore not automatically yield to the wishes of the parents. On the other hand, due regard should be had to

²⁹¹ 2003 (3) SA 422 (CC):par18. See also Heaton 1990:98.

²⁹² Bekink v Bekink 2004:39.

²⁹³ Erasmus 2010:131; Visser 2007:462.

²⁹⁴ Detrick 1999:216-217.

²⁹⁵ CRCG 5 2003:par 12.

²⁹⁶ Visser 2007:462.

the immaturity and evolving capacities of the child. This adds another dimension to the indeterminacy debate and makes it more difficult to determine the best interests of the child.²⁹⁷

7.1.7 Risk of social engineering

Currie and De Waal²⁹⁸ highlight the risk of social engineering owing to the indeterminate nature of the best-interests concept, in particular where public officials are entitled to decide what is in the best interests of the child. Public officials are potentially in a position to make decisions in education which are not in line with the best interests of the child, although they might claim that the decisions are in fact in line with such interests.

Proper safety mechanisms should therefore be built into the system of determining the best interests of the child. One of these safety mechanisms, which has been built into the *Schools Act*²⁹⁹ is the requirement that parents and children should be consulted in the drafting of the code of conduct.³⁰⁰ The supremacy of the Constitution also plays an important role in protecting the best interests of children.

7.2 Indeterminate nature of the concept as a strength

Zermatten³⁰¹ indicates that all the contradictions and criticisms of the concept are not indicative only of the “weakness” of the concept. In fact, these emphasise, rather, some of the characteristics of the concept. He further argues that there is some strength to be found in all the contradictions, because this highlights “the flexibility and richness”. He states:

Not being defined in a precise manner, relating to time and space and containing a good amount of subjectivity, this concept could void the sense of children's rights, it may even appear counter-productive, meaning it might favour the interest of the State or the family to the detriment of the child. That is true, and criticisms were (and continue to be) numerous against imprecisions of the criterion and the vagueness of this concept.

In its defense, let us say that it has the advantage to be broad, flexible and able to adapt itself (relative to time and space) to the cultural, socio-economic differences of various legal systems.

²⁹⁷ See ch 5, par 6 herein for a detailed discussion on the child's right to be heard or to participate.

²⁹⁸ Currie & De Waal 2001:467.

²⁹⁹ 84/1996:s 8(1).

³⁰⁰ *Schools Act* 84/1996:s 8(1).

³⁰¹ 2003:13.

The Constitutional Court³⁰² has confirmed Zermatten's view and has held that the strength of the best-interests concept actually lies in the presumed indeterminacy of the principle. The strength of the principle also lies in the fact that the best-interest standard should be flexible, as individual circumstances will determine which factors secure the best interests of a particular child. In *S v M*,³⁰³ the Constitutional Court clarified the issue of indeterminacy as a weakness and held that, to ensure a truly child-centred approach, every case should be examined individually, taking into account the real-life situation of the child involved. The court recognises the existence of the above-mentioned indicators of indeterminacy, but stresses that it is indeed the impossibility of drafting a comprehensive list of factors to determine the best interests, the need to evaluate every case on its own merits, and the flexibility to adapt the standard to fit particular circumstances which provide the source of strength for this standard. It would thus not be in the best interests of a child to have a predetermined formula to determine his or her best interests. A more precise test would risk sacrificing the child's best interests to expediency and certainty. The real-life situation of every case plays an important role in determining the best interests of the child. In fact the concept's strength is captured in this context-based flexibility.³⁰⁴

8. THE IMPLEMENTATION OF THE BEST-INTERESTS-OF-THE-CHILD CONCEPT

The best-interests-of-the-child concept must be applied in order to be effective, but its application is not without obstacles. These include the failure to apply the benchmark, and the role of onus and normal litigation procedures in giving effect to the benchmark. The misuse of the concept to justify unlawful administrative proceedings and, finally, the lack of explicit measures to guide the implementation process also pose a challenge. These challenges will be discussed in more detail in what follows.

8.1 Failure to adhere to the best-interests-of-the-child benchmark

Despite the laudable expectation that the best interests of the child will be the benchmark for all decision-makers,³⁰⁵ there are still recent examples where the courts,³⁰⁶ the executive³⁰⁷ and the

³⁰² *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC).

³⁰³ 2007 (2) SACR 539 (CC):par 24.

³⁰⁴ Erasmus 2010:128, 131-132; Heaton 1990:96; Ferreira 2010:208.

³⁰⁵ See par 5 above.

³⁰⁶ In April 2011, in the *Juma Masjid* case 2011 (8) BCLR 761 (CC), the Constitutional Court found that the High Court had not properly considered the best interests of the children in an application for an eviction order of a public school on private property.

³⁰⁷ In March 2011, in *Freedom Stationary (Pty) Ltd and Another v MEC for Education, Eastern Cape, and Others (Centre for Child Law as Amicus Curiae)* [2011] JOL 26927 (E), the applicants approached the court for an interdict to prevent the Department of Education from entering into a new contract with other providers of stationary for learners. In 2010, the applicants were notified that they had been awarded the tender to provide stationary for the schools in the province. However, in January 2011, shortly before the schools reopened for the new school year, the Department published a notice cancelling the tender. The

legislator³⁰⁸ have failed to give due regard to the child's best interests. Decision-makers should therefore constantly be reminded to have due regard for these best interests.³⁰⁹

Thus far, the Constitutional Court has played an important role in initiating legislative reform in line with the best interests of the child.³¹⁰ In some of these instances, the court granted the legislature a period of time to amend legislation and to bring it in line with, *inter alia*, the constitutional imperative of the best interests of the child. The court gave Parliament time to

Department claimed that the applicants did not have a valid tax certificate. In the meantime, the Department awarded the tender to two other companies without publishing a new tender. These companies did not comply with the tax legislation either. It later transpired that the tax certificate of the applicants had been withdrawn by mistake. The interim application was brought to prohibit the Department from entering into new contracts with new providers until the hearing on the administrative fairness of the original process was concluded. It was at this point that the *amicus curiae* joined the proceedings and argued that the tender should be awarded to the new providers identified by the Department or any of the other parties to ensure that stationary was provided for more than 680 000 learners. The envisaged proceedings could take some time to conclude and would leave learners without stationary. The *amicus* argued that the court should consider the best interests of the children in this regard. However, the court failed to use the best interests of the children in its judgment and limited the learners' right to education. The applicant's right to fair administrative proceedings and the learners' right to education were thus balanced against each other without referring to the best interests of the child. Couzens 2012 rightly criticises the court for its decision, but also concedes that the court tried to minimise the impact on the best interests of the children and the children's right to education by setting very narrow dates for the subsequent hearings. Yet, in reality, it could mean that children, who were mostly very poor, would be without stationary for four to five months. Thus almost half of the academic year would have passed by that time. It is clear that the Department of Education did not consider the impact of its decision to cancel the tender in January on the interests of the learners in the province. Consequently, the *amicus* had to intervene, but the court also did not heed the calls of the *amicus*. See also the judgment on 17 May 2012 in the North Gauteng High Court ordering the Minister of Basic Education to deliver textbooks to schools in Limpopo: *Section 27 and Others v Minister of Basic Education and Another*; unreported case 24565/2012.

³⁰⁸ In January 2012, in *C and Others v Department of Health and Social Development, Gauteng, and Others* 2012 (2) SA 208 (CC):par 27 the Constitutional Court found that sections 151 and 152 of the *Children's Act* 38/2005 (which came into full operation in 2010) was unconstitutional since it did not provide that children removed from the family are entitled to an automatic review of the removal. Consequently, the court found, *inter alia*, that the provisions were unjustifiably limiting the children's right to family care and the right to have their best interests considered by a children's court. Thus the legislation did not make proper provision for the explicit consideration of the child's best interests to an appropriate degree within a limited time after the removal.

³⁰⁹ For example, see the *Juma Masjid* case 2011 (8) BCLR 761 (CC); *C and Others v Department of Health and Social Development, Gauteng, and Others* 2012 (2) SA 208 (CC); *Centre for Child Law and Others v MEC for Education Gauteng, and Others* 2008 (1) SA 223 (T); *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* 2003 (4) SA 160 (T); *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 SCA.

³¹⁰ The adoption legislation changed dramatically after a series of legal challenges pertaining to: the legal position of the father of the child born out of wedlock (*Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC)); the prohibition on homosexuals adopting children (*Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae* 2003 (2) SA 198 (CC)), and the prohibition on non-South Africans adopting a South African-born child (*Minister of Welfare and Population Development and Others v Fitzpatrick and Others* 2000 (3) SA 422 (CC)). These challenges resulted in the following legislation: *Natural Fathers of Children Born Out of Wedlock Act* 86/1997, and the conditions set out in case law were later reflected in the *Children's Act* 38/2005, which replaced the *Child Care Act* 74/1983.

change the legislation because there were not enough safeguards in place in the legislation to guarantee the best interests of children if the provisions were found to be unconstitutional with immediate effect.³¹¹ In other instances, the court did not grant the legislator a period of time to amend the legislation, because the suspension of declaring the legislation unconstitutional was not in the children's best interests.³¹²

If those who are supposed to have access to the latest developments in the law still fail to have due regard to the best interests of the child, one can assume that lay people would also be at risk of not complying with the constitutional guidelines. This highlights the importance of revisiting legislation, policies and the implementation of disciplinary practices in schools to ensure that focused attention is given to the best interests of children.

The lack of focus on the best interests of the child seems to be a problem not only in South Africa, but also globally.³¹³ Hammarberg,³¹⁴ a Commissioner for the Human Rights Council of Europe, argues that, despite the fact that the best interests of the child are not considered to be of paramount importance in terms of article 3 of the CRC, this does not weaken the principle, but in fact provides a perfect starting point for discussing important policy issues. He further contends:

It is clear, however, that the principle's full policy potential has not yet been fully understood or utilized. Only a few governments have taken the "best interests" principle seriously outside the area of family affairs, an omission that continues to be a major concern.

He continues by stressing the importance of continuous child-impact assessments so as to determine the impact of any proposed law, policy or budgetary allocation on the interests of children. In addition, evaluations should also be done to determine the actual impact of policies on the best interests of children after implementation. He argues that decision-makers will have to be able to prove that they indeed considered the best interests of the child. Those who have acted contrary to the best interests of children will consequently carry the burden of proof of showing that the best interests of the child were adequately considered. Decision-makers might therefore reconsider their decisions if assessments are likely to indicate that they did not properly consider the interests of children. He contends, in conclusion, that decision-makers

³¹¹ *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC).

³¹² *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC).

³¹³ Hammarberg 2008:3.

³¹⁴ 2008:3.

should “always systematically attempt to assess and evaluate the consequences of the proposed action”.³¹⁵ He justifies his position and states:

The intention is not to introduce new bureaucratic elements into child-related decisions for the sake of form: rather it is to compensate for the fact that children have little political power, even indirectly through parents or other representatives. The new procedures may be seen as an unusual display of adult “self-discipline” to force our decision-making systems to take steps to bridge that gap. The procedures clearly require discussions on methodology in order to be made “real”. But if consciously used, they may one day contribute to what is really intended: a genuine attitudinal change leading to children being fully respected as human beings endowed with rights.³¹⁶

This approach to the best-interests-of-the-child principle is in sharp contrast to the traditional roles globally prescribed for it. It is acknowledged that the best interests of the child are rarely applied in a broader sense than that of care and custody disputes. The call for child-impact assessments and child-impact evaluations therefore requires major changes to the political agendas of national and local governments and administrative bodies. Very few countries in the world have, according to him, heeded this call thus.

The South African legislative response to the call to evaluate policies, legislation and decisions with due regard to the best interests of the child should be highlighted as being a step in the right direction. Section 7 of the *Children's Act*³¹⁷ specifically makes provision for the application of the best interests of the child and provides explicit factors to guide the process of applying the particular Act. Section 6 of the Act also provides for general principles and holds that children's rights, as contained in the Bill of Rights, must be respected, protected, promoted and fulfilled in all proceedings, actions, decisions or matters concerning children. This latter general principle holds for “all legislation applicable to children including this Act”. The application of any legislation is thus again explicitly subjected to the best-interests-of-the-child standard.

A specific dimension of the failure to have due regard to the best interests of children is highlighted in the *locus classicus*, *S v M*,³¹⁸ in referring to the prescribed level of independent focus in decision-making processes. The court considered the rights and interests of the children as individual bearers of rights and did not view the children only as a personal circumstance of the convicted mother. Once the court focused on the children as individual

³¹⁵ Hammarberg 2008:8-9.

³¹⁶ Hammarberg 2008:9.

³¹⁷ 35/2008.

³¹⁸ 2007 (2) SACR 539 (CC).

rights bearers, their rights became separated from their mother's and the court was in a better position to determine the best interests and needs of the children concerned.³¹⁹ It is thus important to ensure, in an analysis of what is in the best interests of a child, that the child's interests are not completely subsumed by the interests of other parties who are directly or indirectly involved in a matter.³²⁰

However, there are still instances where the court did not fully separate the children's interests from those of the other parties involved in a matter. Erasmus³²¹ argues that the earlier case of *Government of the Republic of South Africa and Others v Grootboom and Others*³²² provides an example of cofounding or confusing the rights of parents and children, which resulted in a weakening of the children's rights. The court found that parents are primarily responsible for providing shelter for their children. It also recognised the danger that children might be used by parents as stepping stones to housing and therefore refused to grant the children shelter in terms of section 28(1)(c) of the Constitution. In granting the applicable order, the court stopped short of an individualised investigation of the needs of the individual children involved in the case. It merely made a blanket order to deny the children, who were in the care of their parents, access to shelter, without considering the individual circumstances of all the children involved.

An investigation should have been conducted in terms of the *Children's Act*³²³ to determine whether all or some of the children were not perhaps in need of care and should be removed from their parents and placed in proper alternative care, which would have ensured that the children's right to shelter was secured. The court thus did not pertinently consider the best interests of the individual children involved, but considered only the financial and practical implications of enforcing the children's socio-economic rights as a collective. It is common cause that the courts are reluctant to interfere in budget allocations with regard to the

³¹⁹ Erasmus 2010:129, 135.

³²⁰ *S v M* 2007 (2) SACR 539 (CC):par 43-45. In *S v M*, the Constitutional Court compared the approaches followed in the High Court in the unreported case of *S v M* and in the Supreme Court of Appeal in *S v Howells* [2000] JOL 6577 (A). In both instances, the primary caregivers were found guilty on charges of fraud and correctional supervision was one of the sentencing options. The cases were very similar, but the court found that the major difference lay in the way the two courts considered the best interests of the children. The court further found that a proper analysis of section 28 was made in the *Howells* case, while it was barely touched on in *S v M* in the High Court. The Constitutional Court found that section 28 must be "expressly weighed" in the balancing process to give proper effect to its provisions. The following issues should thus have been investigated fully: quality of alternative care, impact of splitting children up, moving them and maintenance.

³²¹ Erasmus 2010:129.

³²² 2001 (1) SA 46 (CC).

³²³ 38/2005:s 150(1).

enforcement of socio-economic rights. This reluctance inevitably has an impact on the paramountcy of the best interests of the child.³²⁴

It should be remembered that the *Grootboom*³²⁵ case was decided six years before *S v M*.³²⁶ This refined approach proposed now of how the best interests of the children should have been addressed is with the benefit of hindsight. Furthermore, as was indicated in the discussion on the development of the best-interests concept since the new Constitution came into force, the process was a gradual one which initially caused some confusion, much of which was clarified in *S v M*. Criticism should thus make room for the courts' own process of refining the concept over time.

Erasmus,³²⁷ however, argues that an individualised approach to determining the best interests of the child might be too burdensome and impractical in the enforcement of socio-economic rights.³²⁸ In instances of the enforcement of other socio-economic rights, it might not be a feasible option to follow an individualised approach as proposed. Erasmus³²⁹ therefore argues that a principled approach might be more appropriate in order to ensure that effect is given to the best interests of the child. A principled approach, however, requires the courts and/or policy-makers to give content to children's rights, which would make it easier to enforce. Yet, the courts are reluctant to do this because of the inevitable cost implications involved in most cases related to socio-economic rights. The legislator is also reluctant to provide minimum norms and standards regarding socio-economic rights, because that would bind government to these and make them easier to enforce if there is any form of non-compliance with minimum standards.³³⁰ Thus, although a principled approach would be most suitable to enforce socio-economic rights and ensure the best interests of the child, it is unlikely that these principles would be laid down any time soon.

³²⁴ Visser 2007:461.

³²⁵ 2001 (1) SA 46 (CC).

³²⁶ 2007 (2) SACR 539 (CC).

³²⁷ 2010:133-135.

³²⁸ This is in line with the reasoning provided in *S v M* 2007 (2) SACR 539 (CC):par 43-45, 105 where the court explicitly referred to the practicability of an order to compel state departments to conduct an investigation into the circumstances of the children involved in the sentencing of primary caregivers who are also the breadwinners. The court found that less than 2% of sentenced criminals are primary caregivers and that it would not impose an undue burden on the authorities to conduct an investigation to ensure the best interests of the children involved.

³²⁹ Erasmus 2010:134.

³³⁰ See also SAPA 2012:1.

Bonthuys³³¹ indicates that the inclusion of children's rights and the best-interests principle in the Constitution creates two distinct tensions. Firstly, case-by-case application of the best-interests principle is in contrast to the general, principled application of human rights and constitutional norms. In addition, children's rights and interests need to be balanced against the rights and needs of others and of society at large. Without a principled approach, the impression could be created that socio-economic rights for children are rights on paper only and will lose their true meaning and strength as actionable and justiciable rights.³³²

In the school discipline context, it would thus be necessary, firstly, to focus on the best interests of all learners, and, secondly, to ensure that the best interests of the children are considered individually or on the basis of a principled approach. In this process, it would also be necessary to ensure that the learners' interests are, for instance, separated from the interests of the school and that different rights of individual children and/or groups of children are properly disentangled from one another and given due consideration. In addition, even if it is necessary to make a principled decision, due to practical considerations of the large numbers of children involved in a particular incident, these principles should not be elevated to rigid rules. There should always be room to address the needs of individual children and their needs despite the general principles, to resolve the issue.

8.2 Application of best interests and the enforcement of socio-economic rights

Although the best-interests concept is applied in numerous settings, the courts are still reluctant to use this concept to enforce socio-economic rights. In general, they are hesitant to interfere in budget allocations. Erasmus³³³ argues that this reluctance contributes to a weakening of children's rights. He is therefore of the opinion that the current case-by-case application of the concept to the circumstances of individual children is not really suitable for the enforcement of socio-economic rights and that a principled approach would be more effective. Such an approach would give concrete content to the rights of children and would make the enforcement of these rights more accessible.

8.3 The onus of proof and procedural rules in applying the best interests of the child

In *Girdwood v Girdwood*,³³⁴ the court emphasised its role in determining the best interests of the child and held:

³³¹ 2006:24-25.

³³² Erasmus 2010:134.

³³³ 2010:125.

³³⁴ 1995 (4) SA 698 (C).

As upper guardian of all dependent and minor children this court has an inalienable right and authority to establish what is in the best interests of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded. No agreement between the parties can encroach on this authority.³³⁵

Unlike most civil cases, the Supreme Court of Appeal found in *B v S*³³⁶ that, in cases involving access to a child, there is no *onus* on the applicant, since this type of “litigation is not of the ordinary civil kind. It is not adversarial.” The court further held that this type of litigation rather “involves a judicial investigation and the Court can call evidence *mero motu*”.³³⁷ Furthermore, if the court is unable to decide the case on the papers as far as the best interests of the child are concerned, it “would not let the matter rest there”. The court cautioned against the normal procedure and held:

Because the welfare of a minor is at stake, a Court should be very slow to determine the facts by way of the usual opposed motion approach... . That approach is not appropriate if it leaves serious disputed issues of fact relevant to the child’s welfare unresolved.³³⁸

With regard to expert witnesses, the court found that these are not always available or affordable to the parties involved. The court is therefore obliged to take the initiative and to obtain oral evidence from at least the parties involved so as to be in a position to form its own opinion on their worth and commitment before deciding on the best interests.³³⁹

In *S v M*,³⁴⁰ the Constitutional Court instructed the prosecution to provide the trial court with available information pertaining to the status of the accused as a primary caregiver. Thus the court imposed a duty upon the prosecution to provide relevant information regarding the children which might impact on the sentence and possibly result in a reduced sentence for the accused. In this regard, the court held:

³³⁵ *Girdwood v Girdwood* 1995 (4) SA 698 (C):708J. See also *Kotze v Kotze* 2003 (3) SA 628 (T). In this case, the court refused to make an agreement between divorcing parents regarding the religious upbringing of the child an order of court.

³³⁶ 1995 (3) SA 571 (A):584-585.

³³⁷ See also *Shawzin v Laufer* 1968 (4) SA 657 (A):663. With regard to the process to be followed by the court in an application to vary a custody agreement between the parents, the court held that it “[could] act *mero motu* in calling evidence” and further that “while in form there is an application for variation of the order of Court, in substance there is an investigation by the Court, acting as upper-guardian”.

³³⁸ *B v S* 1995 (3) SA 571 (A):585.

³³⁹ *B v S* 1995 (3) SA 571 (A):585.

³⁴⁰ 2007 (2) SACR 539 (CC):par 36.

The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved.³⁴¹

In the *Juma Masjid* case,³⁴² the Constitutional Court found that, although the High Court was correct in its assertion that the trust was entitled to an eviction order, the order should not have been granted unless the court was satisfied that the best interests of the learners in the school had been taken care of, even if this meant that the court had to take the initiative in this investigation. The court thus has an explicit judicial oversight function to safeguard the best interests of children.³⁴³ The same oversight function is required from all decision-makers where the best interests of children are at stake.

Not only are the rules regarding the onus of proof sometimes relaxed or altered to accommodate the needs of children,³⁴⁴ but the best interests of the child are sometimes also used to justify procedural mistakes or to relax procedural prescriptions. In this regard, the court held in *Kotze v Kotze*³⁴⁵ that it possesses extremely wide powers as upper guardian of children to determine the best interests of the child. The court is therefore not bound by procedural strictures, by the limitations of the evidence presented or by contentions advanced or not advanced by the respective parties. There are numerous examples in several areas of the law to illustrate this lenient approach adopted by the courts to give paramountcy to the best interests of the child.³⁴⁶

³⁴¹ 2007 (2) SACR 539 (CC):par 36.

³⁴² 2011 (8) BCLR 761 (CC).

³⁴³ *Juma Masjid* case 2011 (8) BCLR 761 (CC):par 26.

³⁴⁴ Examples of normal procedures being relaxed to accommodate the needs of children are the appointment of intermediaries, children being warned to speak the truth instead of the oath being administered, and testifying in camera. See *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC); the constitutionality of these provisions were challenged, but were found to be in accordance with the best-interests-of-the-child provisions of the Constitution.

³⁴⁵ 2003 (3) SA 628 (T):630; see also *Girdwood v Girdwood* 1995 (4) SA 698 (C):708-709: an agreement between parties does not restrict court interference if the agreement is not in the best interests of the child; *Terblanche v Terblanche* 1992 (1) SA 501 (W):504: here, the court held as follows: "Also, from the procedural point of view, an application to vary an agreement is different from the ordinary application, in that the Court need not consider itself bound by the contentions of the parties and may, in suitable cases, notwithstanding the fact that the *onus* is on the applicant to show good cause, depart from the usual procedure and act *mero motu* in calling evidence, irrespective of the wishes of the parties." This is done to secure the best interests of the child.

³⁴⁶ The merits of a case are normally not considered in review proceedings. However, in *Swarts v Swarts* 2002 (3) SA 451 (T), the court, as upper guardian of all children, considered the merits of a case in the review of a quasi-judicial action. The court did so in order to determine whether the best interests of the children were served by the decision taken by those with administrative powers. In a number of cases, the High Court exercised its review powers, despite the lack of any enabling Act. In *Re Moatsi* 2002 (4) 712 (T), the court reviewed a decision regarding the dissolution of an intestate estate, despite any legislative provisions, and followed *Noradien v Andrews* 2002 (3) SA 500 (K). See also pre-1994 Constitution judgments in this regard, namely: *Ex parte Commissioner of Child Welfare: In re Smidt* 1956 (4) SA 787 (T); *Ex parte Kommissaris van*

In conclusion, the normal rules with regard to onus, procedure, and admissibility of evidence are often relaxed or not applied if the best interests of children are at stake. In addition, the court plays an active role in the process, ensuring that the relevant information is available before decisions which might impact on children are made. This approach strengthens the application of the best-interests concept.

8.4 The application of the best interests of the child in administrative review proceedings

A point of criticism regarding the application of the best-interests-of-the-child concept is that the courts have on occasion condoned illegal or unlawful conduct in an attempt to protect the best interests of children.³⁴⁷ Two distinct examples of the misuse of power and the application of the best interests of the child concept in dealing with the consequences of these transgressions of

Kindersorg: In re Steyn Kinders 1970 (2) SA 27 (NK); *Ex parte Commissioner of Child Welfare, Durban: In re Kidd* 1993 (4) SA 671 (N). Several adoption orders were quashed in review proceedings initiated by the Commissioner of Child Welfare, who had granted the adoption orders despite any statutory provision enabling the Commissioner to institute the review; see *Ex parte Commissioner for Child Welfare: In re Adoption Volczer* 1960 (2) SA 312 (O); *Ex parte Kommissaris van Kindersorg: In re Van Wyk* 1964 (4) SA 601 (GW); *Ex parte Commissioner of Child Welfare: In re Adopted Child* 1966 (2) SA 301 (C); *Ex parte Commissioner of Child Welfare: In re Bromfield* 1971 (1) SA 323 (N); *Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB; Ex parte Kommissaris van Kindersorg, Oberholzer: In re AGF* 1973 (2) SA 699 (T); *In re Adoption of Child* 1974 (3) SA 835 (N). Normally, parties are restricted to the content of their pleadings. However, in *P and Another v P and Another* 2002 (6) SA 105 (N):110, the court found that it had to take everything into account when determining the best interests of the child – including all information, even after the close of pleadings up to the day of the hearing. See also the *Juma Musjid* case 2011 (8) BCLR 761 (CC).

³⁴⁷ In *T v C* 2003 (2) SA 298 (W), the mother of a child born out of wedlock deliberately misled the Commissioner of Child Welfare during the process of her husband adopting the 10-year-old minor child. She lied and claimed that she did not know who the biological father was. Shortly after the adoption, the biological father, unaware of the adoption, tried to obtain access to the child and was informed about the adoption. The biological father then applied for a rescission order. The court held that, owing to the fraudulent behaviour of the mother, the process was clearly unfair, but that to rescind the adoption order would not be in the child's best interests. The application for a rescission order was therefore denied. In *Märtens v Märtens* 1991 (4) SA 287 (T), the custody of two minor children was awarded to the mother by a German court in 1984. The father then abducted the two four-year-old children and took them to the United States of America, to the United Kingdom and eventually to South Africa, where they settled. The mother found them in South Africa when the children were 11 years old. At that point, the children were totally estranged from their mother. The court initially restored the mother's custody, but, after a month, the parties approached the court for a new order to award custody to the father. Although it was clear that the mother would be a better parent than the manipulative father with his "common law wife", it was not in the children's best interests to be in the custody of the mother. The father's unlawful conduct was thus condoned by the court in the end, because, although the mother was a better parent, the children had no relationship with her, and to live with the mother was not in the best interests of the children at that time. To return them to the better parent was not in their best interests at this late stage. In this instance, the best-interest principle could only prohibit further disruptions and orders were made to ensure that the children could rebuild the relationship with their mother. However, the principle was unable to restore an injustice done to the children when they were unlawfully abducted and forced to grow up with the second-best parent.

the law in the education contexts can be found in the cases of *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* (“*Laerskool Middelburg case*”)³⁴⁸ and *Western Cape Minister of Education v Governing Body of Mikro Primary School* (“*Mikro Primary School case*”).³⁴⁹

The *Laerskool Middelburg* had Afrikaans as the only medium of instruction. The Department instructed the school to enrol 20 learners who wished to be taught in English. Since it was the prerogative of the SGB to determine the language policy of the school,³⁵⁰ the SGB consequently refused to change the language policy and to enrol the learners. The Department then withdrew the powers of the SGB to determine the language policy of the school, changed the language and admission policy of the school, and enrolled the 20 learners. The school then applied to the High Court to set aside the decision of the Department to withdraw its powers.

The court appointed a *curatrix ad litem* to investigate the interests of the learners preferring English as the mode of instruction as well as the impact of the change of status of the school on the Afrikaans learners. The court found that the Department had transgressed its powers and had unlawfully withdrawn the powers of the SGB. Despite this transgression, the court was particularly concerned about the interests of the learners involved and had to balance the interests of the Afrikaans learners with the interests of the English learners who were unlawfully enrolled in the school. After considering a number of factors, the court found that, despite the unlawful conduct of the department, it would not be in the best interests of the English-speaking children to be removed from the school and to be placed in another school.³⁵¹ The school

³⁴⁸ 2003 (4) SA 160 (T).

³⁴⁹ 2005 (2) All SA 37 (C).

³⁵⁰ *Schools Act 84/1996*:s 6(2).

³⁵¹ It was clear that the English-speaking learners could easily have been accommodated in other schools, that the learners had adapted reasonably well in the new school, that the school in question was probably the best primary school in the area, that the school was the closest school to the learners' homes, that the parents of the English-speaking learners preferred their children attending this school, that the children might experience a sense of rejection if they were removed, and that it would consequently be in the children's best interests to stay in the school. On the other hand, the court had to consider the Afrikaans-speaking learners' right to be instructed in a single medium of instruction (with its inevitable impact on accompanying, own cultural life rights) as opposed to the right to be instructed in the language of choice. The court found that the claim of the Afrikaans-speaking learners to a single medium of instruction was based on the emotional, cultural, religious and social-psychological security of these learners. The court recognised that the Afrikaans classes would become somewhat fuller and that the children would lose the exclusivity of an Afrikaans-only school. The court, however, found that the right to a single-medium public institution was subordinate to the right of every South African to education and that it was necessary to share educational facilities where this was clearly needed, even if this would imply that a school had to change from a single medium of instruction to a dual medium of instruction. The learners lost their right to a single medium of instruction but not their right to be taught in the language of choice. This transition from a single-medium to a dual medium school should, however, occur within the existing legal framework. This

therefore had to accommodate this particular group of children and ensure that education would be provided in English for them at the particular school. However, the school was not obliged to change its language policy or to accommodate other English-speaking learners.

Although the court found that the Department had acted unlawfully, the impact of these unlawful actions on the learners was considered independently by the court and it accordingly used the best-interests-of-the-child principle to ensure that the 20 children did not become the casualties in an administrative law battle between the school and the Department. The court thus gave practical content to the children's fundamental rights in terms of section 28(2). The court also found that, if the school had applied immediately for the order, it would have ordered the removal of the children, but that, owing to the lapse of time before the school acted (almost nine months), the children had acquired an indisputable interest in staying at the school.

This judgment emphasises the important role of section 28(2) and the impact of its application on other rights, such as language rights. However, Visser³⁵² is of the opinion that the application of section 28(2) might lead to considerable uncertainty regarding the rights and duties in public education.

In the *Mikro Primary School* case,³⁵³ the facts were almost the same. In this instance, the school was requested to change the language policy from an Afrikaans single-medium school to a parallel-medium school, and this despite the fact that there was another parallel-medium primary school less than 1 200 metres from Mikro Primary School. The school refused to change its language policy. The Head of Department (HoD) subsequently issued a directive to admit 40 grade 1 learners to the school and instructed the school to teach them in English. This gave rise to an urgent application by the school to the High Court to set the directive of the HoD aside. The court interdicted the Department from instructing or permitting its officials to unlawfully interfere with the governance and management of the school. In addition, the court ordered the enrolment of the learners in other suitable schools. The Department appealed the decision. Although the court gave a comprehensive judgment on language rights, the Supreme Court of Appeal held that there was no evidence to indicate that it would not be in the children's

had not been done in this case and the court therefore set the decision of the Department aside, but secured the best interests of the 20 learners concerned.

³⁵² 2007:466.

³⁵³ 2005 (3) SA 504 (C).

best interests to be removed from the school. Consequently, the Department was ordered to remove the children and to enrol them in other suitable schools.³⁵⁴

These two cases illustrate the possible misuse of power by state officials. In the *Laerskool Middelburg* case, the court upheld the rules of administrative justice and found the conduct of the Department to be unlawful. Therefore, the directives of the HoD were set aside, but the learners' best interests were secured and they could stay on at the school. In the *Mikro Primary School* case, the Department's unlawful conduct was again condemned by the court and the Department was ordered to ensure that the learners were enrolled at other suitable schools as soon as possible. The children could thus also stay on at the school pending their enrolment at another school. However, in this instance, they were not allowed to stay on, on a permanent basis, and could remain at the school only until the end of the academic year. In addition, the Department had to report monthly to the school on its progress in removing the children. The court also granted the parties permission to approach the court on the same papers if the need arose during the course of the year. On appeal, the Supreme Court of Appeal confirmed the findings of the court *a quo*, but added an additional order, namely:

The placement of the children at another suitable school is to be done taking into account the best interests of the children.³⁵⁵

It is important to note that, in the *Laerskool Middelburg* case, nine months elapsed before the school approached the court. In addition, the court also appointed a *curatrix ad litem* to investigate the interests of all the children at the school. The court carefully weighed the interests and came to the conclusion that it would not be in the best interests of the children to be moved and that they had established interests in staying at the school. In the *Mikro Primary School* case, the school acted immediately and the Department failed to put any real evidence before the court to indicate that the learners had a vested interest in staying at the school or that it was in their best interests to stay at the school or that it would not be in their best interests if they had to move to another school. The court thus expected the Department to do more than merely allege that it would be in the best interests of the children to stay because they had apparently settled in already and because the parents were of the opinion that their children were happy at the school. The court did not allow the Department to act unlawfully and then condone its conduct without proof that the best interests of the children were really at

³⁵⁴ *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA):par 48-49.

³⁵⁵ *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA):par 59.

stake. If the court had followed this approach, it might have opened the door for excessive abuse by the Department. In other words, it could merely thereafter have acted unlawfully and then left it to the courts to condone its actions by claiming that it would not be in the children's best interests if the courts did not condone the unlawful conduct.

The danger still exists that the misuse of power coupled with the best-interests-of-the-child argument can succeed if the Department or any other party unduly protracts the legal process. This might change the position of the children involved and expose them to use for the political or ulterior motives of others. It is thus necessary to ensure that there are proper legislative or other provisions in place so that children are not used as stepping stones.

In *S v M*,³⁵⁶ in both the majority and minority judgments, the court warned that children should not be used as a "pretext" for escaping the consequences of unlawful conduct. In the minority judgment it was stated that the interests of children should be properly considered, but the following warning was issued:

[T]his enquiry becomes tainted once those interests are elevated at the expense of other important relevant considerations...³⁵⁷

8.5 Lack of measures to guide and regulate the implementation of the best interests of the child in the context of school discipline

The indeterminacy of the concept and the failure to pay due regard to the best interests of the child can be addressed by providing proper legislative and other measures. However, such measures do not exist in the context of school discipline. These deficiencies will be highlighted below.

8.5.1 The role of independent parties in assisting with the determination of the best interests of the child

Since the Constitution came into force, there have been various examples of measures taken by independent third parties, special courts and special structures in order to focus on securing the best interests of the child. These include the Office of the Family Advocate,³⁵⁸ which plays

³⁵⁶ 2007 (2) SACR 539 (CC):par 34, 107 & 117.

³⁵⁷ *S v M* 2007 (2) SACR 539 (CC):par 117.

³⁵⁸ The Family Advocate plays an important role in determining parental rights and responsibilities, in particular in divorce proceedings and in proceedings related to unmarried fathers. The Office of the Family Advocate is involved in the drafting of parental plans, in mediation processes, in preparing professional reports for the court, in providing evidence in court, and in playing a part in resolving child abduction cases; see Act 38/2008:s 21(3), 22(4)-(6), 23(3), 28(3)(e), 28(5), 33(5)(e), 34, 49.

an important role in decisions on parental rights and responsibilities, in the drafting of parental plans in divorce proceedings, and in determining the ambit of parental rights and responsibilities of unmarried fathers; the appointment of legal representatives in civil matters for the expense of the state;³⁵⁹ examples of *amici curiae* joining court proceedings in order to focus on the best interests of children;³⁶⁰ the appointment of a *curator ad litem*;³⁶¹ litigation instituted by non-governmental organisations (NGOs) and public-interest groups such as Section 27³⁶² and the Centre for Child Law,³⁶³ the introduction of preliminary inquiries in child justice proceedings;³⁶⁴ and the introduction of sexual offences courts.³⁶⁵ Numerous steps have been taken thus far in several contexts in order to secure the best interests of the child. As yet, similar responses to secure the best interests of the child in the context of school discipline do not exist so as to address infringements of these interests, as was highlighted in chapter 3.³⁶⁶

³⁵⁹ Constitution 1996:s 28(1)(h).

³⁶⁰ *S v M* 2007 (2) SACR 539 (CC); *Juma Masjid* case 2011 (8) BCLR 761 (CC).

³⁶¹ *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* 2003 (4) SA 160 (T).

³⁶² Section 27 is an NGO which operates as a public-interest law centre and seeks to influence, develop and use the law to protect, promote and advance human rights; see *Section 27 and Others v Minister of Basic Education and Another*: unreported case 24565/2012, Gauteng North High Court (non-delivery of textbooks to schools).

³⁶³ The Centre for Child Law is based within the Faculty of Law at the University of Pretoria and contributes to establishing the best interests of children through education, advocacy and litigation. Examples of cases driven by the Centre include: *Centre for Child Law and Others v Minister of Basic Education and Another*: case 1749/2012, Eastern Cape High Court, Grahamstown; *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T); *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T).

³⁶⁴ *Child Justice Act 75/2008*:s 43 & 44. The main aim of this process is to speed up criminal justice for children. This is done through a compulsory process for specified crimes to ensure that important decisions regarding children in conflict with the law are taken within 48 hours of arrest. The process ensures that all the important role players are available to provide information to enable the prosecutor to make a decision regarding prosecution and the possible diversion of the child away from the criminal justice system. The role players include the accused, parents, the investigating officer, victims, probation officers, the prosecutor, legal representatives and any other person with an interest in the matter. The process also enables the presiding officer to make a determination on detention pending the trial and to make arrangements for a bail hearing where necessary. The process facilitates other decisions which might later delay the process, such as age determinations through medical examinations. The preliminary-inquiry process therefore obliges role players to gather information on the child as soon as possible and to make decisions as soon as possible. The best interests of the child are thus prioritised through this process. See Reyneke & Reyneke 2011:123-142 for a detailed discussion on the implementation of the preliminary-inquiry process and on its advantages for children.

³⁶⁵ Reyneke & Kruger 2006:73-107. Sexual offences courts were introduced to address the scourge of sexual offences against women and children. Most of these courts specialise in hearing cases of sexual offences involving child victims. Specialisation in these courts has resulted in several advantages for children, such as prosecutors with special training, a volunteer system to support victims at court, court-preparation processes, improved intermediary services, better coordination with the police and medical professionals, to mention but a few. The child's best interests have become the central focus of the multidisciplinary process, resulting in the reduction of turnaround times, increased conviction rates, and the minimisation of secondary victimisation, which are clearly all in the best interests of the child.

³⁶⁶ See ch 3, par 6 herein.

In the context of school discipline, the question arises as to who acts as an independent third party or which processes ensure that the best interests of all the learners involved in school matters remain the main focus of any disciplinary actions. The SGB must secure the best interests of the school;³⁶⁷ the parents of learners are subjective and are supposed to support their children;³⁶⁸ and the HoD³⁶⁹ must make decisions and cannot be equated with an independent third party whose focus is to secure the best interests of the children. In view of the hostile atmosphere surrounding disciplinary hearings, the fact that learners are often represented by legal practitioners, and the fact that emotions can run high owing to the impact of the misconduct, there is an inevitable risk that the focus will shift away from the best interests of the learners involved as a battle of wills ensues among the various adults and as a legal battle fraught with technicalities evolves. There is currently no explicit process or independent body available to ensure that the best interests of the different children involved in disciplinary matters in schools remain the primary focus.³⁷⁰

8.5.2 The role of a list of factors in addressing the indeterminacy of the best-interests-of-the-child concept

The indeterminacy of the best-interests concept does not lessen the importance of the concept, but stresses the need for guidelines to steer decision-makers.³⁷¹ To some extent, the indeterminacy can be alleviated through the application of a list of factors indicating the best interests of the child in a particular context. It is common cause that no single factor can steer decisions regarding the best interests of the child.³⁷² Therefore, it is preferable to have a list of factors to indicate the best interests of the child and thereby ensure that these interests are secured in the context of actions taken. It should, however, be conceded that it will not be possible to draft a comprehensive list of factors.³⁷³ The ideal would however be to draft it as comprehensively as possible in order to ensure that decision-makers take as many relevant factors as possible into account.

In applying the list of factors, the courts and other decision-makers will assign different weights to the factors in each case. The weight attached to a specific factor could also be a bone of contention. It is therefore rightly contended that a single factor cannot be determinative and that

³⁶⁷ *Schools Act 84/1996:s 8(1).*

³⁶⁸ *Schools Act 84/1996:s 8(6).*

³⁶⁹ *Schools Act 84/1996:s 9(1D).*

³⁷⁰ See ch 3, par 6 herein for examples indicating the lack of focus on the best interests of the child in disciplinary matters.

³⁷¹ Ferreira 2010:201.

³⁷² Heaton 1990:96.

³⁷³ *S v M* 2007 (2) SACR 539 (CC):par 24.

there is no fixed number of factors to be taken into account. It is preferable to consider as many factors as possible, on condition that each specific factor is relevant to the particular circumstances.³⁷⁴ The weight attached to a specific factor will also depend on the conflicting rights of others.³⁷⁵ In this regard, the court held in *J v J*³⁷⁶ that “the interests of the child must always be considered within the wider context of an objective regard of all relevant factors”. However, the relevancy of a particular factor will differ from one case to another and from one type of application to another. The aim of a list of factors is thus not to provide a pre-set formula to determine the best interests of the child for the sake of certainty, but rather to act as a tool to assist decision-makers and to ensure that all relevant factors are taken into account. The child's present and future best interests must remain uppermost in an evaluator's mind.³⁷⁷ Consequently, each case will be decided on its own merits.³⁷⁸

The Constitutional Court has confirmed this and has found that the strength of the best-interests concept lies in the fact that it depends on the particular circumstances and that it is inherently flexible. It is common cause that it does not have exhaustive content and that it is:

necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child [and] the list of factors competing for the core of best interests [of the child] is almost endless and will depend on each particular factual situation.³⁷⁹

The list of factors does not provide a definition of what the “best interests” of the child are. An attempt to provide a general definition would devalue the concept's usefulness. Therefore, a list of factors indicating the best interests of the child is more useful than an abstract definition of these.³⁸⁰ The most expansive list of common law factors to be taken into account in care or custody proceedings can be found in *McCall v McCall*.³⁸¹ This list has proven very useful and

³⁷⁴ Heaton 1990:96; Ferreira 2010:212-213.

³⁷⁵ Hammarberg 2008:8.

³⁷⁶ 2008 (6) SA 30 (C):par 39.

³⁷⁷ Heaton 1990:96; Ferreira 2010:212-213.

³⁷⁸ Heaton 1990:96.

³⁷⁹ *S v M* 2007 (2) SACR 539 (CC):par 24. The court referred to its pronouncement in *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC).

³⁸⁰ Visser 2007:461.

³⁸¹ 1994 (3) SA 201 (C):205B-G. Other examples of case law which provides lists and factors to be taken into account in determining the best interests of the child are *French v French* 1971 (4) SA 298 (W): list of factors summarised in headnote; *Van der Linde v Van der Linde* 1996 (3) SA 509 (O): discusses splitting of siblings and mothering not being dependent on the sex of the parent; *Venton v Venton* 1993 (1) SA 763 (D): factors to be taken into account in joint custody awards; *S v Howells* 1999 (1) SACR 675 (C) and *S v M* 2007 (2) SACR 539 (CC): factors to be taken into account in sentencing a primary caregiver.

makes it easier to determine the best interests of the child.³⁸² Moreover, the legislator recognised the value of such a list and included a similar list in the *Children's Act*.³⁸³

The list of factors in the *Children's Act* is closed. This creates the impression that only those factors can be taken into account, a state of affairs that has been heavily criticised.³⁸⁴ However,

³⁸² Ferreira 2010:208.

³⁸³ 38/2005:s 7 Best-interests-of child standard

(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely –

- (a) the nature of the personal relationship between –
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards –
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child –
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's –
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by–
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

(2) In this section "parent" includes any person who has parental responsibilities and rights in respect of a child.

³⁸⁴ Ferreira 2010:208.

the courts are not really restricted to the listed factors. As upper guardian of all children, the courts are entitled and obliged to take all factors into account, even those not listed, to ensure that effect is given to the child's rights in terms of section 28(2).

It was stressed above that the application of the best interests of the child is context-specific.³⁸⁵ Therefore, although some of the factors listed in the *Children's Act*³⁸⁶ might be applicable to the school discipline context, they do not really serve this purpose completely. Furthermore, international law also does not provide specific guidance on the best interests of the child in this context. As yet, the Committee on the Rights of the Child has failed to propose specific criteria to determine or judge the best interests of the child in general or in specific circumstances. The committee has however continuously stressed the importance of considering the CRC as a whole, and that the general values and principles of the CRC should be applicable to every situation.³⁸⁷ Consequently, the need arises to compile a list of factors to assist decision-makers to determine the best interests of the child in school discipline matters. This study will provide such a list of factors in chapter 7, which will serve as a point of departure for elaboration in future.

9. CONCLUSION

The development of the best-interests-of-the-child concept in international and national law highlights the move from a mere welfare-orientation approach regarding the protection of children to an acknowledgement of children as independent rights bearers. This perspective is important in determining specific content for the concept in the context of school discipline.

The content-giving process commenced in this chapter through a textual analysis. The broad functions of the concept as a principle and a right were highlighted, as well as its role in giving content to other rights, but also being informed by other rights. The application of the concept in private law, as well as its increasing application in public law, points to the need to evaluate its application in the context of school discipline. The school context was discussed in detail in chapter 2 and the lack of a proper focus on the best interests of the child was then discussed in depth in chapter 3.³⁸⁸

Apart from this lack of focus, the best-interests-of-the-child concept is also subject to criticism that rightly emphasises the indeterminacy of the concept. On the other hand, the Constitutional

³⁸⁵ Erasmus 2010:128, 131-132; Heaton 1990:96; Ferreira 2010:208.

³⁸⁶ 38/2005:s 7.

³⁸⁷ CRCGC No 8 2006:par26; Hammarberg 2008:5.

³⁸⁸ See ch 3, par 6 herein.

Court found in *S v M*³⁸⁹ that this feature of the concept is indeed also its strength and enhances its flexibility and applicability in different circumstances. The implementation of the concept also poses a number of challenges, which include the failure to adhere to the best-interests standard and the dangers of misusing the concept in administrative review proceedings. The indeterminacy of the concept further hampers the application of the concept. However, the indeterminacy of the concept can be addressed to some extent by providing decision-makers with a list of factors indicating the best interests of the child. These factors should be weighed in decision-making processes to ensure compliance with the best-interests-of-the-child standard.

The process of giving content to the best-interests-of-the-child concept will be continued in chapter 5 and all the information gained will culminate in a list of factors indicating the best interests of the child in chapter 7. This list of factors will then be used to evaluate the existing disciplinary approaches and measures employed in schools.³⁹⁰

³⁸⁹ 2007 (2) SACR 539 (CC).

³⁹⁰ See ch 6 herein for a discussion on approaches to discipline.

CHAPTER 5

THE BEST INTERESTS OF THE CHILD AND OTHER CONSTITUTIONAL RIGHTS IN THE CONTEXT OF SCHOOL DISCIPLINE

1. INTRODUCTION

The best-interests-of-the-child concept must be contextualised within the school discipline setting to facilitate the eventual drafting of a list of factors¹ which should guide decision-makers in enforcing school discipline. The conceptualisation process comprises several methods, which include textual analysis of section 28(2) of the Constitution (see chapter 4 above).² The present chapter further develops this contextualisation by exploring the informative value of other relevant constitutional rights in giving content to the best-interests-of-the-child concept.³

The lack of focus on the best interests of the child in the legal framework pertaining to discipline was highlighted in chapter 3, and some of the relevant issues with regard thereto will be addressed in this chapter. The content of the rights discussed in this chapter will be used to inform the best-interests-of-the-child concept and will guide recommendations for addressing these deficiencies in the legal framework.

However, in view of time and scope constraints, it will not be possible to discuss all the relevant rights in this study. Therefore, although rights such as the right to freedom and security of the person (which includes the right not to be subjected to torture or to cruel, inhumane or degrading treatment or punishment),⁴ the right to religion, belief and opinion,⁵ the right to freedom of expression,⁶ and the right to just administrative action⁷ are relevant to the

¹ See ch 7 herein.

² See ch 1, par 4.1 herein for details on the process of conceptualising the best interests of the child. See also ch 4, par 4 herein for a textual analysis of the best-interests-of-the-child concept.

³ See ch 1, par 4.1.2 herein.

⁴ Constitution 1996:s 12; see also *S v Williams and Others* 1995 (3) SA 632 (CC); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

⁵ Constitution 1996:s 15; see also *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC); *Antonie v Governing Body, Settlers High School, and Others* 2002 (4) SA 738 (C).

⁶ Constitution 1996:s 16; see also *MEC for Education, KwaZulu-Natal v Pillay and Others* 2008 (1) SA 474 (CC).

⁷ Constitution 1996:s 33; see also *Maritzburg College v Dlamini NO and Others* [2005] JOL 15075 (N); *Pearson High School v Head of Department, Eastern Cape Province, and Others* [1999] JOL 5517 (Ck); *Queens College*

disciplinary context in schools, they will not be discussed explicitly, but only in so far as they are relevant to the discussion of the selected rights.

Despite the fact that not all the relevant rights will be discussed in this study, the conceptualisation process should still adhere to the principle that all constitutional rights and values are mutually interrelated, are interdependent, and form a single constitutional value system.⁸ In narrowing down the rights to be discussed, the foundational principles of the Convention on the Rights of the Child (CRC) have been used as the point of departure. The best-interests-of-the-child concept is one of the four foundational principles of the CRC.⁹ The other three foundational principles, namely the right to life, survival and development,¹⁰ the right to non-discrimination,¹¹ and the child's right to be heard¹² will be discussed so as to inform the best-interests-of-the-child concept. The content given to the best interests of the child in the disciplinary context should be aligned with, and imbedded in, the foundational principles.

Furthermore, the right to dignity is chosen because it is highlighted in several international instruments and other international documents, and is mentioned specifically in the context of school discipline.¹³ Dignity also plays a pivotal role in South African jurisprudence and is regarded as the foundational value.¹⁴ The important role of the specific context in determining the best interests of the child is also emphasised; therefore, a discussion on the right to education and on the aims of education with regard to school discipline is indispensable for determining the content of the best-interests concept. The interrelatedness of the right to dignity, the right to education, the right to non-discrimination, the right to participate and the best interests of the child is clearly apparent in international law.¹⁵

Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government, and Others – Eastern Cape Provincial Division: unreported case 454/08; *St Michael's School for Girls and Others v The Head of the Free State Education Department and Others* – Free State Provincial Division: unreported case 5597/2008; *Tshona v Principal, Victoria Girls High School and Others* [2006] JOL 18445 (E); *Mose (Legal Guardian of Luzuko Mose) v Minister of Education, Provincial Government of the Western Cape, Gabru and Others* [2008] JOL 22623 (C).

⁸ *De Reuk v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC):432; *S v M* 2007 (2) SACR 539 (CC):par 26.

⁹ CRCGC 5 2003:par 12.

¹⁰ CRC 1989:a 6.

¹¹ CRC 1989:a 2.

¹² CRC 1989:a 12.

¹³ CRC 1989:a 28(2); see also ICESCR 1966:a 13(1); European Union 2000:a 1; ACHPR 1981:a 5; CRCGC 8 2006:par 16; Committee of Ministers 2012:preamble.

¹⁴ See the discussion in par 3 below.

¹⁵ ICESCR 1966:a 13; CESCRGC 13 1999:par 1; CRCGC 1 2001:par 8-10; CRCGC 5 2003:par 12.

The contextualisation process will focus on the South African legal position, but reference will be made to international and foreign law to enrich the interpretations of these rights.¹⁶ The discussion will commence with the right to education, followed by the right to dignity, the right to non-discrimination, and the right to life, survival and development, and will conclude with the right to participate.

2. RIGHT TO EDUCATION

The right to education is an economic, social and cultural right and, in many ways, also a civil and political right. The realisation of the right to education is necessary to fulfil many other human rights and contributes to the prevention of human rights violations. It therefore epitomises the indivisibility and interdependence of all human rights.¹⁷ The right to education is multidimensional, which is illustrated by the two provisions on education in the CRC. Article 28 of the CRC focuses on the state's obligations to establish an educational system and to ensure access to it. On the other hand, article 29 underlines the right to a specific quality of education, aimed at specific outcomes.¹⁸ The provisions of article 29 thus complement, and extend, the principles contained in article 28 of the CRC, and add a qualitative dimension to the content of article 28, highlighting that education should be "child-centred, child-friendly and empowering".¹⁹ The article 29 provisions also emphasise the need for education processes, which include disciplinary processes, to be based on the principles that the CRC endorses.²⁰ Education should therefore not only be available, but should also meet specific outcomes. General Comment 13 on the Right to Education of the Committee on Economic, Social and Cultural Rights (CESCR) also highlights the aims of education and provides as follows:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments states can make. But the importance of education is not just practical:

¹⁶ Constitution 1996:s 39(1)(b), (c).

¹⁷ CESCR 11 2009:par 2, 4.

¹⁸ CRCGC 1 2001:par 9.

¹⁹ Dall 1995:146.

²⁰ CRCGC 1 2001:par 2.

a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.²¹

This chapter will focus on two specific issues only. Firstly, the aims of education and their link with discipline will be discussed. The ambit of these aims will be explored, as well as the mechanisms to realise such aims. Secondly, the link between discipline and the provision of basic education, in particular, will be investigated. In General Comment 13, the Committee on Economic, Social and Cultural rights developed indicators of the state's level of compliance with the obligation to provide education.²² These indicators, namely the availability, accessibility, acceptability and adaptability of education (from here on the "four As") will be used to evaluate the impact of the provision of education on discipline. The strict parameters for the enforcement of discipline are emphasised in article 28(2) of the CRC and will be highlighted in the discussion.²³

2.1 The aims of education

Since discipline is a teaching and learning process, any disciplinary measures²⁴ should also be aligned with the general aims of education.²⁵ The aims of education can be found in different international instruments, such as in article 26(2) of the Universal Declaration of Human Rights (UDHR),²⁶ in article 13(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁷ and in article 13(2) of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.²⁸ There are slight differences between the different aims

²¹ CESCRGC 13 1999:par 1; see also European Union 2000:a 14; ACHPR 1981:a 17; ACRWC 1990:a 11.

²² CESCRGC 13 1999:par 6.

²³ CRCGC 1 2001:par 8.

²⁴ The term "disciplinary measures" refers to any action, decision, policy, and/or procedure used to enforce discipline in a school. The exact meaning of the word should be deduced from the broader context of the discussion where the term is used.

²⁵ DoE 1995. The White Paper on Education and Training provides, *inter alia*, an overview of the aims of education in general, and of the values and principles that underpin the education system in post-apartheid South Africa. See the discussion on the definition of discipline, in ch 2, par 3.1 herein, as a teaching and learning process.

²⁶ UDHR 1948:a 26(2) provides:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

²⁷ ICESCR 1966:a 13(1) provides:

The State Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

²⁸ OAS 1969.

of education in these instruments, but they are not significant and help rather to build on one another. These instruments provided a starting point for the drafting of article 29(1) of the CRC, which provides:

States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

The provision commences by providing that "states parties agree" that education will be directed towards a number of purposes mentioned in the sub-articles. Hodgkin and Newell²⁹ are of the opinion that article 29(1) of the CRC "reflects a consensus of world opinion about the fundamental purposes of education". They aver that this article does not deal with the "tools of learning, such as literacy, numeracy, factual knowledge, problem solving and so forth, but addresses learning's basic aims".

Upon closer scrutiny of article 29(1), two main aims of education can be identified for purposes of this study, namely the holistic development of the individual child's full potential (article 29(1)(a)), and that education should be directed at the preparation of the child for responsible life in society, which encompasses respect for human rights (article 29(1)(b)-(e)). Thus the one aim focuses on the optimisation of the individual child's needs and the other on developing the child's ability to acknowledge, respect and balance the needs and interests of society at large with his or her own needs and interests. The child therefore needs to develop the ability to function in society within the boundaries of what is regarded as appropriate and respectful towards others and the natural environment. A clear individual focus and a collective focus are evident and should be addressed in the education process. General Comment 1 of the Committee on the Rights of the Child provides, in this regard:

²⁹ Hodgkin & Newell 2007:437.

“Education” in this context goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.³⁰

A group of experts gathered in 2007 and drafted the Experts’ Consultation on the Operational Definition of Basic Education (from here on, “the Experts’ Consultation”).³¹ The comprehensive definition of basic education provided by these experts is also aligned with the above-mentioned conclusions drawn from the provisions of article 29(1) of the CRC and provides:

Basic education prepares the learner for further education, for an active life and citizenship. It meets basic learning needs including learning to learn, the acquisition of numeracy, literacies and scientific and technological knowledge as applied to daily life.

Basic education is directed to the full development of the human personality. It develops the capability for comprehension and critical thinking, and it inculcates the respect for human rights and values, notably, human dignity, solidarity, tolerance, democratic citizenship and a sense of justice and equity.

With reference to the definition of discipline formulated in chapter 2 of the present study, a clear overlap can be seen between the overall aims of education and discipline. Discipline is defined as a teaching and learning process with two distinct aims. The first aim is to create an orderly environment conducive to teaching and learning and so enable the holistic development of every learner. The second aim of this teaching and learning process is to teach learners to behave in a socially responsible manner and to attain self-control, which, ultimately, will result in respect for the rights and needs of others.³²

In order to be in line with the best-interests-of-the-child standard, discipline, as a teaching and learning process, must be seen as an integral part of the right to education. Disciplinary measures should therefore contribute to the holistic development of the child, and should, further, optimise the child’s ability to conduct himself or herself in a socially responsible manner. The measures must strengthen the child’s ability to acknowledge rights, and to respect and balance rights in a specific situation. Article 29(1) of the CRC imposes upon states parties the obligation to provide education in such a way that it promotes and reinforces the range of

³⁰ CRCGC 1 2001:par 2.

³¹ UNESCO 2007:1.

³² See ch 2, par 2.1 herein.

specific ethical values enshrined in the CRC.³³ Education and disciplinary measures should therefore promote other human rights and human rights values, and should contribute to a better understanding of their indivisibility.³⁴

In what follows, the above-mentioned two aims of education will be discussed in the disciplinary context. The ambit of these aims will be explored, as well as their realisation. Attention will therefore be given to the actions that can be taken to ensure that the child is developed holistically, and that the child's ability to act in a socially responsible manner is optimised in the enforcement of discipline. This optimisation process has a wide ambit and ranges from the individualisation of every child's needs to aligning human rights education, through policies and implementation strategies, with these aims.

2.1.1 The role of discipline in the holistic development of the individual child

The importance of individualising education by having due regard to the needs and abilities of every child, and to optimise his or her holistic development, is a recurring theme in discussions on the right to education.³⁵ Education measures should be child-friendly, child-centred, inspiring and motivating where the individual child is concerned. Schools are encouraged to foster a humane atmosphere and should allow children to develop according to their evolving capacities.³⁶ Disciplinary measures should therefore also be flexible enough to cater for this demand.

The individualisation of children's developmental needs should be addressed in policy documents and in the implementation of disciplinary measures. Policy documents and implementation strategies should therefore address issues such as the extent to which disciplinary measures contribute to, or inhibit, the child's individuality and his or her ability to develop an own personality. Since disciplinary measures refer to any action, decision, policy, and/or procedure used to enforce discipline in a school, all of these aspects should contribute to the optimal development of every child.³⁷ One can therefore ask, for instance, if dress codes unduly limit children's individuality and the development of their, especially in instances where school uniforms are prescribed together with strict rules on hair styles, the length of nails and even the colour of underwear. In many instances, these rules are enforced in a degrading way, infringing on the privacy and dignity of learners. Thus, in the absence of any evidence that

³³ CRCGC 1 2001:par 13.

³⁴ CRCGC 1 2001:par 14.

³⁵ CESCRGC 13 1999; CRCGC 1 2001; CRCGC 5 2003; CRCGC 7 2005; CRCGC 8 2006; CESCR11 1999.

³⁶ CRCGC 1 2001:par 9, 12.

³⁷ This obligation can only be limited in terms of the limitation clause of the Constitution 1996:s 36.

school dress codes contribute to children's education³⁸ in general or the maintenance or improvement of school discipline, they are potentially infringing on children's right to develop their full personality.³⁹ A one-size-fits-all approach to education and discipline is not in line with the general best-interests-of-the-child principle.⁴⁰

2.1.2 The role of discipline in preparing the child to live a responsible life and to respect human rights

"Responsible life" for purposes of this study means a life in which individual rights, needs and interests are balanced with those of society at large through acknowledgement thereof and respect therefor on the part of the individual. Article 29(1) of the CRC stresses the child's individual and subjective right to a specific quality of education. Quality education should not only result in the development of the child's full personality, talents and abilities, but should also be aimed at ensuring that essential life skills are learnt in order to equip the child for the challenges posed by life. The Committee on the Rights of the Child defines basic skills as follows:

Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.⁴¹

To teach children these basic skills requires that the curriculum should be suitable for the child's social, cultural, environmental and economic context, should address the current and future needs of the child, and should take account of the evolving capacities of the child. Furthermore, teaching methods should also fit the different needs and abilities of individual children.⁴² By analogy, disciplinary measures as well as the overall approach to discipline⁴³ should accordingly be suitable for the different contexts of the child mentioned above. Disciplinary measures should take the physical, mental, spiritual, emotional, intellectual, social, practical, childhood and lifelong aspects of the child into consideration and should be properly balanced "to maximize

³⁸ Keep in mind that education is about the development of full personality and the ability to function in a free society.

³⁹ See *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC); par 101, 114 where the court held that there was no evidence that the wearing of a nose stud did indeed impact negatively on the school's discipline. However, its prohibition was found unconstitutional, not on this ground, but on religious grounds.

⁴⁰ CRCGC 1 2001:par 9.

⁴¹ CRCGC 1 2001:par 9.

⁴² CRCGC 1 2001:par 9.

⁴³ See ch 6 herein for a detailed discussion on the reactive, proactive and restorative approaches to discipline.

the child's ability and opportunity to participate fully and responsibly in a free society."⁴⁴ Such measures should also have due regard for the child's short-, medium- and long-term interests and should be appropriately individualised.⁴⁵

The definition of basic skills illustrates the impossibility and inappropriateness of separating the optimal, holistic development of the child and his or her responsible functioning in society into watertight compartments. This should be kept in mind in all the discussions that follow, because not all the relevant aspects will be repeated under every right to be examined. A child can only develop holistically if he or she acquires the skills and ability to function in a socially acceptable and responsible manner. The discussion below on the role of human rights education in discipline is thus also relevant to the first aim of education, namely to ensure the holistic and optimal development of the individual child's abilities and needs. To limit any unnecessary duplication, all the aspects of disciplinary measures related to the development of the individual child will be incorporated in the discussion on the second aim of education, namely the preparation of the child for a responsible life. Human rights education is one of the measures employed to attain this goal, and will therefore be discussed in more detail below.

2.1.3 Preparing the child for responsible life through human rights education

The impact of the Second World War on the development of international treaties and their content must be kept in mind. As one of the earlier international documents, the UDHR states that one of the aims of education should be to "further the activities of the United Nations for the maintenance of peace".⁴⁶ Since then, numerous international instruments have stressed the importance of respect for human rights and human rights education.⁴⁷ The inclusion of article 29(1)(b) in the CRC highlights the importance of human rights education as one of the processes for enforcing human rights and, ultimately, enforcing the right to education. In line with this stated goal, the United Nations Member States adopted the United Nations World Programme for Human Rights Education Phase 1 (UNWPP 1) in 2006. This document constitutes the first phase in encouraging the development of national strategies and programmes for human rights education in primary and secondary schools. The Programme recognises that the "education system plays a vital role in fostering respect, participation,

⁴⁴ CRCGC 1 2001:par 12.

⁴⁵ See ch 4, par4.2.4 herein; CRCGC 1 2001:par 9.

⁴⁶ UDHR 1948:a 26(2).

⁴⁷ ICESCR 1966:a 13(1); the states parties to the American Convention on Human Rights adopted the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* – OAS 1988:13(2); ACHPR 1981:a 25; ACRWC 1990:a 11(2)(b); Detrick 1999:511.

equality and non-discrimination in our societies".⁴⁸ It is further recognised that human rights education "contributes to the prevention of abuses and violent conflicts".⁴⁹ Several examples of human rights abuses and of different forms of conflict in the context of school discipline are discussed in chapter 2, which highlights the importance of human rights education in the context of discipline and school violence.

2.1.3.1 Defining human rights education

Human rights education should not be seen in the narrow sense of comprising curriculum content only, for it has a much wider meaning. In terms of this wider meaning, it should be viewed against the background of the state's obligation to ensure that education is aimed at the strengthening of respect for human rights and fundamental freedoms, and that this aim is included in educational policies at the national as well as international level.⁵⁰

The Committee on the Rights of the Child provides in General Comment 1 on the aims of education that the practical application and implementation of human rights, as part of the education process, have two important components: the first refers to the inclusion of human rights education in the curriculum; and the second refers to the practical application of human rights to the lived worlds of children.⁵¹ Therefore, apart from subject knowledge, learners:

should learn more about human rights by seeing human rights standards implemented in practice, whether at home, in school, or within the community. Human rights education should be a comprehensive, life-long process and start with the reflection of human rights values in the daily life and experiences of children.⁵²

Consequently, children should be granted the opportunity to:

identify and address their human rights needs and to seek solutions consistent with human rights standards. Both what is taught and the way in which it is taught should reflect human rights values, encourage participation and foster a learning environment free from want and fear.⁵³

⁴⁸ UNWPP 1 2006:Foreword. The General Assembly of the United Nations adopted Resolution 59/113B on 14 July 2005 setting out the plan of action for the first phase (2005-2007) of the World Programme for Human Rights Education.

⁴⁹ UNWPP 1 2006:2.

⁵⁰ World Conference on Human Rights 1993:par 8.

⁵¹ CRCGC 1 2001:par 15.

⁵² CRCGC 1 2001:par 15.

⁵³ UNWPP 1 2006:1.

The UNWPP 1 refined the scope of human rights education and emphasised that human rights should be promoted through education,⁵⁴ but also in education.⁵⁵ Human rights education is therefore defined as education, training and information aimed at building a universal culture of human rights through the sharing of knowledge, the imparting of skills and the moulding of attitudes directed to the strengthening of human rights, to the full development of the human personality, to the promotion of understanding and tolerance, to effective participation, to the building and maintenance of peace, to people-centred sustainable development, and to social justice.⁵⁶ Human rights education therefore encompasses knowledge and skills,⁵⁷ values, attitudes and behaviour,⁵⁸ and action.⁵⁹

The Committee on the Rights of the Child explicitly links human rights education and school discipline and states:

The participation of children in school life, the creation of school communities and student councils, peer education and peer counselling, and the involvement of children in school disciplinary proceedings should be promoted as part of the process of learning and experiencing the realization of rights.⁶⁰

Discipline is part of the education process and not an add-on to education in general and human rights education in particular. To teach children human rights is one facet of human rights education, but allowing them to experience the implementation of human rights in all disciplinary measures is another important facet.

Although human rights education and its application are important for all learners, the Committee on the Rights of the Child highlights its increased importance in the education systems of communities affected by conflict and emergency situations, natural calamities and instability in order to “promote mutual understanding, peace and tolerance, and help to prevent violence and conflict”.⁶¹ In this regard, the impact of South Africa’s apartheid system, reported

⁵⁴ UNWPP 1 2006:18. This means “ensuring all the components and processes of learning, including curricula, materials, methods and training, are conducive to the learning of human rights”.

⁵⁵ UNWPP 1 2006:18. This means “ensuring the respect of human rights of all actors, and the practice of rights, within the education system”.

⁵⁶ UNWPP 1 2006:12.

⁵⁷ UNWPP 1 2006:12. This means “learning about human rights and mechanisms for their protection, as well as acquiring skills to apply them in daily life”.

⁵⁸ UNWPP 1 2006:12. This means “developing values and reinforcing attitudes and behaviour which upholds human rights”.

⁵⁹ UNWPP 1 2006:12. This means “taking action to defend and promote human rights”.

⁶⁰ CRCGC 1 2001:par 8; see also Detrick 1999:512.

⁶¹ CRCGC 1 2001:par 16.

instances of racism in some schools, instances of intolerance of homosexual and transsexual learners, as well as xenophobia should be kept in mind.⁶²

The wide ambit of human rights education is highlighted by the UNWPP 1, which provides that, with regard to schools, human rights education be based on, *inter alia*, the following: the development of rights-based policies and legislation; policy implementation; the creation of a learning environment conducive to respect for, and promotion of, human rights; the adoption of rights-based teaching and learning processes; and the education and professional development of staff to facilitate the learning and practise of human rights in education.⁶³ In what follows, the broadened scope of human rights education, which now includes more facets of disciplinary measures, will be discussed and applied to the enforcement of discipline.

2.1.3.2 Human rights education through the curriculum

Human rights education should be included in the learner's curriculum and should provide information on the content of human rights treaties.⁶⁴ The curriculum content should promote learners' understanding of human rights and should contribute to tolerance, peace, friendly relations and non-discrimination among, *inter alia*, different racial and religious groups. Apart from the theoretical knowledge, the practical⁶⁵ application should also receive proper attention.

Equality is discussed in detail in paragraph 4 below. However, the emphasis on non-discrimination in human rights education should be highlighted here. The Committee on the Rights of the Child indicates that education can play an important part in effectively preventing and eliminating racism, ethnic discrimination, xenophobia and other forms of intolerance found in discrimination on such other grounds as religion, sexual orientation and learner pregnancies, to mention but a few.⁶⁶ The UNWPP therefore underlines the introduction of non-discrimination in human rights programmes in the curriculum so as to develop and improve the relevant educational material, and to ensure that all educators are effectively trained and adequately motivated to shape attitudes and behaviour patterns compliant with human rights based on the principles of non-discrimination, mutual respect and tolerance.⁶⁷

⁶² See ch 2, par 2.3.5 herein.

⁶³ UNWPP 1 2006:18.

⁶⁴ CRCGC 1 2001:par 15.

⁶⁵ World Conference on Human Rights 1993:par 33.

⁶⁶ CRCGC 1 2001:par 10-11; see also the discussion on human rights education in par 2.1.3 above.

⁶⁷ UNWPP 1 2006 2-4.

2.1.3.3 Human rights education through the development of national policy and legislation

Education policies⁶⁸ should explicitly promote a rights-based approach to education. This implies that the school and the education system become conscious of human rights and fundamental freedoms. The adherence to, and implementation of, human rights should be an educational aim as well as a quality-criterion in all education policy documents.⁶⁹

Since discipline is part of education, policies regarding education and human rights education should explicitly refer to discipline. Such policies should be aligned with the human rights standards set in the rights-based approach. School governors and management should therefore be sensitised to the safeguarding of this alignment. Furthermore, there should be proper synergy between different education policies and plans and other sectoral policies such as those applicable in the health, welfare and justice sectors.

In the South African context, it would thus be necessary to investigate the alignment of the *Child Justice Act*,⁷⁰ the *Children's Act*,⁷¹ the *South African Schools Act* ("the *Schools Act*")⁷² and the different policies with regard to human rights and other issues that might impact on school discipline.⁷³ There is currently some legislation, as well as policies, which is not properly aligned. One example is the mismatch in the philosophies underlying the *Schools Act* and the *Child Justice Act*. An adversarial and punitive approach is prescribed in the *Schools Act* and in Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners ("Guidelines"),⁷⁴ while a restorative approach and diversion programmes are prescribed in the *Child Justice Act*.⁷⁵ Reading the legislation together leads to the conclusion that a child first needs to come into conflict with the law before obligatory restorative processes and measures come into play in order to channel him or her away from the formal adversarial justice system towards procedures designed to help him or her master the necessary life skills. The *Schools Act* prescribes adversarial disciplinary hearings, and it was pointed out earlier that

⁶⁸ UNWPP 1 2006:3, 37. "Education policies" are understood as being a clear and coherent statement of commitments by the government and includes legislation, plans of action, curricula and training policies.

⁶⁹ UNWPP 1 2006:3, 37-38.

⁷⁰ 75/2008.

⁷¹ 38/2005.

⁷² 84/1996.

⁷³ Other issues that impact on school discipline are, for instance, policies on: admission to school (see GN 2433/1998:s 4(A); repetition (see GN 2432/1998:s 30-32); the prioritisation of adequate physical resources in order to reduce the number of learners in a class (see ch 2, par 8.1.6 herein); the provision of support structures and measures for support (see *Schools Act* 84/1996:s 8(5)(b)).

⁷⁴ GN 776/1998.

⁷⁵ 75/2008: see the preamble, ch 6 & 7 on diversion, ch 7 on the preliminary inquiry, s 73 on restorative justice as a sentencing option. See also the discussion in ch 6, par 5.4 herein on the differences between a restorative and a retributive approach to discipline.

the Guidelines are mostly punitive in nature.⁷⁶ Unlike the *Child Justice Act*, the *Schools Act* does not provide for an alternative to the adversarial process.⁷⁷ However, it does prescribe support measures and counselling services for children who are subjected to disciplinary proceedings.⁷⁸

This mismatch between the underlying approaches and philosophies of the *Schools Act* regarding discipline and the *Child Justice Act*⁷⁹ becomes even more evident once the objectives and guiding principles of the *Child Justice Act* are scrutinised.⁸⁰ It is clear that one of the main aims of the *Child Justice Act* is to ensure that the child is diverted away from the formal criminal justice system and is provided with assistance to master life skills in order to be able to act in a socially responsible manner in future. This approach, however, is not so evident in the *Schools Act* or related policies, which focus on punishment. Compliance with the international standard on human rights education is also evident in the *Child Justice Act*. The aims of the Act include:

reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community.⁸¹

⁷⁶ See ch 3, par 5.8.3 herein.

⁷⁷ *Schools Act* 84/1996:s 9.

⁷⁸ *Schools Act* 84/1996:s 8(5)(b).

⁷⁹ 75/2008.

⁸⁰ *Child Justice Act* 75/2008:s 2, 3; see ch 1, par 1 herein for the full quote for section 2.

Section 3: Guiding principles. In the application of this Act, the following guiding principles must be taken into account:

- (a) All consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.
- (b) A child must not be treated more severely than an adult would have been treated in the same circumstances.
- (c) Every child should, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal and inquisitorial proceedings in terms of this Act, where decisions affecting him or her might be taken.
- (d) Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.
- (e) Every child should be treated in a manner which takes into account his or her cultural values and beliefs.
- (f) All procedures in terms of this Act should be conducted and completed without unreasonable delay.
- (g) Parents, appropriate adults and guardians should be able to assist children in proceedings in terms of this Act and, wherever possible, participate in decisions affecting them.
- (h) A child lacking in family support or educational or employment opportunities must have equal access to available services and every effort should be made to ensure that children receive similar treatment when having committed similar offences.
- (i) The rights and obligations of children contained in international and regional instruments, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

⁸¹ *Child Justice Act* 75/2008:s 2(b)(ii).

A similar focus on the development of the child's respect for human rights is lacking in the *Schools Act* in general and in the provisions on discipline in particular. The Guidelines state that the code of conduct should prescribe conduct which will prepare learners for "conduct and safety in civil society",⁸² should be "directed at the advancement and protection of the fundamental rights of every person",⁸³ and "must prescribe behaviour that respects the rights of learners and educators".⁸⁴ Although the Guidelines refer to behaviour that respects the rights of learners and educators, it does not explicitly focus on respect for human rights or human rights education. Rather, it focuses on the prescription of specific behaviour that is compatible with human rights, but does not have a similar explicit focus on the child's obligation to respect human rights or to be taught to respect human rights.

2.1.3.4 Human rights education on local level through the process of drafting of the code of conduct

The Committee on the Rights of the Child emphasises the role of child participation in school life.⁸⁵ Including children in the drafting of the code of conduct provides an opportunity for them not only to exercise their right to participate, but also to be exposed to the balancing of the different human rights and needs of others in the process of drafting policies. The deficiencies in the provisions regarding the consultation process were highlighted in chapter 3⁸⁶ and signal a lack of focus on human rights education and on the child's right to participate.⁸⁷ Current legislative provisions are therefore clearly not in the children's best interests.

2.1.3.5 Human rights education through the content of the code of conduct

The content of the code of conduct should not only reflect respect for, and the protection of, human rights, but the prescribed procedures to address, for instance, misconduct should also reflect an explicit focus on teaching human rights. The procedures prescribed in the code of conduct should thus facilitate the implementation of strategies that promote human rights education.

2.1.3.6 Human rights education through policy implementation

Implementation strategies should be devised to provide for implementation measures, responsibilities, proper resource allocation, coordination mechanisms, monitoring and

⁸² GN 776/1998:par 1.4.

⁸³ GN 776/1998:par 3.2.

⁸⁴ GN 776/1998:par 3.3.

⁸⁵ CRCGC 1 2001:par 8; see also Detrick 1999:512.

⁸⁶ See ch 3, par 6.1 herein.

⁸⁷ See par 6 below for a discussion on the child's right to participate.

accountability.⁸⁸ The different levels of government and other stakeholders in education will have to play their part in determining and implementing policy which has an impact on school discipline. Therefore, due regard should be had to the following warning:

The implementation of human rights education policies needs to be in line with current trends in educational governance towards devolution of powers, democratic governance, school autonomy, and sharing of rights and responsibilities within the education system. The responsibility for the education system cannot and should not lie with the Ministry of Education only.⁸⁹

Every school's management and governance teams are thus responsible for ensuring that human rights education is not only included in policy documents, but is also implemented properly. This would include human rights education through the way in which discipline is instilled, since education is not only about what is learned on a cognitive level, but also about what is experienced.

The impact of different views pertaining to democracy and current dangers of minimising participatory democracy and using school governing bodies (SGBs) to further personal, political aspirations were highlighted in chapter 2.⁹⁰ In addition, several examples were provided of the misuse of power on the part of heads of department (HoDs) and of their unlawful refusal to expel learners.⁹¹ The unlawful or improper implementation of policies has an impact on the realisation of human rights education. Learners might, for example, experience the impact of diminished participation in democratic processes (such as being excluded from the drafting of a code of conduct), but see it as an acceptable use of power when in a position of authority. They might also experience the lack of protection of their own rights and interests in instances where their own needs are not addressed in disciplinary proceedings or where one party's interests are overemphasised. All of these situations hamper children's full experience of the positive impact of the appropriate balancing of human rights in a real-life situation.

The lack of proper implementation, by education departments, of existing policies regarding misconduct of educators also undermines human rights education. Examples include the unabated application of corporal punishment and the forging of sexual relationships with

⁸⁸ UNWPP 1 2006:41-42.

⁸⁹ UNWPP 1 2006:42.

⁹⁰ See ch 2, par 8.1.9, 8.6.2 herein.

⁹¹ See ch 3, par 5.9 herein.

learners, despite the existence of policy and legislative provisions outlawing these practices.⁹² It would be hard for children to learn to respect human rights if they are constantly subjected to human rights violations. Moreover, they are also taught that human rights violations have no consequences for the perpetrator. The examples set by educators are an important vehicle for teaching respect for human rights. Examples of the unacceptable conduct of educators, and its influence on school discipline, were discussed in chapter 2.⁹³

2.1.3.7 Human rights education and informal disciplinary measures

Informal disciplinary measures are mostly concerned with the day-to-day enforcement of discipline to ensure an environment conducive to teaching and learning, including the drafting of classroom rules and addressing the frequent, low-impact misconduct of learners. These measures should also contribute to enhancement of respect for human rights.

This raises questions on the suitability of frequently used disciplinary measures such as detention, exclusion from class, additional class work, writing lines, and merit and demerit systems in promoting learners' respect for human rights. The educational value of these measures and their compatibility with the optimisation of the child's best interests have yet to be tested in the courts. However, if a disciplinary measure does not contribute to the holistic development of the child and to the child's ability to acknowledge and respect opposing rights and interests, and balance these with his or her own rights and interests, it would be hard to argue that the measure is in the best interests of the child and in line with the aims of education. Furthermore, the justifiability of the application of these measures would become even more doubtful if other disciplinary measures are available, are suited to the circumstances, and are better aligned with the aims of education.

Also, in choosing a disciplinary measure to address misconduct, care should be taken not to overemphasise respect for, and the protection of, certain rights such as the child's right to be free from all forms of violence. Even informal disciplinary measures should focus on promoting the child's respect for all human rights. It is clear from the earlier textual analysis of the best-interests-of-the-child standard that "best interests" requires that the child's well-being should be the ultimate goal, and that the most advantageous position practically possible should be chosen in decisions regarding children.⁹⁴ These considerations, as well as the child's short-, medium- and long-term best interests should be taken into account in deciding on an

⁹² See ch 2, par 8.1.2 herein.

⁹³ See for example ch 2, par 5.1.1.1.1, 5.1.1.2, 7.1, 7.2, 7.4 herein.

⁹⁴ See ch 4, par 4.2.2, 4.3 herein.

appropriate disciplinary measure.⁹⁵ The importance of the paramountcy of the child's best interests should also be considered and the additional responsibilities of decision-makers to optimise the best interests of the child must be highlighted.⁹⁶ Decision-makers are therefore required to take reasonable additional precautions to ensure the best interests of the child.⁹⁷ It would thus be inappropriate merely to choose a disciplinary measure because it is ostensibly effective and does not take up too much of the educator's time. Any disciplinary measure should still contribute to the development of the child and to respect for human rights.

2.1.3.8 Human rights education and formal disciplinary proceedings

The same arguments as those put forward above are applicable to decisions in formal disciplinary proceedings. Since the consequences of a guilty verdict (and possible suspension and expulsion) in formal disciplinary proceedings are more profound than in informal proceedings, the importance of having due regard to the aims of education and the best interests of the child becomes even greater.

The lack of focus on the best interests of the child in formal disciplinary proceedings was discussed in chapter 3.⁹⁸ Lack of focus on the aims of education is equally apparent from the provisions of the *Schools Act* and will not be further discussed. It is, however, important to ensure that any policies, processes or sanctions related to serious misconduct are aligned with the aims of education. Particular attention should be given to the inclusion of provisions that focus the attention of SGBs and the HoD, in decisions regarding expulsions or suspensions, on the importance of reinforcing the child's respect for human rights. Specific procedures should be included in legislation and codes of conduct to ensure that attention is given to this aspect. If this is not done, learners are, legally, not attending school while they are taught no academic content or the importance of human rights. This is clearly not in the best interests of the child.

2.1.3.9 Human rights education through the creation of a human rights culture

General Comment 1 of the Committee on the Rights of the Child⁹⁹ specifically refers to school discipline and the aims of education and states:

A school which allows bullying or other violent and exclusionary practices to occur is not one which meets the requirements of article 29(1).

⁹⁵ See ch 4, par 4.2.4 herein.

⁹⁶ See ch 2, par 4.3 herein.

⁹⁷ See ch 2, par 4.3 herein.

⁹⁸ See ch 3, par 6.2-6.9.

⁹⁹ CRCGC 1 2001:par 19.

The school environment should rather reflect:

[t]he freedom and the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin called for in article 29(1)(b) and (d).

The school's ethos and culture thus play an important role in the realisation of the aims of education. The broad scope of human rights education is further highlighted by the fact that it is not only about cognitive and experiential learning, but also includes "the social and emotional development of all those involved in the learning and teaching process". It encompasses the process of developing a human rights culture that is practised and lived on a daily basis in the school community.¹⁰⁰ In a rights-based environment, the human rights of all the stakeholders are respected and promoted, and such environment is not only characterised by, but also fosters, mutual understanding, respect and responsibility, a sense of belonging, autonomy, dignity, and a healthy self-esteem on the part of all the stakeholders in the education system. All the stakeholders in the system are responsible for creating an enabling environment where these aims can be achieved. In this environment, children will be the primary focus and they will be at liberty to express their views freely, participate in school life and interact with the wider community.¹⁰¹

In this context, "learning environment" refers mainly to issues related to school governance and management, and not to physical resources. To ensure a proper learning environment, the rights-based policies should highlight the rights and responsibilities of educators and learners. The code of conduct should ensure an environment free of all the different forms of violence and discrimination and must include "procedures for resolving conflicts and dealing with violence and bullying".¹⁰²

In such environment, educators will be provided with opportunities to develop and implement innovative and best practices in human rights education. Learners, in turn, will have opportunities for self-expression, for responsibilities and age-appropriate participation in decision-making, to organise their own activities, and to represent, mediate and advocate their own interests.¹⁰³ These principles should also be applicable to the enforcement of school discipline.

¹⁰⁰ UNWPP 1 2006:43.

¹⁰¹ UNWPP 1 2006:3-4, 44.

¹⁰² UNWPP 1 2006:44.

¹⁰³ UNWPP 1 2006:44.

2.1.3.10 Human rights through education and the professional development of staff

Policies on human rights education should also include measures to ensure the training of educators and other staff regarding the content and implementation of human rights in general, and in respect of school discipline in particular.¹⁰⁴ Educators and other staff should be able to transmit and model human rights values. They should therefore have the necessary knowledge, commitment and motivation to do this. If they do not, appropriate professional development opportunities should be made available. On the other hand, they are also entitled to a work environment where their human rights are given effect to.¹⁰⁵

Educators should be empowered to deal in a human rights-compliant manner with disciplinary issues. However, the unpreparedness and underpreparedness of educators to respond to disciplinary problems, and the consequent impact on discipline in the form of human rights violations, which was discussed in chapter 2, should be addressed on a policy and implementation level.¹⁰⁶ This unpreparedness and underpreparedness of educators is also contrary to the content given to the right to basic education by the United Nations Educational, Social and Cultural Organization (UNESCO):

The State guarantees the right to basic education of good quality based on minimum standards, applicable to all forms of education and provided by qualified teachers, as well as effective management along with a system of implementation and assessment.¹⁰⁷

2.2 Provision of education

It was indicated above that the right to education has a quality dimension, which is manifested in the aims of education, but that it also has a provision dimension. In what follows, this second dimension of the right to education will be discussed. The focus will be on determining states' obligations to provide education in accordance with the standard set by the CESCR. In General Comment 13 on the right to education, the Committee identified the "four As" as indicators of a state's compliance with its obligation to provide basic education.¹⁰⁸ These four indicators are interrelated and are essential features of education. The impact of compliance or non-compliance with the four-As standard on discipline will be investigated to inform not only the ambit of the right to basic education, but also the best interests of the child in the context of discipline. The Committee explicitly linked the application of the four As with the best-interests-of-the-child concept and declared:

¹⁰⁴ UNWPP 1 2006:39-40.

¹⁰⁵ UNWPP 1 2006:4, 48-49.

¹⁰⁶ See ch 2, par 8.3.2 herein.

¹⁰⁷ UNESCO 2007:1.

¹⁰⁸ CESCRGC 13 1999:par 6.

When considering the appropriate application of these “interrelated and essential features” the best interests of the student shall be a primary consideration.¹⁰⁹

Before the arguments pertaining to the relevance of the four As to discipline can commence, international law and the South African legal position on the right to education must be explored as far as these are applicable to the current focus on discipline. The same applies to the clarification of terms and to the necessity to highlight specific dimensions of the right to education captured in international documents, in particular in article 28 of the CRC.

2.2.1 International instruments and international documents on the provision of education

There are a number of international instruments which provide for the right to education, such as the UDHR,¹¹⁰ the ICESCR¹¹¹ and the CRC.¹¹² The following provisions of article 28 of the CRC are of particular importance to the focus on discipline:

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - a. Make primary education compulsory and available free to all;
 - b. Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - c.
 - e. Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.

Scrutinising this provision confirms the interrelatedness of human rights in the context of discipline. The most obvious relation is the reference to the right to dignity in article 28(2), which right will be discussed comprehensively in paragraph 3 below. Another dimension of the right to education relevant to the discipline context is the compulsory nature of education. Learners are

¹⁰⁹ CESCRGC 13 1999:par 7.

¹¹⁰ 1948:a 26.

¹¹¹ 1966:a 13, 14. The South African Cabinet acceded to the ICESCR on 10 October 2012.

¹¹² 1989:a 28, 29.

obliged to attend school, but might be exposed to school-based violence and an environment that is not conducive to teaching and learning because of a lack of discipline. In addition, learners are sometimes exposed to overcrowded classes, huge age differentials among learners, and a lack of resources with no support measures such as counselling services to address their needs in order to enable them to cope with the academic demands of education. All these aspects have an impact on discipline and the quality of education.¹¹³

An added dimension of the right to education relevant to discipline is the obligation on states parties to encourage learners to attend school regularly. Children's consistent attendance of school can, however, be compromised by factors associated with discipline, such as the impact of bullying, school-based violence, gang activities, learners having to walk long distances to school and being punished for late-coming, and the ill-considered application of sanctions for misconduct, such as suspending learners for truancy.¹¹⁴ States parties are also obliged to take appropriate steps to reduce dropout rates. Issues relevant to discipline and dropout rates are the impact of financial constraints on learners' ability to comply with the school's dress code as well as learner pregnancy policies.¹¹⁵

These issues will be addressed in the course of the discussion that follows on the four As or in the discussion of the other rights, and such discussions will illustrate the interrelatedness of the rights impacting on discipline.

2.2.2 South African constitutional provisions on the provision of education

The following provisions of section 29 of the Constitution on the right to education are applicable to this study:

- 29. Education
- (1) Everyone has the right –
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Unlike international prescriptions,¹¹⁶ the South African Constitution does not lay down that primary or basic education should be compulsory or free, and that secondary education should

¹¹³ See, for example, ch 2:par 5.1, 5.3, 6, 7, 8.1.6, 8.1.7, 8.1.8, 8.3, 8.4.3, 8.4.6, 8.4.7 herein.

¹¹⁴ See for, example, ch 2:par 5.1, 6, 7, 8.4.3 herein & par 2.2.4.2.2 below.

¹¹⁵ See ch 2, par 5.3 herein & par 2.2.4.2.2 below.

¹¹⁶ ICESCR 1966:s 13(2)(a); CRC 1989:s 28(1)(a); ACRWC 1990:a 11(3)(a).

be progressively made available.¹¹⁷ Further, the constitutional provision on education does not contain a specific reference to school discipline. To assist states parties in the implementation of this right, general comments and other documents have been compiled over time. These include the general comments of the CESCR¹¹⁸ and the Committee on the Rights of the Child.¹¹⁹ General Comment 13 of the CESCR provides a comprehensive list of international documents on the right to education, which will not be repeated here.¹²⁰

Since everyone, including adults, is entitled to basic education, the ambit of what constitutes basic education should be investigated. This investigation is essential in the context of school discipline in view of the following provisions and matters related to discipline: compulsory school-going age; the impact of overage learners on discipline; the best-interests-of-the-child provision; securing the best interests of everyone under 18 years of age; and provisions regarding the Department's obligation to find an alternative placement only for suspended learners under the compulsory school-going age. Other issues impacting on school discipline and basic education include: teenage pregnancies; school-based violence and compulsory education; the impact of a lack of resources on discipline; and support measures and structures for counselling. The question that thus arises is: What is the impact of the right to basic education in determining constitutionally compliant disciplinary measures which are in the best interests of the child?

2.2.3 Clarification of terms

An investigation of the provisions relating to the right to education reveals that there is no consistency in the use of terminology, especially with regard to basic education. Several concepts are used, such as "basic", "primary", "elementary", "fundamental", "secondary education" and "basic education needs". To give content to the right to basic education, these terms have to be clarified. As stated earlier, a group of experts gathered in 2007 to draft the Experts' Consultation.¹²¹ The key legal and policy parameters of basic education were identified as "duration (number of years), purpose, curriculum and content, quality and evaluation of outcomes, beneficiaries, provision and resources as well as its free and compulsory nature".

¹¹⁷ Constitution 1996:s 29(1)(a). See the discussion in par 2.2.3 below on the distinction between primary and basic education. The relevance of this distinction and its application will become more evident in the discussion pertaining to compulsory school-going age and the state's obligation to provide alternative education for learners who are expelled from school. See par 4.3.5 below.

¹¹⁸ CESCRGC 11 1999; CESCRGC 13 1999.

¹¹⁹ CRCGC 1 2001.

¹²⁰ CESCRGC 12 1999:par 5.

¹²¹ UNESCO 2007:par 1.

In drafting an operational definition for basic education, the drafters took into account that the above-mentioned parameters should be harmonised, and that the definitions should be universally acceptable and flexible enough to be applicable in diverse, local specificities, while still respecting the elements contained in an international perspective.¹²² The following definition was adopted, and only those aspects relevant to the current discussion are quoted:

For the purposes of this definition, basic education covers notions such as fundamental, elementary and primary/secondary education. ...¹²³

Beyond preschool education, the duration of which can be fixed by the State, basic education consists of at least 9 years and progressively extends to 12 years. Basic education is free and compulsory without any discrimination or exclusion.

...¹²⁴
...¹²⁵
...¹²⁶
...¹²⁷
...¹²⁸
...¹²⁹

The definition was accompanied by explanatory text to give content to the definition and to justify the adopted text. These explanations, among others, inform the discussion of the right to education and of discipline that follows further on in this chapter.

It is important to note that the operational definition of basic education does not restrict the provision of basic education to education provided in schools. The significance of this will be examined in more detail in the discussion on the impact of age on the Department's obligation to provide alternative education for expelled learners and overage learners.¹³⁰

¹²² UNESCO 2007:par 2.

¹²³ Refers to the equal provision of education; see the discussion below in par 4.2.2.

¹²⁴ See par 4.3.1 below for provision on equivalent basic education for youth and adults.

¹²⁵ See par 2.1 above for the full quote on the aims of education.

¹²⁶ See par 2.1 above for the full quote on the aims of education.

¹²⁷ See par 2.1.3.10 above for the full quote on the link between the realisation of the right to basic education and qualified educators.

¹²⁸ Refers to the importance of mother-tongue education.

¹²⁹ Refers to the state's responsibilities with regard to private schools.

¹³⁰ See par 4.3.5 below.

It is also important to recognise that there is a close link between primary education and basic education, but they are not synonymous. The position of UNESCO in the Experts' Consultation was that "primary education is the most important component of basic education",¹³¹ Moreover, secondary education is included in basic education, although it is not necessarily compulsory and provided free of charge. Basic education is further regarded as a key element of the right to education.¹³²

The experts considered the legal position of several countries and concluded that the position varies from country to country. Therefore, basic education was set at a minimum of at least 9 years and a maximum of 12 years, without referring to any specific age.¹³³ Twelve years of basic education was, however, considered to be an objective that could be achieved gradually.¹³⁴ Thus, there is an element of progressive realisation of the right to basic education beyond the compulsory first nine years.¹³⁵ Basic education should be provided regardless of the age of the individual, especially if the person has been deprived of the opportunity to exercise this right at an earlier stage.¹³⁶ It is important to note that the nine years of basic education are specifically linked to levels of education and not mere attendance of an education institution for a period of nine years. Two levels of education are referred to, namely six years of primary education and three years of secondary education. In addition, it is stressed that learners should be able to enter further education, in the various advanced structures of education, after completion of basic education.¹³⁷

The South African position on what constitutes basic education has not been clarified in exact terms. In the discussion that follows, it will become clear that it is sometimes interpreted in line with the above-mentioned international position, but there are indications that a much more limited ambit is given to it. The lack of proper alignment of the South African position on basic education and of the operational definition of basic education is further evident from the inclusion of grade R in the responsibilities of the Department of Basic Education. In contrast, UNESCO provides that pre-school or early childhood ends when a child reaches school-going age and is not included in basic education.¹³⁸

¹³¹ UNESCO 2007:par 3.

¹³² UNESCO 2007:par 6.

¹³³ UNESCO 2007:par 13.

¹³⁴ UNESCO 2007:par 14.

¹³⁵ UNESCO 2007:par 15.

¹³⁶ UNESCO 2007:par 16.

¹³⁷ UNESCO 2007:par 13, 27, 30.

¹³⁸ UNESCO 2007:par 11, 12.

The exact ambit of basic education in the South African context is currently unclear and several recent documents indicate that policy-makers are careful to avoid making any specific reference to its precise scope.¹³⁹ Since May 2009, when the national Department of Education was divided into the Department of Basic Education and the Department of Higher Education and Training, numerous documents have been published on the content of the national qualifications framework.¹⁴⁰ However, some of these documents contradict one another and it is therefore difficult to determine the exact definition of, or what is regarded as, basic education in terms of these documents.

Qualifications are divided into different levels ranging from level 1 to level 10.¹⁴¹ However, the entire qualifications framework system is in the process of change and a whole range of policy documents are being developed on several levels. One of the latest government notices¹⁴² highlights the fact that sub-frameworks for the different levels of education are in the process of being developed and acknowledges that there is a need to create a generally stable and predictable policy environment.

The December 2012 Government Notice indicates the National Senior Certificate (NSC) (matric) as a level-4 qualification, which is regarded as “further education”.¹⁴³ This certificate is obtained after the completion of grade 12, the highest grade offered by schools, but equivalent qualifications are also offered by Further Education and Training (FET), among others. The national qualifications framework does not provide for a number of years of education, but rather for specific outcomes that should be reached at every level. This is in contrast to the *Schools Act* which provides that compulsory education takes place until the end of grade 9 or until the end of the year in which the learner attains the age of 15, whichever occurs first.¹⁴⁴ Consequently, compulsory education does not have a specific, prescribed educational outcome, because education can be exited at a specific age without achieving specific outcomes. Unlike the international prescription, the South African provision includes age in the determination of compulsory school-going age. This has the effect that children with the necessary intellectual capacity can leave school at the age of 15 without completing the internationally prescribed 9 years of basic education. Thus a learner who has only completed, for instance, grade 5, but who

¹³⁹ *National Qualifications Framework Act 67/2008*; GN 1040/2012; GN 972/2012; NPC 2011:261-294; DHET 2012.

¹⁴⁰ DHET 2012:x; GN 1040/2012; GN 972/2012; NPC 2011:261-294.

¹⁴¹ GN 1040/2012: schedule; GN 586/2012.

¹⁴² GN 1040/2012:s 6, 15. This Government Notice was published on 14 December 2012. The Green Paper for Post-school Education and Training published in January 2012 indicated that the “existing regulatory system is complex and difficult to understand”; see DHET 2012:xiii.

¹⁴³ GN 1040/2012:s 17.1 & schedule.

¹⁴⁴ *Schools Act 84/1996*:s 3(1).

is 15 years old, can leave school without acquiring the necessary skills to meet the requirements of 9 years of basic education.

As mentioned above, it is evident from recent documentation that there is a degree of caution when it comes to defining basic education. Instead, terms such as “further education, provided by Further Education Colleges”, “schooling” and “post-schooling” are used rather than “basic education”.¹⁴⁵ This leaves the door open for the legislator and for policy documents to delay the determination of what level of education constitutes basic education on the national qualifications framework. Nevertheless, the overall conclusion to be drawn from the documents, when read together, is therefore that basic education comprises only the compulsory phase of education.

The advantage of this position, however, is that it leaves the door open for the drafters of policy to eventually arrive at a point where basic education can be divided into a compulsory phase and a non-compulsory phase. Yet, there is little likelihood of this happening any time soon, because it will have enormous financial implications. Were it to in fact happen, it would then be much easier to enforce the set standards in instances of non-compliance. If the non-compulsory part of basic education is recognised in policy documents, it will compel the government to provide FET colleges and other facilities for everyone who drops out of school and chooses to continue with the non-compulsory part of education, because everyone is entitled to a basic education, including adult basic education. The National Development Plan highlights the existing lack of adequate institutions and the poor performance of the existing ones.¹⁴⁶ Therefore, it makes more political sense to argue that education beyond the compulsory phase should be interpreted as further education, because the constitutional provision regarding further education has an internal qualifier.

In contrast to the current policy documents mentioned above and the Constitutional Court¹⁴⁷ judgment that basic education coincides with compulsory education only, the Department of Basic Education is responsible for “all schools from Grade R to Grade 12, and adult literacy programmes”. The name and responsibilities of the Department lead to the conclusion that basic education goes beyond the compulsory nine years of education or until the learner attains the age of 15. However, the establishment of the Department of Basic Education is in line with

¹⁴⁵ NPC 2011:265-271; DHET 2012:1.

¹⁴⁶ NPC 2011:270-271, 287-288.

¹⁴⁷ *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC):par 38.

the National Development Plan. Vision 2030¹⁴⁸ which strengthens the underlying impression created by reading the different documents together that the long-term vision is in fact that schools will eventually cater for the education needs of learners up to grade 12 or 18 years of age only. The National Development Plan states in this regard:

The post-school sector needs to meet the wide range of education and training needs of people over 18.¹⁴⁹

The realisation of this vision will address issues such as the impact of overage and underage learners, but careful management and proper policy provisions will be necessary to deal with these issues in the meantime. Until this goal is attained, overage and underage learners will continue to have an impact on school discipline, and this must be managed and regulated. Therefore, existing and new policies should be developed and implemented to address overage and underage learners' educational needs, as well as the huge age differentials, in accordance with the best-interests-of-the-child provision in order to contribute to the improvement of discipline.

The focus of this study is the best interests of the child under the age of 18 years. Further, the discussion will thus focus on this age group and not necessarily on the distinction between basic education and further education, unless necessary for the sake of the specific argument.

2.2.4 The four As and discipline

The CESCR drafted General Comment 13 on the right to education, which provides a standard to determine whether states parties are providing education in accordance with international standards. This standard is based on the availability, accessibility, acceptability and adaptability of education and is called the "four As".¹⁵⁰ In what follows, these different dimensions highlighted in the standard applicable to the right to education will be discussed in the context of discipline. It should be kept in mind that these dimensions are overlapping and interrelated and cannot be placed in watertight compartments.

¹⁴⁸ This National Plan was developed by the National Planning Commission appointed by the President to advise on several issues that impact on the long-term development of the country. One of the issues addressed was education on different levels.

¹⁴⁹ NPC 2011:264. In contrast, see DHET 2012:1, which provides, in the Green Paper for Post-school Education and Training that post-schooling refers to "all education for people who have left school as well as for those adults who have never been to school but require education opportunities". No reference is made to age in this definition.

¹⁵⁰ De Groof & Lauwers 2009:25. They identify four additional As, namely adequacy, accountability, awareness and advocacy, to assist in the evaluation of the quality of education.

2.2.4.1 Availability

The ability to develop the child's full potential depends on the availability of education and on equality of opportunity. The child's ability to develop to his or her full potential is also dependent on the education system's ability to inspire and motivate children.

According to General Comment 13 of the CESCR on the right to education, "availability" means that:

functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.¹⁵¹

The focus of this requirement is, firstly, on the availability and adequacy of the necessary physical infrastructure and human resources to provide education.¹⁵² Woolman and Fleisch¹⁵³ indicate that "adequacy" includes: (a) teaching, which includes the quality of teaching staff as well as educator:learner ratios; (b) school facilities and classrooms structures that protect learners from the elements, and desks, chairs, water, electricity and sanitation and (c) instrumentalities of learning, which include textbooks, blackboards, stationery, and possibly computers.

Conversely, a key element of the availability of education is to be found in the underemphasised phrase, "functioning educational institutions", in the definition of availability.¹⁵⁴ The lack of discipline, in the sense of an orderly environment conducive to teaching and learning, would render education unavailable, despite the availability of physical and human resources. An undisciplined environment makes education very difficult, if not impossible. In these circumstances, therefore, education would be unavailable. The extent of this problem is

¹⁵¹ CESCRGC 13 1999:par 6(a).

¹⁵² Woolman & Bishop 2011:57-19-57-20. They refer to United States case law and indicate that courts in the United States have identified teaching, school facilities and classrooms, and instrumentalities of learning as the three key inputs necessary to meet the availability-of-education requirement; see also De Groof & Lauwers 2009:25.

¹⁵³ Woolman & Fleich 2009:135-137.

¹⁵⁴ See ch 2, par 2, 8.4.6, 8.4.7 herein for some examples illustrating the dysfunctionality of the South African education system.

illustrated by research indicating that 80% of secondary schools are highly ineffective and thus dysfunctional.¹⁵⁵

The right to education includes, *inter alia*, the availability of adequate physical and human resources, as well as an environment conducive to teaching and learning. Lack of availability of these dimensions of the right to education has a negative impact on school discipline and should accordingly be addressed in legislation, policy, and implementation strategies. In what follows, some of these dimensions of the right to education will be discussed.

2.2.4.1.1 Availability of adequate physical resources

The South African Human Rights Commission (SAHRC)¹⁵⁶ found that unattractive school environments contribute to school violence.¹⁵⁷ Consequently, learners are more prone to fight for access to physical resources at school, because there are not enough cloakrooms, chairs and textbooks available for everyone. This lack of resources thus negatively impacts on school culture and should be addressed explicitly. Disciplinary measures, including the drafting of policies, should therefore proactively provide for strategies to minimise the impact of the lack of physical resources on discipline. Actions taken after misconduct has occurred should also have due regard for the impact of the lack of resources and should thus be educative in nature rather than punitive. For instance, it would be inappropriate to punish learners for fighting about a chair or textbook. The lack of resources should instead be used to teach learners to find suitable ways to resolve conflict among them, and to formulate practical solutions, in conjunction with the learners, to address the problems. This will contribute to learners' understanding of what it means to respect the rights of others and to reasonably accommodate the needs of all members of society.

¹⁵⁵ Taylor 2007:2-3; NPC 2011:282; see also Moloi & Kamper 2010:256-279. See Radebe 2012:4 for examples of schools without adequate physical facilities delivering acceptable academic outputs. For instance, in KwaZulu-Natal, 27 of the schools that obtained a 100% pass rate in the matric examination were of the poorest fifth of schools in the province; Thakali 2011:4: The Senaoane Secondary School had a matric pass rate of 72% four years ago, despite a lack of resources, but it has slumped to a 37% pass rate since then. It is currently a troubled school with numerous teaching disruptions, and with allegations of educators drinking alcohol at the school and passing learners who have not met the requirements so as to conceal the high failure rate; Mjekula 2011:4: The pass rate in this school almost doubled from a 45% matric pass rate in 2010 to 87% in 2011 due to the influence of the new principal who required dedication and discipline from educators and learners; Mkhwanazi 2010:4: The Minister of Basic Education claimed that not the whole education system was in a crisis, but that the education of black children in particular was in a crisis. The Minister pointed out that the crisis was due to the lack of discipline among educators. She highlighted the fact that some schools performed well, while others performed dismally, despite the fact that these schools were in the same communities and were operating under similar conditions. See ch 2, par 8.1.7 herein on the impact and extent of a lack of physical resources.

¹⁵⁶ 2008:22.

¹⁵⁷ The extent of the lack of resources is discussed in detail in ch 2, par 8.1.7 herein.

The lack of extracurricular facilities and its negative impact on discipline has been highlighted. A lack of these facilities constitutes a violation of children's right to basic education and has a negative impact on their holistic development and, consequently, their best interests.¹⁵⁸

2.2.4.1.1.1 The availability of physical facilities for children with serious behaviour problems

A particular manifestation of the state's obligation to provide adequate physical facilities in the context of discipline is the provision of educational facilities for learners who should be held in custody owing to criminal behaviour and for children who are removed from ordinary schools and placed in dedicated schools for learners with serious behaviour problems. A discussion on the availability of physical educational facilities for learners in conflict with the law does not form part of this study, because, if they are subjected to a custodial sentence, they will not be able to attend an ordinary school. Instead, they will be accommodated in secure-care facilities.¹⁵⁹

On the other hand, learners with serious behaviour problems impact negatively on a school's teaching and learning environment owing to frequent and serious forms of misconduct. It is thus not always conducive to accommodate them with other learners in ordinary schools. This necessitates the availability of separate physical facilities to address the specific educational needs of these learners. Section 191(2)(i) of the *Children's Act*¹⁶⁰ provides for the establishment of child and youth care centres for:

the reception, development and secure care of children with behavioural, psychological and emotional difficulties.

These facilities were formerly known as schools of industry.¹⁶¹ In *Anna Jonker v The Manager, Gali Them bani/JJ Serfontein School*,¹⁶² the lack of these facilities in the Eastern Cape in particular was raised, and specific reference was made to the lack of facilities for girls. The unavailability of child and youth care centres impacts on all learners, and not only those with serious behaviour problems, and influences their ability to reach their full potential. It also

¹⁵⁸ See ch 2, par 8.1.7 herein.

¹⁵⁹ *Children's Act* 38/2005:s 191(h), (j), 196(e). These facilities were formerly known as reform schools. See *S v Z en 4 Ander Sake* 1999 (1) SACR 427 (E) and *S v Z and 23 Similar Cases* 2004 (2) SACR 410 (E) on the lack of reform schools. The issue was raised for the first time in the Eastern Cape in 1999. In 2004, the court issued an order compelling the state to build a reform school, but, by 2012, the school was still not accessible – see *Anna Jonker v The Manager, Gali Them bani/JJ Serfontein School*: unreported case 94/2011 – judgment delivered in the Eastern Cape, Grahamstown High Court, on 19 March 2012.

¹⁶⁰ 38/2005.

¹⁶¹ *Children's Act* 38/2005:s 196(d).

¹⁶² Grahamstown High Court: unreported case 94/2011.

compromises individualisation, because the needs of the different children or groups of children vary considerably, thus negatively influencing all of the children's best interests. The acceptability of the therapeutic programmes offered by child and youth care centres is discussed below.¹⁶³

The provision of adequate support measures and counselling structures is included in the realisation of the right to basic education. Non-compliance with this requirement obliges states to draft action plans to rectify the position and to implement appropriate measures within a reasonable number of years.¹⁶⁴ Legislative and policy should accordingly be drafted and implemented to address the lack of insufficient and suitable child and youth care centres. This will prevent the undue and inevitable continuation of disciplinary problems where learners with serious behaviour problems are accommodated in ordinary schools.

2.2.4.1.2 Availability of a safe learning environment

Special care should be taken to explicitly ensure the emotional security of learners and to reduce emotions such as worrying, as well as surges of anxiety, panic, frustration and irritation, anger and rage.¹⁶⁵ Children who are the victims of bullying, gangsterism, school violence, harassment, sexual harassment or discrimination are exposed to a great deal of stress, which inhibits their optimal functioning and ability to learn, increases absenteeism and leads to higher dropout rates in this unsafe school environment.¹⁶⁶ Furthermore, learners may be exposed to disciplinary methods that cause stress and anxiety, such as corporal punishment, belittlement, sarcasm, exclusion, and shouting and screaming educators, even though they might not be the direct target of the conduct. They may fear that they might be next in line to be subjected to this conduct. Consequently, the fight-or-flight response could kick in, which would make it biologically and neurologically impossible for a child to learn.¹⁶⁷

Thus, although there may be enough physical facilities, enough educators and no undue discrimination at a school, education might still be inaccessible for many learners because of the state of general safety at the school and/or the way in which discipline is maintained. This implies that there should be an obligation on schools to create a calm, safe and relaxed environment which enables learners to access the available education. In addition, there is an

¹⁶³ See par 2.2.4.3.2 below.

¹⁶⁴ ICESCR 1966:s 14; CESCRGC 11 1999:par 9.

¹⁶⁵ Goleman 1998:73-74; Brendtro, Mitchell & McCall 2009:29-32.

¹⁶⁶ See ch 2, par 7.1-7.4 herein.

¹⁶⁷ Goleman 1998:74-78; Jenkins 2011:1; Mash & Wolfe 2007:417.

obligation to enhance the learner's resiliency through the development of emotional intelligence in order to enable the learner to acquire the necessary skills to deal with stressful situations in everyday life.¹⁶⁸ Some learners are exposed to so much stress that they need professional assistance in this regard.¹⁶⁹

In terms of article 28(2) of the CRC, states parties have an explicit obligation to ensure that measures are in place to encourage school attendance and to reduce dropout rates. Disciplinary measures should accordingly pay special attention to the inclusion of measures in this regard. Failure to do so would not only constitute an infringement of the right to education, but is also not in the best interests of the child, because it fails to place the child in the most advantageous position possible to develop his or her full potential.¹⁷⁰

2.2.4.1.3 Availability of properly qualified educators

One of the factors indicating the availability of education is "trained teachers receiving domestically competitive salaries".¹⁷¹ Research indicates a clear link between the preparedness of the educator and the level of discipline.¹⁷² Large numbers of South African educators do not have the necessary subject knowledge and/or knowledge and skills to manage their classes – or the school as a whole, if they are in a management position.¹⁷³ In addition, many educators have complained about the lack of training after the abolition of corporal punishment.¹⁷⁴ Unprepared and underprepared educators are unable to keep the attention of learners and to prevent, for instance, boredom, and this impacts negatively on discipline. Moreover, it will contribute to further deterioration in the teaching and learning environment with, *inter alia*, negative academic outcomes. It is also more difficult to teach learners to act in a socially acceptable manner in an environment that discourages teaching and learning. Thus, although the necessary infrastructure might be available, the inability of the educator contributes to the unavailability of education and lack of discipline.

2.2.4.1.4 Availability of an adequate number of educators

On the other hand, an adequate number of educators should be available to provide education. There is a clear link between class size and an educator's ability to maintain a disciplined

¹⁶⁸ See Van der Merwe 2012:646-659 for a discussion on the impact of emotional intelligence on crime and violence in schools.

¹⁶⁹ Mash & Wolfe 2007:40; 415; see par 2.2.4.1.5, 2.2.4.2.4 for a discussion on the availability of support structures and counselling services.

¹⁷⁰ See ch 4, par 4.2 herein.

¹⁷¹ CESCRGC 13 1999:par 6(b).

¹⁷² See ch 2, par 8.1.4, 8.3.2 herein.

¹⁷³ See ch 2, par 8.3.4 herein.

¹⁷⁴ See ch 2, par 8.1.4 herein.

environment.¹⁷⁵ In *Federation of School Governing Bodies of SA and Others v MEC for the Department of Basic Education, Eastern Cape, and Others*,¹⁷⁶ the court granted an order setting aside the decision of the provincial department in the Eastern Cape not to fill any vacant positions, including temporary positions. This decision of the Department resulted in 6 282 vacancies in the province, which had severe consequences for many schools. The failure of the Department to comply with its statutory obligations to declare post establishments implied that children would have had no educators or that there would have been a dramatic increase in class size, both of which would have impacted negatively on discipline and on their best interests.¹⁷⁷

2.2.4.1.5 Availability of support measures and counselling services

Learners often display unacceptable behaviour which is due to other serious problems, such as difficult socio-economic circumstances, including poverty, abuse and maltreatment,¹⁷⁸ a lack of emotional intelligence,¹⁷⁹ disruptive behaviour disorders,¹⁸⁰ anxiety disorders,¹⁸¹ mood disorders,¹⁸² eating disorders,¹⁸³ pervasive developmental disorders,¹⁸⁴ and mental retardation.¹⁸⁵ Frequently, such learners are unable to alter their behaviour and to progress in respect of the academic curriculum unless these issues are addressed. In addition, the unacceptable behaviour impacts on the teaching and learning environment and increases the challenges of

¹⁷⁵ See ch 2, par 8.1.6 herein; see also UNESCO 2012:2.

¹⁷⁶ [2011] 6 BLLR 616 (ECB). "Vacant positions" in this context refers to positions held by temporary educators. The Department decided not to renew their contracts for the 2011 school year. The Department failed for a couple of years to advertise available positions and to fill them with permanent staff, called "substantive posts". It merely filled all vacancies with temporary educators.

¹⁷⁷ The Department claimed that it would suffer financial harm if it were forced to fill the positions, but the court was not convinced by the Department's arguments. Consequently, an urgent interim order was granted.

¹⁷⁸ See ch 2, par 8.7.1 herein.

¹⁷⁹ Mayer, Caruso & Salovey 2000:267. According to the authors:

Emotional intelligence refers to ability to recognize the meanings of emotions and their relationships, and to reason and problem-solve on the basis of them. Emotional intelligence is involved in the capacity to perceive emotions, assimilate emotion-related feelings, understand the information of those emotions, and manage them.

This is an ability of learners that should be developed, because, if it is lacking, learners will react in an emotionally inappropriate way, which can impact negatively on discipline and the teaching environment. For example, learners need to learn to manage their anger in an acceptable way if they are, for instance, insulted by another learner. To react in a physically violent manner is not uncommon, but learners should be provided with an opportunity to learn what the appropriate alternative would be.

¹⁸⁰ Le Roux 2007:105-113. These include attention deficit hyperactivity disorder, oppositional defiant disorder and conduct disorder.

¹⁸¹ Le Roux 2007:113-123. These include separation anxiety disorder, generalised anxiety disorder, obsessive-compulsive disorder, and post-traumatic stress disorder.

¹⁸² Le Roux 2007:124-133. These include major depressive disorder, bipolar disorder and adjustment disorder.

¹⁸³ Le Roux 2007:134-139. These include anorexia nervosa and bulimia.

¹⁸⁴ Le Roux 2007:139-142. These include autistic disorder and Asperger's disorder.

¹⁸⁵ Le Roux 2007:143-147.

maintaining discipline. The provision of adequate and appropriate social services is therefore necessary to address these issues. Failing to provide these services will impact not only on the child's realisation of the right to social services,¹⁸⁶ but also on the right to education. Unless these issues are addressed, learners will not be able to develop to their full potential and they will also find it difficult to develop proper relationships with others. Thus, there is a clear link between the provision of social services and the child's right to a basic education.

Section 8(5)(b) of the *Schools Act*¹⁸⁷ lays down that the code of conduct must provide for support measures or structures for counselling a learner involved in disciplinary proceedings.¹⁸⁸ However, in 2011, 78% of learners attended more than 20 000 school-fee-free schools. The question that thus arises is: Who is responsible for providing these services if the SGB is not allowed to charge school fees? In what follows, the respective roles of the state and the SGB will be discussed in relation to the obligation to provide these services. Both the state and SGBs have responsibilities in this regard. The level and enforceability of these obligations however differ.

2.2.4.1.5.1 Role of the state

In *Centre for Child Law and Others v Minister of Basic Education and Another*,¹⁸⁹ the Eastern Cape Department of Education, *inter alia*, had refused to declare the post establishments for 2013 for non-teaching staff, which included social workers and psychologists.¹⁹⁰ It argued that it was not the duty of the Member of the Executive Council (MEC) for Education to declare the post establishments for non-teaching staff.¹⁹¹ There was also a moratorium on the filling of vacant positions for non-teaching staff, despite the fact that these had been budgeted for. The court found that the moratorium was unlawful and it explicitly linked the provision of non-teaching staff with the realisation of the right to basic education. The court held:

¹⁸⁶ Constitution 1996:s 28(1)(c).

¹⁸⁷ 84/1996.

¹⁸⁸ See ch 2, par 8.1.8 herein for a discussion on the extent of the lack of available professionals to provide these services.

¹⁸⁹ As yet unreported case 1749/2012 (hereafter "*Centre for Child Law*"). Case heard on 3 July 2012 and judgment delivered on 26 July in the Eastern Cape High Court, Grahamstown.

¹⁹⁰ *Centre for Child Law*, Eastern Cape High Court case 1749/2012:par 20. In this instance, positions for social workers and psychologists in a school for disabled learners were not filled due to the moratorium.

¹⁹¹ It is not clear from the judgment whom they argued should then do the declaration if the MEC for Education was not responsible for it.

In any event, the imposition of a moratorium in such circumstances would ... place the respondents in breach of their constitutional obligations to respect, protect, promote and fulfill the fundamental right to basic education, in terms of s 7(2) of the Constitution.¹⁹²

Although there is no indication that schools are entitled to social-service providers, the Amended National Norms and Standards for School Funding ("the Norms and Standards") provide as follows:

- (a) schools must be supplied with an adequate number of educator and non-educator personnel;
- (b) such staff members must be equitably distributed according to the pedagogical requirements of the schools;
- (c) the cost of personnel establishments must also be sustainable within provincial budgets.¹⁹³

The Norms and Standards regarding the distribution of spending provide that the policy target for the distribution of personnel and non-personnel expenses should be aligned with the international standard "of the order of 80:20".¹⁹⁴ With regard to the ratio between teaching staff and non-teaching staff, the ratio should be targeted at 85:15.¹⁹⁵ The reasonableness of this provision warrants a separate investigation in view of the fact that non-teaching staff include, *inter alia*, cleaners, security guards, administrative personnel and professionals such as occupational therapists, physiotherapists, and social-service professionals.¹⁹⁶

Since learners' social problems impact negatively on school discipline, the provision of social services should be a priority and should be reflected in the number of professionals available. The availability of support measures and counselling structures is essential in order to deal with the root causes of misconduct.¹⁹⁷ Taking the high ratios of social-service professionals to learners into account, existing policy on the distribution of staff expenditure is open to constitutional challenge. Such a challenge might result in a finding that the current policy and/or its implementation are unconstitutional.¹⁹⁸

¹⁹² *Centre for Child Law*, Eastern Cape High Court case 1749/2012:par 33.

¹⁹³ GN 869/2006:s 20.

¹⁹⁴ GN 869/2006:s 22.

¹⁹⁵ GN 869/2006:s 23.

¹⁹⁶ Such an investigation does not fall within the scope of the present study.

¹⁹⁷ See also ch 3, par 5.6.1.2 herein.

¹⁹⁸ See ch 2, par 8.1.8 herein.

Two recent judgments support this viewpoint. In *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*,¹⁹⁹ the court was asked to declare the subsidy policy of the Western Cape Department of Education invalid, because the policy did not make provision for subsidies for children with severe and profound disabilities. The court eventually granted an order effectively obliging the Department to reconsider its budget allocations for the different groups of children and to take the needs of this very vulnerable group into account in its allocations.

In *National Association of Welfare Organisations and Non-governmental Organisations and Others v MEC for Social Development, Free State, and Others*,²⁰⁰ the court also had to determine the reasonableness of the Department of Social Development's allocation of funding. The court found that, although the non-governmental organisations (NGOs) had the ability to raise funds and provide the services, it was becoming increasingly difficult to do this, and, furthermore, that the services rendered by the NGOs was essentially the state's obligation. The court therefore found that the current policy did not take proper cognisance of this obligation. The policy regarding the allocation of subsidies to NGOs should, it said, result in a fair, equitable and transparent method to indicate what the NGOs were able to, and should, contribute. The court thus granted an order allowing the Department four months in which to redraft its policy, with due regard being had to the Department's primary responsibility to provide the services.

It is thus clear that the courts are hesitant to interfere in budget allocations, but are willing to evaluate the policies and allocations made to determine whether these are reasonable. Therefore, the courts would not readily make determinations on the number of social workers and psychologists who should be appointed to render social services in schools. However, they might be more inclined to determine whether the policies and the implementation of social-service delivery in schools are in line with the constitutional imperatives regarding children's right to social services, their right to education, and their best interests. If not, the courts might instruct the department concerned to redraft policies and ensure proper implementation.

The Norms and Standards²⁰¹ also refer to the distribution of staff according to the pedagogical needs of the school community. The allocation of social-service professionals should reflect the social needs of the area in which the school is situated, and due prioritisation of the allocation of social-service professionals should thus take place. The provision of social services would thus

¹⁹⁹ 2011 (5) SA 87 (WCC).

²⁰⁰ [2010] JOL 26056 (FB). See Ngwena & Pretorius 2012:81-115 for a comprehensive discussion of this case and its implications for substantive equality.

²⁰¹ GN 869/2006:s 20.

be indispensable for the optimisation and realisation of children's right to education in some communities, because the lack of professionals impacts on the ability to address the root causes of misconduct and the continuation of indiscipline in schools. There are currently no minimum norms and standards regarding the provision of social services for schools, and such provision will probably be delayed by the Department of Basic Education owing to budgetary implications.²⁰²

2.2.4.1.5.2 Role of the School Governing Body

Section 8(5)(b) of the *Schools Act*²⁰³ lays down that the code of conduct must provide for support measures or structures for counselling a learner involved in disciplinary proceedings. Apart from the fact that the provision of social services is, first and foremost, the responsibility of the state,²⁰⁴ there are a large number of schools situated in very poor communities and there are also large numbers of school-fee-free schools. Thus the burden of providing these specialised services would have to be carried by the state in any event.²⁰⁵ In addition, it should also be kept in mind that school-fee-paying schools might also not be in a position to afford these specialised services. The question thus arises whether SGBs have any role to play in the provision of these services.

Section 36(1) of the *Schools Act* stipulates the responsibility of the SGB with regard to the funding of schools²⁰⁶ and provides as follows:

A governing body of a public school must take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school.

Thus, although a school might be classified as a school-fee-free school, this does not absolve the SGB from its obligation to supplement the resources provided by the state. Yet, this might not be feasible in all communities.

²⁰² See Dwane & Isaacs 2011:30; Phakati 2012a:4 for details on the need to litigate to compel the Minister to draft minimum norms and standards for infrastructure.

²⁰³ 84/1996.

²⁰⁴ *National Association of Welfare Organisations and Non-governmental Organisations and Others v MEC for Social Development, Free State and Others* [2010] JOL 26056 (FB):par 44, 47.

²⁰⁵ See ch 2, par 2 and ch 3, par 6.4 herein for a discussion on the number of school-fee-free schools (more than 20 000) and problems related to this issue.

²⁰⁶ See *Federation of School Governing Bodies of SA and Others v MEC for the Department of Basic Education, Eastern Cape, and Others* [2011] 6 BLLR 616 (ECB):par 21 where the court emphasised this obligation of SGBs.

The aim of such supplementation is to improve the quality of education provided for every learner at the school. The SGB should thus exercise a reasonable discretion in the utilisation of this additional funding. Since social difficulties experienced by learners can impede their optimal development, the decisions taken by the SGB should reflect the impact of socio-economic realities on the learners of the school. The key criteria in determining the reasonableness of the SGB's decisions regarding the distribution of funding are the impact of the expense on the quality of education provided for learners and the fact that "all" the learners will benefit from it. For instance, it might be difficult to justify an expensive sports tour or sports facility which benefits only a small number of learners when there are a substantial number of learners with social problems who could benefit from the employment of a social-service professional at the school. In addition, the disruptive conduct of learners with social problems often infringes on other learners' right to education. Thus, if these learners' social problems are addressed, this would impact on their unacceptable behaviour and, eventually, there would be fewer disruptions. This will also positively impact on other learners' ability to exercise their right to education. Thus "all" learners would benefit from the provision of social services, thereby having a favourable impact on the availability of quality education.

2.2.4.2 Accessibility

Accessibility implies that educational institutions and programmes have to be accessible to everybody. Woolman and Bishop²⁰⁷ indicate that accessibility entails, on the one hand, that people are not unjustifiably turned away, and, on the other, that appropriate steps are taken to facilitate easier access for people who have been deprived of proper education or who have been excluded from education altogether. According to General Comment 13, accessibility has three overlapping dimensions, namely non-discrimination, physical accessibility and economic accessibility.

2.2.4.2.1 Non-discrimination

There are a number of examples where school rules or practices have an impact on access to education and overlap with discrimination issues. These include learner pregnancies, the wearing of religious symbols, age of admission to schools, assistance by the Department of Basic Education in re-enrolling a learner after expulsion, and refusal of admission to a school on the grounds of an unfavourable certificate of conduct. These issues and their relevance to discipline will be referred to below in the discussion on non-discrimination.²⁰⁸

²⁰⁷ Woolman & Bishop 2011:57-21.

²⁰⁸ See par 4 below.

2.2.4.2.2 The implications of financial accessibility of education for disciplinary measures

The realisation of the right to basic education should in principle not be compromised because of a lack of financial resources. States parties are therefore urged to provide free primary education and to eliminate, as far as possible, direct as well as indirect costs of education, such as transport costs and the cost of school uniforms.²⁰⁹ The right to basic education therefore entails that disciplinary measures, such as school dress rules, should not adversely impact on the financial accessibility of education.

Learners are often punished at school or sent home for not wearing the correct attire, despite the fact that they do not have a school uniform or adequate school uniforms.²¹⁰ For example, recently, a learner (a 10-year-old girl) was subjected to undignified punishment for failing to wear the right school uniform.²¹¹ She came from a poor family and had only one school dress. It had rained and her mother had been unable to clean and dry the clothes in time for her to wear them to school the next day. The mother had therefore told the girl to wear her school trousers to school. When she arrived at school, the educator was furious and forced her to take off the trousers and to spend the day at school wearing only her underwear. At the end of the day, because someone had misplaced the trousers, she had to go home in only her underwear. To add to her humiliation, she had to make use of public transport.

Wintertime is also a desperate time for many learners who do not have school jerseys or school blazers. They are often not allowed to wear other clothes and do not have the necessary resources to obtain the prescribed uniform. Furthermore, it can also be humiliating for learners to admit that they do not have the money to buy school clothes. Consequently, they stay at home rather than go to school.²¹²

In a recent case, a boy was found guilty of theft and sentenced to R2 000 or four months' imprisonment, suspended for five years. He was convicted of stealing a pair of school shoes. His single mother was unable to afford a pair of school shoes and the school refused to give him

²⁰⁹ CRC 1989:a 28(1); CESCRGC 11 1999:par 7.

²¹⁰ Bailey, Mtshali & Olifant 2012:1. See also Masitsa 2006:171, 174-175, who highlights the link between the lack of decent clothing and high dropout rates. Mgwangqa & Lawrence 2008:22-23 also link the lack of school uniforms with dropout rates. Further, refer to instances of public humiliation due to non-payment of school fees. See also Chigona & Chetty 2008:274 on the problems faced by pregnant schoolgirls who are forced to wear school uniforms during their pregnancies. Olifant 2012:2 observed an educator sending a learner home for not wearing school shoes.

²¹¹ Bailey, Mtshali & Olifant 2012:1; see also Wolhuter & Van Staden 2008:389-398; and see ch 2, par 6.1.3 herein which indicates that school uniforms are listed as one of the main issues in school discipline.

²¹² Mgwangqa & Lawrence 2008:22-23.

permission to wear his “takkies” to school. Thus, to avoid disciplinary action at school, he stole the shoes and ended up with a criminal record and the humiliation of the criminal process. In his effort to access education within the framework of the school rules, he had exacerbated the situation. Consequently, serious questions regarding social justice can be asked if one takes into account his reduced chances of employment owing to his criminal record.²¹³

Late-coming by learners and educators is often a huge problem in schools, and many learners are punished for this.²¹⁴ Although there are many instances where late-coming is due solely to a lack of commitment to comply with the rules,²¹⁵ the impact of a lack of transport, or resources to afford transport, should be taken into account in school rules and other measures designed to address late-coming.²¹⁶ Statistics on the number of learners who walk to school provide some insight into the extent of the problem. In 2010, 76% of learners walked to school. Of these, 42,7% walked to school in less than 15 minutes, 40,8% walked to school for between 15 and 30 minutes, 13,1% walked to school for between 31 and 60 minutes, 2,1% walked to school for between 61 and 90 minutes, and 0,9% walked to school for more than 90 minutes. If one considers that there were 12 195 509 learners in school in 2010, this means that more than 1,95 million learners walked to school for more than 30 minutes. This includes the more than 256 000 learners who took between 60 and 90 minutes to walk to school, and the almost 110 000 learners who took more than 90 minutes to walk to school.²¹⁷

Furthermore, learners often have to make use of public transport, which is very expensive and is not always very reliable or safe.²¹⁸ In some instances, transport is provided by the

²¹³ *Mercury* correspondent 2012:3. On appeal, the court set aside the sentence and referred the case back to the magistrate to consider correctional supervision as an alternative sentence.

²¹⁴ Wolhuter & Van Staden 2008:389-398; see also ch 2, par 2.4 herein which indicates that late-coming and absenteeism are some of the major disciplinary issues in schools; Govender & Laganparsad 2011:1, 5 – a principal was videotaped showing him kicking and beating a child with a hose, while shouting at the child for coming to school late; Olifant 2012:2 – educators were spotted at the school entrances shouting at learners who arrived late at school, with taxis arriving late, playing loud music and clearly exceeding the speed limit.

²¹⁵ Dwane & Isaacs 2011:30; Abramjee 2012:35. Members of an activist group monitored late-coming at one school and recorded that 700 learners and 7 educators arrived late on that particular morning.

²¹⁶ Mgwangqa & Lawrence 2008:22, 27; Masitsa 2006:171, 173, 177-178 and Mahlomaholo 2011:317 – both authors highlight the link between the high dropout rates of learners and walking long distances to school; Mngambi 2012:8 – children in a poor village walk five kilometres to school and back home again, very often without having anything to eat.

²¹⁷ DBE 2012b:14.

²¹⁸ Mashala 2011:15. Learners in rural areas, in particular, are affected by the lack of reliable transport and are often left stranded and unsafe on the side of roads; Mgwatyu 2011:5 – a taxi driver was arrested for overloading the vehicle. He had loaded 34 high-school learners in a vehicle licensed to carry only 13 people. In addition, the driver was drunk. In another incident, a learner died and 12 others were injured due to speeding. Owing to the high prevalence of this type of conduct, there is currently an intensified programme being conducted by traffic officials to focus on learner transport.

Department of Basic Education, but, owing to corruption, funding is currently a problem in, for instance, the Eastern Cape.²¹⁹

The right to education therefore requires that disciplinary measures take due cognisance of learners' access to financial resources when it comes to complying with school rules. Decision-makers should consider the impact of financial constraints on learners' ability to comply with school rules on, for instance, dress codes and rules related to order, such as the time at which school starts. School rules should reasonably accommodate exemptions and should be flexible enough to accommodate onerous socio-economic factors, such as living far away from school and not having affordable and reliable transport. The financial realities of learners' lived worlds should be reflected in the disciplinary measures adopted in a school and prescribed in legislation.

2.2.4.2.3 Physical accessibility

Education should be within safe and reasonable geographical reach or be accessible through technology. Large numbers of learners are exposed to the risk of physical harm on their way to school, at school or on their way home.²²⁰ The right to education thus dictates that disciplinary measures should respect, protect, promote and fulfil learners' physical access to school. The extent of school-based violence and its impact on learner absenteeism and learner dropout rates were highlighted in chapter 2. In addition, the impact of learners having to travel long distances and of high transport costs were indicated above. These issues will therefore not be dealt with further here.

2.2.4.2.4 Responsibility to promote access to social services

Although a certain level of support can be provided by educators, some children need professional assistance.²²¹ An example of the impact of the non-delivery of social services to a troubled learner can be found in *Jacobs v Chairman, Governing Body, Rhodes High School, and Others*.²²² This case dealt primarily with a civil claim by an educator against the Department and the principal of a school for serious injuries and psychological trauma after she was

²¹⁹ Fengu 2011:3. Fengu 2011:2 – the lack of transport is reported to be due to service providers refusing to transport learners because they are not paid. Children thus have to walk long distances to school, become tired and are afraid of being mugged on their way to school.

²²⁰ See ch 2, par 5.1 herein.

²²¹ An example of the specialised support needed is that of teenage mothers returning to school after they have given birth and having to deal with marginalisation, intimidation and discrimination, and to cope with the pressures of being a mother and a learner. Instead, schools often adopt a punitive approach to these learners, claiming that they should face the consequences of their conduct. See Chigona & Chetty 2008:269.

²²² 2011 (1) SA 160 (WCC) – judgment confirmed in the unreported Supreme Court of Appeal case of *Long and Another v Jacobs* (145/11) [2012] ZASCA 58 (2 April 2012).

attacked with a hammer by a learner at the school. The court awarded R1,3 million in compensation. However, her claim was reduced by 20% owing to her own negligence in dealing with the situation and to her failure to seek professional assistance timeously for the learner.

For purposes of this discussion, issues relevant to the provision of social services and support measures will be considered. The claim was based, firstly, on the systemic failure over time to address the learner's social problems, and, secondly, on the conduct of the HoD and principal on the day of the incident. A third possible cause of action was that the nature of the punishments imposed on the learner over time had led to the assault on the educator. Thus the plaintiff alleged that she had suffered damages because of the way in which disciplinary measures were enforced against the learner. In this particular case, there was no evidence establishing a causal link between the previous punishments and the eventual assault.²²³

However, there is evidence that corporal punishment instils more anger and aggression in children.²²⁴ There is thus the likelihood of successfully claiming damages suffered owing to the impact of the school's disciplinary measures on the learner who has subsequently caused harm to another. In what follows, the focus of the discussion will be the systemic failure to provide professional services for the learner.

The educator in question as well as the HoD were aware of the social and emotional problems of the learner. At some point, the HoD referred the learner to the social worker at the school, but did not provide her with any details. The services were terminated at the request of the learner after only five sessions. In determining liability, the court found that, although the Department of Education severely lacked the resources to provide social services, there were other service providers in close proximity to the school. The court therefore held that the school was obliged to access these services and/or to assist the learner to access these services.²²⁵

Since education is sometimes only really available and accessible to learners after their social needs have been addressed, disciplinary measures should promote and enhance access to

²²³ *Jacobs v Chairman, Governing Body, Rhodes High School, and Others* 2011 (1) SA 160 (WCC):par 30.

²²⁴ See ch 2, par 7.2 herein.

²²⁵ There were clear indications that this child was in need of care. In terms of the new *Children's Act*, educators are obliged to report certain instances of child abuse and neglect. They may also report instances where they are of the view that the child is in need of care – see *Children's Act 38/2005*:s 110, 150. In terms of the new legislation, a strong case could have been made out that the educators were obliged to report the case to the Department of Social Services, because there were indications that the mother was deliberately neglected the child. However, none of the parties raised this legislative requirement. It was, however, abundantly clear that the child was in need of care and met several of the criteria laid down for a child in need of care.

these services. Schools and the Department therefore have a responsibility to build networks and to ensure that the limited resources available to NGOs and state departments are optimised and made accessible to all learners.

2.2.4.3 Acceptability

General Comment 13²²⁶ of the CESCR provides that acceptability of education means the following:

The form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13(1) [of the ICESCR] and subminimum educational standards as may be approved by the State (see art 13(3)²²⁷ and (4)²²⁸) [of the ICESCR].

Disciplinary measures should thus be acceptable and culturally appropriate. Moreover, the overall approach to discipline should be aligned with the aims of education before discipline can be regarded as acceptable. Some of the aspects relevant to the acceptability of disciplinary measures will be discussed below.

2.2.4.3.1 Acceptability of disciplinary measures

In view of the aims of education, all disciplinary measures (legislation, policy, and implementation strategies) should be regarded as teaching methods.²²⁹ All disciplinary measures should be acceptable and aligned with the goals of education. The standard used to determine whether education and, for purposes of this study disciplinary measures are acceptable, is that they must be:

directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.²³⁰

Acceptable education and disciplinary measures include the development of basic life skills as defined above.²³¹ Acceptability of education has an explicit quality dimension.²³² If learners do

²²⁶ CESCRGC 13 1999:par 6(c).

²²⁷ This refers to parents' right to choose suitable education for their children.

²²⁸ This refers to the right to establish independent educational institutions.

²²⁹ See discussion above in par 2.1 on the aims of education and the expanded role of human rights education.

²³⁰ UDHR 1948:a 26(2); see also UNESCO 1960:a 5(1)(a) (Convention against Discrimination in Education – adopted by the General Conference at its 11th Session in Paris on 14 December 1960), ICESCR 1966:a 13(1); CRC 1989:a 29(1)(b); ACRWC 1990:11(2)(b).

²³¹ See par 2.1.2 above; CRCGC 1 2001:par 9.

not receive education of an acceptable academic standard, this would constitute an infringement of their right to education. In the same vein, the right to education requires that all disciplinary measures should contribute to, *inter alia*, the following skills of learners: balanced decision-making; non-violent conflict resolution; the ability to build and maintain relationships; critical thinking; and problem solving. Disciplinary measures which do not contribute to the attainment of these skills are not in line with the acceptability requirement contained in the right to education. A lack of active steps to align disciplinary measures with these dimensions of the right to education is unlawful and a failure to promote human rights and the best interests of the child.²³³

It is conceded that it will be difficult to establish exact standards to determine whether a child has reached an age-appropriate and acceptable level of basic skills. Prescriptions as to what should be included in disciplinary measures to ensure attainment of these basic skills also need further refinement. States parties should therefore pay special attention to the development of these standards in policy and legislation. However, in some instances, the unacceptability of disciplinary measures is glaring and should be addressed as a matter of urgency. Examples of obvious non-compliance would be the continued use of corporal punishment and the lack of a developmental focus in formal disciplinary hearings.

At present, the impact of an absence of discipline as well as of inappropriate disciplinary measures on a learner's right to education or on his or her best interests are apparently not a priority in South Africa. Since the abolition of corporal punishment, litigation pertaining to disciplinary issues has thus far focused only on other rights.²³⁴ Despite the knowledge that corporal punishment is still unlawfully administered in many schools, there is no real urgency in the actions taken, if any, by the Department to stop this practice.²³⁵ In addition, the overemphasis of the rights of transgressing learners as opposed to those who act in a socially responsible manner comes to mind, something that was stressed together with all the other issues highlighted in chapter 3 to indicate a lack of focus on the best interests of the child.²³⁶

²³² CESCR11 1999:par 6.

²³³ See also UNWPP 1 2006:16. Par 16 provides:

Goal 6 of the Dakar Framework is to improve all aspects of the quality of education, ensuring their excellence so that recognized and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills. It provides the basis for a concept of quality education that goes beyond reading, writing and arithmetic, and which, while necessarily dynamic, is strongly rights-based and entails democratic citizenship, values and solidarity as important outcomes.

²³⁴ See par 1 above for a list of rights and case law.

²³⁵ See ch 2, par 8.1.2 herein.

²³⁶ See ch 3, par 6 herein.

2.2.4.3.2 Acceptability of support measures and structures for counselling

Case law provides some guidance on the level of acceptability of support measures and structures for counselling within the disciplinary context. In *Jacobs v Chairman, Governing Body, Rhodes High School, and Others*,²³⁷ the importance of appropriate instructions to professionals was highlighted and it was considered not sufficient merely to “chat” to the learner. These services must be focused on determining the root causes of misconduct, and these should be addressed accordingly.

Another example of the lack of available and acceptable social services is to be found in *Centre for Child Law and Others v MEC for Education, Gauteng, and Others*.²³⁸ In this case, children were sent to a school of industry.²³⁹ Apart from the appalling state of the residential buildings, there were no social or psychological services available and the court had to order the Department to rectify the situation. The court found that the children had been removed from their parents with the aim of developing them to their best advantage through skilled interventions. The provision of psychological and social support is a critical element in the rehabilitation and development of such children. The *Children’s Act*²⁴⁰ provides for different types of child and youth care centres and prescribes that every child and youth care centre should provide appropriate therapeutic programmes for children who have been removed from their families and placed in such centres. This highlights the need to develop therapeutic programmes for the specific needs of the different groups of learners. The best interests of the child further require that the therapy for every child should also be individualised.²⁴¹

In *Anna Jonker v The Manager, Gali Thembani/JJ Serfontein School*,²⁴² the court emphasised exactly this point and held that children who are in a child and youth care centre intended for dealing with children experiencing behavioural, psychological and emotional difficulties cannot be removed to a child and youth care centre designed as a secure-care facility without an order to this effect by the Children’s Court. Furthermore, if they are removed to the new physical facility designated as a secure-care facility, this can only be done after the secure-care facility²⁴³

²³⁷ 2011 (1) SA 160 (WCC) – judgment confirmed in unreported Supreme Court of Appeal case of *Long and Another v Jacobs* (145/11) [2012] ZASCA 58 (2 April 2012).

²³⁸ 2008 (1) SA 223 (T).

²³⁹ Now known as child and youth care centres for children with behavioural, psychological and emotional difficulties – see *Children’s Act* 38/2005:s 191(2)(i), 196(1)(d). These children are not necessarily in conflict with the law.

²⁴⁰ 38/2005:s 191(2).

²⁴¹ See ch 4, par 4.2.3 herein.

²⁴² Unreported case 94/2011 in the Grahamstown High Court, Eastern Cape Division.

²⁴³ A child and youth care centre designed to be a secure-care facility is aimed at children awaiting trial and children sentenced in terms of the *Child Justice Act* 75/2008.

has been appropriately reprogrammed for the needs of children with behavioural, psychological and emotional difficulties. It would thus be unacceptable to accommodate children with behavioural, psychological and emotional difficulties only with children who have been sentenced to a secure-care facility. There is thus a responsibility to ensure that support measures and structures for counselling are appropriate to the needs of different children. Section 8(5)(b) of the *Schools Act*²⁴⁴ provides that the code of conduct should make provision for support measures and structures for counselling services for learners who are involved in formal disciplinary proceedings. SGBs therefore have to include appropriate measures in the code of conduct to meet the needs of the learners in the particular school community. The provisions in an affluent school community could, for instance, stipulate that learners will be obliged to access such services at their own expense, whereas such a provision would not be acceptable in a poor community.

2.2.4.3.3 Acceptability of legislation and policies impacting on discipline

Since the right to education includes the holistic development of the child and respect for human rights, legislation and policy should respect, protect, promote and fulfil these aims of education and they must be aligned accordingly. Legislation and policy which have an impact on discipline must therefore be aligned with these aims. The provisions regarding age-grade norms, admission of learners of a specific age and the repetition of grades warrant an investigation into their acceptability. The content of the provisions as well as a lack of proper implementation have resulted in numerous overage learners in classes, as well as huge age differentials between the oldest and youngest learners in a particular grade. The impact of overage and underage learners and of the age differentials on discipline and dropout rates was discussed in chapters 2 and 3. The positive impact of a stricter application of these provisions on discipline and academic performance was also highlighted.²⁴⁵

These provisions and/or the way they are implemented clearly have a detrimental effect on the teaching and learning environment. Therefore, children are unable to develop to their full potential and the provisions are thus contrary to their best interests. Consequently, these provisions should be re-evaluated and proper implementation mechanisms should be put in place to ensure that the number of overage and underage learners is properly addressed. Failure to do this will result in the continuation of unacceptable teaching and learning environments in which it is difficult to instil discipline. The impact of these provisions on the optimal development of children is not in their best interests and should be addressed.

²⁴⁴ 84/1996.

²⁴⁵ See ch 2, par 8.4.6, 8.4.7 and ch 3, par 6.11 herein.

2.2.4.4 Adaptability

General Comment 13²⁴⁶ of the CESCR provides that adaptability means that:

education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

Woolman and Bishop²⁴⁷ aver that adaptability is concerned with the “content of the curriculum and the means of deploying that content”. Therefore, according to them, due regard should be had to new developments such as technology. Such a focus is, however, very narrow and does not reflect a conscious link between the adaptability of education and discipline.

In terms of a broader focus, adaptability requires that the curriculum and the school environment should adjust to accommodate diversity and also be in line with the requirements of non-discrimination. If the CESCR’s criteria are applied to the context of school discipline, it would mean that disciplinary measures should be flexible and adaptable to address the needs of different children, different societies and different school communities. A uniform approach to discipline in the interest of consistency would therefore not be acceptable in all circumstances. A flexible approach is also more in line with the best-interests-of-the-child concept, where the needs of every child are assessed and acted upon.²⁴⁸ *Antonie v Governing Body, Settlers High School, and Others*²⁴⁹ and *MEC for Education, KwaZulu-Natal, and Others v Pillay*²⁵⁰ illustrate how the changed representation of different religious and cultural groups can lead to the need to adapt school policies.

Admission policies, policies on the repetition of grades, and policies dealing with overage and underage learners have a profound impact on the composition of learners in a class. Adaptability in education requires a re-evaluation of these policies and practices, because they have a negative impact on discipline and other educational outcomes.²⁵¹

²⁴⁶ CESCRGC 13 1999:par 6(c).

²⁴⁷ 2011:57-32.

²⁴⁸ See ch 4, par 4.2.3 herein.

²⁴⁹ 2002 (4) SA 738 (C); see ch 3, par 5.5.5.2 herein.

²⁵⁰ 2008 (1) SA 474 (CC); see also ch 3, par 5.5.1, 5.5.4, 5.5.5.2, 5.5.5.3, 5.5.5.4 herein.

²⁵¹ See herein: ch 2, par 8.1.6 (overcrowded classed), 8.4.6 (overage learners), 8.4.7 (underage learners); ch 3, par 6.11.

An example of an extremely inflexible approach to discipline can be found in the zero-tolerance policies of numerous states in the United States of America.²⁵² These policies entail the application of predetermined consequences, normally punitive in nature, for specified infractions. The punishment therefore follows automatically after the learner has been found guilty of the misconduct. Thus no regard is had to the gravity of the behaviour, mitigating circumstances or the situational context. The American Psychological Association Zero Tolerance Task Force examined existing research results on the impact of the zero-tolerance policy and found it to be counter-productive with several negative consequences.²⁵³

The zero-tolerance policy is an extreme disciplinary measure and is not applied in all schools in America or to the same extent in other countries. It might thus seem to be the only obvious inflexible disciplinary measure. Yet, there are also other less extreme examples of the application of an inflexible approach to the enforcement of discipline. For instance, schools may implement a merit and demerit system. In terms of this system, if a learner accumulates a specific number of demerits, he or she must immediately report for detention. Other examples would be rules that learners automatically receive no marks for an assignment if it is handed in late, that the school gates close at a specific time and that no late-comers will be admitted to school for the day, and that pregnant learners may not return to school before a specific period has lapsed.²⁵⁴ These are measures applied in many schools. However, the adaptability of education provision requires a re-examination of such disciplinary measures to determine whether they are unduly inflexible and infringe on the best interests of children.

The impact of other social realities such as a lack of values, unfavourable socio-economic circumstances, a lack of vision and hope for the future, and school-based violence, to name but a few, were discussed in chapter 2. Disciplinary measures, in all their dimensions, should take account of these realities and should be flexible enough to adapt to these situations. Disciplinary measures should be part of the solution to these problems, and not exacerbate them by being too rigid and too slow to respond to social changes and demands.

²⁵² American Psychological Association Zero Tolerance Task Force 2008:852-862.

²⁵³ American Psychological Association Zero Tolerance Task Force 2008:852-862.

²⁵⁴ *Welkom High School and Another v Head, Department of Education, Free State Province, and Another* 2011 (4) SA 531 (FB). The pregnancy policies in the two cases before the court prescribed that the pregnant learners could only return to school after a specific time period had elapsed. The court found the application of predetermined outcomes in policies unlawful, because such outcomes do not make adequate provision for the needs of individual children. See the detailed discussion on teenage pregnancies in par 4.3.3 below. See also the discussion below in par 4.3.5 on equality and the distinction between learners above and below 15 years of age.

In conclusion, the aims of education are to develop the child holistically and to teach the child to act in a socially responsible manner. Further, disciplinary measures are required to contribute to these aims. Human rights education, in all its dimensions, therefore plays a very important role in achieving these goals. General Comment 1 of the Committee on the Rights of the Child²⁵⁵ acknowledges that the provisions of article 29 of the CRC regarding the aims of education are very wide, resulting in states parties unduly neglecting the explicit incorporation of these aims and values in legislation and/or administrative directives. States parties are thus cautioned to endorse these aims and values in national law and policy, because it seems unlikely that the relevant principles are being, or will be, used to genuinely inform educational policies without formal endorsement.

General Comment 13, on the other hand, provides guidance on the need to align disciplinary measures with the standard set by the four As. Disciplinary measures should therefore be aligned with the availability, accessibility, acceptability and adaptability standards of education.

3. RIGHT TO DIGNITY

Human dignity plays an important role in South African jurisprudence and is explicitly linked to education and discipline in the CRC. To define human dignity is not an easy task and its multidimensionality will be highlighted in the discussion that follows. The different dimensions of human dignity will be explained and applied to the school discipline context. Furthermore, the different dimensions of the right to dignity will be used to inform the best-interests concept and to identify factors that should be taken into account in any disciplinary measures. In giving content to constitutional rights, reference should be made to constitutional values. However, dignity as a value will not be discussed separately.²⁵⁶

3.1 Dignity and international instruments related to discipline

As early as 1959, the United Nations Declaration on the Rights of the Child linked development with dignity. It provided that the development of the child should be in conditions of "freedom and dignity."²⁵⁷ Principle 2 stipulates:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the

²⁵⁵ CRCGC 1 2001:par 17.

²⁵⁶ See ch 1, par 4.1.3 herein.

²⁵⁷ UN 1959; Freeman 2007:15; Prest & Wildblood 2005:129.

enactment of law for this purpose, the best interests of the child shall be the paramount consideration.

The ICESCR²⁵⁸ provides that education shall, *inter alia*, be directed to the development of a “sense of dignity”. Article 28(2) of the CRC, which focuses primarily on the provision of education, explicitly links the right to dignity and school discipline.²⁵⁹ This highlights the state’s obligation to ensure that discipline is administered in accordance with the child’s dignity. Non-compliance with this provision thus not only infringes on the child’s right to dignity, but also on the right to be provided with education.

The right to dignity is also linked to the aims of education in General Comment 1 on the right to education of the Committee on the Rights of the Child.²⁶⁰ According to this General Comment, the aims of education are to promote, support and protect the dignity and equal, inalienable rights of children. The five aims of education stipulated in article 29(1) of the CRC are directly linked to the realisation of the human dignity and other rights of the child.²⁶¹ The General Comment links the aims of education to specific dimensions of the right to dignity and provides as follows:

The aims are: the holistic development of the full potential of the child (29(1)(a)), including development of respect for human rights (29(1)(b)), an enhanced sense of identity and affiliation (29(1)(c)), and his or her socialisation and interaction with others (29(1)(d)) and with the environment (29(1)(e)).

The child’s right to human dignity is realised by “taking into account the child’s special developmental needs and diverse evolving capacities”.²⁶² This is clearly in line with the different dimensions of the best interests of the child discussed in chapter 4.²⁶³

General Comment 8 of the Committee on the Rights of the Child on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment highlights dignity as the “fundamental guiding principle of international human rights law”.²⁶⁴ With regard to discipline, the Committee found that learners’ human dignity and physical integrity are

²⁵⁸ ICESCR 1966:a 13(1); see also European Union 2000:a 1; ACHPR 1981:a 5.

²⁵⁹ See par 2.2.1 above for the full quote of the article.

²⁶⁰ CRCGC 1 2001:par 1.

²⁶¹ CRCGC 8 2006:par 26. CRC 1989:a 28(2), 39; ACRWC 1990:a 11(5).

²⁶² CRCGC 1 2001:par 1.

²⁶³ See ch 4, par 4 herein.

²⁶⁴ CRCGC 8 2006:par 16.

affected by school discipline and that children are entitled to protection in this regard. Children's vulnerability and special needs are highlighted. Therefore it provides:

The distinct nature of children, their initial dependent and developmental state, their unique human potential as well as their vulnerability, all demand the need for more, rather than less, legal and other protection from all forms of violence.²⁶⁵

3.2 Dignity in South African law

Dignity has a distinct, dual role in the South African Constitution. It is enshrined in the Constitution not only as a founding value²⁶⁶ upon which a democratic society must be built, but also as a substantive and enforceable right.²⁶⁷ In addition, it plays an important role in the limitation of rights in terms of section 36 of the Constitution. Dignity further plays an important role in South African jurisprudence and several reported cases have given content to it. Woolman²⁶⁸ avers that the South African case law matches the German Federal Constitutional Court's rich jurisprudence on dignity.

Dignity is regarded as a cornerstone of the South African Constitution.²⁶⁹ Although rights cannot be prioritised, Chaskalson P held as follows in *S v Makwanyane and Another*²⁷⁰:

The right to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.

Apart from being a right and a founding value, dignity is also often used in conjunction with other rights and plays an interpretative role. If an infringement of more than one right occurs in a specific situation, and dignity is one of the infringed rights, it rather plays an interpretative role. This approach is favoured by some authors, because it underlines the foundational value of dignity, encourages a "purposive interpretation of the content of the right more directly implicated" and "avoids the potential pitfalls of the most expansive interpretation" of the right to

²⁶⁵ CRCGC 8 2006:par 21.

²⁶⁶ Constitution:s 1, 7(1), 36(1), 39(1). Section 1 provides that dignity is one of the founding values of the Republic of South Africa. This important provision can be amended only by way of a 75% majority of the National Assembly; see also Davis 1999:398-399; Liebenberg 2005:3; Cheadle, Davis & Haysom 2002:129; Cheadle, Davis & Haysom 2010:5-2–5.3.

²⁶⁷ Constitution:s 10.

²⁶⁸ 2005:36-1.

²⁶⁹ Constitution:s 7(1), 10, 36(1), 39(1); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC):par 28.

²⁷⁰ 1995 (2) SACR 1 (CC):par 144.

dignity.²⁷¹ This approach prevents the right to dignity from being spread so thin that it eventually loses its meaning and impact. Therefore, courts rather focus on the other rights normally associated with the specific issue at hand. Dignity as a value will then be used to give content to these rights. Cowen²⁷² argues that dignity “for practical purposes serves as a flexible and residual right”. Although dignity is often used by the courts to interpret other constitutional values, it is regarded as the “one pristine value that does not require interpretative assistance from other values”.²⁷³

In analysing the right to dignity across different jurisdictions, Cheadle, Davis and Haysom²⁷⁴ found very little difference in the interpretation thereof, despite the fact that dignity is not entrenched in all the constitutions examined. The International Covenant on Civil and Political Rights (ICCPR)²⁷⁵ provides that fundamental rights “derive from the inherent dignity of the human person”. This is equally true in South African jurisprudence, where fundamental rights, such as the right to life, to equality and not to be subjected to cruel, inhuman and degrading treatment or punishment, are all closely linked to human dignity.²⁷⁶

²⁷¹ Cheadle, Davis & Haysom 2002:134. For example, if a learner or educator is assaulted, the right not to be subjected to cruel, inhuman or degrading treatment or punishment as well as the right to dignity are violated. In this instance, both rights will be used to determine whether the conduct is unconstitutional. The right to dignity of the victim of the assault can be protected independently, but the courts often confine the role of dignity to interpreting the right more specifically related to the infringement. Dignity is then used to inform the other right, and the meaning of other rights is enriched by the “idea of protecting human worth”. In this example, the court might focus on the prohibition against cruel, inhuman and degrading treatment, and dignity would then inform and give content to the prohibition against cruel, inhuman and degrading treatment or punishment. See also Cowen 2001:47; Rautenbach & Malherbe 2004:332-333; Cheadle, Davis & Haysom 2010:5-10.

²⁷² Cowen 2001:47.

²⁷³ Cheadle, Davis & Haysom 2002:125; Cheadle, Davis & Haysom 2010:5-7-5-8; see also *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC):860. See Davis 1999:412-413 who, however, warns that the courts are at risk of undermining the impact of dignity through its very wide interpretation and application. He contends that the concept runs the risk of becoming too vague if the content and scope are not carefully guarded.

²⁷⁴ Cheadle, Davis & Haysom 2002:125-7; Cheadle, Davis & Haysom 2010:5-3-5-4; Rautenbach & Malherbe 2004:332.

²⁷⁵ ICCPR 1966: preamble; see also Schachter 1983:853.

²⁷⁶ Cheadle, Davis & Haysom 2002:125. See also: *S v Makwanyane and Another* 1995 (2) SACR 1 (CC):par 328; Liebenberg 2005:9. Dignity has played an important role in several other branches of constitutional law and in the application of several other rights – see *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC):17-18 (right to vote); *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) – (death penalty – right to life); *S v Williams and Others* 1995 (3) SA 632 (CC):par 92 (corporal punishment – right to personal security); *S v Coetzee* 1997 (3) SA 527 (CC):par 121 (right to be presumed innocent); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC):par 30 (sodomy – right to equality and privacy); *S v Manamela* 2000 (3) SA 1 (CC):par 40 (right to be presumed innocent); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC):par 12, 17, 40 (corporal punishment in schools – right to personal freedom and security); *S v Dodo* 2001 (1) SACR 594 (CC):par 34 (punishment – right to freedom and security of the person.); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 CC – (socio-economic right – right to housing); and

Dignity is a complex concept with various functions. The right to dignity has no precisely definable content and cannot be captured in precise terms. Justice Brennan in the United States of America also alluded to the indeterminate nature of dignity and stated that “the demands of human dignity will never cease to evolve”.²⁷⁷ Schachter²⁷⁸ points out that there is no explicit definition of dignity and that “its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors”.²⁷⁹

Woolman²⁸⁰ summarises this complexity by indicating that dignity operates as a “first order rule, a second order rule, a correlative right, a value and a grundnorm”. This illustrates the various dimensions of the concept, and would be impossible to address all of these in this discussion. This discussion will therefore focus primarily on the working definitions of dignity and their application to school discipline.

In conclusion, dignity is a complex concept with a dual role and with no precisely determined content, which renders it a flexible and indeterminate concept. It is substantially foundational in nature and is also used to interpret other rights. Despite all these complexities, it is interpreted similarly across different jurisdictions. In what follows, some dimensions of the content of this concept will be discussed and applied to the school discipline context. It should, however, be noted that the different dimensions cannot be discussed in watertight compartments and that there will inevitably be overlapping.

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC):par 12, 17, 40 (right to culture and religion).

²⁷⁷ Cheadle, Davis & Haysom 2002:128; see also Cowen 2001:42.

²⁷⁸ 1983:849.

²⁷⁹ The dignity concept is strongly connected to the *ubuntu* concept of dignity. *Ubuntu* is an indigenous concept and is acknowledged as one of the constitutional values – Rhoederer 2005:13-8. The relationship between the concepts is very important in the South African context. Its importance was highlighted in *S v Makwanyane and Another* 1995 (2) SACR 1 (CC), where the court gave a brief overview of the concept and held:

Generally, *ubuntu* translates as *humanness*. In its most fundamental sense, it translates as *personhood* and morality. Metaphorically, it expresses itself as *umuntu ngumuntu ngabatu*, describing the significance of group solidarity and survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity making a shift from confrontation to conciliation.

See also Broodryk 2002; Metz 2007:331-335; Metz 2007a:369-387.

²⁸⁰ 2005:36-4.

3.3 Content of the right to dignity

3.3.1 Inherent nature of the right to dignity

Dignity cannot be earned, acquired or lost. Dignity is about acknowledging the intrinsic worth of human beings.²⁸¹ The Constitution guarantees the inherent dignity of all people, “thus asserting that respect for human dignity, and all that flows from it, is an attribute of life itself, and not a privilege granted by the state”.²⁸² Woolman²⁸³ quotes Kant as follows in this regard:

[A] human being regarded as a person ... is exalted above any price; for as a person ... he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in itself, that is, he possesses a *dignity* (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of *equality* with them.

Thus every child has inherent dignity which should be respected, protected, promoted and fulfilled when disciplined. In prohibiting certain disciplinary actions, such as corporal punishment, the child’s inherent dignity is respected and protected. The question, however, arises whether this is enough to promote the inherent dignity of the child, and, if not, what positive actions should be taken to promote the dignity of the child in the process of enforcing discipline.

The lack of training of educators on alternatives to corporal punishment²⁸⁴ and the lack of active steps to address the continued use of corporal punishment²⁸⁵ and other forms of school-based violence²⁸⁶ have been highlighted. The absence of active steps to address these issues in relation to disciplinary measures constitutes an infringement of the dignity of learners, because it wilfully disregards their inner worth as human beings who should be protected from inhuman and degrading treatment. Inaction signals to children that they are not worthy of the state’s protection.

3.3.2 Dignity entails protection from inhuman conditions, treatment or punishment

The right not to be subjected to cruel, inhuman and degrading treatment²⁸⁷ or punishment is closely linked with dignity. In *S v Williams and Others*,²⁸⁸ the court found as follows:

²⁸¹ Liebenberg 2005:6; Schachter 1983:853; Raath 2007:159-191.

²⁸² Chaskalson 2000:196; see also *S v Dodo* 2001 (1) SACR 594 (CC):par 38.

²⁸³ 2005:36-10 fn 2.

²⁸⁴ See ch 2, par 8.1.4 herein.

²⁸⁵ See ch 2, par 8.1.2 herein.

²⁸⁶ See ch 2, par 5.1 herein.

²⁸⁷ Constitution 1996:s 12(1)(e).

The Constitution clearly places a very high premium on human dignity and the protection against punishments that are cruel, inhuman or degrading; very stringent requirements would have to be met by the State before these rights can be limited ... [T]here is no place for brutal or dehumanising treatment and punishment. The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be the foremost in upholding those values which are the guiding light of civilised societies.

Inhuman punishment and the lack of action against it have already been mentioned. Other aspects related to this point are that inaction points to the state's failure to act as a role model in respecting, protecting, promoting and fulfilling the dignity of learners and society at large.²⁸⁹ To move away from a violent past calls for active steps to ensure that new generations are not exposed to violence and other forms of inhuman and degrading treatment and punishment in schools. This should accordingly be reflected in all disciplinary measures.

Nobody should be treated as a non-human. Langa J held in *S v Makwanyane and Another*²⁹⁰ that "the test of our commitment to a culture of rights lies in our ability to respect not only the rights of the weakest but also of the worst among us". In the same judgment, with reference to abolition of the death penalty, O'Regan J quoted Brennan J, who held:

The true significance of these punishments is that they treat members of the human race as non-humans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the clause that even the vilest criminal remains a human being possessed of common human dignity.²⁹¹

Therefore, it is important to note that this dimension of dignity is not only related to punishment, but also to treatment and conditions. The way children are treated in general and the approach to discipline in a school can be degrading and an affront to their dignity. The impact on learners' ability to learn in a hostile and stressful environment was highlighted above in the context of the availability of a safe environment for education.²⁹² This includes, for instance, a disrespectful way of talking to learners or educators, belittlement and sarcasm. The school environment

²⁸⁸ 1995 (3) SA 632 (CC).

²⁸⁹ See the discussion below in par 3.3.7 on collective dignity.

²⁹⁰ 1995 (2) SACR 1 (CC); par 229; see also Cheadle, Davis & Haysom 2010:5-7.

²⁹¹ *S v Makwanyane and Another* 1995 (2) SACR 1 (CC); par 328.

²⁹² See ch 2, par 8.1 and 8.3 herein for a discussion on disciplinary problems caused by the state and educators. See also ch 6 herein on the different approaches to discipline.

indicates the level of respect for, and the protection and promotion of, human dignity. These steps include measures to address school-based violence and bullying. Discipline should contribute to the child's feeling of, *inter alia*, safety, security and belonging and should not leave the child fearful, anxious, intimidated or overwhelmed.

Learners who exhibit serious behaviour problems can easily be labelled in the school environment. Disciplinary measures should therefore not only ensure that these learners receive additional support and counselling, but also that the dignity of all the affected learners is restored. The impact of a lack of resources has been highlighted as a factor contributing to ill-discipline.²⁹³ Lack of resources is especially degrading when learners fight over textbooks and chairs and are eventually punished for their conduct.

3.3.3 Dignity entails equal worth and value

Cheadle, Davis and Haysom refer to the work of Dworkin and conclude that dignity entails the recognition of the equal worth of every individual, and that everyone therefore has a right to be treated "with equal respect and equal concern".²⁹⁴

In the Canadian case of *Law v Canada (Minister of Employment and Immigration)*,²⁹⁵ the court ruled that dignity can be harmed on an individual basis or as part of a group if physical or psychological integrity is impaired. The court held:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society.²⁹⁶

In *Christian Education South Africa v Minister of Education*,²⁹⁷ the Constitutional Court outlawed the use of corporal punishment in private schools which was based on religious grounds,

²⁹³ See ch 2, par 8.1.7 herein.

²⁹⁴ Cheadle, Davis & Haysom 2002:132; see also Cheadle Davis & Haysom 2010:5-9; Davis 1999:413.

²⁹⁵ [1999] 1 SCR 497; 170 DLR (4th) 1.

²⁹⁶ *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497; 170 DLR (4th) 1:par 53.

²⁹⁷ 2000 (4) SA 757 (CC).

holding that all children are entitled to equal protection of their human dignity and that their parents' religious convictions do not provide justification for the limitation of their dignity.

Marginalised groups and individual learners include victims of bullying, sexual violence, gang activities and sexual harassment, as well as members of minority groups.²⁹⁸ The SAHRC report on school-based violence highlights the fact that members of these groups often run the risk of having their dignity infringed.²⁹⁹ The overemphasis of the rights of transgressing learners also comes to mind in this regard.³⁰⁰ School discipline policies and practices should ensure that every individual and every group's value or worth is respected, protected, promoted and fulfilled equally.

Problems pertaining to provision, in the code of conduct, for support measures or structures for counselling a learner involved in disciplinary proceedings are relevant here.³⁰¹ The lack of these services not only impacts on learners' right to education, but also constitutes an infringement of their right to dignity. Therefore, failure of an SGB or the state to secure these services would result in learners in need of these services being marginalised, ignored and devalued. Respect for the equal worth of learners implies that services should be provided irrespective of their socio-economic status and circumstances.

3.3.4 Dignity prohibits the objectification of people

In *Advance Mining Hydraulics (Pty) Ltd and Others v Botes NO and Others*,³⁰² the court emphasised the prohibition on objectifying people and held that:

[t]he [dignity] concept does require that persons be treated as recipients of rights and not as objects subjected to statutory mechanisms without a say in the matter.³⁰³

In *S v Dodo*,³⁰⁴ the court dealt with a difficult issue, namely the message that should be sent to the community when a criminal is punished. The judgment was delivered in the context of the constitutionality of life imprisonment. The court held:

²⁹⁸ See *MEC for Education, KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC).

²⁹⁹ SAHRC 2008-5-15.

³⁰⁰ See ch 3, par 6.2 herein.

³⁰¹ See ch 3, par 6.4 herein and par 4.3.2 below.

³⁰² 2000 (2) BCLR 119 T.

³⁰³ 2000 (2) BCLR 119 T:127.

³⁰⁴ 2001 (1) SACR 594 (CC):par 38.

To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached: they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.

The same principles are applicable to school discipline. Educators admit that they punish some learners severely, especially at the start of a new school year to set an example.³⁰⁵ Another relevant aspect is predetermined punishments for certain transgressions. Zero-tolerance policies and similar systems deny learners the right to be treated as individuals with special needs and traits. Instead, they are regarded as mere objects to be punished and as not being worthy of their punishments being individualised or their specific needs addressed.

Excessive rehabilitation programmes included in punitive measures can also degrade the learner and reduce him or her to a mere object of rehabilitation, without ensuring that his or her individual needs are assessed and addressed and are in proportion to the punishment imposed on him or her.³⁰⁶

In *Government of the Republic of South Africa and Others v Grootboom and Others*,³⁰⁷ the Constitutional Court warned that one should be aware of the danger of objectifying children by

³⁰⁵ Maphosa & Shumba 2010:394.

³⁰⁶ Schachter 1983:849; Woolman 2005:36-9, 36-36-36-39. See also Raath 2007:165 who refers to the work of Martin Luther and avers that "dignity is actually reflective of the glory of God, because every human being and every institution should be pleasing to God and should reflect the glory of God... . Human dignity is primarily a spiritual matter discernible through faith and the work of the Spirit."

³⁰⁷ 2000 (11) BCLR 1169 (CC):par 71.

allowing parents to use them as “stepping stones” in the process of obtaining housing. Instead of viewing children as an end in themselves, they are used as a means to an end.³⁰⁸

Due care should thus be taken in the disciplinary process to ensure that learners are not treated or punished in such a way that the treatment or punishment they receive serves mainly to deter them and others from transgressing.

3.3.5 Dignity entails autonomy and self-governance

To be human entails:³⁰⁹

the ability to understand or at least define oneself through one's own powers and to act freely as a moral agent pursuant to such understanding of self-definition.

Woolman³¹⁰ asserts that self-governance constitutes another dimension of dignity. He avers that people's capacity for self-governance, through the capacity to reason, and the fact that they are not mere slaves of their passions distinguish them from beasts. This ability of (almost) all human beings to “reason their way to the ends that give their life meaning” provides the justification for democracy as the “only acceptable secular form of political organization”. Therefore, as a minimum, participation in collective decision-making processes is necessary to determine the ends of a community. In *August and Another v Electoral Commission and Others*,³¹¹ the court held:

The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.

³⁰⁸ Ackerman in Woolman 2005:36-7. See also *S v Makwanyane and Another* 1995 (2) SACR 1 (CC):144 The Constitutional Court held:

This [recognition of the importance of dignity and the right to life] is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.

In *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC):par 66, the Constitutional Court found the provisions that allowed the imprisonment of debtors to be unconstitutional. The court further found that debtors are mostly imprisoned for small amounts of money, are normally unemployed, are poor and have no assets to be attached. Therefore, the court found that “to penalise the workless and the poor so as to frighten those a little better-off would be exactly the kind of instrumentalising of human beings which the concept of fundamental rights was designed to rebut”.

³⁰⁹ Ackerman in Woolman 2005:36-7.

³¹⁰ 2005:36-12–36-14.

³¹¹ 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC):par 17.

In the context of school discipline, this would mean that everyone who has the necessary capacity³¹² and interest in a matter must be given the opportunity to take part in disciplinary processes, be it the drafting of a code of conduct or participation in formal or informal disciplinary processes. If those with a stake in school discipline are not given a proper opportunity to take part in the disciplinary processes, this will be tantamount to disregard for their personhood and their right to be counted and will be an infringement of their right to dignity.

Beyleveld and Brownsword³¹³ are of the opinion that human beings are:

recognized not only as having the capacity to make their own choices, but also as being entitled to enjoy the conditions in which they can flourish as self-determining authors of their own destinies.

A school's approach to discipline should be of such a nature that it creates an environment where learners can make their own choices and where they can flourish so as to be who they are and to be the best they can be. The creation of a teaching and learning environment conducive to this goal would thus be important in realising this dimension of dignity.

3.3.6 Dignity recognises individual qualities and includes self-actualisation and self-identification

In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,³¹⁴ the Constitutional Court emphasised the importance of being able to express oneself as who one is and stated that the limitation of one's ability to achieve self-identification and self-fulfilment constitutes an infringement of the right to dignity. The court warned that denying people the ability to achieve self-identification and self-fulfilment:

[g]ives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities...³¹⁵

The right to self-identification, self-determination, self-respect and self-worth is part and parcel of dignity. Dignity is concerned with the "physical and psychological integrity and development

³¹² See also the discussion on the child's right to be heard in par 6 below and on the right to development in par 4 below.

³¹³ In Capps 2009:108; Cheadle, Davis & Haysom 2010:5-7.

³¹⁴ 1999 (1) SA 6 (CC). See also Schachter 1983:850; Raath 2007:173-176; Cheadle, Davis & Haysom 2010:5-9.

³¹⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC):par 28; see also Cheadle, Davis & Haysom 2010:5-7.

of an individual or a group".³¹⁶ Learners with serious behaviour problems need additional assistance to reach these dimensions of dignity and will only be able to attain them with adequate support measures. Respect for human dignity entails the recognition that every person is entitled to his or her own choices, preferences, ideas, beliefs, attitudes and feelings.³¹⁷

Dignity as an intrinsic feature of every human being was stressed in *Ferreira v Levin NO and Others*,³¹⁸ where Ackerman J accentuated the importance of individuals being able to develop their "humanness" to its full potential. The autonomy of everyone should be respected and should be "appreciated in their concrete realities and respected for what they actually represent in their family and personal lives,"³¹⁹ as well as at school. School discipline should contribute to the optimal personal development of every child. This would include accommodating pregnant learners and their concrete reality of being a learner and eventually a mother who wants to attend school.

The value attached to everyone is further dependent on the sometimes distorted perceptions and values attached to the person by society. For example, owing to some social constructs, certain societies might attach less value to females. This might impact negatively on their opportunities to receive education and to develop to their full potential.³²⁰ The same negative perceptions might be created about learners who are continuously in trouble at school because of misconduct, and there is a real risk that they may be perceived as being of less value and not worthy of self-actualisation and self-determination. Dignity is linked to the unique talents of everyone. These talents should be recognised and every individual should be permitted to develop his or her unique talents optimally.³²¹ The school's approach to discipline should thus make provision for the uniqueness of everyone and permit every learner to develop his or her unique talents.³²²

Liebenberg³²³ further points out that to value and respect the dignity of humans implies that they should have access to social and economic means to develop their "physical, emotional,

³¹⁶ *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497; 170 DLR (4th) 1:par 53.

³¹⁷ Schachter 1983:850. The inseparable link between dignity and one's cultural and religious identity is acknowledged in *MEC for Education, KwaZulu Natal, and Others v Pillay* 2008(2) BCLR 99 (CC):par 53, 62.

³¹⁸ 1996 (1) SA 984 (CC).

³¹⁹ Capps 2009:108-122; Cheadle, Davis & Haysom 2010:5-5.

³²⁰ Nussbaum 2000:241-252; Cheadle, Davis & Haysom 2010:5-4-5-5.

³²¹ *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC):1013-1014.

³²² For instance, instead of forcing a learner to go to detention for smoking on school premises, his or her creativity and artistic talents could rather be used to make a poster to illustrate the dangers of smoking.

³²³ 2005:7.

creative and associational capabilities". Furthermore, conditions should be created to enable them to "develop their capabilities and to flourish as individuals and social beings".³²⁴

The right to dignity plays an important role in the realisation of socio-economic rights. In this regard, the Constitutional Court has held that, in the process of realising socio-economic rights, it should be kept in mind that "human beings are required to be treated as human beings". By recognising that dignity is at stake in the realisation of socio-economic rights, the state's obligation in a social democratic state is to ensure "positive social relationships which both respect autonomy and foster the conditions in which it can flourish".³²⁵ Woolman³²⁶ indicates that:

the general entitlements secured through socio-economic rights are essential components of a just political order because they are necessary for self-actualisation.

Within the realisation of the right to education, due regard should be had for the dignity of learners. It should also be kept in mind that school discipline is an integral part of education. Thus the manner in which discipline is instilled in schools has an impact on learners' exercise of their right to education and dignity. Unfortunately, there is evidence to indicate that learners drop out of school because of the way they are treated in the disciplinary process. The most extreme examples are the school-to-prison pipeline created by zero-tolerance policies and school policies on pregnant learners.³²⁷ Learners also drop out of school or experience undue hardship due to the lack of proper disciplinary measures. Examples include learners who drop out of school as a result of school-based violence, bullying, and intolerance of religious and cultural practices of minority groups or individual learners in the school.³²⁸ Learners are thus unable to exercise their right to education properly, which negatively impacts on their self-actualisation and their ability to develop their unique talents to their fullest extent.

³²⁴ Liebenberg 2005:13.

³²⁵ Liebenberg 2005:11.

³²⁶ 2005:36-59 fn 1. See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC):par 83.

³²⁷ See par 2.2.4.4 above and par 4.3.2 below.

³²⁸ See ch 2, par 7 herein on the impact of bullying, school violence and sexual violence on learners. Victims of these types of conduct often experience depression and anxiety, are often suicidal, and feel helpless and disempowered; *MEC for Education, KwaZulu Natal, and Others v Pillay* 2008 (1) SA 474 (CC).

3.3.7 The collective dimension of dignity

Apart from the dimensions of dignity relevant to the individual, the Constitutional Court has also attached another dimension to the dignity concept, namely the dignity of the collective. In *Port Elizabeth Municipality v Various Occupiers*,³²⁹ the Constitutional Court held:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.

Dignity binds the community together, but it can fulfil this function only if it is recognised by the community.³³⁰ Therefore, the Constitutional Court has held that the Constitution requires us to understand dignity in the sense that:

wealthier members of a community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.³³¹

Dignity is thus described as a collective good.³³² There are a few examples of the dignity interests of the collective trumping the dignity interests of the individual.³³³ However, Woolman³³⁴ indicates that, except for a few references to this collective dignity in mostly socio-economic cases, the courts do not really refer to collective dignity. He contends that the courts' circumspection in this regard might be due to caution not to create some "neo-romantic conception of the political community". He is of the opinion that the courts rather want to drive the message home that:

...for dignity to be meaningful in South Africa the political community as a whole must provide that basket of goods – including such primary goods as civil and political rights – which each member of the community requires in order to exercise some basic level of agency.³³⁵

He further refers to the work of Aristotle and Sen and holds that what is at stake is more than material wealth, and that material wealth is merely useful for the sake of something else. This something else is:

³²⁹ 2004 (12) BCLR 1268 (CC):par 18.

³³⁰ Woolman 2005:36-15.

³³¹ *Khosa and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC):par 78.

³³² Woolman 2005:36:15.

³³³ *S v Dube* 2000 (2) SA 583 (N); *MEC for Health, Mpumalanga v M-Net* 2002 (6) SA 714 (T).

³³⁴ 2005:36-16.

³³⁵ Woolman 2005:36-16.

[t]he expansion of the “capabilities” of persons to lead the kinds of lives they value – and have reason to value... Having freedom to do the things one has reason to value is (1) significant in itself for the person’s overall freedom, and (2) important in fostering the person’s opportunity to have valuable outcomes.³³⁶

Woolman³³⁷ avers, with reference to Sen, that the development of the individual’s agency impacts on the global social development of a community. Thus the freedom to live the kinds of lives individuals value not only enhances their ability to help themselves, but also influences the world in a cyclical manner. He contends that:

[e]nhancement of individual freedom – by both political and material means – leads to greater social development, which in turn, further enhances the possibilities for individual capabilities and the freedom to lead the kinds of lives we have reason to value. The enhancement of the capabilities of the poorest members of our political community enhances the development of South Africa as a whole. Or put differently, the greater the ‘agency’ of the least well-off members of our society, the greater the ‘agency’ of ‘all’ the members of our society.

Most of the cases where reference is made to collective dignity deal with socio-economic rights. The question that thus arises is: What would be the relevance of collective dignity in the context of school discipline? The well-being of society does not refer only to financial well-being, but also to the emotional, physical and psychological well-being of society. There are learners at schools whose emotional, physical and psychological well-being is impaired due to a lack of school discipline and the school culture.³³⁸

In addressing the needs and dignity interests of learners, the emotional, physical and psychological well-being of those who transgress and those who suffer the consequences of the misconduct should be kept in mind.³³⁹ Unless the well-being of all these learners is addressed adequately, proper effect cannot be given to the collective dignity of the community.

³³⁶ Woolman 2005:36-16.

³³⁷ 2005:36-16–36-17. See also *Khosa v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC):par 81.

³³⁸ Nelsen, Lott & Glenn 2000:xv.

³³⁹ See Goleman 1998:11-12 on the importance of developing the emotional intelligence of children. This impacts on the collective dignity of society. He alludes to the declining emotional intelligence of children and its impact on the lives of children. He states:

As children grow smarter in IQ, their emotional intelligence is on the decline. Perhaps the most disturbing single piece of data comes from a massive survey of parents and teachers that shows the present generation of children to be more emotionally troubled than the last. On average, children are

The link between punishment and the collective dignity of those involved in the process was also highlighted in *S v Williams and Others*.³⁴⁰ Here, the court found that juvenile whipping demeans everyone involved in the process. It thus seems as though everyone directly affected in the process of punishment can be demeaned by the process. However, from the case of *Port Elizabeth Municipality v Various Occupiers*, it is clear that even those who are not directly involved in the process can be demeaned by the conduct or lack thereof.³⁴¹ Thus, if an educator belittles a child in the presence of other learners, the educator is demeaned by the conduct, the learner who is subjected to the belittlement is demeaned, and the learners who are exposed to the incident are demeaned, although they are not directly involved. The lack of action to protect learners from misconduct or to properly address the consequences of misconduct would also constitute an infringement of the right to dignity of the individual and the collective. The same arguments are applicable to the lack of reasonable accommodation of the cultural and religious diversity of the school community. If proper disciplinary measures are not enforced, the dignity of not only individuals is infringed, but the whole community is also demeaned in the process.

Awareness-raising and advocacy, where the different dimensions of the right to dignity of individuals as well as the collective are highlighted, should be included in the adoption of any disciplinary measures.³⁴² This will contribute to respect for, and the protection, promotion and fulfilment of, the right to dignity in the context of school discipline.

3.3.8 Dignity sets boundaries

Rights are not exercised in isolation, but within a community, which brings about an inevitable conflict of rights. Cheadle, Davis and Haysom³⁴³ indicate that dignity plays an important role in crafting the boundaries between “personal and social demands”, and thus between individual autonomy and the needs of society at large.

For instance, while a learner has a right to the development of his or her full potential, the educator has a duty to ensure that the learner is provided with sufficient opportunities to develop his or her potential. On the other hand, the educator and other learners have a

growing more lonely and depressed, more angry and unruly, more nervous and prone to worry, more impulsive and aggressive. ... The most telling signs of this [decline in emotional intelligence] are seen in the rising rates among young people of problems such as despair, alienation, drug abuse, crime and violence, depression or eating disorders, unwanted pregnancies, bullying, and dropping out of school.

³⁴⁰ 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC):par 17.

³⁴¹ Woolman 2005:36-34-36-35.

³⁴² De Groof & Lauwers 2009:25.

³⁴³ 2002:132.

correlative right to be treated in a humane way and to experience a sense of self-actualisation through teaching and learning. Learners should thus behave in such a way that, while exercising the right to develop to their full potential, no infringements of the rights of educators or fellow learners to humane treatment and self-actualisation occur. School discipline should therefore be enforced so that due effect is given to the personal demands of the learners, but also to the social demands of the school community and the community at large.³⁴⁴

In conclusion, the right to dignity is inextricably linked to school discipline. It has many dimensions, which has an impact on the standard set for school disciplinary measures. These measures should respect, protect, promote and fulfil learners' inherent dignity and this should be evident not only in the way learners are punished, but also in the way that stakeholders in the school community treat one another. Furthermore, it should be evident in the conditions that prevail at the school, such as the conduciveness of the school environment to teaching and learning and the availability of resources. Disciplinary measures should reflect the equal worth and value of all learners and should not objectify learners. Learners should be provided with an opportunity to develop their autonomy and ability for self-governance through the disciplinary measures, and should be able to optimise their self-actualisation and self-identification. It is also important to recognise the collective dimension of dignity and the responsibility of the wealthier members of society to ensure the well-being of those who are in a less fortunate position, because this will benefit society as a whole in the end. Disciplinary measures should thus ensure that those with special and additional needs receive the necessary support, also for the eventual benefit of society. Yet, all of this must be achieved through a process in which individual and social demands are properly balanced.

4. RIGHT TO EQUALITY

Equality is one of the founding values of the Constitution and plays an important role in international law as well as in South African law of the post-apartheid era. In what follows, the content of this right will be discussed in so far as it is relevant to the school disciplinary context. The right will then be applied to specific issues related to school discipline to inform the requirements for disciplinary measures that comply with not only the equality standard, but also the best-interests-of-the-child standard.

³⁴⁴ See the discussion, in chapters 6 and 7 herein, on the different approaches to discipline and their capacity to balance different interests.

4.1 Equality and international law

Non-discrimination is one of the foundational principles of the CRC and reference is made to it in several general comments issued by the Committee on the Right of the Child.³⁴⁵ Article 2 of the CRC provides as follows:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States 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.

It is important to note that the CRC recognises that there is a possibility that children might be discriminated against or punished because of who their parents are or what their parents do. Disciplinary measures should thus separate the actions of parents and children, and should not punish children for their parents' actions. For instance, learners should not experience discrimination or unfair punishment at school owing to the political beliefs of their parents.

The CESCR defines discrimination in General Comment 20³⁴⁶ as:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The CESCR further provides in General Comment 11³⁴⁷ that states parties are required to implement "fully and immediately" measures to ensure non-discrimination. This obligation is not subject to progressive realisation. The Convention against Discrimination in Education³⁴⁸

³⁴⁵ General comments relevant to this study include: CRCGC 1 2001:par 10; CRCGC 5 2003:par 6, 12; CRCGC 7 2005:par 11; CRCGC 12 2009 :par 75.

³⁴⁶ CESCRGC 20 2009:par 7.

³⁴⁷ CESCRGC 11 1999:par 11. See also European Union 2000:a 20, 21; ACHPR 1981:a 3; ACRWC 1990:a 3; HRCGC 4 1981; HRCGC 17 1989:par 5; HRCGC 18 1989 (provides specific guidance on non-discrimination); HRCGC 23 1994 (focuses on the rights of minorities).

³⁴⁸ UNESCO 1960:a 3(a).

adopted by UNESCO emphasises that states parties have an obligation to formulate and develop national policy which will promote equality of opportunity and treatment in education. The Human Rights Committee (HRC) provides, in General Comment 17 on the ICCPR,³⁴⁹ that states parties have to indicate in their reports measures put in place to remove discrimination against children and between different children. This thus includes measures related to school discipline, such as the eradication of discrimination against pregnant learners and learners with a sexual orientation other than heterosexuality, and of unlawful differentiation between children of different age groups. These issues will be discussed in more detail below. In the context of school discipline, it can be argued that transgressors, victims of transgressions and third parties must be treated equally in the disciplinary process and must be afforded the same opportunities.

4.2 Equality in South African law

Equality is not only a constitutional right³⁵⁰ but is also one of the foundational values of the Constitution.³⁵¹ In this regard, section 1 of the Constitution provides that South Africa is “one, sovereign, democratic state founded”, *inter alia*, on the achievement of equality. This sentiment is repeated in the limitation clause, which provides that the limitation of rights is permissible only if such limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.³⁵² Section 39(1) of the Constitution also requires the courts to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom” when interpreting the Bill of Rights.

It is common cause that the Constitution has an important transformative function and therefore the courts often interpret rights to give effect to this transformative goal. Currie and De Waal³⁵³ explain that “restitutionary equality” is envisaged by section 9(2) of the Constitution in providing that legislative and other measures should be designed to protect and advance those disadvantaged by the previous system of unfair discrimination. These measures should be remedial in nature. The concept of restitutionary equality is in line with the politically accepted concept of transformation and has gained considerable acceptance.

³⁴⁹ HRCGC 17 1989:par 5.

³⁵⁰ Constitution 1996:s 9.

³⁵¹ Constitution 1996:s 1. Equality is one of the important values that would give content to the best-interests-of-the-child concept. In chapter 6 herein, the values relevant to this discussion will be considered. However, since equality is a right as well, its content will be discussed in this chapter and the discussion will not be repeated in chapter 6 herein.

³⁵² Constitution 1996:s 36(1).

³⁵³ 2005:233-234.

Ngwena and Pretorius³⁵⁴ highlight the importance of transformational constitutionalism and hold that it is a term used to:

capture the philosophical and juridical essence of a radically reformed constitutional order that clearly inclines towards an expansive universe of equality, recognises a humanity that is diverse but equal in worth and dignity, inscribes justiciable second-generation rights and horizontally requires participatory governance, and is historically conscious.

Although scholars might have different understandings of the term, there is consensus on the central role of equality in this discourse.³⁵⁵ Nevertheless, for purposes of this study, the above-mentioned definition will be used to guide some of the arguments with regard to equality and disciplinary measures.

The aim of the transformative process is, *inter alia*, to “heal the divisions of the past” captured in apartheid history and to depart from the previous mind-set of categorising people, thereby resulting in harm. There is thus a need to think differently about difference and to adjust existing mind-sets.³⁵⁶ The new focus should be to ensure an equal and just society where everyone has equal access to resources and amenities of life and is in a position to develop to his or her full potential. Specific aspects of the past relevant to this study are racial and gender discrimination and the lack of recognition of children as individual rights bearers in a culture of patriarchy. Transformative ways should therefore be found to address these issues in the school disciplinary context. To achieve this calls, *inter alia*, for the dismantling of systemic inequalities.³⁵⁷ Ngwena and Pretorius³⁵⁸ therefore caution that, if it is necessary to categorise people, one should err on the side of recognising inclusive citizenship. The importance of inclusion in communities was stressed as follows in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*:³⁵⁹

The acknowledgement and acceptance of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognizing and accepting people as they are ... What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm equal respect and concern that should be shown to all as they are. At the very least, what is

³⁵⁴ 2012:82.

³⁵⁵ Ngwena & Pretorius 2012:82.

³⁵⁶ Constitution 1996:preamble; Ngwena & Pretorius:83, 114.

³⁵⁷ Albertyn & Goldblatt 2007:35-1, 35-5.

³⁵⁸ 2012:83.

³⁵⁹ 1999 (1) SA 6 (CC):134.

statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives to acknowledge, accommodate and accept the largest spread of difference.

Consequently, disciplinary measures should not unduly exclude learners from the school community because they have “human essences that are different and do not measure up to a socially ascribed norm”.³⁶⁰

As a constitutional value, equality underwrites and guides this broad transformation aspiration. As a value, together with other values, it gives content to specific constitutional rights.³⁶¹ To explore the right and value of equality is thus important for determining the content of the child’s best-interests right. However, it is acknowledged that equality is the “most difficult right” to define, since such a definition runs the risk of promising more than it can deliver.³⁶²

Equality as a right, on the other hand, provides an enforceable mechanism for actually achieving equality and for giving effect to transformation goals. Section 9 of the Constitution provides:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

³⁶⁰ Ngwenya & Pretorius 2012:83.

³⁶¹ Albertyn & Goldblatt 2007:35-2; Curry & De Waal 2005:231-232.

³⁶² Albertyn & Goldblatt 2007:35-2.

The *Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)* was adopted to give effect to the constitutional imperative regarding national legislation preventing and prohibiting unfair discrimination. In terms of this Act, discrimination means:

any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

- (a) imposes burdens, obligations or disadvantages on; or
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.³⁶³

Equality is defined by the Act as:

the full and equal enjoyment of rights and freedoms as contemplated in the constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes.³⁶⁴

These provisions and their bearing on school disciplinary measures will be discussed in what follows. However, the interrelatedness of equality and the right to dignity and education will be discussed first, followed by a discussion of the distinction between formal and substantive equality and between direct and indirect discrimination and the implications thereof for the disciplinary context.

4.2.1 The relationship between equality and dignity

The Universal Declaration of Human Rights (UDHR)³⁶⁵ provides, in article 1, that “all human beings are born free and equal in dignity and rights”. Equality is “informed by and intimately connected to dignity”. The value of dignity is relevant in the equality analysis, since the Constitutional Court has employed the value of dignity to develop the concept of equality.³⁶⁶ Dignity is the value that largely defines the right to equality.³⁶⁷ The inherent dignity of people is often ignored, resulting in discrimination and inequality and in infringements of people's dignity. Therefore, the court held as follows in *President of the Republic of South Africa and Another v Hugo*.³⁶⁸

³⁶³ PEPUDA 4/2000:s 1.

³⁶⁴ PEPUDA 4/2000:s 1.

³⁶⁵ UDHR 1948.

³⁶⁶ Cowen 2001:47-48; Liebenberg 2005:14. See also Davis 1999:398-413; Cheadle, Davis & Haysom 2010:5-2; Albertyn & Goldblatt 1998:248-276 (they criticise the use of dignity in equality jurisprudence); Raath 2007:166-7 (he explains equality and dignity with reference to the work of Martin Luther).

³⁶⁷ Albertyn & Goldblatt 2007:35-8.

³⁶⁸ 1997 (4) SA 1 (CC).

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.³⁶⁹

Rautenbach³⁷⁰ summarises this relationship, stating that the right to dignity protects the worth of human beings, while the right to equality protects the equal worth of every human being. The Constitutional Court stressed the fact that everyone has equal worth and value and referred to the Canadian case of *Egan v Canada*,³⁷¹ where the court held:

Equality means our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.³⁷²

In *Bhe and Others v Magistrate Khayelitsha and Others, Shibi v Sithole and Others, SA Human Rights Commission and Another v President of the RSA and Another*,³⁷³ the court linked the right to dignity and equality and held:

The right to equality is related to the right to dignity. Discrimination conveys to the person who is discriminated against that the person is not of equal worth.³⁷⁴

Consequently, disciplinary measures should safeguard and promote the equal value of every learner and other stakeholders in education. Therefore, due regard should be had to the issues raised in chapter 2 which can lead to an unbalanced focus where the worth of only some stakeholders in a specific situation is considered. These include the overemphasis of transgressors' rights³⁷⁵ at the expense of the rights of others, the overemphasis of children's

³⁶⁹ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC):par 92.

³⁷⁰ 2008:74.

³⁷¹ (1995) 29 CRR (2d) 79.

³⁷² *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC):par 41.

³⁷³ 2005 (1) BCLR 1 CC.

³⁷⁴ *Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005 1 BCLR 1 (CC):par 187. See also *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC) – by claiming that the disabled learners were uneducable, the Department effectively relegated the learners to the status of second-class citizens.

³⁷⁵ See ch 3, par 6.2 herein.

rights in general,³⁷⁶ and the risk of protecting the rights of educators at the expense of those of children.³⁷⁷

Although dignity requires that everyone should be treated with equal respect and concern, it does not “presuppose equality of goods and the elimination of material difference”.³⁷⁸ Chaskalson stated in this regard:

No society can promise equality of goods or wealth. Nor could it be reasonably thought that this is what our Constitution contemplates.³⁷⁹

Equality does not entail that all schools must have exactly the same quality of staff and facilities. Yet, it requires that there be equal respect and concern for the best interests of all learners and that disciplinary decisions should be made accordingly. However, the principles of substantive equality would dictate that historically disadvantaged schools should be prioritised in order to bring about real change.³⁸⁰

4.2.2 The relationship between equality and the right to education

The operational definition of basic education provided by the Experts' Consultation in the UNESCO document emphasises the importance of non-discrimination in exercising the right to education and stipulates as follows:

It is guaranteed to everyone without any discrimination or exclusion based notably on gender, ethnicity, nationality or origin, social, economic or physical condition, language, religion, political or other opinion, or belonging to a minority.³⁸¹

Therefore no discrimination against,³⁸² or exclusion³⁸³ of, anyone is allowed. The word “notably” is used to indicate that there might be other grounds apart from those listed.³⁸⁴ Article 29(1)(a) of

³⁷⁶ See ch 2, par 8.1.5 herein.

³⁷⁷ See ch 2, par 8.1.2 herein (inaction against educator applying corporal punishment) & 8.5 (protection of educators' rights by way of union action).

³⁷⁸ Cowen 2001:41-42.

³⁷⁹ Chaskalson 2000:202; see also Cheadle, Davis & Haysom 2010:5-12.

³⁸⁰ See the discussion below in par 4.2.3 on formal and substantive equality. See also the discussion, in ch 2, fn 7 herein, on the quintile system which allows for pro-poor subsidy allocations. Thus poor schools receive more money from the state to address the disadvantage caused by apartheid.

³⁸¹ UNESCO 2007: operational definition of basic education.

³⁸² UNESCO 2007:par 7 – refers to “different treatment of a group, category, or certain individuals without justification”.

³⁸³ UNESCO 2007:par 7 – refers to “situations and cases where certain individuals, groups and so on are entirely prevented from accessing this right”.

the CRC provides that one of the aims of education is the “development of the child’s personality, talents and mental and physical abilities to their fullest potential”. Any discriminatory practices in school discipline which impact on learners’ ability to reach their full potential would thus not only be an infringement of their right to equality, but also an infringement of their right to education.³⁸⁵

General Comment 7 of the Committee on the Rights of the Child deals with the implementation of children’s rights in early childhood. Yet, valuable comments are also made with regard to discrimination in access to services which should be available to all children. States parties are cautioned to ensure that children have equal access to quality services in, *inter alia*, education. States parties thus have to monitor the availability of, and accessibility to, quality services that contribute to children’s development and survival. This includes the equal provision of adequate support measures and structures for counselling.³⁸⁶ In addition, states parties should take appropriate steps to ensure that children have an equal opportunity to benefit from the available services.

4.2.3 Formal and substantive equality

To achieve transformation, the idea of substantive equality was developed in contrast to the idea of formal equality. Formal equality is premised on the idea that inequality is irrational and arbitrary. It presupposes that everyone is equal and that any differential treatment on any of the prohibited grounds is almost inevitably suspect and irrational. In law, formal equality is narrowly defined and is oblivious of the social realities of individuals and groups. Therefore, the economic and social differences in society are not included in the legal enquiry. Albertyn and Goldblatt³⁸⁷ are of the following opinion:

Formal equality is perhaps best described as the abstract prescription of equal treatment for all persons, regardless of their actual circumstances. It perceives inequalities as irrational aberrations in an otherwise just social order. These aberrations can be overcome by extending the same rights and entitlements to all, in accordance with the same “neutral” standard of measurement.

³⁸⁴ UNESCO 2007:par 9, 10. Compare the list provided in the Experts’ Consultation document and the list provided in the South African Constitution.

³⁸⁵ CRCGC 1 2001:par 10.

³⁸⁶ See the discussion above in par 2.2.4.1.5 above on the availability of services and par 4.3.2 on equality in the provision of support measures and structures for counselling.

³⁸⁷ 2007:35-36; see also Rautenbach 2008:74.

Since the formal approach to equality does not take social and economic factors into account, measures such as affirmative action are regarded as discrimination. Consequently, affirmative action cannot be taken, thereby risking the perpetuation of the inequality of disadvantaged groups.

Substantive equality, on the other hand, entails, at a minimum, a democratic vision that includes both equality of opportunities and equality of outcomes. To realise this vision calls for the redistribution of power and resources and for active steps to eliminate material disadvantage.³⁸⁸ This approach does not only take the prohibited grounds of discrimination into account, but also the systemic inequalities rooted in structures and institutions in society and created by the social and economic divides between groups. To address inequality in such a system requires an understanding of, and due regard for, these underlying social and economic conditions.³⁸⁹ Rautenbach³⁹⁰ maintains that substantive equality aims at protecting the equal worth of people who find themselves in inferior positions owing to circumstances beyond their control. Substantive equality emphasises the equality of outcomes and therefore tolerates differences in treatment.³⁹¹

Substantive equality requires active steps to reasonably accommodate those who do not ascribe to the socially ascribed norms of society, for instance pregnant learners in schools. It requires an affirmation of differences and does not allow differences to “become socially embedded sources of exclusion, marginalisation and stigmatisation of certain groups”.³⁹² It further requires an acknowledgement of all the dimensions of human beings, including their socio-cultural and biological differences. It therefore implies the following:

The constitutional injunction is not that we should never categorize or recognize difference per se, but that we should resist from giving legitimacy to social constructions of difference that are historically privileged and are used, or can be used, to create and sustain hierarchical human essences as apartheid shamelessly did.³⁹³

The focus should thus be on ensuring that differentiation does not create boundaries, but rather facilitates the creation of positive relationships.³⁹⁴ Equality, therefore, requires disciplinary

³⁸⁸ Albertyn & Goldblatt 2007:35-5; Rautenbach 2008:74; Ngwena & Pretorius 2012:113.

³⁸⁹ Albertyn & Goldblatt 2007:35-6; Albertyn 2005:40-41 Ngwena & Pretorius 2012:114.

³⁹⁰ 2008:74.

³⁹¹ Currie & De Waal 2005:232-233.

³⁹² Ngwena & Pretorius 2012:83-84.

³⁹³ Ngwena & Pretorius 2012:84.

³⁹⁴ Ngwena & Pretorius 2012:84.

measures to create a teaching and learning environment which enables the development of positive human relationships, and not an environment where difference is merely tolerated. It requires positive steps to enable everyone in the school community to participate in all socio-economic spheres and to develop to their full potential.³⁹⁵

However, equality does not imply that all learners should be accommodated in the same physical setting, only that the outcomes of education, namely the best interests of the child, should be optimised.³⁹⁶ It may sometimes therefore be apposite to rather provide education for learners with behavioural, psychological and emotional difficulties in another setting, such as a designated child and youth care centre.³⁹⁷ The education received in an alternative setting may be different and may focus more on addressing the causes of misconduct and providing learners with specific social skills. Yet, the outcome of the education must be equivalent to the education provided for learners in ordinary schools.

In general, though, difference should be reasonably accommodated.³⁹⁸ Learners' conduct does not always comply with the social norm and they are accordingly excluded from schools. Issues related to the impact of substantive equality on disciplinary measures will be discussed in more detail in 4.3 below.

Inequality, on the other hand, is assessed and addressed in the lived realities of those affected. The focus is not on the mere difference, but rather on the harm that flows from it. The aim is thus not to ensure equal treatment for all, but rather that the equal treatment does not perpetuate the inequality. Therefore, a concerted effort is made, firstly, to determine the impact of the perceived unequal treatment, rather than concentrating on the act itself, and, secondly, to determine the harm that flows from the unequal treatment. Keeping the transformative goals in mind, the focus is thus on the broader advancement of equality.³⁹⁹ Equality can therefore be advanced through either similar or differential treatment.⁴⁰⁰ There are various claims to equality ranging from claims to equal treatment across difference, to claims for recognition, to claims for inclusion and acceptance of individuals and groups as equal and valued members of society, to claims for the redistribution of economic benefits and resources. Some of these claims are

³⁹⁵ Ngwena & Pretorius 2012:84.

³⁹⁶ Cf the refusal of HoDs to expel learners discussed in ch 3, par 5.9.2 herein.

³⁹⁷ *Children's Act* 38/2005:s 191 (2)(i). See the discussion below in par 4.3.1.

³⁹⁸ See also the discussion on reasonable accommodation in ch 3, par 5.5.5.3 herein on *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC) where a learner was not permitted to wear a nose stud in accordance with her religious convictions.

³⁹⁹ Albertyn 2005:45-46.

⁴⁰⁰ Albertyn & Goldblatt 2007:35-7; Currie & De Waal 2005:232-233; Rautenbach 2008:74.

intertwined. Yet, the main aim of the equality inquiry is to ensure the dismantling of systemic inequality.⁴⁰¹

Applied to the disciplinary context, equality implies that every child should not necessarily be treated the same, but that the focus should rather be on equal outcomes. Keeping the focus of this study in mind, the overarching equal outcome would be that the best interests of every child should be optimised. Disciplinary measures should thus ensure equality of opportunity for learners to optimise their best interests, for instance the interests of pregnant learners, of learners with serious behaviour problems or of those affected by misconduct must all have an equal opportunity to be considered as being of paramount importance. Children's needs and interests differ, thus requiring an individualised approach which will inevitably result in different treatment of learners. Disciplinary measures should therefore provide for differential treatment to ensure the best interests of all children. This is also in line with the discussion on the adaptability of education and disciplinary measures.⁴⁰²

4.2.4 Direct and indirect discrimination

A distinction should be made between direct and indirect discrimination. Direct discrimination refers to differential treatment on one of the prohibited grounds included in section 9(3) of the Constitution.⁴⁰³ For example, discrimination on the ground of sex and pregnancy would be direct discrimination if school rules prohibit pregnant learners from attending school or from returning to school after they give birth.⁴⁰⁴ In contrast, there are normally no rules that prohibit male learners who have impregnated schoolgirls, from attending school. If there is, on the face of it, differential treatment on a prohibited ground, the onus of proof is on the discriminator to show that such discrimination is not unfair.⁴⁰⁵

Another form of direct discrimination is discrimination on a ground not listed in section 9(3), but which is:

⁴⁰¹ Albertyn & Goldblatt 2007:35-7.

⁴⁰² See par 2.2.4.3.3 above.

⁴⁰³ The prohibited grounds are: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

⁴⁰⁴ *Welkom High School and Another v Head, Department of Education, Free State Province, and Another* 2011 (4) SA 531 (FB).

⁴⁰⁵ Constitution 1996:s 9(5).

based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.⁴⁰⁶

*PEPUDA*⁴⁰⁷ provides the legislative response to the Constitutional Court's judgment in *Harksen v Lane NO and Others*.⁴⁰⁸ It determines that the prohibited grounds of discrimination are:

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground –
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

Thus, apart from discrimination on one of the listed grounds, disciplinary measures which discriminate on the basis of an attribute or characteristic of a learner and impair the inherent dignity of the learner or affect him or her in a comparatively serious manner will constitute direct discrimination on an analogous ground.

On the other hand, indirect discrimination in the school disciplinary context refers to rules, actions or decisions which are, on the face of it, neutral. However, the effect of these is differentiation between individuals or groups on one of the listed grounds or on an analogous ground. To determine whether these rules, actions or decisions constitute indirect discrimination, the following test should be applied. Firstly, does the rule, action or decision exclude or degrade an individual or a group of learners as being less than human simply because they do not conform to the standards of "normality" of those who are in a position of social, economic or political power? Secondly, the effect of the differentiating measure must be determined, and not the intention or the purpose of such measure. The first question entails a factual analysis of the impact of the rule on the dignity of the learner, and the second deals with the justifiability of the measure within the framework of the limitation clause set out in section 36

⁴⁰⁶ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC):par 54.

⁴⁰⁷ *PEPUDA* 4/2000:s 1.

⁴⁰⁸ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC):par 54.

of the Constitution. In instances of indirect discrimination, the onus of proof is on the complainant.⁴⁰⁹

Ostensibly neutral school rules on dress codes for learners can constitute a form of unlawful, indirect discrimination. To be unable to comply with the prescribed dress code due to financial constraints and then not being allowed an exemption may constitute an infringement of the dignity of the learner based on a specific attribute or characteristic of that learner, namely his or her poverty. Dress code rules can thus disproportionately affect learners of a specific socio-economic status⁴¹⁰ or learners from a specific cultural or religious group.⁴¹¹

It will be hard to justify such rules if the consequences are considered, for instance that poor learners may have to drop out of school and may thus not be able to exercise their right to education. If there is no rational connection between dress prescriptions and the aims of education, namely to develop the child's full potential and to teach the child to act in a socially responsible manner, the prescriptions will constitute unfair discrimination.

Another example of indirect discrimination is the implementation of zero-tolerance policies. Although the provisions are neutral, there is a disproportionate representation of learners from low-income groups, from groups of colour, from minority groups, and from groups of disabled learners to be found in out-of-school suspensions. This disproportionality is also repeated in the juvenile justice system.⁴¹²

A learner's right to be protected from unlawful, direct and indirect discrimination should therefore be properly reflected in the disciplinary measures adopted. In fact, such right should rather play a positive role in the realisation of learners' right to equality. If not duly considered, the possibility of redistribution of economic benefits is hampered in the long term and the poverty cycle continues.

⁴⁰⁹ Rautenbach 2008:76. Albertyn & Goldblatt 2007:35-43 indicate that, to determine the unfairness of discrimination, the following three questions should be asked: (1) Does the differentiation amount to discrimination? (2) If so, was it unfair? (3) If so, can it be justified in terms of the limitation clause (s 36)?

⁴¹⁰ *PEPUDA 4/2000:s1*. This Act defines socio-economic status as "a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment or lack of low-level educational qualifications".

⁴¹¹ See *MEC for Education, KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) – the school rule prohibiting the wearing of jewellery constituted indirect discrimination on the grounds of culture and religion.

⁴¹² Amstutz & Mullet 2005:47; Bloomenthal 2011:312; Gonzalez 2011:12-13; Ofer 2011:1374-1375, 1401.

4.3 Equality and specific aspects of school discipline

In what follows by way of illustration, some aspects of school discipline related to the non-discrimination requirements of the Constitution will be highlighted. The interrelatedness of constitutional rights will also be emphasised.

4.3.1 Equality and the provision of adequate and appropriate educational facilities and social services

In *Centre for Child Law and Others v MEC for Education, Gauteng, and Others*,⁴¹³ the applicant applied for an order for the immediate provision of 111 sleeping bags for learners in a school of industry,⁴¹⁴ which was in a dilapidated state and consequently exposed the learners to inclement winter conditions. The former Department of Education acknowledged that the circumstances in the school were well below standard, but still defended the application. One of the reasons put forward by the Department was that it had a limited budget and, if it provided the sleeping bags for the learners in this school, this would open it up to claims by other similarly situated schools. In this regard, the court held as follows:

The equality argument equally holds no water. It can never be a defence to a violation of constitutional rights to argue without qualification that the remedy should not be granted, lest others, similarly denied their rights, should seek the same remedy, at significant cost to the State. While levelling-down may have its place when considering remedies for infringements of rights with pecuniary consequences, in cases such as the present, where the fundamental right to dignity is central, and where the costs are foreseeable, manageable and containable, levelling-up is the appropriate and desirable remedy.⁴¹⁵

It seems as though the Department was arguing for the equal misery of all learners in schools of industry instead of taking responsibility for only about 150 learners in the entire province who were in these schools.⁴¹⁶ In this regard, the court held:

As a society we wish to be judged by the humane and caring manner in which we treat our children. Our Constitution imposes a duty upon us to aim for the highest standard, and not to shrink from our responsibility.⁴¹⁷

⁴¹³ 2008 (1) SA 223 (T):224-225.

⁴¹⁴ *Children's Act 38/2005*:s 191(2)(i), 196(d). Schools of industry are now called child and youth care centres for children with behavioural, psychological and emotional difficulties.

⁴¹⁵ *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T):228.

⁴¹⁶ The court severely criticised the Department for defending the action and stated that providing the sleeping bags would have been less expensive than the legal costs of defending the matter.

⁴¹⁷ *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T):228.

One of the main aims of including the right to equality in the Constitution is to prohibit patterns of discrimination and to remedy the results of such discrimination.⁴¹⁸ Albertyn and Goldblatt⁴¹⁹ warn that the broader goals of substantive equality should be kept in mind in ensuring equal respect and concern for individuals and groups, such as learners in schools.

The impact of insufficient schools of industry, reform schools and other forms of social services on the learner's right to education was highlighted above.⁴²⁰ Taking the pronouncements regarding the provision of education for the most vulnerable groups of children into account,⁴²¹ as well as the requirements of substantive equality, the provision of physical facilities and social services for learners with behavioural, psychological and emotional difficulties should be regarded as a constitutional imperative. In fact, *Centre for Child Law and Others v MEC for Education, Gauteng, and Others*⁴²² requires humane and caring conduct on the part of society, as well as the aspiration to render the highest possible standard of service delivery to children. Failing to do this might indeed constitute unfair discrimination, as was seen in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.⁴²³ The lack of physical facilities to address the needs of learners with behavioural, psychological and emotional difficulties may lead to their eventual exclusion, marginalisation and stigmatisation.

Without adequate physical resources, it will not always be possible to optimise the holistic development of all children with behavioural, psychological and emotional difficulties. These children will not be able to learn socially acceptable conduct within the confines of ordinary schools. Proper care should thus be taken to ensure that the limited resources available are distributed in a reasonable and justifiable way to ensure equality of outcome in education, especially for children with additional needs.⁴²⁴

Another aspect with regard to adequate physical facilities is the lack of Further Education and Training (FET) centres and Adult Basic Education and Training facilities.⁴²⁵ Table 1 in chapter 2 illustrates the number of overage learners and, in particular, the number of learners above 18

⁴¹⁸ *Brink v Kitshoff* 1996 (6) BCLR 752 (CC):par 42. See the discussion on transformative constitutionalism in par 4.2 above.

⁴¹⁹ 2007:35-13.

⁴²⁰ See par 2.2.4.1.5 above.

⁴²¹ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC).

⁴²² 2008 (1) SA 223 (T):228.

⁴²³ 2011 (5) SA 87 (WCC):par 27-48, in particular par 45.

⁴²⁴ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC):par 49-52.

⁴²⁵ NPC 2011:270

years of age, and the impact of overage learners on discipline was highlighted.⁴²⁶ In this regard, the operational definition of basic education provides as follows:

Equivalent basic education is offered for youth and adults who did not have the opportunity or possibility to receive and complete basic education at the appropriate age.⁴²⁷

The state is thus obliged to provide equivalent basic education for those who were not able to complete their basic education at the appropriate age. Lack of resources, however, indicates that this need will persist for some time into the future. Practical solutions must therefore be found and legislative prescriptions should be developed to regulate and balance the educational needs of adult and child learners. The practical solutions and legislative prescriptions should ultimately comply with the substantive-equality requirements, securing equal basic education for all age groups. However, this balancing process should have due regard for the best-interests-of-the child imperative.

4.3.2 Equality and the provision of support measures and counselling services

The same arguments as advanced above are applicable to the provision of support structures and counselling in all ordinary schools. Disciplinary measures and, in particular, those associated with formal disciplinary hearings, as well as the legislative prescription to provide support measures and structures for counselling services, must have due regard for substantive equality requirements.⁴²⁸ All disciplinary measures should be sensitive to the needs of learners exposed to difficult socio-economic circumstances, and who are disadvantaged or part of a vulnerable group.⁴²⁹ Consequently, support measures and structures for counselling services should be made available as a prevention strategy and to address the needs of learners who are also involved in informal disciplinary processes.

Equality requires that disciplinary measures create a teaching and learning environment which enables the development of positive human relationships and not an environment where difference is merely tolerated. It requires the affirmation of difference and the taking of positive steps to:

⁴²⁶ See ch 2, par 8.4.6.

⁴²⁷ UNESCO 2001:par 1

⁴²⁸ *Schools Act 84/1996*:s 8(5). See the criticism of the current provisions in ch 3, par 6.4 herein.

⁴²⁹ Hodgkin & Newell 2007:17-18. See also the discussion on the availability of social services and physical facilities in par 2.2.4.3.2 above.

empower excluded and marginalized groups so that they are also *enabled* or given capabilities to participate as equal citizens in all our socio-economic domains.⁴³⁰

Support measures and structures for counselling services should consequently enable everyone in the school community to participate eventually in all socio-economic spheres.

4.3.3 Gender equality and disciplinary measures

General Comment 1 on the right to education of the Committee on the Rights of the Child specifically pays attention to gender discrimination in schools and calls on states to ensure that the girl child is safe in schools and not subjected to an unfriendly environment which can discourage her participation in education.⁴³¹

Teenage pregnancies are a real concern and a reality that schools have to deal with.⁴³² Consequently, policies and codes of conduct often have explicit provisions in this regard, which usually include the expulsion of the learner permanently or for a specified time. It is therefore quite evident that the issue of pregnant learners is regarded as a school disciplinary issue. In *Welkom High School and Another v Head, Department of Education, Free State Province, and Another*,⁴³³ two schools approached the High Court regarding a directive issued by the HoD instructing the schools to allow the two girls in question to return to school after they had given birth. However, the schools refused to allow them to return. Both these schools' policies provided that such learners were not allowed to return to school for a specified time. The implementation of the policy would have resulted in the girls having to repeat the year. The main arguments revolved round the question of the administrative powers of the HoD to issue the directive. The court was not at liberty to evaluate the constitutionality of the policies, because no counter-claim to that effect had been entered by the HoD.⁴³⁴

⁴³⁰ Ngwenya & Pretorius 2012:84-85. See also the requirements of *ubuntu* in *Afri-Forum and Another v Malema and Another (Vereniging van Regslui vir Afrikaans as Amicus Curiae)* 2011 (12) BCLR 128(EqC):par 18. *Ubuntu* stresses the level of commitment necessary to establish relationships across difference, which is more than merely tolerating one another, but rather understanding and respecting the inherent dignity of everyone.

⁴³¹ CRCGC 1 2001:par 10; see also HRCGC 4 1981:par 1-2.

⁴³² Masitsa 2006:171, 173, 180-181; Mahlomaholo 2011:318; Runhare & Vandeyar 2011:4100-4124. Grobbelaar 2011:5 indicates that, between July 2008 and July 2009, 71 364 schoolgirls fell pregnant.

⁴³³ 2011 (4) SA 531 (FB). Decision confirmed on appeal in *Head of Department: Department of Education, Free State Province v Welkom High School and Another, Head of Department: Department of Education, Free State Province v Harmony High School and Another* (766/2011, 767/2011) [2012] ZASCA 150; 2012 (6) SA 525 (SCA); [2012] 4 All SA 614 (SCA) (28 September 2012).

⁴³⁴ It transpired that the HoD did not have the capacity to issue the directives and that the schools were therefore at liberty to enforce their policies, since the constitutionality of the school policies were not before the court.

Despite the provisions of section 9(3) of the Constitution and of *PEPUDA*⁴³⁵ which explicitly provides that pregnancy is one of the prohibited grounds of unfair discrimination where schoolgirls are punished for being pregnant and may not continue with their education, or may only proceed with such education after a lengthy absence from school.

PEPUDA provides legislative prescriptions regarding unfair discrimination on the ground of gender and stipulates that unfair gender discrimination includes:

...

- (c) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;

....

- (f) discrimination on the ground of pregnancy;
- (g) limiting women's access to social services or benefits, such as health, education and social security;

...

Although the content of the pregnancy policies was not the issue before the court, it made certain *obiter* remarks pertaining to substantial fairness, the discriminatory nature of the policies, and the punitive nature of the expulsion of the learners for being pregnant. The court found that the learners had been expelled for a specified period merely because they were pregnant, without investigating their personal circumstances. It is therefore quite clear that the policies concerned would probably not pass constitutional muster.⁴³⁶ Further, it held that pregnancy policies should not only be aligned with constitutional rights, but should also be flexible enough to take the individual circumstances of every learner into account. This would include her:

medical condition, her family support system, her personal scholastic capabilities, her determination to keep on attending school (without endangering her life, that of her unborn child or anyone else in her school community).

The rights of the pregnant learner before, during and after her pregnancy should be taken into account in drafting and implementing learner pregnancy policies. A pure mechanical application of a policy without due regard for the individual circumstances of the learner will not be acceptable. Furthermore, the policy should also not be discriminatory or punitive in nature. The

⁴³⁵ 4/2000:s 1(pregnancy included in list of prohibited grounds), 8(d), (f), (g).

⁴³⁶ *Welkom High School and Another v Head, Department of Education, Free State Province, and Another* 2011 (4) SA 531 (FB):par 63-80.

court explicitly highlighted the importance of the interests of the unborn child. It reminded governors and principals that the best gift that can be given to the babies involved is to ensure that their mothers are educated and are placed in a position to become better parents.⁴³⁷

Special attention should also be given to the position of pregnant learners or mothers who are still of compulsory school-going age.

The court criticised the national Department for not putting the necessary enabling national policies in place and urged the Minister (not as part of the court order) to provide regulations within 24 months of the judgment.

4.3.4 Equality and appeals by the School Governing Body after the Head of Department's refusal to expel a learner

Section 9(4) of the *Schools Act*⁴³⁸ provides that, if the HoD confirms the SGB's recommendation to expel a learner, the learner, or the parents of the learner, can lodge an appeal against the HoD's decision with the Member of the Executive Council (MEC). However, if the HoD decides not to follow the recommendation of the SGB to expel the learner, there is no similar appeal process available to the SGB. The only recourse available to the SGB is for it to approach the High Court and apply to have the decision of the HoD reviewed.

The constitutionality of this provision is questionable on two grounds. Firstly, it violates section 9(1) of the Constitution, and, secondly, it negatively impacts on the best interests of learners who are the victims of the misconduct or of those who are third parties to the misconduct. With regard to section 9(1), the Constitution provides:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

⁴³⁷ Chigona & Chetty 2008:261-281 – they found that, despite policies to treat teen mothers as learners with special needs, they were marginalised and discriminated against. For instance, educators would help learners who were sick to catch up on work, but were of the opinion that the teen mother should face the consequences of her actions and catch up on her own. The teen mothers experience pressure from their parents, peers and the community. The community expects the schools to expel the teen mothers and to ensure that they do not “contaminate” the other girls in the school. There are clear indications that parents, educators and the community expect these girls to be punished. In some instances, girls are intimidated by community members on their way to school. Therefore, teenage pregnancies are the single-most important factor contributing to the dropout of schoolgirls. They indicate that, by the time girls turn 18, more than 30% have already given birth at least once. See also Runhare & Vandeyar 2011:4100-4124 – their research findings are in line with this discussion.

⁴³⁸ 84/1996.

In interpreting this provision, the Constitutional Court has formulated the rationality test, which provides that claimants should be protected from any arbitrary and irrational distinctions made by the legislator or the administration.⁴³⁹ In *Prinsloo v Van der Linde*,⁴⁴⁰ the Constitutional Court held:

[T]he constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.

In *Harksen v Lane NO and Others*,⁴⁴¹ the Constitutional Court refined this test further and held as follows with reference to a similar provision in the interim Constitution⁴⁴²:

Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1) [now section 9(1)].

There is no rationality in affording expelled learners the opportunity to appeal to the MEC, while the SGB, which represents the interests of the school and of other learners, is not afforded the same opportunity. Instead, the SGB can only take the decision on review to the High Court at considerable cost. The irrationality of this distinction is further highlighted by the fact that the majority of schools are school-fee-free schools with very poor learners.⁴⁴³ The SGBs of these schools would therefore not have the resources to approach the High Court. Consequently, they have no means to protect the interests of the other learners and have to accept the decision of the HoD without the option of having it reviewed by the courts or taking it on appeal to the MEC.

The relevant provision of the *Schools Act*⁴⁴⁴ unduly protects only the right of appeal of those learners who have been found guilty of serious misconduct. This constitutes a naked preference for the interests of accused learners, at the expense of the other learners in the school. There is no defensible public good at stake to afford only one group of learners the option of an

⁴³⁹ Albertyn & Goldblatt 2007:35-17.

⁴⁴⁰ 1997 (6) BCLR 759 (CC):par 25.

⁴⁴¹ 1997 (11) BCLR 1489 (CC):par 38.

⁴⁴² Constitution of the Republic of South Africa 200 of 1993.

⁴⁴³ See ch 2, par 2 herein.

⁴⁴⁴ 84/1996; see ch 3, par 6.2, 6.3 herein.

inexpensive appeal process, while such a process is not available to other groups. The high prevalence of this form of discrimination is illustrated by the increasing number of cases where SGBs, with the necessary financial means, have taken decisions of HoDs on review and have succeeded in their applications.⁴⁴⁵ Unfortunately, many schools do not have the necessary funds and have to accept the unreasonable decisions of the HoD, which inadvertently impact on the interests of the majority of learners in the school.

Section 9(1) of the Constitution also guarantees equality of legal processes. Albertyn and Goldblatt⁴⁴⁶ argue as follows in this regard:

Equal treatment by the courts or equality of legal process does not require identical procedures in different courts, but it does seem to require fair procedures across groups. This suggests that the standard of constitutionality in relation to legal process is not rationality but fairness.

4.3.5 Equality and the distinction between children under and above 15 years of age

Section 9(5) of the *Schools Act*⁴⁴⁷ provides that, if a learner is expelled from school and is of compulsory school-going age, the HoD must make alternative arrangements to place the learner at another public school. No such responsibility regarding learners above 15 years of age exists. Since access to education implies not unjustifiably turning learners away and/or making it easier for learners to access education,⁴⁴⁸ the question arises whether the alleviation of the state's obligation in this regard is constitutional. It seems, on the face of it, as though this provision not only constitutes an infringement of the right to access education, but is also unfair discrimination on the prohibited ground of age.⁴⁴⁹

In *Centre for Child Law v Minister for Justice and Constitutional Development and Others*,⁴⁵⁰ the Constitutional Court had to determine, with reference to section 28(1)(g) and 28(2) of the Constitution, the constitutionality of legislative provisions providing for minimum sentences for children aged 16 and 17 at the time of the offence.⁴⁵¹

⁴⁴⁵ See ch 3, par 5.9 for a detailed discussion of cases in this regard.

⁴⁴⁶ 2007:35-24.

⁴⁴⁷ 84/1996:s 9(5). See also ch 3, par 6.7 herein for a detailed discussion.

⁴⁴⁸ Woolman & Bishop 2011:57-21. See the discussion on accessibility of education in par 2.2.4.2 above.

⁴⁴⁹ Constitution 1996:s 9(3).

⁴⁵⁰ 2009 (6) SA 632 (CC).

⁴⁵¹ Constitution 1996:s 28(1)(g) provides that:

Every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –

The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), the *amicus curiae* in the case, argued that it was irrational and unfairly discriminatory to subject offenders aged 16 and 17 to minimum sentences, while the special protective measures found in section 28 of the Constitution are applicable to everyone under the age of 18. It was also clearly stated by the court *a quo* (the High Court) and summarised by the Constitutional Court that:

(d) [t]he children's rights provision creates a stark but beneficial distinction between adults and children. It draws a distinction between adults and children below the age of 18 and requires that those under 18 be treated differently from adults when authority is exercised over them.⁴⁵²

In its judgment, the Constitutional Court found the provisions to be unfair but did not specifically address the discrimination issue raised in the arguments. It merely confirmed that the protection is afforded to everyone under the age of 18 and that the legislative provisions that had been introduced obliterated the distinction between, on the one hand, adults and, on the other, offenders who are between 16 and 17 years of age at the time of the offence.⁴⁵³ This approach of the legislator lowered the age of protection afforded by section 28 to 16 years and the state therefore had a duty to indicate that such limitation of children's rights was justifiable. Yet, the state failed to provide any tangible reasons why it was justifiable to infringe on the rights of offenders between the ages of 16 and 17.⁴⁵⁴ The court held that children's rights:

do not apply *indifferently* to children by category. A child's interests are not capable of legislative determination by group.⁴⁵⁵

It must be noted that the court did not prohibit the application of children's rights to a category of children, but the *indifferent* application of children's rights. Children's rights must be applied by taking the individual circumstances of every child into account. In this regard, the court referred

-
- (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age.

⁴⁵² 2009 (6) SA 632 (CC):par 14(d).

⁴⁵³ 2009 (6) SA 632 (CC):par 39.

⁴⁵⁴ 2009 (6) SA 632 (CC):par 40-45. Instead, the court referred to the importance of individualising sentences for children and to the international standard that incarceration of children should be for the shortest possible time. The court found that minimum sentencing directs the presiding officer away from non-custodial sentences and de-individualises sentencing. This is not in line with the idea of incarceration as a last option, which should be for the shortest time possible.

⁴⁵⁵ 2009 (6) SA 632 (CC):par 47. [My emphasis]

to *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*⁴⁵⁶ and added:

What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion. This means that the child must “be treated in a caring and sensitive manner. This requires taking into account [the child’s] personal situation, and immediate needs, age, gender, disability and level of maturity”. In short, “every child should be treated as an individual with his or her own individual needs, wishes and feelings”.⁴⁵⁷

The court continued and, in referring to the *S v M*⁴⁵⁸ judgment, held:

A truly principled child-centred approach requires a close and individualized examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.⁴⁵⁹

Thus the court emphasised that legislative provisions setting predetermined formulas could not be haphazardly applied to groups of children because of the risk of infringing on the best interests of individual children in the process. Consequently, it found that the minimum sentencing requirements for those aged 16 and 17 were unconstitutional.

The above discussion can be used to answer the question pertaining to the constitutionality of the legislative provision to afford assistance to expelled learners under 15 years, but not to those above 15 years. The first question would be whether such distinction constitutes unfair discrimination on the ground of age. If it does, the state would have to justify the discrimination. There can be no doubt that to distinguish between learners above and below 15 years of age in this particular circumstance is, *prima facie*, a form of direct discrimination, on the prohibited ground of age, in terms of section 9(3) of the Constitution.⁴⁶⁰

⁴⁵⁶ 2009 (4) SA 222 (CC):par 113.

⁴⁵⁷ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (4) SA 222 (CC):par 47. In *Welkom High School and Another v Head, Department of Education, Free State Province, and Another* 2011 (4) SA 531 (FB), the court followed the same line of argument and found that excluding a pregnant learner without taking individual circumstances into account was unacceptable.

⁴⁵⁸ 2007 (2) SACR 539 (CC):24

⁴⁵⁹ 2009 (6) SA 632 (CC):par 48..

⁴⁶⁰ See also *PEPUDA* 4/2000:s 1. It defines age so as to include “conditions of disadvantage and vulnerability suffered by persons on the basis of their age, especially advanced age”.

In justifying this distinction, the state could argue that the right to basic education coincides with the compulsory school-going age, which is 15 years. However, if the child wants to continue his or her education after the age of 15, he or she can do that, in terms of everyone's right to further education, subject to progressive availability and accessibility. Therefore, the state does not have an obligation to ensure that the child is enrolled at another institution. The state could further argue that the omission of the state in assisting the learner to find alternative enrolment does not infringe on the child's right to education, since he or she can still find enrolment of his or her own accord.

In addition, the state could argue that children do not have any special protection regarding education, since section 28 of the Constitution does not explicitly provide for children's right to education. The right to education is captured in section 29 of the Constitution, which only stipulates that everyone has the right to basic education, including adult basic education. Therefore, a distinction between children above and below 15 years of age is justified, since basic education ends at the age of 15 years.

These arguments would, however, probably not pass constitutional muster if one considers the above discussion of *Centre for Child Law v Minister for Justice and Constitutional Development and Others*,⁴⁶¹ as well as the provisions of section 28(2) of the Constitution. Firstly, to make a blanket distinction between children above and below 15 years of age without any individualisation would be contrary to the notion that the individual circumstances of every child should be taken into account in making decisions regarding the child, and would also be contrary to a child-centred approach.

Furthermore, the best-interests-of-the-child provision is still applicable to all children in all matters concerning them. Thus, even though the children do not have any special protection regarding education, the provision would still be applicable. This would afford them special protection in the context of education until they attain the age of 18 years. The state would thus be unable to limit the protection afforded under section 28(2), unless it provides proper justification.

The limitation of rights can only be done in accordance with the provisions of section 36 of the Constitution.⁴⁶² In the limitation analysis, several factors should be considered, including the

⁴⁶¹ 2009 (6) SA 632 (CC).

⁴⁶² Constitution 1996:s 36. It provides as follows:

nature of the right. The best interests of the child constitute the foundational value of children's rights, as well as one of the foundational rights in respect of children's rights. The purpose of not affording the assistance is not clear, especially if one takes into account the relatively small number of learners who are actually expelled from schools.⁴⁶³ Thus the purpose of limiting the best interests of the child is not clear. Further, to limit the best interests of the child can have devastating long-term consequences, since the learner might not be able to find other suitable enrolment, which will not only have an impact on his or her education, but also on his or her ability to properly exercise other rights. Since the purpose of the limitation is also not very clear, the relationship between the limitation and purpose is not clear. In this particular context, it would be difficult to justify the limitation of the best interests of the child. Consequently, the current provisions regarding assistance by the Department in finding alternative enrolment for expelled learners should be deemed unconstitutional.⁴⁶⁴ The Department should have an obligation to assist expelled learners above 15 years of age who choose to continue their education.⁴⁶⁵ In what follows, the impact of the distinction between basic education and further education will be discussed with reference to learners under and above 15 years of age.

4.3.6 Equality and the right to basic education and further education

In the discussion on the right to education, it was pointed out that the term "basic education" in international law would seem to include primary as well as secondary education, although secondary education is not regarded as being compulsory or required to be free. Yet, the Constitutional Court made an *obiter* remark, which is open to interpretation, that basic education is limited to compulsory education in South Africa.⁴⁶⁶ However, even if one argues that basic education is only until age 15, it would still be difficult to justify the legislative provision to limit

-
- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

⁴⁶³ Compare *S v M* 2007 (2) SACR 539 (CC):fn xlii. The Constitutional Court found that sentencing courts will not be unduly burdened by the obligation to conduct an investigation to determine the best interests of the children of the convicted primary caregiver, because of the limited number of cases of this type.

⁴⁶⁴ *Schools Act* 84/1996:s 9(5). See also ch 3, par 6.7 herein.

⁴⁶⁵ UNESCO 2007:1. See the provisions in the operational definition of basic education regarding the state's obligation to provide equivalent basic education.

⁴⁶⁶ *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC):par 37-38.

the state's obligation to assist expelled learners to find alternative placement, taking into account that section 29(1)(b) of the Constitution provides as follows:

Everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible.⁴⁶⁷

Firstly, if the learners are over 15 years of age, but have not completed grade 9, they have therefore not met the requirements in respect of basic education in terms of the international standards, set at 9 years of education.⁴⁶⁸ Thus to deny these learners assistance would constitute an infringement of the right to basic education of these children.⁴⁶⁹ This also highlights the need to reconsider the unqualified reference to age in the determination of compulsory education.⁴⁷⁰

Secondly, it is clear that the Department goes to great lengths to ensure that there are enough places available for learners to attend school beyond 15 years of age, as can be deduced from the statistics gathered by it to ensure that there are an adequate number of schools available.⁴⁷¹ Furthermore, the Department has even resorted to unlawful measures, such as disregarding the admission policies of schools, in an effort to make education more accessible.⁴⁷² However, when a learner older than 15 years of age is expelled, the HoD is not liable for ensuring that such learner is enrolled at another school. This gives rise to questions as to the reasonableness of the legislative differentiation in terms of which education is made accessible to learners above 15 years of age with no behavioural problems, but not to those over 15 who do have serious behavioural problems. Learners with behavioural, psychological and emotional difficulties should be regarded as a vulnerable group with special needs. Therefore, the failure to legislate that HoDs must assist this vulnerable group constitutes unfair discrimination on the analogous ground that some learners have behavioural problems while others do not. To ensure the eventual and equal best interests of all children, disciplinary measures and, in particular, existing legislation should be re-evaluated and aligned with the constitutional imperatives.

⁴⁶⁷ See the discussion on basic and further education in par 2.2.3 above.

⁴⁶⁸ See ch 2, par 8.4.6 herein on overage learners and table 1 indicating that the majority of learners in grade 9 are above the age-grade norm and have not finished the compulsory basic education phase.

⁴⁶⁹ See par 2.2.3 above for clarification of the terms "basic education" and "further education".

⁴⁷⁰ *Schools Act 84/1996:s 3(1)*.

⁴⁷¹ See ch 2, par 8.1.7 herein.

⁴⁷² *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC). *Governing Body of Rivonia Primary School and Another v MEC for Education, Gauteng Province, and Others*: unreported case in the Supreme Court of Appeal, case 161/12. Judgment delivered on 30 November 2012.

Thirdly, the right to education entails, *inter alia*, the right to be taught to act in a socially acceptable manner, thereby enabling learners to function properly in society. In *Centre for Child Law v Minister of Justice and Constitutional Development and Others*,⁴⁷³ the court provided an elaborate discussion of children's physical and psychological immaturity, of their vulnerability to influence and peer pressure, of their lack of judgement, of their unformed character, of youthful vulnerability to err, of their impulsiveness, of their lack of self-control, and of their lack of full moral accountability for transgressions. The prospect of children's successful rehabilitation was also highlighted, taking into account that it is precisely their immaturity and the fact that their character is not fully developed which provide better prospects for their rehabilitation.⁴⁷⁴ In this regard, the court referred with approval to the United States Supreme Court case of *Roper, Superintendent, Patosi Correctional Center v Simmons*,⁴⁷⁵ where the court held:

From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.⁴⁷⁶

Disciplinary measures should thus take the above-mentioned characteristics of children into account and should enhance children's capacity to be developed and reformed. The Constitutional court further highlighted the fact that children should be regarded as "society's hope for, and investment in, its own future".⁴⁷⁷ This is captured in the Bill of Rights, and that is why the state is obliged to afford children special nurturing, as well as protection from state power.

Children who transgress in schools often infringe on the rights of others in the process. It is thus clear that they have not achieved the envisaged educational outcome of respecting the human rights of others.⁴⁷⁸ If these children are expelled from school, they will in all likelihood not master this skill and attitude, unless there is some other intervention. Unfortunately, there is no guarantee that this will occur. Thus, by expelling the learner and not providing him or her with the necessary assistance in enrolling in another institution, the system is at risk of forfeiting the

⁴⁷³ 2009 (632) (CC):par27-37. The judgment in *Welkom High School and Another v Head, Department of Education, Free State Province, and Another* 2011 (4) SA 531 (FB) is in line with this approach of the Constitutional Court. The Free State High court found that expelling a pregnant learner without taking individual circumstances into account was unacceptable.

⁴⁷⁴ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (6) SA 632 (CC):27-37.

⁴⁷⁵ 543 US 551 (2005).

⁴⁷⁶ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (6) SA 632 (CC):par 35.

⁴⁷⁷ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (6) SA 632 (CC):par 37.

⁴⁷⁸ ICESCR 1966:a 13(1); CRC 1989:a 29(1)(b); ACRWC 1990:a 11(2)(b). Education should be directed towards respect and the strengthening of human rights.

opportunity to instil in the learner respect for the human rights of others. Furthermore, mere enrolment in another institution might not be enough. It should be an appropriate institution that is capable of addressing the particular needs of the learner, that will be able to assist the learner to develop to his or her full potential, and that will teach the learner to act in a socially responsible manner.

4.3.7 Equality and certificates of good conduct

In June 2007, in *Member of the Executive Council for Education, Eastern Cape Province, and Others v Queenstown Girls High School*,⁴⁷⁹ the MEC sought an order declaring the admission policy of the school unconstitutional on the ground of unfair discrimination. The school's admission policy provided that a learner had to present a certificate of behaviour together with his or her application for admission to the school "to protect the educators, learners, parents and non-educators of the school from physical or mental violence". The MEC argued that this constituted unfair discrimination on an unlisted ground in terms of the Constitution.

In analysing the legal position, the court found that no national policy or legislation explicitly prohibited a school from requiring a certificate of good behaviour before admission to the school, or allowed the requirement of such a certificate. Therefore, the school had not acted unlawfully in requiring these certificates. The only other avenue open to the MEC was to argue that the requirement that previous behaviour should be disclosed constituted unfair discrimination on an unlisted analogous ground or that it constituted indirect discrimination, because it negatively affected, for instance, black learners.

The court found that the requirement that previous conduct should be disclosed applied equally to all prospective learners and did not therefore constitute any form of unfair discrimination. If it was to be found unfair, the discrimination should be found in the purpose for which the certificate was required. However, the purpose was clearly stated as being to protect the staff and learners at the school. The court thus found that the admission policy, which was aimed at protecting staff and other learners, did not meet the requirements for discrimination on an unlisted ground, because the policy was not "based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner"⁴⁸⁰ so as to be unconstitutional.

⁴⁷⁹ Unreported case 1041/07 in the Eastern Cape Division.

⁴⁸⁰ See *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC):par 54.

However, the court acknowledged that its finding in this regard might be wrong. Therefore, it held that the alternative approach should be followed so as to reach a decision and decided that it would regard the learner's "potential propensity to violent behaviour" as a characteristic or attribute for which the learner could not be held responsible at that young age. Thus it continued its judgment from the premise that the admission policy requiring a certificate of good conduct constituted discrimination on an unlisted ground. In the case of discrimination on an unlisted, analogous ground, the onus of proof is on the applicant (in this case, the MEC) to indicate that the discrimination is unfair. However, no evidence was adduced in this regard by the MEC.

The court consequently found that the SGB had acted lawfully in providing, in its admission policy, that it reserved the right to protect the rights of others at the school. The learners and staff had a fundamental right to be protected from any form of violence. Therefore, it was not inappropriate to take steps in an admission policy to protect the safety of learners and staff from such violence. However, the SGB could not seek to circumvent its obligation to assist the Department of Education to find suitable placements for all eligible learners. No such evidence was produced by the applicant that the SGB had in fact done so. As a result, the MEC's application failed.

In the same year, in September, the Constitutional Court delivered its judgment in *S v M*,⁴⁸¹ which was discussed at length throughout chapter 4. The outcome of the above-mentioned case on the certificate of conduct might have been – and in all likelihood would have been – different if the principles established in *S v M* had been followed. Firstly, the court adopted a strict application of the onus-of-proof rules, with the result that the MEC bore the onus of proof to sustain a claim of direct discrimination on an analogous, prohibited ground. However, the MEC did not provide any factual grounds to meet this requirement. Therefore, the claim had to fail. Secondly, and in contrast, the Constitutional Court has held on two occasions that the court has an oversight function to ensure the best interests of a child and has to take the initiative in initiating such an investigation.⁴⁸² The Supreme Court of Appeal has also explicitly found that there is no onus of proof if the child's best interests are at stake, and that litigation involving children is not of the ordinary civil kind. In fact, the Supreme Court of Appeal found that it may not make a finding by way of the usual opposed-motion procedures if such an approach would "leave serious disputed issues relevant to the child's welfare unresolved".⁴⁸³

⁴⁸¹ *S v M* 2007 (2) SACR 539 (CC).

⁴⁸² See the discussion in ch 4, par 8.3 herein; *S v M* 2007 (2) SACR 539 (CC):par 36; *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC):par 26.

⁴⁸³ *B v S* 1995 (3) SA 571 (A):584-585.

The strict-application approach is also not in line with the notion of the optimisation of the best interests of the child. As for the individual child who was refused admission, no specific investigation was undertaken or ordered by the court to ensure her best interests. In the same vein, no investigation was conducted either to secure the best interests of any other learners who might have been affected by the decision on the lawfulness or otherwise of the particular admission policy or to safeguard the future safety of other learners who might come into contact with this particular learner. The girl in question was refused admission to Queenstown Girls High School because of previous misconduct which indicated that she was a possible safety risk to other learners and staff. Yet, after she was refused admission at this particular school, she was admitted to another school, where she could also pose a similar safety risk to those learners and educators.

Instead of heeding the call to optimise the best interests of all children, the court in the *Queenstown Girls High School* case relied on a procedural provision. Moreover, the MEC focused only on the admission policy of the one school and not on the best interests of the particular girl or the safety and best interests of any other learners. To optimise the best interests of all children, an investigation should have been launched by the court into the level of risk posed by this learner. The court should have instructed the MEC to ensure that she received the necessary support services to address her own needs and to prevent possible harm to other learners in future.⁴⁸⁴

Substantive equality prescribes an equal-best-interests outcome for all learners. Disciplinary measures, and admission policies in particular, should thus ensure that every child's best interests are respected, protected, promoted and fulfilled. Such measures, and policies, should provide adequately for the safety of all learners and should ensure that, if learners constitute a safety risk for other learners, this risk is properly assessed. Learners should then accordingly be placed in a suitable educational institution. If the learner is placed in an ordinary school, suitable preventative measures should be identified and implemented immediately to ensure that the safety risks posed by the learner are minimised and that the best interests of all children are optimised. Furthermore, the state is primarily responsible for providing social services for learners.⁴⁸⁵ Consequently, it must either provide the services or empower schools adequately to provide the necessary services for all learners who may have an interest in the matter.

⁴⁸⁴ See the discussion in par 2.2.4.1.5, 2.2.4.2.4 and 2.2.4.3.2 and *Jacobs v Chairman, Governing Body, Rhodes High School, and Others* 2011 (1) SA 160 (WCC).

⁴⁸⁵ See the discussion in par 2.2.4.1.5, 2.2.4.2.4 and 2.2.4.3.2 and *Jacobs v Chairman, Governing Body, Rhodes High School, and Others* 2011 (1) SA 160 (WCC).

The approach of securing the best interests of a particular child and the safety of other learners should not only be followed in the admission of learners to a school, but also in every instance where it becomes evident that a particular learner, or learners, poses a safety risk for himself or herself and others.

In conclusion, equality plays an important role in the preferred transformative constitutionalism approach. Therefore, decision-makers are obliged to ensure that disciplinary measures are aligned with the vision of substantive equality in order to guarantee equality of outcome, namely the best interests of every child in any matter related to school discipline. A number of specific issues identified warrant the re-evaluation or realignment of existing policies and practices. These include the provision of adequate physical facilities for learners with behavioural, psychological and behavioural difficulties, the equal availability of support measures and counselling structures for all learners so as to address causes of misconduct and as a prevention strategy, and measures to prevent gender discrimination. Legislative provisions regarding unequal appeal procedures and the position of learners under and above 15 years of age also give rise to questions regarding their compliance with the Constitution. The impact of substantive equality on the obligations imposed on schools and the various departments when they become aware of safety risks posed by learners and prospective learners was highlighted in the discussion on the validity of certificates of good conduct in the admission of learners to a school.

5. RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT

The right to life is universally accepted as the most basic and most fundamental human right.⁴⁸⁶ Without life, none of the other rights can be exercised. Only if life exists, do questions arise as to how to make it worth living, and as to how to prevent it from being undermined by different acts and omissions. The right to life encompasses a negative duty not to extinguish human life, as well as a limited positive duty on the part of the state to protect and preserve life.⁴⁸⁷

The CRC relates the development of the child to several other articles.⁴⁸⁸ The concept of survival and development is fundamental to the realisation of children's rights and plays a pivotal role in the CRC. Survival and development are also closely linked to the best interests of the child.⁴⁸⁹ In what follows, the content of the right to life, survival and development will be

⁴⁸⁶ European Union 2000:a 2; ACHPR 1981:a 4.

⁴⁸⁷ Davis & Youens 2005:104.

⁴⁸⁸ CRC 1989:a 24(health); 27 (adequate standard of living); 28 (provision of education); 29 (aims of education); 31 (leisure and play).

⁴⁸⁹ Hodgkin & Newell 2007:83, 93.

discussed and this will then be applied to the school disciplinary context in order, ultimately, to inform the best-interests-of-the-child concept.

Furthermore, content will be given to the right to life, survival and development with reference to international law and South African law. This will then be applied to the school disciplinary context by focusing on the creation of a safe environment and on providing learners with unrestricted opportunities for development through discipline.

5.1 Right to life, survival and development in international law

Several international instruments refer to the right to life and also emphasise the relationship between development and other rights.⁴⁹⁰ General Comment 6 of the Human Rights Committee (HRC)⁴⁹¹ on the right to life warns against an unduly narrow approach to the right:

The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it will be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

Article 6 of the CRC⁴⁹² combines the right to life and the right to survival and development in one provision and provides as follows:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Although the international community is in agreement on the recognition of the right to life, it tends to emphasise different aspects of the right, including perinatal care, infant mortality, conditions promoting the well-being of young children, malnutrition, preventable disease,

⁴⁹⁰ UDHR 1948:a 3; ICCPR 1966:a 6(1); ACHPR 1981:a 4; European Union 2000:a 2; ACRWC 1990:a 5(2).

⁴⁹¹ HRCGC 6 1982:par 5. See also HRCGC 17 1989:par 1-3 on states’ obligations to ensure the protection of children and the fact that they are entitled to greater protection than adults. Furthermore, every possible economic and social measure should be taken to prevent children from, *inter alia*, being subjected to acts of violence and inhuman treatment. The state must also indicate the measures adopted to assist parents in discharging their responsibility to protect their children. Therefore, legislative provisions and practices must assist parents to protect their children from, *inter alia*, school-based violence, bullying and corporal punishment.

⁴⁹² CRC 1989.

abortion, euthanasia and infanticide, early marriage, armed conflict, the death penalty, suicide, and harmful traditional practices.⁴⁹³

The Declaration on the Right to Development of the General Assembly of the United Nations refers to the provisions of the Charter of the United Nations, the ICESCR and the ICCPR and provides as follows:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁴⁹⁴

The right to development is applicable to all dimensions of people and is related to all the other human rights. The Declaration also stipulates that the right to development implies the full realisation of people's right to self-determination.⁴⁹⁵ Everyone has a responsibility for their individual development as well as the development of the collective, having due regard for the human rights and freedoms of all.⁴⁹⁶

The right to development entails that the state has the obligation to ensure the "constant improvement and well-being of the entire population and of all individuals". Benefits of development should be distributed fairly among the population.⁴⁹⁷ In addition, the state should create conditions favourable for development⁴⁹⁸ and it should take steps to eradicate any obstacles to development due to any failure to give effect to civil, political, economic, social and cultural rights.⁴⁹⁹ The state also has an obligation to ensure equality of opportunity to develop and should therefore regulate, *inter alia*, access to basic resources, education and health services.⁵⁰⁰

⁴⁹³ Pieters 2011:39-1; Hodgkin & Newell 2007:83-93. The content given to the right to life by the South African Constitutional Court will be discussed in more detail in paragraph 5.2 below.

⁴⁹⁴ Declaration on the Right to Development 1986:a 1(1).

⁴⁹⁵ Declaration on the Right to Development 1986:a 1(2).

⁴⁹⁶ Declaration on the Right to Development 1986:a 2(2).

⁴⁹⁷ Declaration on the Right to Development 1986:a 2(3).

⁴⁹⁸ Declaration on the Right to Development 1986:a 3(1).

⁴⁹⁹ Declaration on the Right to Development 1986:a 6(3).

⁵⁰⁰ Declaration on the Right to Development 1986:a 8(1), 10.

The African Charter on the Rights and Welfare of the Child⁵⁰¹ (ACRWC) has a specific provision regarding survival and development, in addition to the right to life, and requires states to optimise actions to maximise the survival and development of the child. It provides:

1. Every child has an inherent right to life. This right shall be protected by law.
2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.

In terms of General Comment 5 on the general measures of implementation of the Committee on the Rights of the Child, states parties are expected:

to interpret “development” in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children.⁵⁰²

This echoes the provisions of article 27 of the CRC with regard to an adequate standard of living and is in line with article 29 of the CRC which provides for the “development of the child’s personality, talents and mental and physical abilities to their fullest potential”. The Committee on the Rights of the Child issued General Comment 4 on adolescent health and development in the context of the CRC.⁵⁰³ The Committee indicates that this comment is not restricted to the provisions in article 6 of the CRC related to the right to life, survival and development and in article 24 on the right to health. The General Comment provides that one of its aims is precisely to identify the main human right that:

[needs] to be promoted and protected to ensure that adolescents do enjoy the highest attainable standard of health, develop in a well-balanced manner, and are adequately prepared to enter adulthood and assume a constructive role in their communities and in society at large.⁵⁰⁴

It is thus clear that the development of the child is related to the other rights of the child and is aimed at preparing the child for adulthood and citizenship. The optimisation of the child’s development is also evident from the fact that the child should be able to fulfil a constructive role

⁵⁰¹ 1990:a 5.

⁵⁰² CRCGC 5 2003:par 12.

⁵⁰³ CRCGC 4 2003.

⁵⁰⁴ CRCGC 4 2003:par 4.

in society. This is also evident from the phrase “to the maximum extent possible” contained in article 6 of the CRC. However, Hodgkin and Newell⁵⁰⁵ aver that the concept “development”:

is not just about the preparation of the child for adulthood. It is about providing optimal conditions for childhood, for the child's life now.

Thus, in the context of this discussion, the state has an obligation to ensure that disciplinary measures contribute to the holistic development of all the dimensions of the child. The development of the child is also related to the promotion and protection of other rights. Disciplinary measures should thus reflect the promotion and protection of other rights which impact on the development of the child. Furthermore, the state and schools in particular are responsible for creating circumstances conducive to the development of the child, and preparing him or her for responsible adulthood.⁵⁰⁶

In addition, states parties are reminded of the following in General Comment 7 of the Committee on the Rights of the Child on implementing child rights in early childhood:

Article 6 [of the CRC dealing with the right to life, survival and development] refers to the child's inherent right to life and States parties' obligation to ensure, to the maximum extent possible, the survival and development of the child... . Ensuring survival and physical health are priorities, but States parties are reminded that article 6 encompasses all aspects of development, and that a young child's health and psychosocial well-being are in many respects interdependent. Both may be put at risk by adverse living conditions, neglect, insensitive or abusive treatment and restricted opportunities for realizing human potential. Young children growing up in especially difficult circumstances require particular attention. ... The Committee reminds States parties (and others concerned) that the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, and adequate standard of living, a healthy and safe environment, education and play (arts 24, 27, 28, 29 and 31), as well as through respect for the responsibilities of parents and the provision of assistance and quality services (art 5 and 18).⁵⁰⁷

General Comment 14 of the CESCR refers to several other international instruments and indicates that health encompasses more than physical health.⁵⁰⁸ The ICESCR provides that

⁵⁰⁵ 2007:93.

⁵⁰⁶ CRCGC 4 2003:par 14.

⁵⁰⁷ CRCGC 7 2005:par 10.

⁵⁰⁸ See also CESCRGC 14 2000:par 2.

everyone is entitled to the “enjoyment of the highest attainable standard of physical and mental health” and highlights states parties’ obligation to take steps to, *inter alia*, achieve the full realisation of the “healthy development of the child”.⁵⁰⁹

The child’s development, health, survival, standard of living, education, leisure, safety and psychosocial well-being are explicitly linked.⁵¹⁰ It is indicated that these dimensions of the child’s being, life and development can be negatively impacted on by adverse living conditions, neglect, insensitive or abusive treatment, and restricted opportunities. Many of these aspects have already received attention in this chapter and will not be repeated here. However, there are dimensions of these factors impacting on the child’s development which will be elaborated on in the following discussion of these rights in the context of school discipline.⁵¹¹

5.2 Right to life, survival and development in South African law

The right to life is left largely open-ended in the South African Constitution.⁵¹² It simply provides: “Everyone has the right to life.” Content is thus given to this right through case law, which allows for a broad and permissive interpretation.⁵¹³ Section 7(2), obliging the state to respect, protect, promote and fulfil rights, opens the door further to ensure an expansive interpretation. There is no explicit right to survival and development in the South African Constitution. However, the right to life and to development have been linked by the Constitutional Court and this has contributed to the wide interpretation given to such rights. In finding the death penalty unconstitutional, the Constitutional Court found infringements of several rights, including the right to life, dignity, equality, fair trials and humane punishment. Chaskalson P found a close link between dignity and the right to life and held:

[t]he right to life and dignity are the most important of all human rights, and the source of all other personal rights... . By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.⁵¹⁴

In *S v Makwanyane and Another*,⁵¹⁵ O’Regan J indicated that the right to life entails the protection of something more encompassing than biological or legal life. It includes the right “to live as a human being, to be part of the broader community”. It also includes the right to “share

⁵⁰⁹ ICESCR 1966:a 12(1), (2).

⁵¹⁰ CESCRGC 14 2000:par 3.

⁵¹¹ See par 5.3 below.

⁵¹² Davis & Youens 2005:103.

⁵¹³ Constitution 1996:s 37(5)(c); Pieters 2011:39-1–39-2.

⁵¹⁴ *S v Makwanyane* 1995 (2) SACR 1 (CC):par 131.

⁵¹⁵ 1995 (2) SACR (CC) 1:par 326.

in the experience of humanity". Thus every individual's value must be recognised and treasured. She held:

The right to life is, in one sense, antecedent to all other rights in the Constitution. Without life, in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: The right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.

It is clear, therefore, that the right to life entails much more than being alive. It encompasses quality of life and is afforded to everyone, because everyone has the right to life.⁵¹⁶ The relationship between poverty and many other social problems, such as drug and alcohol dependency, dysfunctional families, unemployment, violence, and child abuse, is well known. There are many people in South Africa who seem to be unable to break the cycle of poverty in their families and to improve the quality of their lives.⁵¹⁷ Research indicates that this is often due to a lack of skills to improve their desperate situation. There is also a link between providing dignified living conditions for citizens and education.⁵¹⁸ Thus to deny people the opportunity to improve the quality of their lives through education and development would constitute an infringement of their right to dignity. The interrelatedness of the right to life and dignity was explicitly expressed by the Constitutional Court in *S v Makwanyane and Another*.⁵¹⁹

The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence; it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.

⁵¹⁶ The quality dimension of the right to life is also captured in *Clarke v Hurst* 1992 (4) SA 630 (D):649, 653. This case dealt with an application to terminate life-sustaining treatment for a person with severe brain-stem injuries. Although not relevant in the present context, see the discussion in Pieters 2011:39-3-39-5 on debates regarding the term "everyone" in connection with the right to life of the unborn child.

⁵¹⁷ See ch 2, par 8.7.1 herein on socio economic background.

⁵¹⁸ Patel 2005:29-30.

⁵¹⁹ *S v Makwanyane and Another* 1995 (2) SACR 1 (CC):par 326-327.

The right to dignity was discussed in paragraph 3 above and those dimensions relevant to the ensuing discussion will not be repeated here. However, such dimensions should be kept in mind as constituting an integral part of what follows.

It is important to return to the notion that the right to life includes a minimum quality of life. The quoted paragraph from *S v Makwanyane and Another* suggests that the right to life may impose a positive duty on the state to create conditions which will enable persons to enjoy the right to life in its broader sense, and may entail an obligation on the part of the state to provide material means and access to goods and services, such as water, food, livelihood, and the like. The courts, however, have opted to give effect to these rights by referring to the relevant socio-economic rights provided for in the Constitution. The right to life is normally used to inform these socio-economic rights.⁵²⁰

Socio-economic interests can be divided into two main categories, namely survival rights and secondary socio-economic rights. Survival rights are those rights which focus on basic and essential inputs necessary to sustain biological life and include access to basic nutrition, water, shelter, and basic healthcare services. Secondary socio-economic rights are aimed at ensuring an adequate standard of living and refer to housing, more advanced healthcare services and education.⁵²¹

The right to life does not provide an unqualified claim to the realisation of socio-economic rights. However, Pieters⁵²² argues that, even if the right to life is limited to biological existence only, the state's obligation to fulfil the right to life would include, at a minimum, compliance with basic survival requirements contained in the above-mentioned survival rights. Rautenbach⁵²³ further contends that the enforcement of socio-economic rights must be distinguished from those instances in which the:

physical-biological existence of human beings [is] infringed or threatened by socio-economic and ecological degradation, war, internal disorder, and military and security actions. These constitute direct infringements of, or direct threats to, the right to life.

⁵²⁰ Constitution 1996:s 26 (housing); 27 (healthcare, food, water and social security); s 28(1)(c) (children's right to basic nutrition, shelter, basic healthcare services and social services); s 29 (right to education); see Pieters 2011:39-21.

⁵²¹ Pieters 2011:39-18.

⁵²² 2011:39-18.

⁵²³ 2008:89.

The Constitution does not contain a specific provision on the child's right to development, except for the prohibition of child labour which might impact negatively on the child's social development.⁵²⁴

5.3 Right to life, survival and development, and disciplinary measures

The full realisation of the right to life, survival and development is at risk due to adverse living conditions, neglect, insensitive or abusive treatment, and restricted opportunities for realising human potential.⁵²⁵ In what follows, some of the aspects of these rights will be discussed, as well as the risk factors with reference to the school disciplinary context.

5.3.1 Respect for and protection of life, and disciplinary measures

Fatalities, disablement, and psychological and emotional problems due to corporal punishment and other violent conduct in schools were discussed in chapter 2.⁵²⁶ Respect for the preservation of life is the most basic manifestation of the right to life and entails that no one should be killed unlawfully.⁵²⁷ In *S v Makwanyane and Another*,⁵²⁸ the Constitutional Court highlighted the state's obligation to respect the right to life and dignity of everyone. At a minimum, the state is obliged to punish the unlawful deprivation or diminution of life through the effective implementation of criminal law.⁵²⁹

In *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*,⁵³⁰ the Constitutional Court developed the common law of delict to align it with the right to life, dignity, and freedom and security of the person, indicating that the state had a positive obligation to take steps to prevent harm to individuals whose life is at risk. In this regard, the court referred to the European Court of Human Rights,⁵³¹ which held that the right to life:

may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.⁵³²

⁵²⁴ Constitution 1996:s 28(1)(f)(ii).

⁵²⁵ CRCGC 7 2006:par 10.

⁵²⁶ See ch 2, par 7 herein.

⁵²⁷ Pieters 2011:39-1-39-2, 39-8.

⁵²⁸ 1995 (2) SACR CC 1:par 80, 95, 144.

⁵²⁹ Pieters 2011:39-13-39-14.

⁵³⁰ 2001 (4) SA 938 (CC):par 45.

⁵³¹ *Osman v United Kingdom* 29 EHHR 245 at 305:par 115.

⁵³² 2001 (4) SA 938 (CC):par 45.

In *Rail Commuters Action Group v Transnet t/a Metrorail*,⁵³³ the Constitutional Court held that the rights to life, dignity, and freedom and security of the person sometimes impose a positive obligation on the state. It is thus clear that the obligation to protect the lives of citizens exists, but the normative content of this obligation is uncertain and applicable only in exceptional circumstances.⁵³⁴ The extent of the duty will depend on the facts of each case and will include factors such as knowledge of the dangers to the life of another, whether the state failed to take any steps within its available powers as could be reasonably expected in the circumstances, and whether the danger was a real and immediate risk to another.⁵³⁵ The positive duty to secure the safety of the rail commuters in the cited case included the adoption of reasonable measures to secure their safety. The court held that what:

constitutes reasonable measures will depend on the circumstances of each case... .
The more grave is the threat to fundamental rights, the greater the responsibility on the duty bearer. Thus an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb.⁵³⁶

There is no doubt that disciplinary measures should safeguard these dimensions of children's right to life. Instances of fatalities or severe disablement of learners due to the use of corporal punishment and other forms of school-based violence such as gang activities are thus in sharp contrast to the obligation to respect and protect life.⁵³⁷ The extent of the state's liability for the continued application of corporal punishment is debateable. Arguments in favour of state liability would be that the state is well aware of the high prevalence of corporal punishment and the lack of active steps to curb its prevalence.⁵³⁸ On the other hand, it might be argued, in a specific case, that the officials of the Department were unaware of the prevalence of corporal punishment in a particular school or that reasonable steps had been taken to address the issue, albeit unsuccessfully.

⁵³³ 2005 (2) SA 359 (CC):par 66, 70. The court referred to *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (1) BCLR 86:par 11-13 where the court in that case held that section 12(1)(c) of the Constitution regarding the right to be free from all forms of violence from either public or private sources must be read in the context of domestic violence that, read with section 7(2) of the Constitution "has to be understood as obliging the State directly to protect the right of everyone to be free from private or domestic violence". The court explicitly highlighted the need to protect women and children against domestic violence and held that effective forms of relief against family violence should be taken by the state.

⁵³⁴ Pieters 2011:39-15; Davis & Youens 2005:104.

⁵³⁵ Pieters 2011:39-15.

⁵³⁶ *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC):par 88.

⁵³⁷ See ch 2, par 5.1.1.1.1 herein; see also CRGC 4 2003:par 23.

⁵³⁸ See ch 2, par 8.1.2 herein.

It is possible to speculate on the possible outcome of such a case, but the outcome will in the end depend on the specific facts. The fact of the matter is that active steps to address the continued use of corporal punishment and other forms of school-based violence are obligatory to protect further loss of life or the quality of life.⁵³⁹ In addition, parents cannot consent to disciplinary measures that would place the child's life or quality of life unduly at risk.⁵⁴⁰

5.3.2 Promotion and fulfilment of the right to life, and disciplinary measures

Disciplinary measures should reflect the state's compliance with its obligation to promote and fulfil the right to life. For instance, drug abuse does not only sometimes result in death, but also impacts on the quality of life. Disciplinary measures should therefore include prevention strategies and reasonable support measures and structures for counselling within available resources in order to assist learners with drug dependency-problems.

Furthermore, victims of bullying often experience, *inter alia*, anxiety, stress and depression. This inevitably impacts on the quality of learners' lives. Suicide among victims of bullying is also not uncommon.⁵⁴¹ Disciplinary measures should therefore include active steps to prevent bullying, and to provide, within reasonable available sources, assistance to learners subjected to bullying. The same applies to the bully who also suffers from physiological and emotional problems.⁵⁴²

Gangsterism is associated with a negative lifestyle and an increased risk of dying in gang-related violence. Yet, because of the lack of other more positive future prospects, gangsterism may seem to be an acceptable option for some learners, as was seen in *Jacobs v Chairman, Governing Body, Rhodes High School, and Others*,⁵⁴³ where the learner in question aspired to become a gang member like his jailed father. Such a situation obliges the state to ensure that disciplinary measures are in place to prevent learners from pursuing this lifestyle. In addition to other measures for providing learners with a realistic prospect of a prosperous future,

⁵³⁹ See ch 2, par 5.1.1.1, 8.1.2 herein.

⁵⁴⁰ The obligation of parents to respect, protect, promote and fulfil the right to life was illustrated in *Hay v B and Others* 2003 (3) SA 492 (W):495 where the court overruled the decision of parents who refused a blood transfusion for their child on religious grounds. The court found that the parents' religious beliefs could not override the child's "inviolable" right to life. In view of the negative consequences of, for instance, corporal punishment, parents' convictions on acceptable punitive measures cannot supersede children's right to life and quality of life in particular.

⁵⁴¹ See ch 2, par 7.3 herein; see also CRCGC 4 2003:par 22. See also Sapa 2012a. In November 2012, the victim of bullying killed the alleged bully with his mother's service pistol at school.

⁵⁴² See ch 2, par 7.3 herein.

⁵⁴³ 2011 (1) SA 160 (WCC):par 32, 34, 43.

disciplinary measures should teach them alternatives for dealing with conflict, in contrast to a life of gangsterism which prescribes violent solutions to problems. Other forms of school-based violence also perpetuate violence, and the same arguments apply to these.

5.3.3 Right to development, survival rights and disciplinary measures

Survival rights focus on basic and essential inputs necessary to sustain biological life and include access to basic nutrition, water, shelter, and basic healthcare services.⁵⁴⁴ Section 27(1)(b) of the Constitution provides for everyone's right to access sufficient food and water, subject to progressive realisation. Children have a right to basic nutrition in terms of section 28(1)(c) of the Constitution. The exact content of these rights is not relevant to the discussion on school discipline and will therefore not be explored further, except to indicate that school discipline can have a negative impact on learners' ability to realise these rights.

Poverty and malnutrition are a reality for many learners and are evident from the extensive school nutrition programmes.⁵⁴⁵ Some educators use physical exercise as a disciplinary method. This is completely inappropriate, because poor and hungry children have to expend or waste energy acquired from their limited access to food.⁵⁴⁶ Another inappropriate disciplinary method is to deny or restrict learners' access to food and water. This practice is prohibited in the definition on corporal punishment provided in General Comment 13 of the CESCR.⁵⁴⁷

5.3.4 Right to life, development and a safe environment

General Comment 4 on adolescent health and development, in the context of the CRC, of the Committee on the Rights of the Child provides as follows:

The health and development of adolescents are strongly determined by the environment in which they live. Creating a safe and supportive environment entails addressing attitudes and actions of both the immediate environment of the adolescent – family, peers, schools and services – as well as the wider environment created by, inter alia, community and religious leaders, the media, national and local policies and legislation.⁵⁴⁸

⁵⁴⁴ Pieters 2011:39-18.

⁵⁴⁵ DBE 2012e:26, 38 indicates that approximately eight million learners benefitted from the National School Nutrition Programme in 2011.

⁵⁴⁶ Mgwangqa & Lawrence 2008:27 report on learners fainting while doing these exercises.

⁵⁴⁷ CESCRG 13 1999:par 41.

⁵⁴⁸ CRCGC 4 2003:par 14.

The school is recognized as an important “venue for learning, development and socialization.”⁵⁴⁹

The school environment and school culture would thus play an important part in the development of the child and should be physically and emotionally safe. Yet, the influence of the community on the school environment should not be underestimated.

5.3.4.1 Violence and the creation of a safe environment

A child’s holistic development is, *inter alia*, dependent on a safe environment, which includes physical as well as emotional and psychological safety. It also includes protection from violence, other preventable trauma, neglect, and insensitive or abusive treatment.⁵⁵⁰ The HRC of the ICCPR provides guidance, in General Comment 20, on the prohibition of torture and cruel treatment or punishment and highlights states parties’ obligations with regard to school discipline as follows:

The prohibition in article 7 [of the ICCPR] relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee’s view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.⁵⁵¹

A safe school environment is indispensable for the optimal development of every child. Nelsen, Lott and Glenn⁵⁵² warn against school environments which induce anxiety and mood disorders in learners and cause them to suffer from headaches, stomach aches, decreased social functioning outside school, verbalised fear of poor performance, fear of educators, nightmares, sleep disturbances, and depression, or to refuse to attend school. Disciplinary measures should therefore address issues such as school-based violence,⁵⁵³ bullying⁵⁵⁴ and sexual harassment,⁵⁵⁵ aspects which have already been discussed. Although moderate chastisement is allowed in terms of this General Comment, such chastisement is completely outlawed in South African schools.⁵⁵⁶ What is of significance is that states parties are required not only to prohibit or

⁵⁴⁹ CRCGC 4 2003:par 17.

⁵⁵⁰ CRCGC 7 2005:par 10; Hodgkin & Newell 2007:83-84, 93.

⁵⁵¹ HRCGC 20 1992:par 7.

⁵⁵² 2000:xv.

⁵⁵³ See ch 2, par 5.1 herein.

⁵⁵⁴ See ch 2, par 5.1.2.1 herein.

⁵⁵⁵ See ch 2, par 5.1.1.2 herein.

⁵⁵⁶ *Schools Act 84/1996*:s 10.

criminalise the above-mentioned treatment, but also to report on the legislative, administrative, judicial and other measures they take to prevent and punish these acts. This is in sharp contrast to the lack of vigilant action to address the continued application of corporal punishment in schools.⁵⁵⁷

Another example of possible trauma that children can be exposed to is the adversarial atmosphere of a formal disciplinary hearing. This aspect of the creation of a safe environment will be discussed below.

5.3.4.2 Neglect and a safe environment

An omission to act can also contribute to an unsafe and undisciplined environment. General Comment 7 of the Committee on the Rights of the Child indicates that neglect endangers the development of the child.⁵⁵⁸ The *Children's Act*⁵⁵⁹ defines neglect in relation to a child as:

a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs.

This indicates that neglect, broadly speaking, is a failure, by someone who should take care of children, to address the different needs of children, for example educators who act *in loco parentis* while children are at school.⁵⁶⁰ In this context, it should merely be mentioned that there is the neglectful approach to discipline, which reflects inaction on the part of educators to address disciplinary problems.⁵⁶¹ As mentioned in chapter 2, this approach is indeed followed by some educators.⁵⁶² However, such inaction is detrimental to the development of children, because they will not learn to act in a socially responsible way if nobody teaches them this.

5.3.4.3 Initiation practices and a safe environment

Section 10A of the *Schools Act* prohibits any initiation practices in schools. It provides that disciplinary action should be taken against any person who conducts, or participates in, any initiation practices against a learner. Disciplinary action should be taken against learners in terms of the code of conduct,⁵⁶³ while action will be taken against educators in terms of the

⁵⁵⁷ See ch 2, par 8.1.2 herein.

⁵⁵⁸ CRCGC 7 2005:par 10.

⁵⁵⁹ 38/2005:s 1.

⁵⁶⁰ GN 1589/2002:s 2, 3.4.

⁵⁶¹ See ch 6, par 2 herein on the Social Discipline Window indicating the neglectful approach to discipline.

⁵⁶² See ch 2, par 8.1.5 herein.

⁵⁶³ *Schools Act* 84/1996:s 10A(2)(a).

Employment of Educators Act.⁵⁶⁴ The legislation as well as the regulations define initiation practices and link these clearly to the safety and dignity of the child. The *Schools Act* provides:

For the purposes of this Act, “initiation practices” means any act which in the process of initiation, admission into, or affiliation with, or as condition for continued membership of, a school, a group, intramural or extramural activities, interschools sports team, or organisation –

- (a) endangers the mental or physical health or safety of a person;
- (b) undermines the intrinsic worth of human beings by treating some as inferior to others;
- (c) subjects individuals to humiliating or violent acts which undermine the constitutional guarantee to dignity in the Bill of Rights;
- (d) undermines the fundamental rights and values that underpin the Constitution;
- (e) impedes the development of a true democratic culture that entitles an individual to be treated as worthy of respect and concern; or
- (f) destroys public or private property.⁵⁶⁵

Initiation practices are not in line with the constitutional rights and can endanger the physical and emotional safety and development of learners. The prohibition of initiation practices is also clearly linked to several dimensions of the right to dignity.⁵⁶⁶ It should be kept in mind that disciplinary proceedings resulting from unlawful initiation practices should be in line with the aims of education and discipline, should thus result in the holistic development of the transgressors and the victims, and should contribute to all the learners’ understanding of what responsible life in society entails.

5.3.4.4 The internet, social networks and a safe environment

Some schools have computer laboratories with access to the internet. This enhances the chances of learners being exposed to harmful and inappropriate material such as pornography.⁵⁶⁷ Disciplinary measures should thus explicitly provide for mechanisms to protect learners from access to this material. Furthermore, such measures should also include clear guidelines on appropriate steps, that are in line with the definition of discipline and the aims of education, in order to address instances of learners being exposed to, or distributing, such material.

⁵⁶⁴ 76/1998:s 8, 18A; see also *Schools Act* 84/1996:s 10A(2)(a).

⁵⁶⁵ *Schools Act* 84/1996:s10A(3). See also GN 1589/2002:s 2.

⁵⁶⁶ See par 3.3 above.

⁵⁶⁷ CRCGC 4 2003:par 25.

5.3.4.5 Physical resources and a safe environment

Physical resources should not endanger the life and well-being of the child, but should rather contribute to the development of the child. The lack of adequate physical resources and facilities for extracurricular activities and its impact on school discipline was highlighted in chapter 2. General Comment 4 of the Committee on the Rights of the Child explicitly links the current and future health and development of the child with, *inter alia*, the provision of a well-functioning school, leisure activities, and access to water and sanitation. Provision of the latter (water and sanitation) is mentioned several times in General Comment 14 of the CESCR on the right to the highest attainable standard of health.⁵⁶⁸ A lack of resources and the unacceptable state of some schools are indicative of non-compliance with the provisions of article 27 of the CRC, which prescribes a “standard of living adequate for the child’s physical, mental, spiritual, moral and social development”.

5.3.4.6 Adversarial processes and a safe environment

Formal disciplinary proceedings, as prescribed in the *Schools Act*, are adversarial in nature, which is, in general, regarded as not being very child-friendly, unless special measures are taken to make it more child-friendly. One of the special measures is the appointment of an intermediary. In chapter 3, several issues pertaining to the appointment of intermediaries in formal disciplinary proceedings were highlighted.⁵⁶⁹ Some of these issues include the fact that the *Schools Act*⁵⁷⁰ provides that the SGB may appoint an intermediary if practical, and if the learner who needs to testify would be exposed to undue mental stress or suffering. Possible conflicts of interest between the SGB members and learners were indicated, as well as the possibility that suitability qualified people might not be available to act as intermediaries. Furthermore, the lack of equipment, such as one-way mirrors and/or a closed-circuit television system might make it impractical.

The provisions in the *Schools Act* closely resemble section 170A(1)-(3) of the *Criminal Procedure Act*.⁵⁷¹ In *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* (“DPP case”),⁵⁷² the Constitutional Court had to decide on the constitutionality of the provisions in the *Criminal Procedure Act* pertaining to the appointment of intermediaries. The court had to determine whether the provisions were in line with section 28(2) of the Constitution.

⁵⁶⁸ CESCRGC 14 2000:par 11, 12(a), 36.

⁵⁶⁹ See ch 3, par 6.5 herein for a detailed discussion.

⁵⁷⁰ 84/1996:s 8.

⁵⁷¹ 51/1977.

⁵⁷² 2009 (4) SA 222 (CC):par 78.

The court referred to the Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime drafted by the United Nations Economic and Social Council.⁵⁷³ The aim of these guidelines is to provide guidance on the child's best interests through protection and assistance of children in the criminal justice system, and to avoid any hardship or trauma that the child might experience while part of the criminal justice process. The guidelines refer explicitly to the best interests of the child and lay down the following principles:

- (c) While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:
 - (i) Protection. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;
 - (ii) Harmonious development. Every child has the right to a chance of harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development.

The child witness's best interests are thus given effect to through proper protection and due care to ensure that a traumatised child's development is not hampered through giving evidence. In addition, every possible step should be taken to prevent further trauma and to safeguard the development of the child. The best interests of the child are thus informed by the child's right to protection and development.

In deciding the constitutionality of the provisions, the court provided valuable guidance. This included, firstly, that the objective of the appointment of an intermediary is to prevent the child from exposure to undue mental stress and suffering while testifying.⁵⁷⁴ This is explicitly linked with the child's best interests. The presiding officer has to determine how the best interests of the child will be affected if the child has to testify without the aid of an intermediary.⁵⁷⁵

Secondly, the prosecutor should take precautionary steps before the trial to ensure that the child is assessed to determine whether it will be necessary to appoint an intermediary. If necessary,

⁵⁷³ United Nations Economic and Social Council 2005.

⁵⁷⁴ DPP case 2009 (4) SA 222 (CC):par 95.

⁵⁷⁵ DPP case 2009 (4) SA 222 (CC):par 95, 98, 111-113.

the prosecutor should accordingly apply to the court. If no such application is made, the court has an obligation to investigate the matter *mero motu*.⁵⁷⁶

Thirdly, there is no burden of proof on any party to convince the court of the desirability of appointing an intermediary, for so burdening one of the parties is contrary to the objectives of such an enquiry. The main focus remains the best interests of the child. In this regard, the court held:

What is required of the judicial officer is to consider whether, on the evidence presented to him or her, viewed in the light of the objectives of the Constitution and the subsections, it is in the best interests of the child that an intermediary be appointed.⁵⁷⁷

The court also emphasised that the process prescribed will eventually protect the child and will ensure not only a fair trial, but also a trial that is fair to all.⁵⁷⁸ The court held that the answer lies not in finding the provision unconstitutional, but rather in ensuring that the provisions are properly interpreted and applied. Consequently, the court found that the provisions of the legislation were not contrary to section 28(2) of the Constitution.⁵⁷⁹ However, judicial education and training for prosecutors and other officials should be provided to ensure the proper implementation of the provisions in accordance with the standard set in section 28(2) of the Constitution.

The same principles should be applicable to the appointment of intermediaries in formal disciplinary hearings. There are, however, a few caveats to this submission. Firstly, the *Schools Act* provides that an intermediary may be appointed, if such an appointment is “practicable”.⁵⁸⁰ The consequence of this is that, if it is not practicable to appoint an intermediary, the proceedings may continue without one. This would obviously be contrary to the best interests of the child and an infringement of the child’s rights. The child’s rights would be limited despite this being unjustifiable in an open and democratic society based on human dignity, equality and

⁵⁷⁶ DPP case 2009 (4) SA 222 (CC):par 89-91.

⁵⁷⁷ DPP case 2009 (4) SA 222 (CC):par 115.

⁵⁷⁸ DPP case 2009 (4) SA 222 (CC):par 116.

⁵⁷⁹ DPP case 2009 (4) SA 222 (CC):par 128-129.

⁵⁸⁰ The 84/1996:s (7) provides:

Whenever disciplinary proceedings are pending before any governing body, and it appears to such governing body that it would expose a witness under the age of 18 years to undue mental stress or suffering if he or she testifies at such proceedings, the governing body may, if practicable, appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

freedom.⁵⁸¹ Since every school has educators, they should be able to act as intermediaries, because they are supposed to know how to communicate with children, unless all the educators have some stake in the case and a possible conflict of interest may arise.⁵⁸² The availability of electronic equipment (CCTV) and/or one-way mirrors might be more problematic and to find a suitable venue might be more difficult.⁵⁸³ This gives rise to the question regarding unequal treatment. In schools where this equipment is available, learners rights will be upheld, while this will not be the position in other schools. However, practical arrangements can be made, such as ensuring that the equipment is obtainable from district offices when necessary.

Unlike judicial officers and prosecutors who are permanently in the criminal justice system and can gain skills and knowledge over time, SGB members are elected every three years and a new training cycle has to start to ensure that all the SGB members in the country are properly trained. Consequently, inexperienced SGB members may have to conduct hearings without proper training, which may result in the infringement of learners' rights. Proper procedures for disciplinary hearings and the appointment of intermediaries should be drafted and should be included in regulations. The latter might be more accessible to SGBs and would also ensure that training provided for SGBs is consistent with the provisions of the Constitution as set out in the case law discussed.

Although the court, in the *Director of Public Prosecutions* case cited above, referred to the link between the best interests and the harmonious development of the child, it did not elaborate on the point. The Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime⁵⁸⁴ however state that every possible step should be taken to ensure the healthy development of a child who has been exposed to trauma. If the same principles, which are laid down for child witnesses in criminal cases, are applied to school disciplinary hearings, this would obviously place an obligation upon the school, the SGB and the Department of Basic Education to ensure that children who have been exposed to trauma before or during a hearing receive the necessary support and counselling. Since the best interests of the child constitute the foundation for this provision, there can be no objection to its application to school disciplinary hearings.

⁵⁸¹ Constitution 1996:s 36.

⁵⁸² See GN R1374/1993 on the regulations for the appointment of intermediaries in terms of the *Criminal Procedure Act 51/1977*.

⁵⁸³ Reyneke & Kruger 2006:87-89.

⁵⁸⁴ United Nations Economic and Social Council 2005.

5.3.5 The right to development and unrestricted opportunities

General Comment 7 of the Committee on the Rights of the Child highlights the risks of impairing development through restricted opportunities. In the context of school discipline, issues mentioned and discussed elsewhere which can restrict learners' development include: pregnancy policies, admission policies, policies on progression through the grades resulting in overcrowded classes, the lack of resources, and other socio-economic factors such as poverty and dress codes. These issues will not be discussed further here.

In conclusion, the right to life, survival and development entails more than merely being alive, and should be understood in a broad sense related to the quality of life and well-being. All the dimensions of the child's life should be included in the development of the child and should be addressed in disciplinary measures. The state has an obligation to constantly improve the well-being of children and they should therefore be provided with equal opportunities to develop holistically. The well-being and health of the child include his or her physical as well as mental health. One of the aims of the development of the child is to prepare the child for adulthood, through the recognition of all the other human rights. The state has an obligation to secure the maximum possible development of the child, and this should be reflected in disciplinary measures. Apart from all the other aspects discussed already in this chapter, special care should be given to respect for and the protection of life through disciplinary measures which will not endanger the life, limb or emotional well-being of the child, as well as disciplinary measures which will prevent and address harm caused by potentially life-threatening situations such as bullying, drug abuse and gangsterism. The importance of ensuring that disciplinary measures do not infringe on learners' survival rights such as food and water was highlighted. Furthermore, the creation of a physically and emotionally safe environment conducive to the child's development, and free of neglect, was emphasised. Initiation practices are therefore forbidden and disciplinary measures in this regard should be aligned with learners' understanding of living a responsible life in a free society. The right to life, survival and development is also linked to disciplinary measures which will prevent and address issues such as access to and use of the internet and social networks which can be harmful to especially the emotional well-being and development of children. Children should also be protected from undue stress and hardship caused by adversarial processes which can eventually impact on their well-being and development.

6. THE RIGHT TO PARTICIPATE

The right to participate is variously referred to as the "voice of the child", "the learner's voice", "the right to express views", "the right to be heard" and the "right to be consulted". One of the main points of contention in the children's rights debate pertaining to participation rights is to

find a balance between, on the one hand, the child's lack of full autonomy and capacity and, on the other, the recognition that the child is an active subject of human rights, with an own personality, integrity, and ability to participate freely in society.⁵⁸⁵

One of the important challenges children face in exercising their right to be heard is that they are first of all dependent on the cooperation of adults. However, adults are reluctant to give effect to this right of children, because they are sceptical of children's capacity to contribute meaningfully to decision-making, and/or they are concerned that giving children more control will undermine their (the adults') authority, and/or that the processes of giving effect to this right will be too time-consuming.⁵⁸⁶ Secondly, there is a limited awareness of the content of the right to participate and its application.⁵⁸⁷

6.1 The international standard pertaining to the right to be heard

The right to be heard is one of the four foundational principles of the CRC.⁵⁸⁸ This is an indication of the importance of this particular right. Article 12 of the CRC provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

As mentioned above, this right is referred to in a number of ways, but, essentially, reference is being made to the same concept as contained in article 12 of the CRC. The Committee on the Rights of the Child⁵⁸⁹ provides some guidance on the content of this right in General Comment 12, while the Committee of Ministers of Member States of the Council of Europe adopted a recommendation on the participation of children and young people under the age of 18, in March 2012.⁵⁹⁰ Reference will be made to these documents in the discussion below.⁵⁹¹ In the latter recommendation, the right to be heard and to be taken seriously is held to be

⁵⁸⁵ CRCGC 12 2009:par 1; Lundy 2007:928.

⁵⁸⁶ Lundy 2007:930.

⁵⁸⁷ Lundy 2007:930.

⁵⁸⁸ CRC 1989:a 6; CRCGC 5 2003:par 12; see also European Convention on the Exercise of Children's Rights 1966:a 3; European Union 2000:a 24.

⁵⁸⁹ CRCGC 12 2009.

⁵⁹⁰ Committee of Ministers 2012.

⁵⁹¹ See par 6.2.2 below.

“fundamental to the human dignity and healthy development of every child and young person”.⁵⁹² In addition, to listen to children and to give due weight to their views:

in accordance with their age and maturity is necessary for the effective implementation of their right to have their best interests to be a primary consideration in all matters affecting them and to be protected from violence, abuse, neglect and maltreatment.⁵⁹³

Section 28 of the Constitution, dealing with children’s rights in particular, does not include the right to be heard. This position was rectified in the long-awaited *Children’s Act*.⁵⁹⁴

6.2 The right to participate in the South African legal context

6.2.1 The *Children’s Act* 38 of 2005

The section in the *Children’s Act*⁵⁹⁵ providing for the child’s right to participate came into operation on 1 July 2007. The Act does not use the same phrasing as the CRC, namely “the right to be heard” or “the right to express views”, but, instead, refers to the child’s right to participate.⁵⁹⁶ However, this is still in line with the provisions of General Comment 12 of the Committee on the Rights of the Child, which indicates that the CRC has developed the concept “participation” over time. The term “participation”, according to General Comment 12 describes:

ongoing processes, which include information sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.⁵⁹⁷

The *Children’s Act* creates a number of rights not contained in the Constitution and provides that these rights are to supplement the rights which the child has in terms of the Bill of Rights.⁵⁹⁸ Section 10 of the *Children’s Act* introduces one of the supplementing rights and provides as follows:

⁵⁹² Committee of Ministers 2012: preamble.

⁵⁹³ Committee of Ministers 2012: preamble.

⁵⁹⁴ 38/2005.

⁵⁹⁵ 38/2005.

⁵⁹⁶ *Children’s Act* 38/2005:s 10. Compare this section with article 12 of the CRC, which refers to the child’s right to express views and to be heard in specific proceedings.

⁵⁹⁷ CRCGC 12 2009:par 3.

⁵⁹⁸ *Children’s Act* 38/2005:s 8(1). See also s 10 (child’s right to participate); s 11 (rights of disabled and chronically ill children); s 13 (right to information on healthcare); s 14 (right of access to court).

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has a right to participate in an appropriate way and views expressed by the child must be given due consideration.

Since state, natural and juristic persons are bound by these supplementary rights, the Department of Education, principals, educators and SGBs are obliged to respect, protect, promote and fulfil the child's participation rights.⁵⁹⁹ The legislator has thus responded to the state's obligation to comply with the international standard regarding the child's right to be heard provided for in the CRC.

6.2.2 Content of the right to participate in South Africa

In giving content to section 10 of the *Children's Act*, reference will in particular be made to General Comment 12 on the right of the child to be heard of the Committee on the Rights of the Child.⁶⁰⁰ It is clear from General Comment 12 that article 12 of the CRC is complex and multifaceted.

It was pointed out above that the term "right to participate" is used interchangeably with terms such as the "child's voice" or the "child's right to be heard". Lundy,⁶⁰¹ however, cautions that these references to article 12 of the CRC run the risk of diminishing the full ambit of this right, and of consequently not affording children the full benefit of the right. For instance, the "right to be heard" could convey that it is sufficient to give children an opportunity to voice their opinions, but that there is no duty to really listen to them and give their views due weight. This is further illustrated by the fact that article 13 of the CRC, which deals with the child's right to freedom of expression, is separated from article 12, dealing with the child's right to be heard. The latter right is not about providing children with a right to self-determination or to merely voice their opinions, but is concerned with the involvement of children in decision-making.⁶⁰² Owing to the risk of unduly diluting the content of the right to participate, measures should be put in place to ensure that, in implementing this right, attention is given to all its dimensions.

To counter the possible narrow interpretation of this right, Lundy⁶⁰³ proposes a new model to conceptualise it. She is of the opinion that the two key elements of this right are the right to

⁵⁹⁹ *Children's Act* 38/2005:s 8(2), (3).

⁶⁰⁰ CRCGC 12 2009; CRC 1989:a 43. See Hodgkin & Newell 2007:639-640.

⁶⁰¹ 2007:930.

⁶⁰² Hodgkin & Newell 2007:150.

⁶⁰³ 2007:933. She also alludes to the interrelatedness of human rights and its impact on the interpretation given to the different rights, in particular: non-discrimination (CRC 1989:a 2, Constitution:s 9); best interests of the child (CRC 1989:a 3, Constitution:s 28(2)); the right to guidance (CRC 1989:a 5); the right to seek,

express a view and the right to have the view given due weight. She avers that, to implement article 12, attention should be given to the following four factors, namely: space, voice, audience and influence.⁶⁰⁴ These factors will be discussed in more detail below.

To ensure that all facets of the right to participate are aligned with the international standard, all the elements of this right, as contained in section 10 of the *Children's Act*,⁶⁰⁵ will be discussed with reference to the General Comment and to Lundy's model for the implementation of the right to participate, and will be then be applied to the disciplinary context.

6.2.2.1 “Every child”

The term “every child” does not refer only to an individual child, but also to groups of children.⁶⁰⁶ Disciplinary measures should guard against the impact of homogenisation of children in schools without recognising the differences among children and their lived worlds. These differences would include factors such as race, gender, class, and socio-economic background.⁶⁰⁷ The Constitutional Court has warned that, even after thorough consultation in respect of the drafting of a code of conduct, schools might still be at risk of acting unconstitutionally because proper measures are not in place to accommodate the views of minority groups.⁶⁰⁸

6.2.2.2 The child must be allowed and enabled to participate

Every child should be allowed and enabled to participate in decisions on matters concerning him or her. This can be achieved by giving effect to the first two factors in Lundy's model, namely the creation of a safe space for participation and the facilitation of the voice of the child.

6.2.2.2.1 Creation of a safe space for participation

In this context, “space” refers to the fact that all children, including marginalised learners, must be given the opportunity to express their views in a safe and enabling environment that encourages them to speak freely and voluntarily on disciplinary matters affecting them.⁶⁰⁹ Programmes related to discipline should be child-friendly and should provide “interactive, caring, protective and participatory environments” which will prepare children for “active roles in society

receive and impart information (CRC 1989:a 19); and protection from abuse (CRC 1989:a 19, Constitution:s 28(1)(d).

⁶⁰⁴ CRGC 12 2009:par 132-134.

⁶⁰⁵ 38/2005.

⁶⁰⁶ See also ch 4, par 4.1 herein on the use of “every child” in article 28(2) of the Constitution. See also Committee of Ministers 2012:s I – definitions.

⁶⁰⁷ Carrim 2011:74-82. The circumstances of all children are not the same, and cognisance should be taken of factors that have a profound impact on learners' schooling, such as child-headed households, domestic violence, “initiation ceremonies”, and pregnancies.

⁶⁰⁸ *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (2) BCLR 99 (CC):par 82-83.

⁶⁰⁹ Lundy 2007:933-935; see also Committee of Ministers 2012:s I – definitions; CRGC 12 2009:par 23, 34, 132.

and responsible citizenship within their communities". The aim is to create a space where the self-esteem of learners can be built and to prepare them to take responsibility for their own lives. This is in line with the aims of education discussed in paragraph 2.1 above.

A safe space conducive to exercising the right to participate is created by properly preparing the child for participation in any disciplinary measures on a proactive as well as a reactive level through informing the child about matters such as: the right to be heard; the impact of his or her views on the outcome; and the right to be heard in person or through a representative, and the consequences of this choice.⁶¹⁰ Human rights education, as discussed above, will also play a particularly important role.⁶¹¹ The Committee on the Rights of the Child also encourages the creation of a safe environment through dialogue, rather than a one-sided examination of the child.⁶¹² Thus, formal disciplinary proceedings in an adversarial atmosphere should be avoided as far as possible. However, if a hearing is necessary, the child should be prepared adequately by the decision-makers with regard to how, when and where the hearing will take place and who the participants will be. The child's views on these practical issues have to be taken into account as well.⁶¹³ Measures such as the use of an intermediary should be employed to limit undue stress and hardship for learners who are exposed to the hostile atmosphere of an adversarial process.

Informal disciplinary proceedings and prevention-of-misconduct strategies should also focus on creating opportunities for dialogue, for instance through regular class meetings and circle processes.⁶¹⁴ Participation in problem-solving activities related to discipline increases as learners sense of safety and skills related to participation improve. The absence of prescriptions regarding informal disciplinary proceedings was highlighted in chapter 3.⁶¹⁵ In contrast, the Committee of Ministers⁶¹⁶ explicitly recommends the creation of safe spaces in school life and through formal and non-formal methods.

Unfortunately, children might be exposed to the risk of violence, exploitation or other negative consequences if they exercise their right to express their views, for instance where learners speak out on bullying or gender violence. Consequently, special precautions should be taken to

⁶¹⁰ CRCGC 12 2009:par 134(h).

⁶¹¹ See par 2.1.3 above.

⁶¹² CRCGC 12 2009:par 43.

⁶¹³ CRCGC 12 2009:par 41.

⁶¹⁴ See ch 6 par 5.9.2.

⁶¹⁵ See ch 3, par 6.10 herein.

⁶¹⁶ 2012:s III – measures.

ensure the protection of children wishing to express their views and needs.⁶¹⁷ The school environment should thus be safeguarded from any form of violence and intimidation that can hamper learners' participation.

Due regard should also be had to the social and cultural expectations of learners in the disciplinary context. An environment should be created where children, in particular minority groups, will feel safe enough to voice their opinions on, for instance, school rules that might impact on their religion, culture or socio-economic background.⁶¹⁸

In conclusion, a safe environment is one that is free of intimidation, hostility, insensitivity or any inappropriate conduct. The provision of adequate, child-friendly information, adequate support for self-advocacy, appropriately trained staff, child-friendly venues for hearings or alternative processes are means to ensure a safe space where the child will be able to express his or her views on disciplinary matters. Participation should always be voluntary and children can withdraw their participation at any stage.⁶¹⁹

6.2.2.2 Facilitation of the child's voice

Lundy⁶²⁰ refers to this notion as "voice" because it implies that children must be assisted to give their opinions. Thus it must be made easy and possible for children to express their views. The child's right to be heard is "anchored in the child's daily life from the earliest stage" and should therefore be facilitated in all aspects of the child's life.⁶²¹ To facilitate the participation of learners requires a number of things, starting with a change in mind-set and attitude on the part of educators and the SGB. General Comment 7 of the Committee on the Rights of the Child on implementing child rights in early childhood provides as follows in this regard:

To achieve the right of participation requires adults to adopt a child-centred attitude, listening to young children and respecting their dignity and their individual points of view. It also requires adults to show patience and creativity by adapting their expectations to a young child's interest levels of understanding and preferred ways of communicating.⁶²²

⁶¹⁷ Committee of Ministers 2012:s II – principles.

⁶¹⁸ For instance, the wearing of religious symbols, the hijab, a nose stud or Rastafarian hair.

⁶¹⁹ CRCGC 12 2009:par 34; 132, 134(b); Committee of Ministers 2012:s II – principles.

⁶²⁰ Lundy 2007:935.

⁶²¹ CRCGC 12 2009:par 21. Even very young children who are unable to express their views verbally should be granted the opportunity to demonstrate their understanding, choices and preferences through other means such as drawings. Other non-verbal forms of communication such as facial expressions and body language should also be recognised as valuable means of expressing views and opinions.

⁶²² CRCGC 7 2005:par 14(c); see also Bragg 2007:505-518 on the process of including learners' voice in a United Kingdom school with learners aged between 5 and 11 years; Linington, Excell & Murriss 2011:36-45.

Educators and other decision-makers should be trained to overcome their resistance to children's involvement in decision-making,⁶²³ particularly with regard to disciplinary matters. Article 5 of the CRC and the definition of "care" in the *Children's Act*⁶²⁴ refer to the rights, responsibilities and duties of adults to provide appropriate direction and guidance for the child in exercising his or her rights, which includes the supplementation of the child's lack of knowledge, experience and understanding. However, as the child gains the necessary knowledge, experience and understanding, the direction and guidance given to the child should be transformed into reminders and advice.⁶²⁵ The child's evolving capacities will thus have a direct impact on the level of support provided for every child in the participation process related to discipline.⁶²⁶ Furthermore, those in a position of authority should allocate sufficient time and resources to understanding issues related to discipline.⁶²⁷ This will, *inter alia*, empower educators to adapt the school environment and disciplinary methods in accordance with children's age, maturity, developmental stage and evolving capacities, and to facilitate the learners in expressing their views.⁶²⁸

The facilitation of children's views should be seen as an educational process of developing learners' participation skills, which will include listening, communication and conflict-resolution skills, and the ability to express emotions, needs and interests.⁶²⁹ Learners should also be provided with child-friendly documentation and information to ensure effective participation in matters such as the drafting of the code of conduct or classroom rules.⁶³⁰

Participation is not a once-off process, but an ongoing activity involving information sharing and dialogue.⁶³¹ An example of a failure to facilitate the views of children is that pertaining to the drafting of the code of conduct. Current legislation requires an SGB to consult with learners beforehand in this regard.⁶³² However, legislation and management structures and procedures applied in many schools do not require frequent reviews and the inclusion of processes and structures to enable learners to request or initiate changes to disciplinary measures.⁶³³

⁶²³ Lundy 2007:935.

⁶²⁴ 38/2005:s 1.

⁶²⁵ CRCGC 12 2009:par 84-85.

⁶²⁶ CRCGC 12 2009:par 134(e).

⁶²⁷ Lundy 2007:935; see also Eurochild 2012:54.

⁶²⁸ CRCGC 12 2009:par 134(e); Lundy 2007:935. This will include fun activities to elicit the views of younger children.

⁶²⁹ CRCGC 12 2009:par 134(e).

⁶³⁰ Lundy 2007:935; see also Committee of Ministers 2012:s II – principles.

⁶³¹ Committee of Ministers 2012:s II – principles.

⁶³² See ch 3, par 6.1 herein.

⁶³³ CRCGC 12 2009:par 134(c).

Children's views can be elicited through learner representatives. The necessary capacity should therefore be built to ensure that learner representatives can play a constructive, participatory role in processes related to discipline.⁶³⁴ However, Carrim⁶³⁵ warns against the danger of learners giving up "their own voices", with it then being assumed that the representatives will speak on their behalf. Moreover, research indicates that representatives often resort to speaking with "their own voices" and not those of their constituents. He avers that representation can result in an exercise of marginalisation and the silencing of particular groups in the school.⁶³⁶ Therefore, special care should be taken to ensure that learner representatives are held accountable to those that they represent.

6.2.2.3 Due consideration of the child's views

Section 10 of the *Children's Act* prescribes that the views of the child should be given due consideration, while article 12(1) of the CRC provides that the views of the child should be given due weight. This dimension of the child's right to participate will be discussed with reference to, on the one hand, the obligation to provide the child with the necessary audience and the opportunity to influence decisions, and, on the other, the limitation of the influence of the child's participation in decision-making processes owing to his or her age, maturity and development.

6.2.2.3.1 Considering the child's voice through audience

Lundy's model provides for "audience", which means that the views of children must be listened to. Children should have an opportunity to communicate their views to an identifiable individual or body that has the responsibility for listening to the views of the child or group of children.⁶³⁷ Consequently, there needs to be a specific person, for instance an educator(s) or structures such as committees and processes with specific timeframes and clear mandates, to address disciplinary measures in schools. Educators should thus be approachable and be able to discuss disciplinary matters in a respectful way with children.⁶³⁸

The importance of audience is further highlighted in section 31 of the *Children's Act*, which section deals with major decisions involving children by a person holding parental rights and responsibilities, normally the parents.⁶³⁹ Such person can only take major decisions which might constitute a significant change in the education of the child or which are likely to have an adverse effect on the child or the general well-being of the child if they have given due

⁶³⁴ Lundy 2007:935; CRCGC 12 2009:par 113.

⁶³⁵ 2011:76-77.

⁶³⁶ See also Wyness 2009:535-552 who expresses the same concerns; CRCGC 12 2009:par 36.

⁶³⁷ Lundy 2007:937.

⁶³⁸ CRCGC 12 2009:par 134(c).

⁶³⁹ *Children's Act* 38/2005; see also s 18 on parental rights and responsibilities.

consideration to the views of the child. These decisions must take into account the child's age, maturity and stage of development. It is clear that children must be listened to in matters concerning their education, such as disciplinary matters: for example, the type of support measures or structures for counselling chosen for children with behavioural problems. Yet, the parent's role in formal disciplinary matters is not clear, and existing legislative provisions do not explicitly include parental participation in decisions made at formal disciplinary hearings.⁶⁴⁰ The exclusion of parents from decision-making processes in formal disciplinary proceedings can thus impact on the extent of audience given to the views of the child through the inputs of their parents.

6.2.2.3.2 Allowing the child's voice to influence decisions

In terms of Lundy's model, "influence" refers to the due weight which should be afforded to children's views.⁶⁴¹ To merely listen to the child is insufficient. The Committee on the Rights of the Child uses quite strong terms to emphasise the level of engagement with children so as to be in a position to give due weight to their views. This includes the fact that the views of the child "have to be seriously considered";⁶⁴² that this is a continuous process of "intense exchange between children and adults";⁶⁴³ that the process should not be "tokenistic";⁶⁴⁴ and that the "participation should be meaningful".⁶⁴⁵ Allowing the learners to take part in disciplinary processes should therefore be sincere and not mere window-dressing.

Since due weight should be given to the views of the child, proper measures should be in place to assess the capacity of the child.⁶⁴⁶ If the child is found to have the required capacity in the circumstances, the decision-maker "must consider the views of the child as a *significant* factor in the settlement of the issue".⁶⁴⁷ The real challenge is not only to convince adults to listen to the views of learners, but also to take those views seriously. Learners should thus have a fair opportunity to persuade decision-makers to include their views in the final outcome of the issue. In this regard, the Committee on the Rights of the Child provides as follows in General Comment 7 on implementing child rights in early childhood:

⁶⁴⁰ *Schools Act 84/1996:s (6)* – focuses on parents; is, however, excluded from the ambit of this study.

⁶⁴¹ Lundy 2007:937.

⁶⁴² CRCGC 12 2009:par 28.

⁶⁴³ CRCGC 12 2009:par 13.

⁶⁴⁴ CRCGC 12 2009:par 132.

⁶⁴⁵ CRCGC 12 2009:par 88.

⁶⁴⁶ See par 6.2.2.3.3 below.

⁶⁴⁷ CRCGC 12 2009:par 44. [My emphasis]

Young children should be recognized as active members of families, communities and societies, with their *own concerns, interests and points of view*.⁶⁴⁸

It should be pointed out that a clear distinction must be made between the child giving evidence and the child expressing his or her own views in disciplinary matters. The right to be heard deals with the right to express one's own views on, for instance, the consequences of misconduct. The concept of participation is thus different from merely relating, at an informal disciplinary hearing, what happened when misconduct occurred or testifying, at a formal disciplinary hearing, about events that took place. Instead, it is about children's own views and about expressing their own needs. Disciplinary processes must therefore be in place to ensure that this is as easy as possible for children to do. This dimension of the right to participation requires an investigation into the views of everyone involved in a disciplinary matter as to what an appropriate outcome should be. This will include decisions on how to address the harm caused by the misconduct and on how to respond in future to the needs and interests of everyone involved.⁶⁴⁹

Children often complain that they give their views, but are never told what becomes of them.⁶⁵⁰ Article 12 of the CRC does not explicitly provide that the child has a right to receive feedback on the outcomes of the process, and on how his or her views were interpreted and used in decisions made.⁶⁵¹ However, General Comment 12 of the Committee on the Rights of the Child stipulates that feedback on how his or her input influenced the outcome of a process is an integral part of the child's right to be heard and participate.⁶⁵² The extent of the consideration given to the child's views, as well as the consequences thereof, should be explained to the child. This is a measure designed to hold adults accountable and to ensure that the views of the child are not regarded merely as another formality in the process, but are considered with the necessary sincerity. It is thus important not only to ask learners their opinion on disciplinary matters, but also to provide feedback on the impact of the learners' input on the decisions taken.

In an effort to promote transparency, the Committee on the Rights of the Child recommends that this feedback to children should be enforced by legislation. Provision should also be made for follow-up processes or other activities where appropriate.⁶⁵³ The due-weight requirement is also

⁶⁴⁸ CRCGC 7 2005:par 5. [My emphasis]

⁶⁴⁹ See ch 6, par 5.6.6, 5.6.7 herein.

⁶⁵⁰ Lundy 2007:938.

⁶⁵¹ Shier 2001:113.

⁶⁵² CRCGC 12 2009:par 45.

⁶⁵³ CRCGC 12 2009:par 33, 45, 134(a), 134(i).

linked with the best interests of the child, and General Comment 12 provides as follows in this regard:

The best interests of the child is similar to a procedural right that obliges States parties to introduce steps into the action process to ensure that the best interests of the child are taken into consideration. The Convention obliges States parties to assure that those responsible for these actions hear the child as stipulated in article 12. This step is mandatory.⁶⁵⁴

Children's views are just one of the factors to be taken into account in decision-making. Despite the fact that children's views are given due weight, other factors might still outweigh their views, resulting in children not accomplishing what they want.⁶⁵⁵ Determining the weight to be attached to the views is a complex issue. One of the factors to be considered in determining the weight attached to the views of the child is the age, maturity and development of the child.

6.2.2.3.3 Impact of age, maturity and development on the child's right to participate

Age, maturity and development normally play a significant role in determining the child's legal capacity. However, the child's legal capacity does not necessarily influence the child's right to participate to the same extent. For instance, although a child might not have the necessary legal capacity to conclude a contract or give permission for medical treatment, this does not exclude the child from the right to participate in the decisions if these concern him or her.⁶⁵⁶ However, the weight accorded to the views expressed will differ, depending on the seriousness of the issue and the evolving capacities of the child.⁶⁵⁷

Although the point of departure is that even very young children are capable of expressing a view, the decision-maker still has the responsibility to give such capacity due weight with reference to the age, maturity and stage of development of the child.⁶⁵⁸ In the context of school discipline, the educators and the SGB will, depending on the circumstances, have to give due weight to the learners' views pertaining to disciplinary issues. The child's capacity will also influence the response or communication to the child on how the child's views influenced the outcome of the process.⁶⁵⁹

⁶⁵⁴ CRCGC 12 2009:par 70.

⁶⁵⁵ Shier 2001:113.

⁶⁵⁶ See, for instance, *Children's Act 38/2005*:s 31 on the obligation of a person with parental responsibilities and rights to give due consideration to any views and wishes expressed by the child in major decisions involving the child.

⁶⁵⁷ CRCGC 12 2009:par 31.

⁶⁵⁸ CRCGC 12 2009:par 20, 28.

⁶⁵⁹ CRCGC 12 2009:par 45.

General Comment 12 of the Committee on the Rights of the Child confirms that the child's age and maturity play a significant role in exercising this right.⁶⁶⁰ This part of the comment refers, in the first place, to the child's capacity to form his or her own views, taking into account the child's age and maturity.⁶⁶¹ Maturity is described as follows by the Committee on the Rights of the Child:

Maturity refers to the ability to understand and assess the implications of a particular matter, and must therefore be considered when determining the individual capacity of a child. Maturity is difficult to define; in the context of art 12, it *is the capacity of the child to express her or his views on issues in a reasonable and independent manner*. The impact of the matter on the child must also be taken into consideration. The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of the child.⁶⁶²

In view of the numerous factors contributing to a child's maturity, the capacity of every child should be determined on a case-by-case basis.⁶⁶³ Factors influencing the child's capacity to form a view include information, experience, environment, social and cultural expectations, and levels of support. The assessment of the child's maturity will be of particular importance in matters such as suspensions or expulsions, arrangements regarding an alternative placement for the expelled learner, and the need for the appointment of an intermediary in formal disciplinary proceedings.

Furthermore, the child's right to express views should not be limited unduly.⁶⁶⁴ The point of departure should not be that children lack the required capacity, but rather that they do have the required capacity to participate. There should be no onus of proof on the child to show that he or she does have the required capacity.⁶⁶⁵ The Committee on the Rights of the Child provides that there should be no age limitations be set in respect of the child's right to be heard.⁶⁶⁶ With reference to Lundy's model, this implies that safe spaces should always be created, that the child should always be facilitated to express views on a voluntary basis, and that the child is entitled to an audience that will listen to his or her views with the necessary sincerity. Children's views must be regarded as a significant factor in decision-making, and children should thus be

⁶⁶⁰ CRCGC 12 2009:par 9.

⁶⁶¹ *Children's Act 38/2005:s 10; CRC 1989:a 12.*

⁶⁶² CRCGC 12 2009:par 30. [My emphasis]

⁶⁶³ CRCGC 12 2009:par 29.

⁶⁶⁴ Committee of Ministers 2012:s II – principles; Hodgkin & Newell 2007:153.

⁶⁶⁵ CRCGC 12 2009:par 20.

⁶⁶⁶ CRCGC 12 2009:par 21; see also Committee of Ministers 2012:s II – principles.

afforded the opportunity to influence decisions. The degree of influence will however be limited in accordance with the age, maturity and development of the child.

6.2.2.4 Participation as an enforceable right

The *Children's Act*⁶⁶⁷ and the CRC⁶⁶⁸ unequivocally frame participation as an indispensable children's right. This implies that children's right to participate must be respected, protected, promoted and fulfilled.⁶⁶⁹ Legislative and other measures, such as the training of SGBs and educators, should thus be taken to protect children from infringements of this right and to enable them to realise the right.⁶⁷⁰ This means that current provisions of the *Schools Act* limiting the participation of victims of misconduct should be re-evaluated. Furthermore, every school's approach to discipline should be scrutinised to ensure compliance with the standards for participation as discussed thus.⁶⁷¹

To neglect to afford children, or to refuse children, the opportunity to participate in disciplinary matters would be a violation of a constitutional right. In this regard, the *Children's Act* provides that a child who is affected by, or who is involved in, a matter that needs to be adjudicated, and who is of the opinion that any right in the Bill of Rights or any of the additional rights contained in the *Children's Act*⁶⁷² have been infringed or are threatened, can approach a competent court for relief. Thus a child, or children, would be at liberty to approach a court to instruct a school or SGB to give effect to their right to participate if they are not afforded an opportunity to participate in disciplinary matters affecting them, such as the drafting of a code of conduct, or if, for instance, they are not afforded an opportunity to voice their opinions on how to address the harm caused to them through misconduct.⁶⁷³

6.2.2.5 "In matters concerning the child"

An analysis of section 28(2) of the Constitution reveals that the phrase "every matter concerning the child" refers to issues affecting individual children as well as groups of children, directly and

⁶⁶⁷ 38/2005:s 10.

⁶⁶⁸ 1989:a 12.

⁶⁶⁹ Constitution 1996:s 7(2).

⁶⁷⁰ Committee of Ministers 2012:s III – measures.

⁶⁷¹ See the discussion in chapter 6 herein on the approaches to discipline, and chapter 7 herein on the evaluation of these approaches.

⁶⁷² 38/2005:s 15(1), 15(2)(a). S 152(b)-(d): others who may approach the court if the child's right to participate is infringed or threatened are persons acting in the interests of the child or on behalf of another person who cannot act in his or her own name; anyone acting as a member of, or in the interests of, a group or class of persons; and anyone acting in the public interest.

⁶⁷³ See *Children's Act* 38/2005:s14 which provides: "Every child has the right to bring, and to be assisted in bringing, a matter to court, provided that matter falls within the jurisdiction of the court."

indirectly.⁶⁷⁴ The same broad approach should be applicable in exercising the right to participate in the context of school discipline.⁶⁷⁵ It would be impractical to include all the learners in every disciplinary matter. However, the voice and audience requirements of the realisation of the right to participate dictate that, even if children are indirectly affected by a disciplinary matter, they should be afforded the opportunity to voice their opinions if they wish to.⁶⁷⁶ Thus proper mechanisms, such as a representative council or class meetings should be available to allow learners who are not directly involved in a disciplinary matter to come forward and participate in an appropriate way. To hear the voices of those learners who are not directly affected by a disciplinary matter will allow decision-makers to make better-informed decisions.

It is recognised that giving effect to this right will help to “include children in the social processes of their community and society”. In addition, it acknowledges that children may add valuable perspectives and experiences to decision-making, policy-making, and the preparation of laws and other measures related to school discipline.⁶⁷⁷

The fact that a particular issue can have a significant impact on the life of a child does not mean that the child should not be afforded the right to participate. It is wrong to assume that children can only exercise the right regarding trivial matters. They must be enabled to exercise this right in every matter concerning them.⁶⁷⁸

Children are not always able to understand the complexities of every situation. Therefore, the Committee on the Rights of the Child warns that “it is not necessary that the child has a comprehensive knowledge of all aspects of the matter affecting her or him”. Thus, although a child may not understand all the complexities of a matter, he or she should not be deprived of an opportunity to, for instance, voice an opinion on how the problem should be solved so as to ensure that effect is given to his or her individual needs.

Only a “sufficient understanding” is required to be capable of forming own views.⁶⁷⁹ This might create uncertainty, for decision-makers’ subjective interpretation whether the child has

⁶⁷⁴ See ch 4, par 4.2.1, 4.4.2 herein.

⁶⁷⁵ 38/2005. Compare this section with a 12 of the CRC, which provides that the child’s views should be considered in all matters “affecting” the child.

⁶⁷⁶ See a similar discussion on the best interests of the child in ch 4, par 8.1 herein.

⁶⁷⁷ CRCGC 12 2009:par 12, 27. Children were involved in the drafting of the new *Children’s Act* 38/2005 and the *Child Justice Act* 75/2008. They shared their experiences of being in the child welfare and child justice systems and made valuable suggestions on how to improve the systems.

⁶⁷⁸ CRCGC 12 2009:par 29.

⁶⁷⁹ CRCGC 12 2009:par 21.

“sufficient understanding” can be problematic. However, Lundy⁶⁸⁰ emphasises that it is not the child’s capacity that determines his or her right to voice an opinion, but rather the ability to form a view, mature or not. It is thus clear that children should be facilitated to participate in decisions regarding school discipline from an early age and that adults have an obligation to elicit their views in this regard from an early age as well.

6.2.2.6 “In an appropriate way”

Section 10 of the *Children’s Act* provides that the child has “a right to participate in an appropriate way”. Thus children cannot express their views on their own terms. The right to express views is accompanied by the responsibility to express them in a responsible way, recognising the rights of others and in a suitable forum. This is in line with section 16 of the *Children’s Act*, which section provides that “every child has responsibilities appropriate to the child’s age and ability towards his or her family, community and the state”.

The CRC provides that the child’s right to be heard in judicial and administrative proceedings must be exercised in a manner consistent with the procedural rules of national law.⁶⁸¹ Hence, views must be expressed in accordance with the provisions of legislation and other lawful measures such as those provided for in a code of conduct. In *MEC for Education, KwaZulu-Natal, and Others v Pillay*,⁶⁸² discussed in chapter 3,⁶⁸³ the Constitutional Court also provided some guidance on the responsibilities of learners who want to be exempted from school rules.

6.3 Levels of participation

It is also important to understand that every situation, and the child involved in the situation, is unique. Therefore, the extent of participation and the consideration given to the views of children will differ in each case. Different degrees of participation are appropriate for different children and different situations. Thus the question arises as to what the minimum requirement for participation would be so as to be in line with the constitutional imperative. In what follows, Hart and Shiers’ models of participation will be discussed to assist in evaluating the level of participation by learners. Figure 1 provides a visual summary of Hart’s ladder of participation, the details of which will not be repeated in the discussion.

⁶⁸⁰ 2007:935.

⁶⁸¹ CRC 1989:a 12(2).

⁶⁸² 2008 (1) SA 474 (CC).

⁶⁸³ See ch 3, par 5.5.5.3 herein.

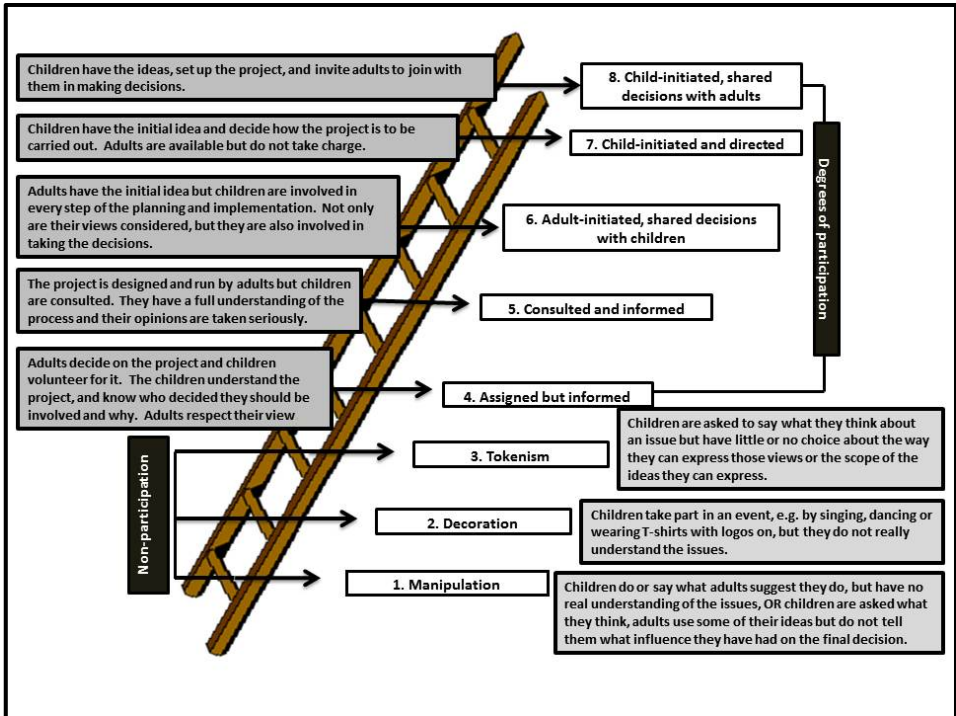


Figure 1: Hart's ladder of participation

Hart⁶⁸⁴ developed this “ladder of children’s participation” in an attempt to measure the authenticity of youth involvement in community-based activities. He states that the bottom three rungs are indicative of non-participation and are at the lowest level, that is, manipulation, followed by decoration, and, in third place, tokenism. These three rungs would not pass constitutional muster.

Rungs four to eight represent the different degrees of participation, with “assigned but informed” at level four, followed by “consulted and informed”, “adult-initiated, shared decisions with children”, “child-initiated and directed”, and, at the highest level, “child-initiated, shared decisions with adults”.

In the school disciplinary context, the aim would be to facilitate opportunities where children can participate in an authentic way in disciplinary processes, avoiding the categories indicated as non-participatory. Further, the aim is not necessarily to ensure that children are participating at

⁶⁸⁴ In Shier 2001:109.

the highest level of their competencies. Rather, it is a matter of allowing them the opportunity to participate at different levels in different situations in the disciplinary context. The child must also be in a position to choose freely whether he or she wants to participate.⁶⁸⁵ The best interests of the child will be the decisive factor in determining the appropriate level of participation in a specific situation.⁶⁸⁶

Shier⁶⁸⁷ builds on Hart's "ladder of children's participation" and arrives at an alternative model with five levels. Figure 2 provides a summary of his model. He asks three questions on every level to assist in gauging the level of participation, and in determining where to improve. If the answer is "Yes" to a particular question, one can then move to the next question. The questions answered in the affirmative on each level indicate how much progress has been made at a particular level. Although these questions are pivotal to the determination of progress made in realising the right to participate, they will not be repeated in the discussions that follow below.

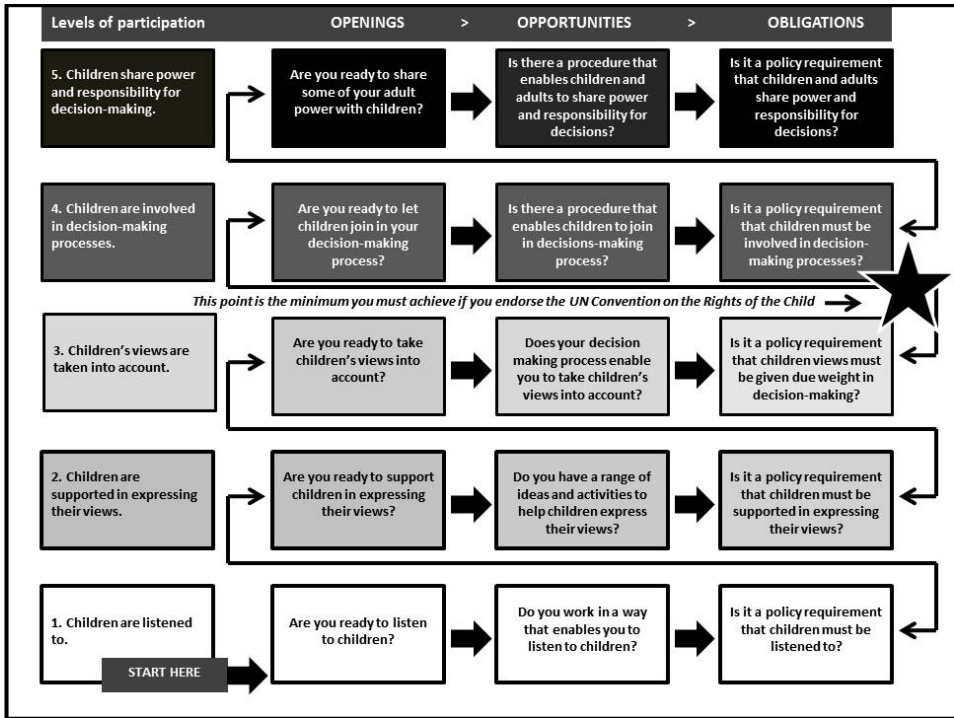


Figure 2: Shier's model of participation

⁶⁸⁵ CRCGC 12 2009:par 22.

⁶⁸⁶ See ch 7 herein for a list of factors indicating the best interests of the child in disciplinary processes.

⁶⁸⁷ 2001:110-116.

6.3.1 Level 1: Children are listened to

At this level, if children express views regarding discipline of their own accord, the responsible educator and the SGB will listen to their views with due care and attention. However, there is no explicit attempt made to allow learners to participate in disciplinary actions.

6.3.2 Level 2: Children are supported in expressing their views

On this level, educators and the SGB are committed to taking positive steps to elicit children's views and to support them in expressing those views in disciplinary matters, as well as creating safe spaces in this regard.⁶⁸⁸ However, there are no guarantees that the views of the children will be taken into account to influence decisions.

The *Schools Act*⁶⁸⁹ provides that children should be consulted in drafting the code of conduct. However, the Act does not prescribe the frequency or extent of consultation or that the views of the learners should be given due weight.⁶⁹⁰ No guidelines are provided to ensure that SGBs properly afford learners the opportunity to participate in accordance with the constitutional standards.⁶⁹¹ The legislation thus lacks vigilance in supporting learners to express their views. In this regard, the Ministers Committee of the Council of Europe provides that member states should:⁶⁹²

Undertake periodic reviews of the extent to which children and young people's opinions are heard and taken seriously in existing legislation, policies and practices and ensure that in these reviews, children and young people's own assessments are given due weight.

The Committee of the Council of Europe further stresses the obligations of member states and provides that they have to:

review and seek to remove restrictions in law or practice which limit children or young people's right to be heard in all matters affecting them.

⁶⁸⁸ See the recommendation of the Committee of Ministers 2012:s III – measures on steps to be taken to protect the child's right to participate, and measures to create safe spaces for participation.

⁶⁸⁹ 84/1996:s 8(1).

⁶⁹⁰ *Schools Act* 84/1996:s 8(1).

⁶⁹¹ Van Wyk 2001:200; Karlsson 2002:332; Van Wyk 2004:50-54; Mashau, Steyn, Van der Walt & Wolhuter 2008:415.

⁶⁹² Committee of Ministers 2012:s III – measures.

This is in line with the criteria provided on the second level of Shier's model for participation. Although, restrictions should be removed that may limit child participation, it does not require states to consider children's views in all matters affecting them. It merely provides that child participation in existing legislation, policies and practices should be monitored. Furthermore, children's views should be given due weight in the assessment of the child participation.

6.3.3 Level 3: Children's views are taken into account

In this instance, children's views are not only elicited, but are also taken into account in decisions.⁶⁹³ To be in line with the provisions of article 12 of the CRC, at least level three must be reached by decision-makers, and they must be able to answer all the questions posed on level three in figure 2 in the affirmative. Educators and SGBs should ensure that they can answer all the questions on levels one to three in the affirmative before they can claim that their disciplinary measures are in line with the right to participate.⁶⁹⁴

The *Schools Act*⁶⁹⁵ provides that, if a learner is suspended, the suspension will only be enforceable once the learner has been given the opportunity to make representations to the SGB. Similarly, if a recommendation to expel a learner is confirmed by the HoD, the learner can appeal by making representations to the MEC, which representations can influence the MEC's decision whether or not to uphold the expulsion.⁶⁹⁶ In contrast, the other learners who are affected by the conduct of the transgressing learner are not afforded any opportunity to influence the above-mentioned decisions.⁶⁹⁷

6.3.4 Level 4: Children are involved in decision-making processes

On this level, a transition is made from mere consultation to active participation in decision-making. The children are involved in the processes of making actual decisions. Neither the CRC⁶⁹⁸ nor the *Children's Act*⁶⁹⁹ prescribes that children should be involved in decision-making, merely that their views should be considered and given due weight. Thus, to allow learners to take part in decision-making processes is exceeding the minimum requirements.

⁶⁹³ See Committee of Ministers 2012:section III – measures on states' obligations to promote and inform, *inter alia*, children, parents, educators and SGBs on children's right to participate and on the need to enhance the capacity of decision-makers to elicit the views of children. In addition, it also refers to the need to create consultative processes and structures on local, regional and national levels.

⁶⁹⁴ Shier 2001:113. Different approaches to discipline will be discussed in chapter 6 herein, and these will be evaluated in chapter 7 herein on, *inter alia*, their compliance with this minimum level of participation.

⁶⁹⁵ 84/1996:s 9(1).

⁶⁹⁶ 84/1996:s 9(4).

⁶⁹⁷ See ch 3, par 6.2 herein.

⁶⁹⁸ 1989:a 12.

⁶⁹⁹ 38/2005:s 10.

Section 23(2)(d) of the *Schools Act* makes provision for learners from grade 8 and higher to be members of the SGB. This affords only older learner representation in a decision-making forum through representatives. However, section 32(2) of the Act curbs their decision-making power by providing that minors on the SGB are not allowed to vote on any resolutions which impose liabilities on the school or third parties.⁷⁰⁰ In some schools, learners are not even allowed to take part in these discussions.⁷⁰¹

Shier⁷⁰² highlights the following advantages of children being involved in decision-making as opposed to merely being consulted: the quality of service provision improves, children's sense of ownership and belonging increases, self-esteem increases, and empathy and responsibility increase. In this way, the groundwork for citizenship and democratic participation is laid, which helps to safeguard and strengthen democracy. He contends that the above-mentioned advantages can really only be achieved on level four – except for better service delivery, which can also be attained at the lower levels. These advantages are in line with the aims of education⁷⁰³ and the development of the child,⁷⁰⁴ as well as the aims of discipline, namely the holistic development of the child and teaching the child to act in a socially responsible manner.

6.3.5 Level 5: Children share power and responsibility for decision-making

Shier⁷⁰⁵ points out that the distinction between levels four and five is rather a matter of degree. Although children can be actively involved in decision-making on level four, they might still be without real power, because they might have the minority number of seats in a meeting. Therefore, to achieve level five fully, requires an explicit commitment on the part of adults to share their power. The decision to share power will be based on the risks and advantages of doing so. With power sharing come the responsibilities for those decisions, which must be borne by the children as well. This model, however, recognises the need to ensure that children are not burdened with responsibilities they do not want to carry, or are unable to carry, owing to their developmental stage. It further recognises that adults are more likely to deny children developmentally appropriate degrees of responsibility than force them to take on too much responsibility. Adults should thus rather be cautioned to weigh up the possible risks and benefits

⁷⁰⁰ Thus the minors will not be able to, for instance, impose a fine on a misbehaving learners, vote on the amount of damages due to the school by a learner who has vandalised the school or decide on the appointment of a social worker, from school funds, to deal with learners with disciplinary problems.

⁷⁰¹ Phaswana 2010:106.

⁷⁰² 2001:114.

⁷⁰³ See the discussion in par 2.1 above.

⁷⁰⁴ See the discussion in par 5 above.

⁷⁰⁵ 2001:115.

of allowing children to take part in decision-making and to be prepared to give children the opportunity when a suitable one arises.

Shier's⁷⁰⁶ model differs from Hart's model, in particular as regards the existence of a level where children make decisions on their own without reference to adults. This normally occurs when children act independently and manage themselves. This is not relevant for Shier's model, since it focuses specifically on the interaction between adults and children. Shier also proposes this model as a useful tool for those working with children in order to develop action plans to improve child participation.

Thornberg⁷⁰⁷ adds another dimension to child participation in negotiations and warns against "pseudonegotiation of nonconflict". Here, the impression is created that there is negotiation and dialogue, but the fact of the matter is that there was no conflict to begin with. Thus, drafting classroom rules which include no bullying, no talking, no running and no teasing are agreed upon by everyone. However, there are no conflicting views and therefore no real negotiation is necessary. He also refers to "pseudonegotiation as a deceptive game of school democracy". Here, the starting point is one of conflicting opinions and the issue is brought to a formal class or school meeting, but the issue is not handled in an authentic, negotiable and democratic way, but in a non-negotiable and assertive way. Thus opinions which are not in line with the views and proposals of the educator receive no attention or consideration during the meeting. Educators dismiss opposing proposals by not allowing any discussion on the proposal, verbally dismiss the proposal outright or ask questions creating doubt, such as "Do you really think that will work?", accompanied by expressions of doubt in their voice and body language. Thornberg⁷⁰⁸ states that it is very unusual to find instances where learners are actually able to make changes to existing school rules. Most of the explicit school rules are non-negotiable. It is therefore argued that rules pertaining to contentious issues, such as dress codes and hairstyles, are determined by adults, or, if learners are involved, through pseudonegotiations. However, he found that rules that are open to change are those related to learners' play activities during breaks, such as rules on play activities. Educators are also sometimes open to temporary deviations from certain rules, but, again, it is in their discretion to allow these in this power asymmetry.⁷⁰⁹

⁷⁰⁶ 2001:115-116.

⁷⁰⁷ 2009:403-404.

⁷⁰⁸ 2009:403-404.

⁷⁰⁹ Thornberg 2009:403-404.

The above-mentioned models indicate that there are different measures to determine whether actual participation is taking place. These models should enable educators and SGBs to gauge their own preparedness to allow children to participate in a constitutionally compliant way.

In conclusion, the right to participate is a multifaceted concept, and, in order to respect this right, all its elements should be present. There is a real risk of unduly diluting this right to one of merely listening to children without affording them the opportunity to influence decisions or to take part in decisions in an age- and developmentally appropriate way.

Hart and Shier's models provide practical guidance that helps to evaluate the level of participation afforded to children. In implementing Shier's model of participation, level three must be reached to ensure that the international standard laid down in article 12 of the CRC is complied with. Thus children should not only be listened to, but should also be supported in expressing their views – and these views should be taken into account in decision-making. It is conceded, however, that the international standard does not require children to be part of the decision-making process or to share in the power and to take responsibility for decision-making, represented by the last two levels of Shier's model. Nevertheless, Shier indicates that these last two levels provide additional advantages aligned with the child's right to education and development. To afford learners an opportunity to take part in decision-making processes contributes to their holistic development and teaches them to consider the rights and interests of others in such processes. Allowing learners to take part in decision-making processes thus provides an opportunity for learners to practise their human rights education.⁷¹⁰

Some of the deficiencies in the *Schools Act*⁷¹¹ were also highlighted above. It is clear from the discussion thus far that the current provisions of the Act do not facilitate the proper implementation of the child's right to participate. The necessary amendments should therefore be made to ensure that children's right to participate is duly recognised in the drafting of a code of conduct. In addition, the child's right to participate must also be given due regard in any strategies for the prevention of misconduct employed by the school, in classroom-management strategies, in any reactive strategies for dealing with less serious instances of misconduct, and in any formal action for dealing with serious instances of misconduct.

7. CONCLUSION

In this chapter, different rights of children were discussed with the aim of determining the content of these particular rights with specific reference to school discipline. Thus to satisfy the

⁷¹⁰ CRCGC 1 2001:par 15.

⁷¹¹ 84/1996:s 8(1).

standard of a specific right, the issues highlighted should be addressed. The identified dimensions of the different rights will also be used to inform the content of the best-interests-of-the-child standard.

In the next chapter, the different approaches to discipline will be discussed. In chapter 7, the different dimensions of the rights will be summarised in a list of factors indicating the best-interests-of-the-child standard. In addition, the different approaches to discipline will be evaluated against the list of factors compiled from the discussion in this chapter.

CHAPTER 6

APPROACHES TO DISCIPLINE

1. INTRODUCTION

The details of the social background to discipline in South African schools was discussed in chapter 2, providing some insight into the nature, extent and causes of disciplinary problems. The current legal position pertaining to discipline was discussed in chapter 3. This discussion indicated that the legal framework for school discipline is open to criticism and that there are several matters pointing to a lack of focus on the best interests of the child. Chapters 4 and 5 aimed to inform the best-interests-of-the-child-standard and its application as a constitutional right. This standard will be summarised and will be captured in a list of factors, indicating the best interests of the child, in chapter 7.

Another aim of chapter 7 is to evaluate the existing approaches to discipline against the standard of the best-interests-of-the-child right. However, before such an evaluation can take place, the broad approaches to discipline should be determined.

In what follows, the predominant approaches to discipline will be determined with reference to the literature, legal documents and the Social Discipline Window. The main features of these approaches will be identified, comparisons between some of the approaches will be made to highlight differences, and a broad overview of the methods employed to implement the approaches will be provided. The chapter does not aim to give a detailed discussion of different disciplinary programmes, techniques, methods or nuances that occur within every broad approach. Rather, the goal is to provide an overview of the broad approaches followed in schools in order to be able to evaluate the broad approaches to discipline in chapter 7.

2. A CONCEPTUAL FRAMEWORK TO DESCRIBE APPROACHES TO DISCIPLINE

Everyone in a position of authority has to make choices on how to maintain discipline.¹ There are numerous approaches to discipline, and there are different ways to categorise or to determine broad approaches to discipline.² The Social Discipline Window has purposefully been

¹ Wachtel 2012:3.

² See, for instance, Korb 2012:17-18, who refers to the different instructional styles that will eventually be reflected in the educator's approach to discipline as well. His model refers to authoritarian, laissez faire,

selected as the conceptual framework to describe four approaches to uphold social norms and maintain behavioural boundaries.³ This conceptual framework divides the regulation of behaviour into four approaches, namely the retributive, neglectful, permissive, and restorative approaches. In what follows, the dominant features of each approach will be discussed.⁴

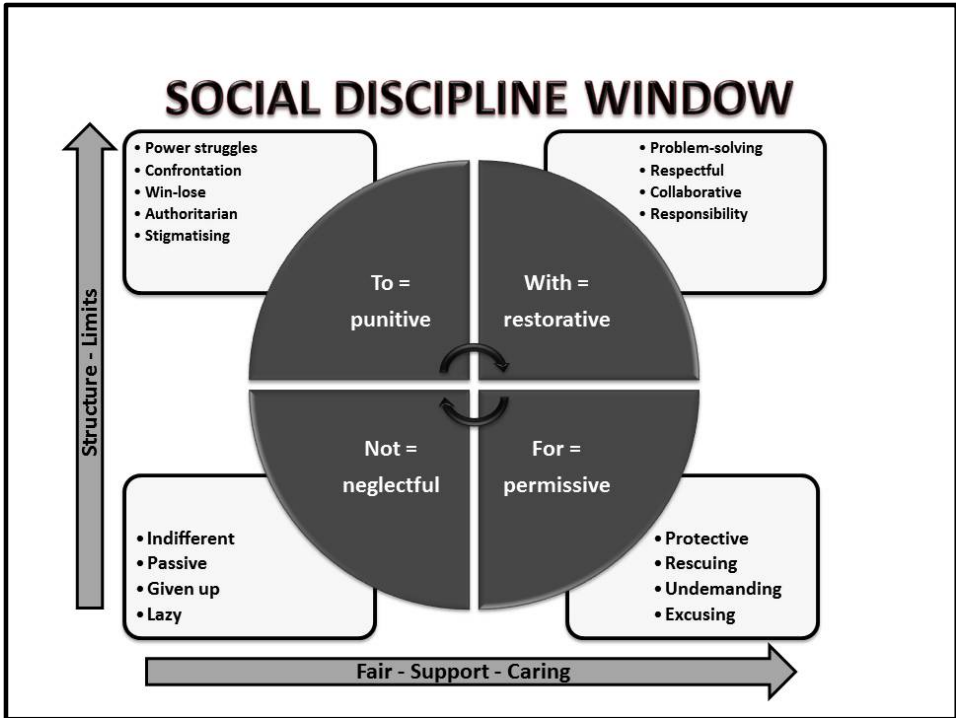


Figure 3: Social Discipline Window⁵

Figure 3 illustrates that the four approaches to discipline are based on combinations of high or low control on the one hand, and high or low support on the other. “Control” refers to the level of structure and the limits provided by the approach – thus how much restraint or influence is exercised over learners. “Support” refers to the level of support and care provided for the misbehaving learner – thus how much nurturing, encouragement and assistance are provided.⁶ In what follows, the features of the four approaches will be discussed.

indifferent and authoritative approaches to classroom management. See also Oosthuizen 2006, who refers to proactive and reactive forms of discipline.

³ Wachtel 2012:3.

⁴ McCold & Wachtel 2003:1; Wachtel 2012:3; Hansberry 2009:15-16.

⁵ Adapted from Wachtel 2012:3.

⁶ McCold & Wachtel 2003:1; Wachtel 2012:3; Hansberry 2009:15-16.

Firstly, a retributive approach to discipline, indicated at the top left corner of the window, would be high in structure and limits, while low in support and care. This approach is also referred to as a punitive or authoritarian approach to discipline. It entails a high premium being placed on compliance with rules. Educators decide on an appropriate punishment (high on structure and limits), but there is no, or limited, support to address the causes or consequences of misconduct (low on support and care). This approach is characterised by power struggles between educators and learners, by confrontation, by a win–lose outcome, by authoritarianism, and by the stigmatisation and labelling of learners. Things are thus done *to* learners to enforce discipline and are punitive in nature.⁷

A neglectful approach to discipline, also called an irresponsible approach, is low on structure and limits and low in support and care. In short, at the most extreme end of this approach, educators would *not* do anything about misconduct.⁸ This approach to discipline is characterised by educators who are indifferent, who are passive about discipline, and who have given up for several different reasons, or are simply lazy.

In the permissive approach, also referred to as the paternalistic or rehabilitative approach, educators do as much as possible *for* children and on their behalf. This approach is high in care and support, but low in structure and limits. There is very little control and structure, and, in extreme cases, everyone can do almost whatever they want. Educators following this approach are very protective and aim to shield or rescue learners from the consequences of their misconduct. Educators are undemanding and there are no, or very low, expectations of learners acting in an appropriate and responsible manner. Learners' behaviour is, for instance, excused because they come from a difficult socio-economic background. In addition, there are also no, or limited, expectations set so that they act according to social norms.⁹

Lastly, the restorative approach to discipline focuses on doing things *with* learners. It is high in structure and limits and sets high expectations for appropriate behaviour. If a learner transgresses, the focus will be on finding solutions to the problems and harm caused by the misconduct through a respectful and collaborative process. This approach is also high in expecting learners to take responsibility for their actions and the consequences of their actions. It is authoritative as opposed to authoritarian in nature.¹⁰

⁷ McCold & Wachtel 2003:2; Wachtel 2012:3; Hansberry 2009:15-16.

⁸ McCold & Wachtel 2003:2; Wachtel 2012:3; Hansberry 2009:15-16.

⁹ McCold & Wachtel 2003:2; Wachtel 2012:3; Hansberry 2009:15-16.

¹⁰ McCold & Wachtel 2003:1; Wachtel 2012:3; Hansberry 2009:15-16.

This conceptual framework has been chosen because it relates well to the realities of the school context in South Africa. The literature indicates that most schools follow a retributive approach to discipline, and that corporal punishment, as the most extreme form of the punitive approach, is still used in many schools, affecting large numbers of learners.¹¹ In addition, there are clear national and international legal prescriptions with regard to the use of punitive disciplinary measures.¹² Instances of educators giving up on maintaining discipline for several reasons have been highlighted, indicating that there are instances of a neglectful approach to discipline in South African schools.¹³ There are also indications of a clear move towards creating caring schools by changing the school climate and working on relationships with children.¹⁴ The *South African Schools Act*¹⁵ (“*Schools Act*”) also provides that support structures and measures for counselling must be made available to learners involved in formal disciplinary proceedings. Case law, such as *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government, and Others*¹⁶ indicates the risk of insisting on care and support for learners, but without high expectations for acceptable conduct. In this case, the HoD refused to expel learners despite serious transgressions. The school was instructed to provide rehabilitation services, but no, or very few, demands for changed behaviour were made of the learners to abide by school rules. Lastly, international literature clearly indicates that there are a growing number of schools accepting a restorative approach to discipline.¹⁷ In addition, there are also indications that schools, and some departments of education, in South Africa are adopting this approach to maintain discipline in schools.¹⁸ It is thus apposite at this point to investigate the appropriateness and lawfulness of introducing this approach to school discipline. If this approach is compatible with the best-interests-of-the-child standard, it needs to be supported. If not, measures should be taken to prevent schools from expending time, money and other resources on the introduction of an approach to discipline which does not meet the standard.

¹¹ See ch 2, par 5.1.1.1.1.

¹² *Schools Act* 84/1996:s 10. (prohibition of corporal punishment); CRC 1989:28(2); CRCGC 8 2006; CESCRGC 13 1999:par 41.

¹³ Motseke 2010:124 and Masitsa 2008:256-258 discuss the prevalence of inaction by educators with regard to discipline. See also ch 2, par 8.1.2 herein.

¹⁴ Moloi & Kamper 2010:256-276.

¹⁵ 84/1996:s 5.

¹⁶ Eastern Cape Provincial Division: unreported case 454/08. See the discussion in ch 3, par 5.9.2 herein.

¹⁷ Holtham 2009:4; Wachtel 2012:2; Morrison 2010:417; Willems & Bauwens 2012:71-72.

¹⁸ WCED 2007:2; De Vente-Bijker 2012:11.

The Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (“the Guidelines”),¹⁹ and General Comment 13 of the Committee on Economic, Social and Cultural Rights (CESCR)²⁰ refer to the application of positive discipline. This approach is not included in the Social Discipline Window. However, as will become evident from the discussion, there is no clear definition of what constitutes positive discipline and there are different interpretations of its features. Close scrutiny of the proposed features of the positive-discipline concept reveals that it will be possible to plot its implementation anywhere on the Social Discipline Window. Therefore, below, the following three main approaches to discipline will be discussed, namely the retributive, positive discipline and restorative approaches to discipline.

3. RETRIBUTIVE APPROACH TO DISCIPLINE

Retributive discipline is the form of discipline most frequently used in South African schools. Research conducted by Rossouw²¹ indicates that some schools employ punitive disciplinary measures only. The use of corporal punishment, is one of the best-known reactive disciplinary methods and is still used in some schools in South Africa, albeit unlawfully.²²

The mind-set of some educators regarding the need for retribution was illustrated in *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)*.²³ In 2006, learners amateurishly manipulated a photo and distributed it. The photo depicted the vice principal and principal in a very compromising sexual pose. Consequently, the learners were subjected to a disciplinary hearing at the school, which resulted in them being unable to hold any leadership positions at the school and in them not being allowed to wear colours. They also had to attend five detention sessions of three hours each. In addition, the vice principal laid criminal charges against the learners and they were eventually subjected to a diversion programme that involved cleaning cages at a local zoo. As a final blow, he instituted a civil claim against them for R600 000 for his injured feelings. A number of appeals followed and, five years later, in 2011, the saga was brought to a final conclusion in the Constitutional Court, which awarded him only R25 000. The amount eventually awarded would not even have covered a fraction of the legal costs incurred in the process. This is indicative of the extreme measures some educators are willing to take to address misconduct. In what follows, this approach to discipline will be investigated.

¹⁹ GN 776 1998:18900 (395); see also Oosthuizen 2006:19-20.

²⁰ CESCRGC 13 1999:a 41.

²¹ 2003:413-435.

²² See ch 2, par 5.1.1.1.1 herein for a discussion on corporal punishment, and par 3.2 below for examples of other punitive measures.

²³ 2011 (3) SA 274 (CC).

3.1 Features of retributive discipline

The retributive approach to discipline represents the more traditional approach to school discipline. This approach is mainly reactive in nature and displays clear parallels with the traditional aims of punishment found in the criminal justice system. Other terms normally associated with retributive discipline includes “punitive discipline”,²⁴ “corrective discipline”²⁵ and “authoritarianism”. Below, the general features of the retributive approach to discipline will be discussed, as well as disciplinary methods used in this regard.

3.1.1 Authoritarianism, dominance, control and power relations

The reactive approach to discipline is associated with concepts such as domination and control of learners, and with authoritarian and even autocratic management styles on the part of educators and school administrators. It also encompasses a strong belief that punishment brings about behavioural change in learners. Educators and/or the School Governing Body (SGB) are in a position of power, while the learners are in a position of submissiveness. The outcomes of zero-tolerance policies, followed in some schools in the United States of America, provide an example of the possibility of the extreme misuse of power, as well as convey the notion that those in a position of authority should remain in control of a school or classroom.²⁶

3.1.2 Focus on establishing guilt for breach of school rules

Hopkins²⁷ highlights the institutionalisation of the reactive approach and argues that misbehaviour is seen as a breach of school rules or as letting the school down. Once misconduct has occurred, the focus is mainly on the past. The aim is to determine which rule was broken and the gravity of the breach.

²⁴ Oosthuizen, Wolhuter & Du Toit 2003:469-470. “Punishment” refers to punitive measures. “Punitive methods of discipline” refers to steps taken in reaction to misconduct after it has occurred.

²⁵ Joubert & Prinsloo 2008:107. The authors define it as follows: “Corrective discipline refers to educators’ actions that are carried out to correct disruptive, anti-social or deviant behaviour (i.e. punishment).”

²⁶ Morrison & Vaandering 2012:140; Aull 2012:179-180; Bloomenthal 2011:303-304; Gonzales 2011:11; Ofer 2011:1377 provide examples of the sometimes ridiculous outcomes of zero-tolerance policies, illustrating the abuse of power by adults. For instance, a 12-year-old girl who was arrested, handcuffed, detained for two hours and charged for doodling on a desk with an erasable highlighter. She was eventually sentenced to eight hours of community service. A 13-year-old was arrested for repeatedly “passing gas” and turning off his classmate’s computer. A 15-year-old was arrested for stealing chicken nuggets in the lunch line. It later appeared that he had got them from his friend, who was fasting at the time. Yet, he was subjected to a humiliating public arrest. A 12-year-old was charged with a misdemeanour for being disruptive in class, for raising his voice and for “getting agitated and upset” with a school administrator. In another instance, a learner in kindergarten was handcuffed for throwing tantrums, but the handcuffs were too big. Consequently, they were put around her biceps.

²⁷ 2002:144-149.

3.1.3 Processes are adversarial in nature and focus on consistency in observance of rules and in punishment

The consistent observance of rules is an important feature of a retributive approach to discipline. Processes followed after misconduct are adversarial in nature, led by an authoritarian figure, who decides on the wrongdoer's guilt and punishment. Formal disciplinary proceedings are very similar to those found in a criminal court.²⁸ These proceedings must also comply with strict procedural rules, focusing on the rules of natural justice, administrative fairness, strict time frames, and on rules as to how to conduct a hearing.²⁹

3.1.4 Traditional aims of punishment guide the outcome after a guilty verdict

A strong element of revenge is evident in this approach to discipline. It is believed that, if the transgressor is found guilty, he or she should be punished. This is done by causing him or her pain by meeting out corporal punishment or making him or her suffer some other form of unpleasantness, such as detention. Retributive forms of punishment tend to be humiliating and include belittling and sarcasm. Consequently, one social injury is replaced by another.³⁰ This approach to discipline also focuses on deterrence, claiming that learners should learn from their mistakes and the mistakes of their peers. They are taught that, to avoid the same unpleasantness, they should rather refrain from misconduct.³¹

Exclusion is often part of a retributive system and includes out-of-class or school suspensions or expulsions. It is also used as a prevention strategy to avoid danger to others and property and to avoid further misconduct.³² The rehabilitation of the offender can play a part in the eventual reaction to misconduct. These rehabilitation programmes are often imposed on learners and attendance of a compulsory programme can form part of the punishment. Stigmatisation and labelling are common features of the punitive system.³³

3.1.5 Focus on the transgressor

The school community on the receiving end of the misconduct is mostly uninvolved in the process of determining the guilt of the transgressing learner. It is mostly represented by an educator or the principal, who acts on its behalf, resulting in the victims feeling powerless.³⁴ The needs and interests of the victims of the misconduct are also not explicitly addressed in the

²⁸ For example, the *Schools Act 84/1996*:s 8, 9.

²⁹ Hopkins 2002:145.

³⁰ Hopkins 2002:144-149.

³¹ Hopkins 2002:145.

³² See the legislative prescription in the *Schools Act 84/1996*:s 8(5).

³³ McCluskey, Kane, Lloyd, Stead, Riddell & Weedon 2011:108.

³⁴ Hopkins 2002:145.

adversarial process. The role of the victims of misconduct is mostly restricted to providing evidence in the process of determining the guilt of the transgressor.

3.1.6 Responsibility for actions is equated with punishment

A retributive approach to justice tends to discourage offenders from taking responsibility for their actions, or, if they do or are found guilty, they try to minimise their role to ensure that they are not subjected to punishment or that they receive a lighter punishment.³⁵ Accountability is thus equated with the transgressor receiving punishment. Restitution sometimes takes place, but it is normally ordered and enforced by those in authority.³⁶

3.2 Retributive disciplinary methods

The most common form of reactive discipline is the application of corporal punishment. Yet, although some educators refrain from using corporal punishment, they generally resort to other punitive forms of discipline such as additional and/or supervised school work,³⁷ exclusion from the group,³⁸ reprimands,³⁹ withdrawal of privileges,⁴⁰ menial tasks and community service,⁴¹ tasks assigned to assist the offended person,⁴² affordable compensation,⁴³ a merit and demerit

³⁵ Zehr 2002:16.

³⁶ Morrison 2002:2191-2196; Wearmouth, McKinny & Glynn 2007:37-49; Karp & Breslin 2001:252-253; Fields 2003:46; Drewery 2004:334.

³⁷ Joubert & Prinsloo 2008:128.

³⁸ These can include time out or excluding the learner from taking part in games or other activities.

³⁹ Oosthuizen 2010:232.

⁴⁰ Oosthuizen 2010:231-232. GN 776/1998:par 10.2 provides that suspension from school activities for minor offences should only be considered after every effort has been made to correct the behaviour of the learner. In *Western Cape Residents' Association v Parow High School* 2006 (3) SA 542 (C), the court found that it was lawful to refuse a learner the privilege of attending the matric farewell function.

⁴¹ Prinsloo 2005:8; Joubert & Prinsloo 2008:128-129; Rossouw 2003:429. Learners who lack responsibility and consideration for others are often made to do community service as punishment. This may include the cleaning of classrooms and toilets, and picking up litter. It may also involve learners doing volunteer work at charity organisations. This form of punishment requires supervision and should be executed after school. Parental cooperation is another prerequisite for this form of punishment. Resorting to community service and menial tasks as a form of punishment raises a number of questions. Firstly, when and in what circumstances will this form of punishment start to infringe on the learner's right to dignity, and, secondly, in what circumstances would it constitute unlawful child labour? Another aspect is the privacy of the learner. Whenever a child is in conflict with the law, the child's identity is protected. The suitability of this form of punishment is questionable if the protection of the child's identity in public, at a charity organisation, is at stake.

⁴² GN 776/1998:par 10.1(c). In an effort to rebuild relationships between the offender and offended, and to acknowledge the harm caused by the offence, the offender can be required to perform tasks to assist the offended person. For instance, if someone's arm has been broken because he or she was deliberately pushed down the stairs at school, the offender might be required to carry the school bag of the victim. These actions are imposed upon the transgressor, whereas, in the restorative process, they flow from a negotiated and mutually agreed process.

⁴³ GN 776/1998:par 10.1(d).

system,⁴⁴ humiliation,⁴⁵ detention,⁴⁶ verbal or written warnings,⁴⁷ behaviour management contracts,⁴⁸ daily reports,⁴⁹ referral to the SGB or disciplinary committee of the school,⁵⁰ suspensions,⁵¹ expulsions,⁵² and pressing criminal charges. Other reactive measures include discussions with parents,⁵³ referral to a social service professional, and rewards for acceptable conduct.⁵⁴

4. THE NEED TO INVESTIGATE ALTERNATIVES TO THE RETRIBUTIVE APPROACH

There is a growing body of research indicating the negative consequences of a retributive approach to misconduct in schools, including children becoming more rebellious and less disciplined after being punished, high dropout rates, and increased exposure to the criminal justice system.⁵⁵ There is also no link between increased punitive measures and the creation of a safe school environment; in fact, learners feel more unsafe at school owing to their fear of

⁴⁴ Joubert & Prinsloo 2008:129. In a merit–demerit system, points are awarded or deducted, depending on the behaviour of the learners. The system relies on values being assigned to certain conduct. Depending on the number of points accumulated, the learner will be either rewarded or punished. Rossouw 2003:429-430 questions the legality of some of the points systems where the offences are permanently recorded, with such record accompanying the learner to secondary school in some instances.

⁴⁵ Joubert & Prinsloo 2008:108. Learners are often punished by deliberately humiliating them. This can be done by way of belittling, name-calling or using derogatory or intentionally offensive language. Learners can also be humiliated by forcing them to stand on a chair or to wear an offensive or humiliating note around the neck stigmatising the child as, for instance, lazy or dumb. Educators also often resort to sarcasm to humiliate learners. See also Nelsen, Lott & Glenn 2000:118.

⁴⁶ Oosthuizen 2010:232. During detention, learners are isolated during lessons, during break or after school. In some schools, learners are merely required to sit in a classroom for a specified period of time without anything to do. In other instances, learners are required to do additional work provided by the educator who has sent the learner to detention. The idea is to take away the learner's free time and to ensure that the learner experiences some discomfort.

⁴⁷ Pienaar 2003:265.

⁴⁸ Joubert & Prinsloo 2008:127. A written contract is drawn up between the educator and learner. This contract stipulates specific behaviour goals for the learner and provides for specific conditions.

⁴⁹ The transgressing learner is obliged to report on a daily basis to every educator after class. The educator will sign the report and comment on the learner's behaviour in class. This report will be used to determine patterns of misbehaviour and to monitor possible improvements in the learner's conduct.

⁵⁰ Oosthuizen, Roux & Van der Walt 2003:471-472; Wolhuter, Oosthuizen & Van Staden 2010:181-183; Oosthuizen 2010:236-241.

⁵¹ Joubert & Prinsloo 2008:126. To send a child home for trivial reasons such as talking in class, not wearing the right uniform or having a hairstyle that is not in accordance with the school rules is unlawful and should not be allowed, unless the learner is wilfully disobedient. The learner may only be suspended for serious misbehaviour, and to remove the child from school amounts to a suspension, which must be carried out in accordance with the prescribed regulations. See the discussion in ch 3, par 5.9.1 herein.

⁵² See discussion ch 3 par 5.9.2.

⁵³ Oosthuizen 2010:236; Wolhuter, Oosthuizen & Van Staden 2010:181-183.

⁵⁴ Rossouw 2003:430. Primary schools often use rewards as an external form of motivation. These include receiving refreshments free of charge from the tuck shop, receiving discount vouchers from shops, and being allowed to have part of a day off. Although ostensibly an effective measure, the educational value thereof is questioned. This disciplinary measure in fact amounts to bribing the child to behave and does not contribute to changes in the internal values of the child. This might also lead to children's good behaviour being dependent on an adult's approval and on the accompanying compensation for such behaviour.

⁵⁵ Aull 2012:183-184; Gonzales 2011:9-15.

punishment⁵⁶ Some researchers indicate that the use of external control mechanisms such as surveillance cameras, guards and metal detectors may actually foster violence and disorder.⁵⁷

In a recent judgment in *The Teddy Bear Clinic for Abused Children and Another v Minister of Constitutional Development and Others*,⁵⁸ the North Gauteng High Court warned against the undue criminalisation of children's conduct and effectively called for a new approach to address children's non-compliance with societal norms. The case dealt with the constitutionality of provisions of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*,⁵⁹ which criminalise almost all sexual contact between adolescents. Rabie J held:

The use of damaging and draconian criminal law offences to attempt to persuade adolescents to behave responsibly is a disproportionate and ineffective method which is not suited to its purpose. There are plainly less restrictive measures available for achieving the purposes sought to be pursued.⁶⁰

The court discussed at length the harm done to children by criminalising almost all adolescent sexual conduct and by exposing them to the criminal justice system. Although this judgment was not related to school discipline, the underlying principle emphasised by the court is that it is inappropriate to revert to punitive measures if other measures are available to achieve the same purpose. In the case under discussion, the court found that the purpose of the legislative provisions is to encourage adolescents to lead responsible sexual lives, and that this purpose can be achieved through other means than to criminalise their conduct.⁶¹ In the same vein, the application of a punitive approach to school discipline is questionable in achieving the aims of education, namely the holistic development of the child and teaching the child to act in a socially responsible manner.⁶² In what follows, the restorative justice approach to discipline is discussed as an alternative to the existing, predominantly retributive approach to discipline in South African schools.

⁵⁶ Bloomenthal 2011:303-356; see also Gonzales 2011:6-15.

⁵⁷ Bloomenthal 2011:309. The negative consequences of the punitive approach will be discussed in more detail in the evaluation of the different approaches to discipline in chapter 7 herein.

⁵⁸ Unreported case 73300/10 – judgment delivered on 4 January 2013.

⁵⁹ 32/2007:s 15, 16.

⁶⁰ Unreported case 73300/10:par 112.

⁶¹ Unreported case 73300/10:par 84, 112.

⁶² CRC 1989:a 29. See the discussion in ch 5, par 2.1 herein.

5. RESTORATIVE JUSTICE APPROACH TO DISCIPLINE

5.1 Broad overview of the development of the application of restorative justice

To understand the restorative approach to school discipline, it is necessary to consider the origins of this approach to justice. Although the Western legal system has important strengths, there is a growing awareness that this system has its limitations and failures too. In this system, victims, offenders and the community sometimes consider that their needs are not adequately met. Zehr⁶³ argues that the existing approach to justice deepens societal wounds and conflicts and does not contribute to healing and peace.

Restorative justice is not a specific programme or practice, but is rather a philosophy which can be applied in different programmes and practices.⁶⁴ Since the 1970s, alternative programmes and practices were developed across the world to address the shortcomings of the traditional retributive approach to crime. These include victim–offender reconciliation programmes, victim–offender mediation, and victim–offender dialogue programmes developed in countries such as Canada, New Zealand, Australia, North America and Europe. As time went by, the scope of restorative justice broadened to include not only the victim and offender, but also their communities of care, including their families and friends. This resulted in processes called restorative conferences and circles, which are sometimes included in legislative provisions. For example, since 1989, restorative justice has been the central focus of the juvenile justice system in New Zealand, which prescribes family-group conferences.⁶⁵

Since the initial application of restorative justice in instances of minor offences in the juvenile criminal justice system, its application has been extended to serious crimes such as murder and rape in some communities. Furthermore, the application of the restorative justice philosophy has spread beyond the criminal justice system and is now being applied in schools, the workplace, and religious institutions.⁶⁶

The application of the restorative approach to school discipline was used for the first time by an Australian educator, Margaret Thorsborne, in 1994.⁶⁷ Its application has since become well established in some schools in several countries.⁶⁸ There is also currently a drive by civil society in the city of New York to replace zero-tolerance school discipline policies with restorative

⁶³ 2002:1.

⁶⁴ Amstutz & Mullet 2005:4.

⁶⁵ Wachtel 2012:2. Also called “family-group decision-making” (in North America) and “community accountability conferences”. Also included in the South African *Child Justice Act 75/2008*:s 2, 53, 55, 73, 79.

⁶⁶ Zehr 2002:4; Wachtel 2012:3.

⁶⁷ Wachtel 2012:2.

⁶⁸ Morrison 2010:417.

practices.⁶⁹ There is evidence that this is slowly taking root in the South African school context too.⁷⁰ The literature also indicates a growing awareness and application of the system in European schools.⁷¹

5.2 Defining restorative justice

It is clear from the literature that there is no exact definition of “restorative justice” and that the focus in different programmes, outcomes and principles related to this approach contributes to its openness to different interpretations.⁷² Zehr,⁷³ one of the founders of the restorative justice concept, says in this regard:

Although the term “restorative justice” encompasses a variety of programs and practices, at its core it is a set of principles, a philosophy, an alternate set of guiding questions. Ultimately, restorative justice provides an alternative framework for thinking about wrongdoing.

What is of importance is that, although there is not necessarily consensus amongst the proponents of restorative justice on a definition or the specific meaning, ambit and details of notions within the philosophy, there is consensus on the material principles of the concept.⁷⁴

Furthermore, Zehr⁷⁵ indicates that the wisdom or usefulness of a uniform definition is questionable. He argues that the need for principles and benchmarks is recognised, but that there are concerns that a single definition might constitute some arrogance and finality which could result in the establishment of a rigid meaning. The lack of a clearly defined position on all aspects of the concept should further be seen against the background of restorative justice as

⁶⁹ The Dignity in Schools Campaign focuses on ending the school-to-prison pipeline created by the zero-tolerance policy. It aims to convince the New York City Department of Education to implement restorative practices. See <http://www.dignityinschools.org/>. Educators are also in favour of the implementation of restorative justice and dignity in New York City schools and established an organisation called Teachers United. <http://teachersunite.net/340>.

⁷⁰ WCED 2007:2; De Vente-Bijker 2012:11. In the context of school discipline, very little evidence exists of the application of restorative justice practices in South African schools. Only one provincial education department, the Western Cape Education Department, refers to it in a policy document, but does not provide any detail of what it entails. It is merely mentioned as an acceptable alternative to corporal punishment.

⁷¹ Balcaen 2011:51 and Willems & Bauwens 2012:71-72 on the development of restorative practices in Belgian schools.

⁷² Bezuidenhout 2007:43-60; McCluskey, Kane, Lloyd, Stead, Riddell & Weedon 2011:105; Balcaen 2011:51

⁷³ 2002:5.

⁷⁴ The lack of a uniform definition of restorative justice is therefore acknowledged in this study, but the differences in definitions and foci are not material to this study.

⁷⁵ 2002:36.

an evolving concept. He avers that the lack of a uniform definition does not diminish its applicability, but rather highlights the different non-negotiable elements of this approach.⁷⁶

He suggests the following working definition of restorative justice:

Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs, and obligations in order to heal and put things as right as possible.⁷⁷

Zehr and Mika⁷⁸ are of the opinion that restorative justice is composed of three headings, which include the notion that crime is a violation of people and interpersonal relationships, that these violations create obligations and liabilities, and that restorative justice seeks to heal and put right the wrongs.

Hansberry⁷⁹ defines restorative justice as follows:

An approach to addressing wrongdoing (or conflict) that focuses on repairing harm. Unlike traditional (retributive) processes, justice is not achieved by penalizing or punishing wrongdoers, but through asking wrongdoers to take responsibility for the harm they've caused. Those harmed are asked to identify their needs. It then becomes the obligation of the wrongdoer(s) to make [an] attempt to put things right (restore) by responding to the needs of those harmed through symbolic or tangible actions.

Bosworth⁸⁰ states that victims' needs are central to the restorative justice model, while offenders are held accountable. The state is a secondary player in restoring victims, offenders and communities to a state of wholeness in the criminal justice system. Morrison⁸¹ highlights the importance of building communities of care around transgressors, while they are held accountable for their actions. This implies that, although their conduct is not condoned, they are still part of a community of care which provides support for them while they have to address the harm they have caused.

⁷⁶ Zehr 2002:37.

⁷⁷ Zehr 2002:37.

⁷⁸ 2010:60-62.

⁷⁹ 2009:119.

⁸⁰ 2005:846.

⁸¹ 2002:2.

The above definitions focus on the actions taken after harm has occurred. Amstutz and Mullet,⁸² however, emphasise the importance of applying restorative values and principles even before harm occurs, and highlight the importance of their application in the way people speak and listen to one another. This should validate the experiences and needs of everyone in the community. The principles and values of restorative justice should thus be applied in order to build community and to prevent harm. If harm has occurred, the same principles should be applied to repair the harm. They therefore propose a wider definition of restorative justice and hold:

Restorative justice promotes values and principles that use inclusive, collaborative approaches for being in community. These approaches validate the experiences and needs of everyone within the community, particularly those who have been marginalized, oppressed, or harmed. These approaches allow us to act and respond in ways that are healing rather than alienating or coercive.

In what follows, the restorative justice concept will be explored and the agreed-upon principles of the concept will be discussed in so far as they are relevant to the broad aims of this study, which does not include an exact clarification of all the dimensions of the restorative approach. The basic principles of restorative justice will then be applied to the school discipline context by referring to existing literature relevant to their application in this context.

5.3 Restorative justice in South Africa

The work of the Truth and Reconciliation Commission, which dealt with the aftermath of the human rights violations during the apartheid era, is certainly the most well-known example of the application of restorative justice in South Africa.⁸³ Since then, the focus of the juvenile justice system also changed and restorative justice is now an integral part of the new *Child Justice Act*,⁸⁴ which came into force in 2010. In terms of this Act, restorative justice means:

an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation

Despite the limited application of restorative justice in the context of schools and the lack of reference to it in legislation and regulations related to school discipline, the Constitutional Court

⁸² 2005:15.

⁸³ Skelton & Bateley 2006:5.

⁸⁴ 75/2008.

clearly approves of, and encourages, a restorative justice approach in general, as is evident from several judgments related to criminal law and other spheres of the law.⁸⁵ The Constitutional Court held in *S v M*⁸⁶ that the Constitution has transformed the traditional aims of punishment. The court's emphasis of restorative justice, albeit in the criminal justice context, is of significant importance for this study.

In 2011, in *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)*,⁸⁷ the Constitutional Court clearly indicated the relevance of a restorative approach to school discipline. The focus of this case was not on school discipline *per se*. However, the context of the case is related to school discipline and relationships in schools. The case, the facts of which were discussed above,⁸⁸ dealt primarily with a claim for damages by an educator against learners and resulted in a very divided judgment on several aspects. However, what is of importance for the present discussion was the unanimous finding of the court pertaining to the development of the Roman-Dutch common law on apology. The learners had tried to apologise to the educator, but the educator did not want to entertain such a discussion, on legal advice. The principal, also depicted in the photo, however accepted the apology. The learners also declared that they would be willing to take part in a restorative process, but this did not materialise.

The court found that, if the Roman-Dutch law had allowed for a genuine apology, this case could have turned out totally differently and that it was possible that there could have been restoration of respect among all the parties. However, that did not happen during the course of the legal proceedings; instead, attitudes hardened and the conflict deepened and steepened. The *amicus* argued that the law should be developed to recognise a retraction and apology for wrongs committed. The argument was that the law should be developed in such a manner that the re-establishment of relationships ruptured by infringements of dignity should preferably occur before matters reached the court. In this regard, the court held:

⁸⁵ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC):par 68, 69, 86, 114, 115; *Du Toit v Minister for Safety and Security and Another* 2009 (6) SA 128 (CC):par 21; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC):par 59, 61, 72; *S v Maluleke* 2008 (1) SACR 49 (T); *S v Saayman* 2008 (1) SACR 393 (E); *S v Shilubane* 2008 (1) SACR 295 (T):297; *S v Tabethe* [2009] JOL 23082 (T);para 38-41; *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W):526; *Camps Bay Residents and Ratepayers Association v Augoustides* 2009 (6) SA 190 (WCC):196.

⁸⁶ *S v M* 2007 (2) SACR 539 (CC):par 10, 55, 59, 61, 62, 72.

⁸⁷ *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC).

⁸⁸ See par 3 above.

Respect for the dignity of others lies at the heart of the constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other's dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them. That experience has become part of the fabric of our society. The law cannot enforce reconciliation but it should create the best conditions for making it possible. We can see no reason why the creation of those conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another.⁸⁹

The court thus emphasised the importance of the restoration of relationships. Although the law cannot enforce the restoration of relationships between people, it should create the best conditions to facilitate it. It is thus imperative that every SGB should ensure that the code of conduct creates the best possible conditions for restoration of relationships and the dignity of everyone affected by misconduct in schools.⁹⁰ On a national level, the legislator thus has to reconsider the current provisions of the *Schools Act* pertaining to disciplinary proceedings and re-evaluate its compliance with the constitutional imperative that relationships should be restored as far as possible.

In another 2011 judgment, in *Afri-Forum and Another v Malema and Another (Vereniging van Regslui vir Afrikaans as Amicus Curiae)*⁹¹ the Equality Court emphasised the need of legislation to provide standards to which society has to adhere, and to determine standards of acceptable behaviour. The court acknowledged the difficulties experienced by society in adapting to the new constitutional standards and in changing conduct according to these standards. It referred to the development of *ubuntu* jurisprudence and highlighted the features of this concept:

In the epilogue to the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993), the concept of *ubuntu* was recognised. This concept was not repeated in the current Constitution. This notwithstanding, there are a number of *ubuntu*-based judgments. An *ubuntu*-based jurisprudence has been developed particularly by the Constitutional Court. *Ubuntu* is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing

⁸⁹ *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC):par 202.

⁹⁰ *Schools Act 84/1996:s 8(1).*

⁹¹ 2011 (12) BCLR 1289 (EqC).

remedies which contribute towards more mutually acceptable remedies for the parties in such cases. *Ubuntu* is a concept which:

1. is to be contrasted with vengeance;
2. dictates that a high value be placed on the life of a human being;
3. is inextricably linked to the values of and which places a high premium on dignity, compassion, humaneness and respect for humanity of another;
4. dictates a shift from confrontation to mediation and conciliation;
5. dictates good attitudes and shared concern;
6. favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the plaintiff without ruining the defendant;
7. favours restorative rather than retributive justice;
8. operates in a direction favouring reconciliation rather than estrangement of disputants;
9. works towards sensitising a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and towards changing such conduct rather than merely punishing the disputant;
10. promotes mutual understanding rather than punishment;
11. favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful;
12. favours civility and civilised dialogue premised on mutual tolerance.⁹²

It will become evident from the discussion on restorative justice that it is aligned with the above-mentioned content given to the *ubuntu* concept. In chapter 7, this study will return to the question whether the respective retributive and restorative approaches to discipline are capable of satisfying the above-mentioned standard regarding building and the reparation of relationships between people.

However, before such an evaluation can be undertaken, the restorative justice approach to discipline should be examined. In what follows, restorative justice will be compared with retributive justice, the basic features of a restorative approach to justice will be discussed, misconceptions and challenges related to the approach will be highlighted, and the different methods employed to implement restorative justice principles will be examined.

5.4 Comparison of the retributive and restorative approaches to discipline

Contrasting the restorative and retributive approaches to justice contributes largely to an understanding of the restorative approach to justice. Hopkins⁹³ summarises the differences

⁹² 2011 (12) BCLR 1289 (EqC):par 18.

⁹³ 2002:145. Some perspectives of Zehr 2002:21 added.

between the two approaches in the context of school discipline as follows and refers to the old paradigm and the new paradigm:

Table 5: Comparison of the retributive and restorative approaches to discipline

OLD PARADIGM – RETRIBUTIVE JUSTICE		NEW PARADIGM – RESTORATIVE JUSTICE
Misbehaviour is defined as breaking school rules or letting the school down. Violation of rules.	1.	Misbehaviour is defined as harm (emotional/mental/physical) done to one person/group by another. Violation of people and relationships.
Violations create guilt.	2.	Violations create obligations.
Focus on establishing blame or guilt, and what happened in the past. (What happened? Did he/she do it?)	3.	Focus on problem-solving by expressing feelings and needs and exploring how to meet them in future.
Justice requires that a person in a position of authority determines guilt and punishment.	4.	Justice involves victims, transgressors, and community members in an effort to put things right.
Adversarial relationships between parties and adversarial processes characterise this approach.	5.	Dialogue and negotiation – everyone involved in communicating and cooperating with one another.
Imposition of pain or unpleasantness to punish and to deter/prevent future misconduct.	6.	Restitution is seen as a means of restoring both parties, the goal being reconciliation and acknowledging responsibility for choices.
Attention to rules and adherence to due process – “We must be consistent and observe the rules.”	7.	Attention to relationships and achievement of mutually desired outcome.
Conflict/wrongdoing represented as impersonal and abstract: individual versus school.	8.	Conflict/wrongdoing recognised as interpersonal conflicts with opportunity for learning.
One social injury replaced by another.	9.	Focus on repair of social injury/harm. Repair is both concrete and symbolic.

School community as spectators, represented by member of staff dealing with the situation; those affected not involved and feeling powerless.	10.	School community involved in facilitating restoration; those affected taken into consideration; empowerment.
Accountability defined in terms of receiving punishment.	11.	Accountability defined as understanding impact of actions, taking responsibility for choices and suggesting ways to repair harm.
Central focus: transgressors should get what they deserve.	12.	Central focus: victim's needs and transgressor's responsibility for repairing harm.

Zehr⁹⁴ warns against the above-mentioned stark distinction between the retributive and restorative approaches to justice. He indicates that these distinctions indeed contribute to an understanding of what the two approaches entail. However, this distinction also obscures the similarities of these two approaches and can wrongly create the impression that an either/or choice which is mutually exclusive is always created.

He avers that these two approaches are not really two polar opposites and in fact have much in common. Both approaches "vindicate through reciprocity, by evening the score". The approaches differ, however, in what each claims would effectively right the balance.

Both these approaches recognise that the balance or equilibrium between people are disrupted by wrongdoing and should be restored. Therefore, the victim deserves something and the offender owes something. Furthermore, both approaches provide that there should be proportionality between the wrongdoing and the response to it. The similarity ends here, because the approaches differ as regards the currency that should be used to right the wrong.⁹⁵

The retributive approach proposes that pain inflicted upon the offender will vindicate the victim. Thus the victim is vindicated through the discomfort experienced by the offender. The restorative approach, on the other hand, proposes that the victim is only truly vindicated if the harm suffered by him or her and the subsequent needs are acknowledged. This should be combined with an active effort by the offender to take responsibility for the actions, to take steps

⁹⁴ 2002:58-59.

⁹⁵ Zehr 2002:58-59.

to set the wrongs right, and to participate in interventions to address the causes of the misconduct and to prevent repetition of the harm in future.⁹⁶

In an ideal world, the application of a restorative approach to injustice would be possible. However, it is not possible because some offences are just too heinous to go unpunished, and some offenders are just too dangerous not to exclude them from the community. The community still needs to be protected. Therefore, it would be unrealistic to argue that the restorative approach can fully replace the retributive approach. It is, however, contended that these processes are not mutually exclusive. Practice has also proven that restorative measures can also be applied in conjunction with retributive processes to ensure some vindication and healing for the victims.⁹⁷

The same principles are applicable in the context of school discipline. In some instances, a restorative approach would suffice and would be the most appropriate for resolving the matter. In other instances, a retributive approach might be inevitable and learners might need to be excluded from the school community, but a restorative approach can be applied after and/or in conjunction with punitive measures to address the needs of the victims and the causes of the misconduct, and to assist the transgressor and/or the victim to be reintegrated into the community. Sometimes, a primarily restorative approach would include an element of retribution as part of the solution to the problem.

5.5 The defining questions in the retributive and restorative approaches

The fundamental differences between the two approaches are further highlighted by contrasting the fundamental questions that underlie each approach.⁹⁸ These questions essentially guide the processes followed in the respective approaches.

⁹⁶ Zehr 2002:58-59.

⁹⁷ McCluskey *et al.* 2011:107-108, 111-112.

⁹⁸ Zehr 2002:21

Table 6: Comparison of the fundamental questions underlying the retributive and restorative justice approaches

RETRIBUTIVE JUSTICE	RESTORATIVE JUSTICE
<ul style="list-style-type: none"> • What laws/rules have been broken? 	<ul style="list-style-type: none"> • Who has been hurt?
<ul style="list-style-type: none"> • Who did it? 	<ul style="list-style-type: none"> • What are their needs?
<ul style="list-style-type: none"> • What do they deserve? 	<ul style="list-style-type: none"> • Whose obligations are these?

Zehr⁹⁹ provides a more expansive list of factors which can, in essence, be linked to the above-mentioned three questions. His questions for a restorative process are the following:

- a) Who has been hurt?
- b) What are their needs?
- c) Whose obligations are they?
- d) What are the causes?
- e) Who has a “stake” in this?
- f) What is the appropriate process to involve stakeholders in an effort to put things right?

The restorative approach thus aims to address these specific issues. The extent of the exploration of these issues will depend on the specific circumstances and the seriousness of the transgression. Different methods to implement restorative justice will be discussed, indicating the flexibility of this approach in dealing with low-impact misconduct as well as very serious transgressions.¹⁰⁰

5.6 Basic features of a restorative approach to discipline

Despite the absence of one generally accepted definition, certain recurring principles can be identified from the definitions and literature. These principles include a victim-centred approach, offender accountability, community involvement, reconciliation, the restoration of relationships, restitution, the making of amends, repairing harm, problem-solving, dialogue, negotiation, reintegration as opposed to stigmatisation, repentance, and forgiveness.¹⁰¹ These concepts will be discussed in more detail below and will be applied to the context of school discipline. Since the context is school discipline, and since not all misconduct constitutes a criminal offence,

⁹⁹ 2002:38; see also Amstutz & Mullet 2005:14.

¹⁰⁰ See par 5.9 below.

¹⁰¹ Bosworth 2005:846, 849.

terms such as “offender”, “victim” and “crime” are inappropriate. Terms such as “the person who caused harm” and “the harmed person” are therefore much more appropriate. The word “transgressor” will also be used to refer to the person who caused the harm and who is ordinarily known as “the misbehaving learner” or “the learner who committed a crime”.

5.6.1 Misbehaviour is harm done to another and creates obligations

The focus of the restorative justice approach is on the emotional and social disruption caused by misbehaviour. The focus is not on the misbehaviour itself, but rather on its consequences. The wrongdoing lies in the violation of people and interpersonal relationships and not in the breaking of rules.¹⁰² Karp and Breslin¹⁰³ emphasise that restorative justice is about disapproving of the transgression while valuing and supporting the transgressor’s intrinsic worth. These violations cause obligations. The transgressor accordingly has an obligation to put the wrongs right.¹⁰⁴

Separate classes, grades, sports teams and other groups in the school, as well as the school as a collective can be regarded as distinct communities. Everyone in the school community should experience a sense of safety and belonging. If a learner misbehaves, it impacts on individuals and the rest of the school community, and, therefore, there is an obligation on the transgressor to right this wrong.

In some instances, the impact of the harm is so profound that the harmed learners might need professional services. These and other needs must be identified and addressed, albeit not necessarily through interventions initiated or managed by the transgressor, but by staff of the school, the Department of Education and/or parents.¹⁰⁵

5.6.2 Addressing the needs of those harmed by misconduct

The criminal justice system and society at large employ mainly an adversarial–retributive justice model. If a transgression takes place, this implies that somebody has broken a rule and should thus be punished. The focus is mainly on the wrongdoing and the perpetrator.¹⁰⁶ The impact of

¹⁰² Drewery 2004:334-335; Shaw 2007:128; Varnham 2005:87-104; Hopkins 2002:144-145; Karp & Breslin 2001:252; Morrison & Vaandering 2012:140; Zehr & Mika 2010:60-62.

¹⁰³ 2001:265; Zehr 2002:19.

¹⁰⁴ Zehr 2002:19-20. People are interconnected and violations disrupt the community among people. This sense of community is represented by different notions in different cultures. In the Maori culture it is represented by the *whakapapa*, for the Navajo it is the *hozho*, and for many Africans it is *ubuntu*. In essence, the transgressor has an obligation to restore the community, because the effect of misconduct is that relationships are harmed.

¹⁰⁵ Zehr & Mika 2010:62.

¹⁰⁶ Drewery 2004:334.

the misconduct on the victim and the community does not play a significant role, if at all. This underestimation of the impact of misconduct on victims led to a reaction in the criminal justice system decrying the notion that offenders are the only ones with constitutional rights. There is now a distinct move towards a victim-centred approach in the policies of the criminal justice system, which includes the adoption of a Victims Charter and the introduction of victim impact statements.¹⁰⁷

The same notion of overemphasising the rights of transgressors exists in schools. In the process of dealing with misbehaving learners, educators and the SGB are cautioned not to infringe on the transgressor's right to education and on the right not to be punished in a cruel, inhumane and degrading way.¹⁰⁸ Furthermore, due process must also be adhered to in order to ensure that the transgressor receives a procedurally fair disciplinary hearing. There is nothing wrong with this cautious approach. However, it carries the risk of focusing only on the transgressor and not on the interests of those harmed and on the interests of the school community at large.

In contrast, in the restorative justice process, the needs of the victim play an important role.¹⁰⁹ Fields¹¹⁰ indicates that, in this approach, victim and community needs for real information, truth-telling, validation, vindication, testimony, restitution, safety and support are considered paramount. Victims and third parties therefore play an important role during the whole restoration process and are afforded ample time to tell their stories and to indicate what they feel, how they were hurt, what their needs are, and what restoration they would like in respect of the harm/damage caused.

¹⁰⁷ Müller & Van der Merwe 2006:647. In an effort to reduce the effect of this notion, and to give proper recognition to the rights of the victims of crime, the Victims Charter came into force in December 2004. It affords victims of crime seven distinctive rights, which are "the right to be treated with fairness and with respect for your dignity and privacy, the right to offer information, the right to receive information, the right to protection, the right to assistance, the right to compensation, and the right to restitution". The move towards a victim-centred approach has been further strengthened by the introduction of victim impact statements in the sentencing phase of a trial. The court no longer focuses just on the crime and the offender, but also shows concern for the well-being and needs of the victim – Müller and Van der Merwe 2006:647-649. A victim impact statement is a written statement by the victim, or someone authorised in terms of the law to make a statement on behalf of the victim, which reflects the impact of the offence, including the physical, psychological, social and financial consequences of the offence for the victim. The victim is thus afforded the opportunity to take part in the sentencing process and can play a part in determining an appropriate sentence – Fields 2003:45. Victim impact statements are in line with the Victims Charter's right to restitution and are also in line with international trends.

¹⁰⁸ See ch 3, par 3 herein. See also the discussion in ch 3, par 5.9.2 herein on *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government and Others* – unreported case in the Eastern Cape Division: case 454/08.

¹⁰⁹ Bezuidenhout 2007:47; Ashworth, Van Bockeren, Ailts, Donnelly, Erikson & Woltemann J 2008:22-26; Fields 2003:48; McCluskey *et al.* 2011:107-108.

¹¹⁰ Fields 2003:48.

The restorative process thus plays an important empowerment role and affords those harmed an opportunity to address the harm caused through the way they view themselves and their lived worlds. This strengthens their self-expression, self-identification, self-determination, self-fulfilment, self-respect and self-worth, as well as their inherent dignity, worth and value.¹¹¹

5.6.3 Enhancing transgressor accountability and addressing needs

In the case of the retributive approach, accountability is equated with guilt and punishment. The transgressor becomes the object of punishment and plays a rather inactive role in the punishment, which is normally determined by an authority figure. In contrast, in the restorative justice approach, the transgressor is obliged, through a voluntarily process, to participate actively in resolving the dispute. Accountability is therefore defined as understanding the impact of one's actions, taking responsibility for one's choices, suggesting ways to repair the harm, and taking steps to put right as much as possible.¹¹² Since the transgressor's behaviour is seen as harm done to the victims, and the community as a whole, the transgressor is indebted to them for repair of the harm.¹¹³

Hopkins¹¹⁴ rightly emphasises that restorative justice is not a "no-blame" response to misbehaviour, but rather a "full accountability-damage repair" response. First of all, the transgressor must acknowledge responsibility or, at the very least, partly acknowledge responsibility for the harm caused. In addition, the transgressor's obligation is to help make things right. Although this obligation might be very difficult, and even painful, for the transgressor, the main aim is not to punish or exclude the transgressor. The transgressor should develop the necessary insight into the consequences of his or her behaviour and find the means to repair the damaged relationship. The transgressor is thus guided toward taking on a more responsible role in future in his or her community and in society at large.¹¹⁵

In the process of guiding the offender towards a more responsible life as a useful citizen, the needs of the transgressor should also be addressed. The transgressor's misconduct can be the result of a vast range of issues such as lack of self-discipline, lack of appropriate values, the impact of socio-economic circumstances, psychological problems or even mental illness. Furthermore, it should be kept in mind that transgressors might have been victimised or

¹¹¹ Zehr 2002:14-15; Morrison 2010:417-418.

¹¹² Hopkins 2002:145; Varnham 2005:92; Karp and Breslin 2001:264; Zehr 2002:16.

¹¹³ Shaw 2007:128; Varnham 2005:95.

¹¹⁴ 2004:106; Holtham 2009:7.

¹¹⁵ Fields 2003:48.

traumatised by other circumstances, often in significant ways.¹¹⁶ The restorative approach requires a willingness to address the full spectrum of needs of the transgressor, ranging from a need to be taught appropriate skills, to gaining self-control, to professional assistance, to addressing serious physiological dysfunctionality. Thus the transgressor should be supported to overcome the root causes of the offending behaviour and should be guided to develop the necessary empathy for the victims and third parties.¹¹⁷

5.6.4 Community involvement

To determine the community involved in a particular issue might be difficult if one considers the erosion of some communities, cultural practices and, in general, the abstractness of the idea of community. Therefore, in the restorative justice approach, “community” refers to “communities of care”. This can be defined by the place where people live or in terms of existing relationships. Therefore, the two key questions to determine who should be regarded as the community for purposes of a specific incident of misconduct are:

- 1) [W]ho in the community cares about these people or about this offence? and
- 2) how can we involve them in the process?¹¹⁸

Zehr¹¹⁹ highlights the difference between “community” and “society” in the restorative justice context and argues that “community” refers rather to the micro-communities of place and to relationships that are directly affected by the misconduct, while “society” would refer to those beyond the parties with a direct stake in the matter. These concerns are more general and include issues such as safety, human rights, and the general well-being of society.

The community’s needs and problems are also addressed during this process. In the school context, the school community is entitled to sustain a safe learning culture and to be part of the processes to create such an environment.¹²⁰ Respect for all affected by the misbehaviour is central to the restorative justice process. The transgressor, victims, third parties, their parents, together with others affected from the school community, such as educators, are involved in the restoration process. A community of care is formed around both the transgressor and the victim.¹²¹

¹¹⁶ Zehr 2002:30.

¹¹⁷ Zehr 2002:17, 29-30.

¹¹⁸ Zehr 2002:27.

¹¹⁹ 2002:28

¹²⁰ Karp & Breslin 2001:252. For instance, to be part of the drafting of the code of conduct and of disciplinary matters affecting them.

¹²¹ Hopkins 2002:145; Drewery 2004:335-336; Wachtel 2012:3.

On the other hand, the community also has responsibilities towards the transgressor, victims and other parties and should ensure, or contribute to, the welfare of all the parties involved in the process. The community is responsible for reintegrating everyone excluded and harmed in the process. In some instances, the community may have contributed to the harm and should therefore take responsibility for this and address it.¹²²

5.6.5 Addressing the harm, repairing relationships, and reconciliation

Restitution is one of the traditional aims of sentencing and has valuable dimensions. Fields¹²³ states that restitution has been used informally for many years by parents and educators in theft and property-damage cases. Restitution is now playing an increasingly large part in the criminal justice system. He holds that restitution can be broadly defined:

as an act that seeks to correct an error or to make amends to an injured person and in some cases to a community that has suffered in some way.

Restitution requires an internal evaluation of what can be done to repair harm.¹²⁴ It thus seeks to ensure that transgressors become more aware of the consequences of their actions, encourages them to take responsibility for such consequences, and ensures that victims are compensated for the injustices that have occurred.¹²⁵

The criteria of good restitution, according to Gossen, include the following: the transgressor should devote notable time and effort to the planning and implementation of restitution; the victim should gain a sense of satisfaction from the process and the outcome; there should be a logical relationship between the misbehaviour and the choice and type of restitution; the transgressor's ability to behave in an acceptable way in future should be strengthened; and the process should be in line with the values and goals of the particular community. Restitution is thus seen as a means of restoring the situation in respect of both parties, the goal being reconciliation and acknowledging responsibility for choices.¹²⁶

One cannot dismiss any one of these criteria as being unnecessary or of no value. Unfortunately, the application of the criteria in practice gives rise to the idea that restitution is

¹²² Zehr 2002:29; see also Bantjes & Niewoudt 2011:30-65, who analyse the roles of all the stakeholders in an incident of vandalism and profanity perpetrated by the matric class in the last week of school before the final examinations.

¹²³ 2003:44-45; see also Zehr & Mika 2010:60-62.

¹²⁴ Fields 2003:46.

¹²⁵ Morrison & Vaandering 2012:140.

¹²⁶ Hopkins 2002:145.

used as another form of retribution, because the act of restitution is imposed upon the transgressor and forms part of the punishment meted out by the authority figure. It is also often used as a way of compensating the victim for the injuries and harm suffered as a result of the transgression.

In the school context, the transgressor is often obliged, for instance, to apologise, to clean up or to make repayment for the harm done as part of detention or another form of punishment. These measures are not the transgressor's idea and he or she might simply comply with them because they are part of the punishment. Often, it is the parents who have to make good the financial damages, with there being no real consequences for the transgressing learner, who actually caused the damage. The question remains whether real insight is developed by the transgressor in such instances, and if the apology, for instance, is sincere.

Although the restorative justice approach encompasses the above, the point of departure is that restitution must benefit both the transgressor and the victim and should not be imposed upon them. To distinguish imposed restitution from restitution as a result of the restorative process, terms such as "fixing the harm"; "addressing the harm"; "fixing what has been broken"; "putting things right"; and "making things better for others, myself and the school" are used. It is also important to pause for a moment to define the term "harm". It is defined as:

[a]n adverse effect on another person or people, involving emotional or mental distress and/or physical or material damage.¹²⁷

In the restorative approach, learners are guided in learning from their mistakes and in thus preventing future harm to others. The transgressor is given the opportunity to make amends in a way that promotes the dignity of all parties and does not objectify or oppress any of the parties.¹²⁸ The parties may also agree on some form of punishment, but Drewrey¹²⁹ argues that it is unlikely that punishment will be the only outcome of the process. Furthermore, "putting things right" includes addressing not only the harm, but also the causes of the harm, thereby preventing the reoccurrence of the misconduct and harm.¹³⁰

¹²⁷ Hopkins 2004:30.

¹²⁸ Ashworth *et al.* 2008:23-24; Drewrey 2004:336; Fields 2003:47; Wearmouth, McKinny & Glynn 2007:39.

¹²⁹ 2004:335; see also Varnham 2005:92.

¹³⁰ Zehr 2002:30.

5.6.6 Problem-solving

To fix the harm and pain, the transgressor and the harmed person must gain insight into what really happened, and a strategy must be developed as to how to repair the harm and damaged relationships.¹³¹ Restorative justice is, in essence, about healing, instead of hurting, through punishment.¹³²

Transgressors have to contribute to the drafting of a restoration plan, and have to make suggestions on how to restore the relationships damaged by their unacceptable behaviour and on how they intend to repair the damage caused to others. A binding agreement is concluded and, when necessary, is put in writing to keep the transgressor accountable.¹³³

Possible solutions to problems in schools and to determining what restoration should be made for the harm caused are: making posters to warn others against the inappropriate behaviour, making cards containing an apology or making friendship bracelets and origami figures. If something has been vandalised, the transgressor must indicate how the damaged property will be replaced, cleaned or repaired. The transgressor may also have to commit to acceptable future behaviour in certain circumstances and/or apologise for unacceptable behaviour in the past.¹³⁴

Learners are thus provided with an opportunity to practise solving problems and repairing relationships, and to discover what is acceptable future behaviour, in a safe environment, with the necessary guidance from adults. This is in sharp contrast to the situation involving the retributive approach, where it is implied that, “when we punish a person for behaving badly, we leave it up to him to learn how to behave well”.¹³⁵ By being part of the problem-solving process, the transgressor is unlikely to be subjected to punishment that he or she perceives to be degrading treatment.

Wachtel¹³⁶ stresses the importance of collaborative processes in solving problems and claims:

[t]hat human beings are happier, more cooperative and productive, and more likely to make positive changes in their behavior when those in positions of authority do things *with* them, rather than to them or for them.

¹³¹ Ashworth *et al.* 2008:23-24.

¹³² Shaw 2007:127; see also Zehr & Mika 2010:60-62.

¹³³ Shaw 2007:130.

¹³⁴ Fields 2003:48; Ashworth *et al.* 2008:26.

¹³⁵ Drewery 2004:32.

¹³⁶ 2012:3.

A restorative approach to discipline creates opportunities to give effect to these basic needs of children.

5.6.7 Voluntary, inclusive and collaborative processes

Any restorative process is developed on the basis of the premise that it is a voluntary process. Nobody can, and should, be compelled to take part in the process. If a harmed person is not convinced or guaranteed that he or she will be happier, safer and more confident after a meeting, he or she can surely not be compelled to participate. These guarantees cannot be given. If one of the parties is not willing to participate in the process, an alternative should be found to deal with the issue at hand.¹³⁷ If the transgressor does not acknowledge responsibility and/or does not want to take part in the restorative process, the alternative would be to revert to the retributive system, resulting in an investigation to find him or her guilty and to determine some form of punishment for him or her.

To develop the insight necessary to arrive at mutually acceptable solutions to the problem requires proper dialogue and negotiation. Everyone who is affected by the misbehaviour is involved in the process. Participants are encouraged to indicate how they contributed to the harm and to the damaged relationship. Everybody is provided with an opportunity to express his or her feelings and needs. They embark on a process of exploring how to meet these needs in the future. The process of reflecting on the past, discussing present feelings and needs, and envisaging what should happen in future allows the participants to move from conflict to cooperation and mutually acceptable solutions. Respect for one another is restored and reintegration into the school community is achieved through constructive and respectful dialogue and negotiation.¹³⁸

Since insight into the needs of all involved is developed through dialogue, effect is given to the advice of the Constitutional Court in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,¹³⁹ where the court held that:

[t]o understand the “other” one must try, as far as humanly possible, to place oneself in the position of the “other”.

¹³⁷ Hopkins 2004:104; see also Zehr & Mika 2010:62.

¹³⁸ Ashworth *et al.* 2008:24-25; Drewery 2004:335, 339; Fields 2003:47; Shaw 2007:128.

¹³⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC):par 22; see also Zehr & Mika 2010:60-62.

Dialogue and negotiation do not always involve direct contact between the parties. In some instances, they are not possible, desirable or culturally appropriate. In such instances, they can therefore take the form of indirect engagement through surrogates or representatives, a video or other forms of involvement, such as writing a letter to the other party. Every effort should be made to ensure the maximum exchange of information between those involved.¹⁴⁰

5.6.8 Reintegration as opposed to stigmatisation

Since the healing of relationships and the repair of harm done play a significant role in restorative justice, the reintegration of the transgressor into the school community follows more easily. Everyone has an inherent desire to belong somewhere. In contrast, stigmatisation is a natural outcome of a retributive system.¹⁴¹

It should also be kept in mind that the victims of harm are also sometimes excluded from the community or they are of the opinion that they are being, or should be, excluded from the community, for example the victims of bullying. Therefore, the restorative justice process emphasises the reintegration of both the transgressor and victims and encompasses human beings' need to be part of a community.¹⁴²

5.6.9 The importance of values in the restorative approach

Unlike the retributive approach, the restorative approach is rooted in values and not rules. In a rule-driven approach, one needs an explicit rule to guide every situation, while values are applicable to any situation. Zehr¹⁴³ is of the opinion that respect is the most important value in the restorative approach and states:

If I had to put restorative justice into one word, I would choose respect: respect for all, even those who are different from us, even those who seem to be our enemies. Respect reminds us of our interconnectedness but also of our differences. Respect insists that we balance concern for all parties.

¹⁴⁰ Zehr 2002:24, 26.

¹⁴¹ McCluskey *et al.* 2011:108.

¹⁴² Fields 2003:47. See also De Wet 2012:1. An example of the stigmatisation of a victim can be found in a recent case where a schoolgirl was stripped of her leadership position and subjected to disciplinary measures because photos of her naked breasts had been distributed by her disgruntled boyfriend. During a criminal case of assault and sexual abuse against the boyfriend, it transpired that she was actually the victim of serious victimisation, abuse and intimidation. The photos were the result of intimidation. The girl almost committed suicide, suffered from serious psychological and physical trauma over an extended period of time, and had nowhere to turn for help. Instead of offering assistance to the victim, the school punished her and excluded her from the school community.

¹⁴³ 2002:36.

If we pursue justice as respect, we will do justice restoratively.

If we do not respect others, we will not do justice restoratively, no matter how earnestly we adopt the principles.

A list of values related to restorative justice and its role in the holistic development of the child is discussed in more detail in chapter 7.¹⁴⁴ These values assist in resolving conflict and harm and in creating communities of care and harmony. They thus form the foundation of healthy communities.¹⁴⁵

5.7 Misconceptions and challenges in respect of the restorative justice approach

Although restorative justice was introduced into the criminal justice system in New Zealand and other countries in the 1970s, it is still an evolving concept. Fields¹⁴⁶ rightly indicates that the “concept is ill-defined and there is no consensus on how it should be applied”. Its application in schools is still in its infancy, with pilot studies being conducted in a number of countries and with it at most being applied for a number of years since the late 1990s and early 2000s.¹⁴⁷ Restorative justice cannot therefore be regarded as being generally accepted in schools.¹⁴⁸ Research on its application is still needed and the theoretical framework still evokes a lot of debate. Further research on issues such as the sustainability and impact of the process, on what constitutes healing, and on community involvement is also required. Research projects and measurement instruments should also be standardised to ensure that data is comparable. Failing to do this will have an impact on policy-makers’ willingness to change policies and/or to invest resources for further research before increased implementation.¹⁴⁹ Nevertheless, there is sufficient evidence to indicate that the restorative justice approach to discipline has a positive impact on school culture, relationships in schools, discipline, and the academic performance of learners to conclude that it is a suitable alternative or supplement to existing approaches to discipline. This will be discussed in more detail in chapter 7 in the evaluation of the different approaches to discipline.

¹⁴⁴ See ch 7, par 2.1 & 2.1.2 herein.

¹⁴⁵ Morrison & Vaandering 2012:142.

¹⁴⁶ 2003:50.

¹⁴⁷ Wachtel 2012:2 indicates that it was used in 1994 for the first time. It is evident from the sources consulted for this study that the literature on the application of restorative justice in schools is mostly written from the early 2000s onwards.

¹⁴⁸ Varnham 2005:98.

¹⁴⁹ Hopkins 2002:146; Bezuidenhout 2007:45, 57; Ashworth *et al.* 2008:26; Drewery 2004:4; Shaw 2007:129, 133-134. See Nagl 2012:26-30 regarding the evaluation of the application of restorative justice in the criminal justice system and regarding the lack of comparable data and its impact on state funding and implementation.

Apart from the fact that restorative justice, and its application in the school discipline context, is an evolving concept, other challenges and misconceptions have also been identified which impact on the implementation of the concept.¹⁵⁰ These misconceptions and challenges will be discussed in what follows, thereby aiming to enhance insight into the concept without addressing these issues in detail.

5.7.1 Restorative justice is not primarily about forgiveness and reconciliation

There is a perception amongst some victims and victim advocates that restorative justice programmes are aimed at encouraging, or even coercing, victims to forgive and to reconcile with offenders.¹⁵¹ Forgiveness and reconciliation are, however, not the primary focus of restorative justice. Nevertheless, the process creates an environment which is more conducive to reconciliation and forgiveness.¹⁵² Yet, this aspect is entirely in the discretion of the victim and no pressure should be exerted on any of the participants to seek or bestow forgiveness and engage in reconciliation.

5.7.2 Restorative justice is not mediation

Although restorative processes can involve, and often do involve, a meeting between the different parties, these processes should not be equated with a mediation process. Restorative justice processes or practices can be facilitated without such a meeting. In some instances, a meeting between the parties is impossible, because one of the parties is not available or willing to take part in the process. In other instances, it would be inappropriate because it might be too traumatic for the victim.¹⁵³

In addition, the notion of mediation creates the impression that the parties involved are on the same “moral playing field” with shared responsibilities. Although it is possible that all the parties to a restorative process might have to carry some responsibility for the harm caused, there are instances where the idea of shared responsibility is inappropriate. For instance, the victim of bullying in the school context should not be held responsible for what happened to him or her, unless his or her conduct provoked the reaction. It would thus be necessary to investigate the history of the bullying.¹⁵⁴

¹⁵⁰ Zehr 2002:8-13.

¹⁵¹ Zehr 2002:8.

¹⁵² *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC):par 202.

¹⁵³ Zehr 2002:8.

¹⁵⁴ Hopkins 2004:105.

Further, the neutral language of a mediation process is misleading, because the restorative process requires the offender to, at the very least, admit to some level of wrongdoing and to take responsibility for it.¹⁵⁵ Owing to these differences between a mediation process and a restorative justice process, the term “mediation” is not used in this context. Consequently, terms such as “conferencing” and “dialogue” are used instead.¹⁵⁶

Yet, there are also a lot of similarities between a restorative process, mediation process, conflict-resolution processes and different peace-making processes. Some of the programmes using these processes are almost identical to the restorative process and can cause confusion. The differences, if any, are not always very clear and are attributed to the lack of uniform use of terminology to distinguish between processes. The uncertainty regarding terminology derives from the different fields contributing to the development of the restorative justice concept.¹⁵⁷ Amstutz and Mullet¹⁵⁸ argue that the other processes focus on solving the problem and finding a solution that is acceptable to all. The restorative justice process, however, has an additional layer focusing on ways to put things right and on working and restoring the harmed relationships.

5.7.3 Restorative justice is not primarily designed to reduce recidivism or prevent repeat transgressions

Although research indicates that there are reduced levels of recidivism after a restorative process, some researchers are of the opinion that the evidence is not conclusive. However, to reduce recidivism is not the main aim of restorative processes.¹⁵⁹ Restorative processes focus first and foremost on the needs of the victims, which include an opportunity to be heard, to be restored to empowerment in the process, and to repair relationships. Reduced recidivism levels are therefore regarded as a positive by-product of the process, but the focus should rather be to implement restorative processes because this is the right thing to do to address the needs of the victim and the community, and to encourage the transgressor to take responsibility for his or her actions.¹⁶⁰

¹⁵⁵ Zehr 2002:9.

¹⁵⁶ Zehr 2002:9.

¹⁵⁷ Balcaen 2011:51.

¹⁵⁸ 2005:20.

¹⁵⁹ Bloomenthal 2011:319-320; Fields 2003:46, 48; Varnham 2005:94, 96. There has been no indication that recidivism figures have escalated after the implementation of a restorative process. It would therefore be fair to conclude that the recidivism rates are, at the very least, the same as where no restorative justice process is employed.

¹⁶⁰ Zehr 2002:9; Bezuidenhout 2007:57-58.

Restorative justice in schools is not primarily about addressing challenging behaviour. It is first and foremost about addressing harm, raising awareness with regard to the consequences of misconduct for others, and finding ways to repair the harm. If the focus is not on the harmed person, there is a risk that the victims may be devalued to mere pawns in a process of diverting wrongdoers from more mischief. The harmed person can then become an object in a process of realising a higher good, instead of being the object of primary concern.¹⁶¹ This is in sharp contrast to the content given to the right to dignity, which warns against objectifying people.¹⁶² In this instance, the victims would become the object of preventing transgressors from engaging in further misconduct.

5.7.4 Restorative justice is not a particular programme or blueprint

It is maintained that restorative justice should not be seen as a map. The principles of restorative justice should rather be seen as a compass to guide communities through a process of dialogue so as to determine their own needs and resources and to apply these in their own situations. Therefore, there is no single programme or practice that constitutes restorative justice in schools or any other setting. In fact, restorative justice practitioners are constantly developing and refining current practices and programmes to ensure the proper and effective implementation of the principles of restorative justice. This approach opens the door to being sensitive to the cultural needs of the community, while still applying the basic principles of restorative justice.¹⁶³

5.7.5 Restorative justice is not exclusively intended for comparatively minor transgressions and first-time offenders

It might be easier to obtain buy-in from a community with a propensity to favour a retributive approach to justice if the restorative approach were to be used for minor offences only. Yet, research indicates that this approach often has its greatest impact in more severe cases.¹⁶⁴ Since the harm caused in severe cases is so much more than in minor cases, the principles of the restorative approach become even more important. It was also stressed above that this

¹⁶¹ Hopkins 2004:105.

¹⁶² See ch 5, par 3.3.4 herein.

¹⁶³ Holtham 2009:7.

¹⁶⁴ Heradien 2013:1-2. In a racially motivated incident, a man planted a bomb in a shopping centre in Worcester in the Western Cape in 1996. It killed three children and an adult and injured 67 people. The bomb was intended to kill as many people as possible. In February 2013, the victims and perpetrator met as part of a victim-offender dialogue programme and the perpetrator apologised and asked for forgiveness. One of the participants remarked that this was a "historic major step in healing our communities", illustrating the positive impact of the process.

approach can be applied in conjunction with other justice approaches, thus making it suitable for more serious infractions too.¹⁶⁵

5.7.6 Restorative justice is not a new development

Although the modern field of restorative justice developed in the 1970s in communities with a sizeable Mennonite population, it has strong roots in the cultures of the indigenous people of North America and New Zealand. Developments in the 1970s focused on victim–offender programmes in these communities, which eventually became models for programmes across the world. Many of the practices can be traced back to the beginnings of human history.¹⁶⁶

5.7.7 Restorative justice is neither a panacea nor necessarily a replacement for existing legal systems

Restorative justice cannot, and does not, claim to be the answer to all situations.¹⁶⁷ Therefore, it cannot claim to be able to fully replace the legal system or existing disciplinary systems in schools. Despite its applicability in many situations and the positive results achieved in several contexts, the formal legal system still has a role to play in ensuring justice in societies. For instance, in the New Zealand juvenile justice system, youth courts play an important backup role in ensuring basic human rights and in acting as a guardian of the process.¹⁶⁸

With regard to crime, some restorative justice advocates claim that it has a public dimension and a private dimension. Zehr¹⁶⁹ argues that it has rather a societal and a more local and personal dimension. The legal system tends to focus on public or societal interests and obligations, represented by the state, while personal and private interests are most often ignored or downplayed. He argues that, by highlighting the personal interests of victims, restorative justice seeks to provide a better balance in how justice is experienced.

5.7.8 Restorative justice is not necessarily an alternative to punishment

One should not think that the restorative approach could, or should, replace, for instance, imprisonment in the criminal justice system or punishment in the school system. In the school context, this approach does not hold that learners should not be punished for wrongdoing or be expelled when really necessary. It, however, means that punishment should not be the first choice in dealing with a disciplinary issue, and that, even though punishment might be

¹⁶⁵ Zehr 2002:11.

¹⁶⁶ Wachtel 2012:2.

¹⁶⁷ Holtham 2009:9.

¹⁶⁸ Zehr 2002:12.

¹⁶⁹ 2002:12.

appropriate in the circumstances, the process should still provide for an opportunity for reconciliation and for reintegration of the transgressor into the community after, or while, the punishment imposed is served.¹⁷⁰

5.7.9 Restorative justice is not a soft option and one that is too lenient to address misconduct and crime

There is a misconception that restorative justice processes and outcomes are a soft option in relation to crime and misconduct. In a society where retribution and visible punitive measures are still demanded, restoration can be seen as too lenient, with transgressors getting away with what they have done simply by saying “sorry”.¹⁷¹ The huge divide with regard to people’s thoughts on what constitutes justice should therefore be kept in mind.

However, the profound impact that the responsibility of having to face the harmed person has on the transgressor should not be underestimated. To face one’s victims and to acknowledge the harm one has caused is a difficult and often painful experience for the transgressor. This also does not exempt the transgressor from being punished for the transgression or from addressing the harm. In addition, if the victim needs some form of punishment to be meted out to the transgressor in order to feel satisfied that sufficient restoration has taken place, this need should be part of the dialogue and negotiations. It is highly unlikely, however, that punishment will be the only outcome of the process. The importance of arriving at a mutually acceptable solution should therefore be highlighted.¹⁷² The real challenge thus lies in balancing the rights and needs of the harmed person, of the transgressor and of the community. Restorative processes must enhance the reintegration of the transgressor on the one hand, and, on the other, the rights of the victim and community to a safe and secure learning environment should be upheld at the same time.¹⁷³ This is particularly important in instances of violent behaviour and bullying.

A 14-year-old girl who was in a centre for troubled youth in Belfast, Northern Ireland, wrote the following poem, which illustrates how hard it is for children to go through a restorative process:

What Scares Me about a Restorative Conference

In court you get dealt with.

¹⁷⁰ Zehr 2002:13; Holtham 2009:9; McCluskey *et al.* 2011:108; Balcaen 2011:56.

¹⁷¹ Fields 2003:46, 48; McCluskey *et al.* 2011:106, 112.

¹⁷² Drewery 2004:335; McCluskey *et al.* 2011:108.

¹⁷³ Varnham 2005:96.

At a conference you have to
face up to, and talk about what you have done.

The last thing I want to do
is talk about things.
It would melt my head.
It would bring everything up.

I know that court is just running away
from facing up to the consequences
but it is easier in Court
because you don't have to face up to
what you've done, and who you've hurt.

I've done things to people
and they don't deserve it.
A Restorative Conference is probably
The best solution.
But it scares ME!¹⁷⁴

People's attitudes and perceptions concerning the value of punishment will not change overnight. The slow uptake of restorative justice practices in schools underlines the ingrained preference for punishment.¹⁷⁵ To implement restorative justice practices successfully, the whole school community and the community at large should buy into and understand the process, and should realise the advantages of this approach and that it is not a soft option in addressing harm and misconduct.

5.7.10 Restorative justice and secondary victimisation and public retribution

Restorative justice has been used successfully in cases of assault, bullying, property damage, theft, drugs, behaviour harmful to the reputation of the school, truancy, verbal abuse, serious victimisation, and persistent disruption in class.¹⁷⁶ Cases involving serious misconduct such as rape and sexual harassment, however, are usually not suitable for restorative justice interventions, since the victims feel intimidated and exposed.¹⁷⁷

¹⁷⁴ Alanna in Jansen & Matla 2011:22.

¹⁷⁵ Fields 2003:50.

¹⁷⁶ Fields 2003:48; Hopkins 2002:146; Varnham 2005:96.

¹⁷⁷ Cf *S v Tabethe* [2009] JOL 23082 (T). Here, the court handed down a non-custodial sentence to the stepfather of a rape victim after a restorative justice process was concluded which, *inter alia*, included a commitment by the offender to pay for the victim's education. However, the sentence was changed to a

However, there are reports of the restorative justice process causing secondary victimisation in schools as well as the criminal justice system. Some victims have stated that they felt worse after the restorative conference, that professional support was not available during the process, that the process was imposed on unwilling participants, that the participants were threatened by the facilitators, and that the facilitators imposed their views on the participants.¹⁷⁸

On the other hand, there is a real risk that the process can also end up being a public retribution session, shaming and humiliating the transgressor instead of promoting dialogue and facilitating reparation.¹⁷⁹

Therefore, the whole restorative process should be facilitated by well-trained facilitators or mediators in order to ensure that secondary victimisation, trauma and humiliation are avoided.¹⁸⁰

5.7.11 Addressing cultural differences in the implementation of restorative justice

Culture is mentioned as a possible obstacle to successfully implementing restorative justice processes, the reason being that different cultural groups might have different perceptions of restoration.¹⁸¹ However, issues related to diversity can be overcome with the proper training of facilitators and the development of culturally appropriate restorative practices. It was highlighted above that restorative justice is a philosophy which can be applied to different programmes and practices, and this renders it flexible enough to accommodate cultural sensitivities.¹⁸²

Mirsky¹⁸³ also alludes to other challenges, namely changes in the demography of schools, especially in schools where streetwise children start to enter in large numbers, for instance where township learners start to attend suburban or inner-city schools. In such situations, there is a real risk that the school's culture can change dramatically. However, in schools where restorative practices are used, the newcomers have adapted quickly and a positive culture has been maintained or has been created where it did not exist previously.

custodial sentence by the Supreme Court of Appeal, despite the testimony of the victim that she did not want the offender to be incarcerated and that she was satisfied with the outcome of the restorative justice conference held before sentencing. The offender was the only breadwinner. Consequently, the further education of the victim was compromised. See *Director of Public Prosecutions v Thabete* [2011] JOL 27881 (SCA).

¹⁷⁸ Bezuidenhout 2007:48-49; Hopkins 2002:148.

¹⁷⁹ Hopkins 2002:148; Drewery 2004:336.

¹⁸⁰ Bosworth 2005:849.

¹⁸¹ Bosworth 2005:849.

¹⁸² Ashworth *et al.* 2008:23.

¹⁸³ 2007:10; Fields 2003:44.

5.7.12 A multidisciplinary and multidimensional approach is needed to address misconduct

A multidisciplinary approach has proven to be successful in effectively managing and preventing youth crime.¹⁸⁴ Professional social-service providers are indispensable in addressing the needs of learners with serious anti-social behaviour. The lack of enough professionals in South Africa was discussed earlier.¹⁸⁵ However, the lack of adequate social-service providers strengthens the need to adopt a holistic approach to discipline.¹⁸⁶

More social workers and psychologists should be involved in schools in order to deal with the causes of anti-social behaviour. However, they should rather train educators and volunteers to act as facilitators in the restorative process. Facilitators can then identify children with serious anti-social behavioural problems and refer them for professional help, while the facilitators attend to the needs of the learners who do not need professional help. They can thus play a preventative role in reducing the number of learners who would eventually need professional help. The ideal is to increase the number and variety of people involved in the restorative justice vision of schools. Police, religious leaders and community members should therefore be mobilised to become part of the implementation of this approach to discipline.¹⁸⁷ Furthermore, there should be better coordination between the Department of Social Development and the Department of Basic Education.¹⁸⁸

A multidisciplinary approach, however, is costly and time-consuming and requires proper coordination.

5.7.13 Restorative justice is a time-consuming process

Unlike traditional punitive measures such as corporal punishment, restorative justice processes are time-consuming and require effort to implement.¹⁸⁹ Despite the positive results achieved, the uptake for the implementation of restorative justice processes remains slow.¹⁹⁰ Ashworth *et*

¹⁸⁴ Fields 2003:44.

¹⁸⁵ See ch 2, par 8.1.8 herein.

¹⁸⁶ Hopkins 2002:147.

¹⁸⁷ Hopkins 2002:147. The police are involved in promoting restorative justice approaches in a number of schools in the United Kingdom.

¹⁸⁸ See *Jacobs v Chairman, Governing Body, Rhodes High School, and Others* 2011 (1) SA 160 (WCC) for an example of the consequences of not having due regard for the requirement to address children's needs on a multidisciplinary level.

¹⁸⁹ Ashworth *et al.* 2008:23; see also Karp & Breslin 2001:269; McCluskey *et al.* 2011:112; Balcaen 2011:55.

¹⁹⁰ Varnham 2005:96; Balcaen 2012:54-57.

al.,¹⁹¹ report that, in a particular case, educators were initially willing to volunteer their services at the restorative justice centre linked to a school's detention programme, but that, owing to other commitments and demands, they could not continue to render such services. To proceed with the project, college students, some of whom are paid and others of whom act as volunteers, now run the centre together with two paid educators. Shaw¹⁹² also alludes to the difficulties overstretched educators experience in balancing their increased responsibilities in respect of learner's well-being. Creative solutions to address the need for enough facilitators, even in the form of volunteers from the community and parents, should be devised to facilitate the successful implementation of the process.

Hopkins¹⁹³ agrees that restorative justice can be a time-consuming process, but emphasises that, once implemented properly, the time spent on dealing with disciplinary issues is largely reduced. She also suggests that learners, youth workers, parents or other interested members of the community can be taught to use restorative justice principles and peer-mediation techniques. This can reduce the time educators eventually spend on disciplinary issues.

5.7.14 The impact on the school's culture is not visible at first

Some of the pilot studies indicate that a change in school culture is not immediately visible. It took three to four years for some schools, which had adopted restorative justice principles, to indicate that there was definitely a positive change in school culture.¹⁹⁴ This might be disheartening for schools. The level of initial visible change in schools depends on the existing culture in the school and levels of disruption. Furthermore, the more committed the educators and staff are in implement the process, the sooner results are visible. It takes longer to see results in schools where only a small number of educators are trained and implement it. One of the factors contributing to the successful implementation of restorative practices is the attitude of the principal and management. If the process is a priority for the principal, positive results will soon follow.¹⁹⁵

Mirsky¹⁹⁶ reports that, despite the fact that it takes time to notice the effects of a restorative approach, an added advantage is an increased "culture of support among staff members". The implementation of restorative practices has created more positive relationship between staff and learners, as well as between administrators and educators. The schools are reported to have a

¹⁹¹ 2008:26.

¹⁹² 2007:130; Varnham 2005:95.

¹⁹³ 2002:148. See also Wachtel 2012:09.

¹⁹⁴ Mirsky 2007:6; Hopkins 2002:147.

¹⁹⁵ McCluskey *et al.* 2011:111-112.

¹⁹⁶ 2007:6.

friendly and helpful atmosphere.

5.7.15 Lack of communication skills

Being able to relate one's story is an important part of a successful restorative process. Unfortunately, children do not always have the necessary verbal skills to tell their stories promptly and clearly. Furthermore, they can misperceive, misrepresent and misstate what has happened. This can be overcome by asking appropriate questions, by giving sufficient support, by interacting with children, and by using creative ways of stimulating communication, such as using art, singing and role-playing.¹⁹⁷ Educators and other volunteers will, however, have to be trained properly in order to acquire the skills necessary to enhance effective communication before implementation. This will include the development of learners' skills, such as listening skills, expression of emotions in a constructive way, and problem-solving skills.

5.7.16 Unwilling and unconvinced administrators, policy-makers and school communities

Despite the positive results achieved in the early trials, many education administrators and policy-makers are not willing to accept a restorative process as an alternative for dealing with disciplinary problems. This unwillingness stems from them being "uncomfortable with the shift from control and punishment as the primary approaches to discipline to one of building and sustaining positive relations in school communities".¹⁹⁸ They are afraid that the restorative practices "are stealing their strength".¹⁹⁹ Punishment is imbedded in many educators and school cultures and it therefore remains an important part of many schools, despite the application of restorative practices.²⁰⁰ This is further fuelled by perceptions held by parents and educators that punishment, including corporal punishment, is the appropriate response to disruptive behaviour. This underlines the importance of conclusive and comprehensive research indicating the advantages of the restorative approach to discipline..

Not all educators are comfortable with the application of restorative justice principles. Thorsborne,²⁰¹ for instance, indicates that, since the abolition of corporal punishment, the debate regarding discipline has chiefly had to do with the question of which control mechanism should replace corporal punishment. The focus thus remains on control and the power relationship, while restorative justice principles require a whole new focus, namely the

¹⁹⁷ Ashworth *et al.* 2008:23-24; Hansberry 2009:66-74 provide guidance on assisting very young learners in the restorative process.

¹⁹⁸ Fields 2003:49; Ashworth *et al.* 2008:26; Shaw 2007:132; Karp & Breslin 2001:261.

¹⁹⁹ McCluskey *et al.* 2011:112.

²⁰⁰ McCluskey *et al.* 2011:113.

²⁰¹ Fields 2003:49; see also Shaw 2007:131-132.

restoration of relationships and not the punishment of certain acts.

Unless the majority of the school community buys into the process, the programme will not be successful. Thus, a concerted effort must be made to consult and to explain the process and its advantages before implementation.²⁰²

The misconceptions and challenges discussed above are real and hinder the implementation of restorative justice in schools. It should, however, be noted that the challenges are due to implementation strategies, perceptions and academic discussions. There are also serious and numerous academic debates surrounding many of these issues. Nevertheless, these challenges and debates are not fundamental to the discussion of restorative justice as a broad approach to the school discipline context.²⁰³

5.8 A punishment-to-restoration discipline continuum to deal with misconduct

Amstutz and Mullet²⁰⁴ highlight the importance of recognising that the restorative approach to discipline does not mean that punishment is excluded from the process. However, it is proposed that the preferred way of dealing with misconduct is a restorative approach. A restorative approach or a fully restorative approach is not always possible. Therefore, a continuum of discipline is provided and entails the following responses to misconduct.

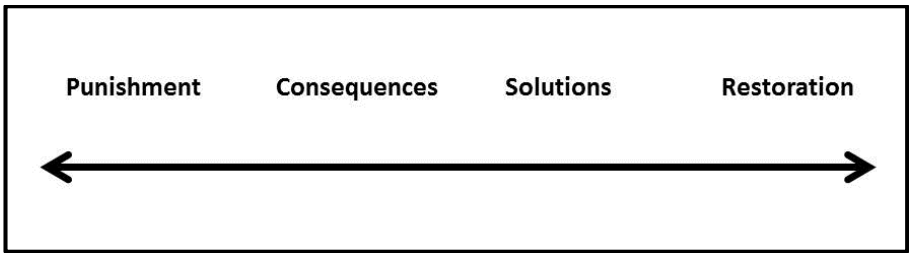


Figure 4: Punishment-to-restoration discipline continuum to deal with misconduct

In terms of the punishment approach to misconduct, consequences for misconduct are selected by a person in a position of authority without any meaningful connection between the misbehaviour and the punishment – for example, suspension of a learner for defacing a wall with paint. The consequences approach aims to fit the transgression and the punishment by

²⁰² Hopkins 2002:148.

²⁰³ See, for instance, the four volumes titled *Restorative Justice, Critical Concepts in Criminology*, edited by Hoyle, 2010, which include several debates on restorative justice. See also Cunneen & Hoyle 2010.

²⁰⁴ 2005:21-23.

linking natural or artificially connected consequences to the transgression – for example, the learner who defaces a wall with paint and is ordered to clean it. Both these approaches assume that unpleasant results or pain will deter misconduct. A solutions approach sees the misbehaviour as a problem to be solved. In this instance, the disciplinary process would include an investigation as to why the learner defaced the wall. Thus attempts are made to determine the function or purpose of the misconduct and to develop a plan to address the needs of the learner without breaking rules. The learner might, for instance, have been upset about the selection of a team and have been of the opinion that the selection process was unfair. Attempts would then be made to address the learner's concerns about the selection process. This approach assumes that, by addressing the underlying problem, future misconduct will be prevented and it provides a healthier replacement behaviour.²⁰⁵

The main feature of the above-mentioned retributive approaches is that the initiative for the punishment comes from the adult in a position of power, without any input from the learner. A restorative approach, on the other hand, recognises the needs and purpose behind the misconduct, as well as the needs of those who have been harmed. All the parties involved work together to find a suitable solution to address the needs of all, to put things right and to decide on an appropriate way forward. The restorative approach assumes that learners will make respectful choices once they understand the pain they have caused and the consequences of their misconduct for others.²⁰⁶

5.9 Restorative disciplinary methods

In what follows, the different methods used to instil discipline will be discussed. In the literature, the term “disciplinary methods” is not used, but rather the term “restorative practices”. However, there are also slight differences of opinion as to what the latter term actually means or represents. Hansberry²⁰⁷ defines restorative practices as:

[a] set of practices philosophically aligned with the principles and values of Restorative Justice. The terms “Restorative Practices” acknowledges the range of different approaches/strategies (particularly within schools) that can be deemed to be restorative by nature.

Hansberry thus argues that restorative practices entail the practical implementation of the restorative justice philosophy through different programmes or methods, called “restorative

²⁰⁵ Amstutz & Mullet 2005:21-23.

²⁰⁶ Amstutz & Mullet 2005:23.

²⁰⁷ 2009:119.

practices". Wachtel,²⁰⁸ in contrast, argues that a distinction should be made between restorative justice and restorative practices. He claims that restorative justice is reactive and a "subset of restorative practices". He maintains that:

[r]estorative justice is reactive, consisting of formal and informal responses to crime and other wrongdoing after it occurs. The IIRP's [International Institute for Restorative Practices] definition of restorative practices also includes the use of informal and formal processes that precede wrongdoing, those that pro-actively build relationships and a sense of community to prevent conflict and wrongdoing.

Wachtel²⁰⁹ therefore contends that "restorative practices" is a broader concept than "restorative justice" and includes a proactive, preventative component focusing on the prevention of misconduct, as well as a reactive component (restorative justice) for addressing harm after misconduct. Restorative practices therefore include practices that develop the school ethos and culture, and strategies to reduce the possibility of risk and harm.²¹⁰ A broad definition of restorative practices is accepted for purposes of this study and is captured in the model developed by Morrison²¹¹ and adapted for the present discussion. The different levels of restorative practices are illustrated in figure 5 below.

It is clear that there is a need to clarify definitions and terminology related to restorative justice. This is further highlighted by the terms used to describe the vast number of restorative practices captured in strategies, approaches, programmes, models, methods and techniques used to deal with misconduct and to prevent it. These restorative practices were, and are, developed in different countries for different purposes.²¹² Consequently, different terms are used to describe restorative practices that are almost the same. In some instances, different terms are used to describe the same processes.

²⁰⁸ 2012:1.

²⁰⁹ 2012:1-2.

²¹⁰ McCluskey *et al.* 2011:105 refer to restorative approaches and state:

"Restorative Approaches" have come to be used in education to mean restoring good relations where there has been conflict or harm; and developing school ethos, policies and procedures that reduce the possibilities of such conflict and harm occurring. Recently the term "Restorative Approaches" (RA) has gained wider acceptance internationally, encompassing not only the practices but also the underlying philosophy, values, skills and strategies associated with RA.

²¹¹ Morrison 2005:106; see figure 5 below. See also Warren & Williams 2007:9-10; Morrison & Vaandering 2012:144.

²¹² Wachtel 2012:2-3; Morrison & Vaandering 2012:142.

Yet, all of them apply restorative justice principles. From an academic point of view, this constitutes a serious challenge, because there is currently not a single set of definitions for the different restorative practices.²¹³ Wachtel therefore avers that:

[t]he social science of restorative practice offers a common thread to tie together theory, research and practice in diverse fields such as education, counselling, criminal justice, social work and organizational management. Individuals and organizations in many fields are developing models and methodology and performing empirical research that share the same implicit premise, but are often unaware of the communality of each other's efforts.

For purposes of this study, the term “restorative practices” will refer to all the strategies, approaches, programmes, models, methods and techniques used on a proactive level to prevent misconduct, as well as on a reactive level to address the harm caused by misconduct. The proactive as well as reactive interventions are illustrated in figure 5 below.

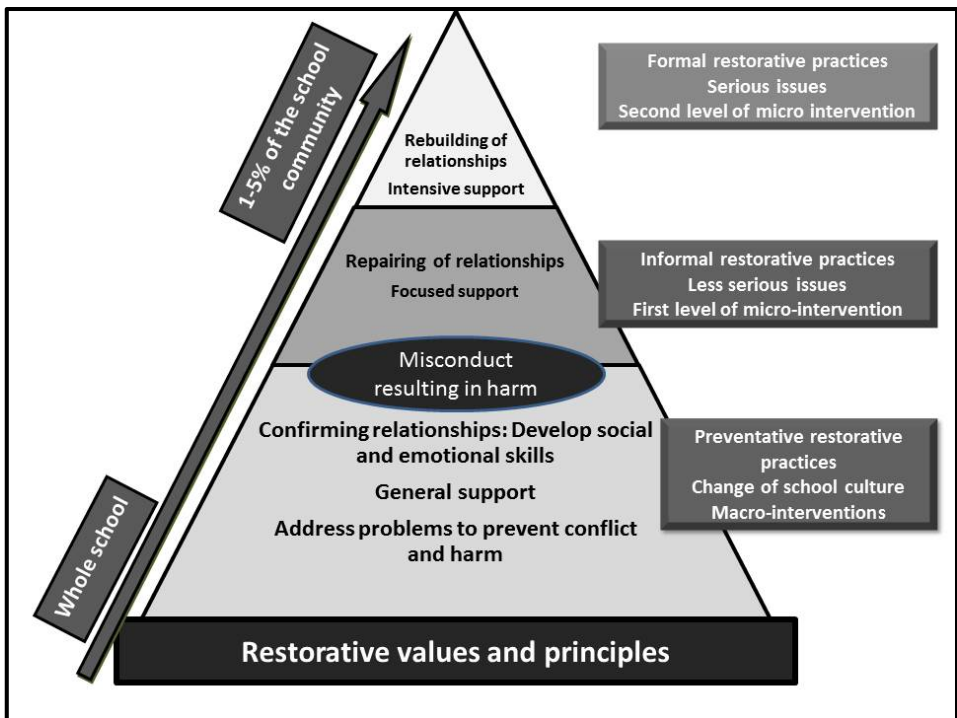


Figure 5: Levels of restorative practices

²¹³ Wachtel 2012:2-3.

Jansen and Matla²¹⁴ provide a continuum of restorative justice practices. The different practices included in their continuum are adapted for purposes of this study. In addition, the two levels of intervention after misconduct has occurred, as indicated in figure 5, are added to their original continuum. This refined continuum of restorative practices is included in figure 6 below.

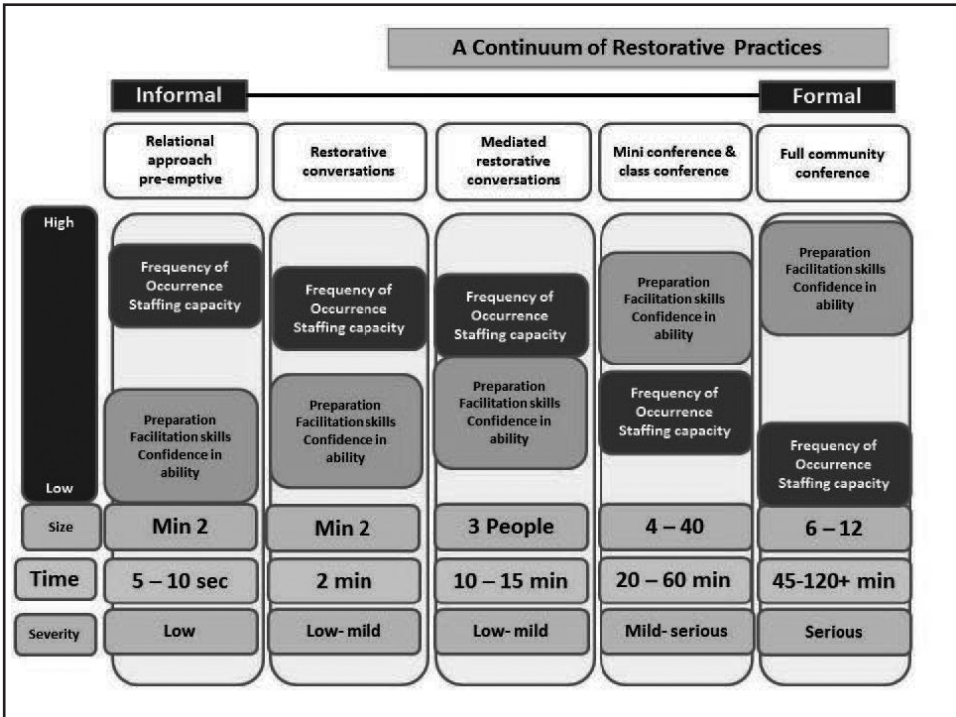


Figure 6: Continuum of restorative practices

It should be kept in mind that this continuum, at best, provides an indication of the different practices, the severity of the misconduct, how much time should ideally be spent on every practice, and how many people are involved in the application of every practice. It is impossible and undesirable to place the different practices in watertight compartments, because their application will depend on the circumstances of every case, which might dictate that more than one practice be used simultaneously, that more or less people be involved, or that more or less time be spent on addressing an issue.²¹⁵

²¹⁴ Jansen & Matla 2011:33; see also Wachtel 2012:4.

²¹⁵ Hopkins 2004:32, 109.

In what follows, a brief discussion is provided of the general principles of restorative practices. This will be followed by a discussion on the different levels of intervention. The most common practices applied on every level are mentioned, without any in-depth discussions on what every practice entails. Such detailed descriptions are not necessary to illustrate that there are numerous practices available on every level to ensure the successful implementation of a restorative approach to discipline. In some instances, a brief description of what a practice entails is provided in the footnotes. As was indicated above, terminology is not uniform. Therefore, it is not claimed that the descriptions provided are the best, the most suitable or the only terms used. Furthermore, more practices may exist, but, for purposes of the discussion, the continuum of restorative practices provided in figure 6 will suffice.

5.9.1 General principles of restorative practices

Apart from the features of restorative justice discussed above, the following general principles should be kept in mind, namely that all restorative practices are imbedded in values, that all processes should be respectful, and that participation is always voluntary. Participants should be prepared properly to determine their expectations, and to clarify their roles and the sequence of the processes. The more formal the processes and the more serious the matter, the more attention should be given to this aspect.²¹⁶ The facilitator of a restorative process should not act from a position of authority and control. The facilitator's role is to guide the group towards a solution, and he or she should not make the decision on behalf of the group and should not impose his or her view on the group.²¹⁷

It is important to note at this point that almost all the restorative practices mentioned in figure 6 and in the discussions below will involve the restorative justice questions cited below. There are numerous variations on these questions, and, depending on the seriousness of the situation, questions will be added to elicit more information.²¹⁸ These questions can, and should, also be adapted to the developmental stage of the learner.²¹⁹ It is not necessary to discuss all the variations and available scripts at this point. Suffice it to say that the four main phases of the restorative process are captured in the following questions:

- a) What happened? ("Tell the story" phase)
- b) Who has been affected? ("Explore the harm" phase)

²¹⁶ Hansberry 2009:120; Warren & Williams 2007:28.

²¹⁷ Pranis 2005:11-14; Hopkins 2004:34; Jansen & Matla 2011:54; Wachtel 2012:7-8.

²¹⁸ See Jansen & Matla 2011:46-50 for a comprehensive list of questions.

²¹⁹ See Hansberry 2009:66-74 for a discussion on the implementation of restorative practices for children in the early-childhood development phase.

- c) What do you need to do to put things right? (“Repair the harm” phase)
- d) How can you make sure this does not happen again? (“Move forward” phase)

In what follows, the three levels of intervention mentioned in figure 5 will be discussed and reference will be made to some of the restorative practices mentioned in figure 6. These practices will mostly be guided by the above-mentioned questions.

5.9.2 Preventative restorative practices through culture change

The whole school is involved on the level of preventative restorative practices.²²⁰ One of the main aims is to change the school’s culture and to ensure that a restorative approach is followed throughout the school. The focus is on building and maintaining relationships in the school and on developing a safe community where everyone in the school community (learners, educators, administrative staff and parents) experiences a sense of community and belonging. Apart from changing the school culture from a retributive to a restorative environment, the aim of the interventions on this level is normally to prevent misconduct and harm as far as possible.²²¹

To build a restorative justice culture in a school requires a commitment by the management of the school to build and reaffirm relationships with regard to every aspect of the school’s life and ethos. This is done through the development of a culture that supports building and reaffirming relationships and includes: class and playground activities to promote and practise social and emotional aspects of learning; the widespread use of restorative language; sound behaviour and relationship management strategies; adult modelling of positive relationships and communication; support for staff’s emotional health and well-being; and systems that support parent and caregiver involvement.²²² One of the most important practices is the use of community-building circles focusing on building a sense of belonging.²²³ Circles have different functions, which include peace-making, healing, talking, checking in and checking out, understanding, support, resolving conflict, reintegration and celebration.²²⁴ Hopkins²²⁵ argues that, without regular circles, it would be difficult to maintain the ethos which is necessary for the successful implementation of restorative justice. Other prevention and culture-building

²²⁰ See figure 5 above.

²²¹ See Morrison & Vaandering 2012:138-155 on the use of restorative justice to create bonds of belonging.

²²² Warren & Williams 2007:10.

²²³ Hopkins 2004:134; Morrison & Vaandering 2012:143.

²²⁴ Learners take turns in briefly telling the class, for instance, what the highlight of their week was, what their expectations for the week are, and, by the end of the week, what they plan to do on the weekend. This can also be used to determine what the emotional states of learners are by employing a check-in question focusing on their emotions at that specific moment.

²²⁵ 2004:134.

strategies include the use of a restorative enquiry²²⁶ and the inclusion of restorative justice in the curriculum.²²⁷

5.9.3 Informal restorative practices for less serious disciplinary issues

Once misconduct has occurred or a conflict situation has arisen which results in harm, the restorative processes should be put in motion to address it. The first level of interventions is for less serious transgressions and is related to normal day-to-day occurrences in schools. All staff, or at least the majority of staff, particularly teaching staff, should be able to use appropriate restorative practices to deal with misconduct on this level. They should thus be able to address transgressions of low to mild severity restoratively in as little as 10 seconds and in a maximum of 15 minutes.²²⁸

Educators need basic knowledge and skills, and little, if any, preparation by the parties involved in the matter is necessary to resolve the issue restoratively. Specific preparation of learners might be necessary in some instances of transgressions of mild severity to ensure, for instance, that they are willing to take part in the process, are willing to accept responsibility for their actions, and are willing to determine a time that suits everyone to resolve the issue.²²⁹

In most instances, it will be possible, and preferable, to deal immediately and swiftly with the issue. The educator would, in most instances, act as the facilitator of the process, but peer mediators can also be used in suitable circumstances.²³⁰ The main aim of intervention is to repair relationships and to address harm as far as possible. To create or restore an environment conducive to teaching and learning is also important.

The following practices can be implemented: rational and pre-emptive approaches to misconduct which include low-key verbal and non-verbal cues given to the learner to facilitate a change of conduct on the part of the learner, for example: eye contact;²³¹ restorative

²²⁶ Hopkins 2004:32. It is a way of listening to the story of another that enables the listener to elicit the speaker's story while acknowledging his or her thoughts, feelings and needs in a given situation.

²²⁷ Johnson & Johnson 2012:5, 21.

²²⁸ Every school will determine its own classification of low, mild and serious transgressions, and which restorative practices will be applied in particular circumstances. This will depend on, for instance, the frequency of serious transgressions and the level of training of the educators to apply restorative practices.

²²⁹ Amstutz & Mullet 2005:69-70; Hansberry 2009:75-79.

²³⁰ Hansberry 2009:75; Hopkins 2004:108-109.

²³¹ Jansen & Matla 2011:39-40; Nelsen, Lott & Glenn 2000:117-118.

reminders;²³² affective statements;²³³ affective interactions;²³⁴ restorative conversations or restorative chats;²³⁵ restorative mediated conversations;²³⁶ mini-conferences;²³⁷ restorative thinking plans;²³⁸ use of a restorative thinking wall or referral room;²³⁹ reconnection meetings;²⁴⁰ small-group support; or individual support and peer mediation.²⁴¹

5.9.4 Formal restorative practices for serious disciplinary issues

On the second level of intervention after misconduct, the number of learners will be much less and will normally comprise only 1 to 5% of them. However, the intensity of the intervention is much higher, because the seriousness of the misconduct is more profound. These interventions are much more formal in nature and are used for those transgressions which are considered to be grave transgressions of rules, conduct which constitute serious harm to others and/or for which learners could be suspended or expelled. The aim of these interventions is to rebuild

²³² Warren & Williams 2007:17. Cards with the restorative questions are handed discretely to the learner to remind him or her that his or her conduct impacts on others. Questions include: What are you doing? Who is being affected? Are you making a good choice? What are you going to do?

²³³ Hansberry 2009:24-25. Educators will use these to intervene if conduct caused harm. The statements are made in a calm and respectful tone. Each statement will focus on a positive attribute of the learner, will include an affirmation of the expected behaviour and of the harm caused by the transgression, and will end with another affective statement. The message conveyed to the learner should be that he or she as a person is accepted, but that his or her behaviour is unacceptable. See also Wachtel 2012:4.

²³⁴ Hansberry 2009:25-26. When a third party witnesses a harmful act, an affective interaction might be advisable. The aim is not to judge, but to raise awareness of the effect of the act on the other person. The ideal would be to guide the learner to address the harm. See also Wachtel 2012:4, who refers to these as "affective questions".

²³⁵ Warren & Williams 2007:9, 34; Hansberry 2009:120. These are used on a daily basis to help learners to think through the potential consequences of a minor misdemeanour and to explore more constructive ways to move forward. The usual restorative questions are asked in an attempt to repair the harm. The questions guide the learner to gain insight and come up with acceptable solutions to the problem. These interactions are often brief and focus on, *inter alia*, the school's values with regard to relationships and problem-solving.

²³⁶ Hansberry 2009:121: See also Amstutz & Mullet 2005:63-64; Hopkins 2004:35; Jansen & Matla 2011:54, 57-59. These are used in situations of general conflict where there is not necessarily harm or where there is no clear indication as to who the wrongdoer is and as to who the harmed person is, for both are normally harmed and cause harm. Other terms used are "problem-solving circles", "community conferences", "no-blame conferences" or "restorative discussions".

²³⁷ Hopkins 2004:36; Amstutz & Mullet 2005:60-61; Wachtel 2012:4; Jansen & Matla 2011:33. These are the same as a formal conference, just on a smaller scale, and include only those directly involved. Other terms used for the same or similar practices include "impromptu restorative conferences", "restorative conversation", "a restorative chat", a "mini-conference" or "a restorative mediated conversation".

²³⁸ Warren & Williams 2007:42. Learners have to complete forms with the restorative questions on them and these forms then constitute the basis of a restorative conversation with the learner in the classroom or the referral room.

²³⁹ Warren & Williams 2007:17. The restorative questions are indicated on the wall and learners are expected to go to the wall or referral room to calm down and to reflect on their behaviour while they are there. The educator or other facilitator will meet the learners there.

²⁴⁰ Warren & Williams 2007:48. Meeting between educators and learners are held to facilitate the reintegration of a learner after out-of-class and/or school suspensions.

²⁴¹ Warren & Williams 2007:17.

relationships and to address harm. Such interventions require intensive support, often from professionals.²⁴²

In instances of serious misconduct, learners are normally referred to skilled staff with the necessary knowledge, training and experience to deal with these matters. These interventions are time-consuming and require a lot of preparation.²⁴³ Only a small number of staff, which will include those who provide support services such as social workers and psychologists on the staff, need to be trained in these procedures. Volunteers from the community can also be trained in this regard. Depending on the circumstances, the parents of the transgressing learners, as well as learners affected by the transgression and their parents, will be involved in the process. Community members can also be included in the process, in appropriate circumstances.

A formal restorative conference is the practice most commonly used on this level. It is used to address instances of mild to serious transgressions and is a much more formal process than those processes used on the previous level. A detailed conference script is followed after proper preparation by all the parties involved.²⁴⁴ The outcomes of a formal conference are also put in writing and are signed. Although there will be follow-up in all the other processes where necessary, follow-up is an integral part of this process to ensure follow-through on commitments and to provide additional assistance where necessary.²⁴⁵

Other restorative practices used on this level include large-group conferences,²⁴⁶ full community conferences,²⁴⁷ individual interventions by professionals, and alternative encounters.²⁴⁸

²⁴² Hansberry 2009:120.

²⁴³ Balcaen 2012:55.

²⁴⁴ Wachtel 2012:4, 6-9; Morrison & Vaandering 2012:143.

²⁴⁵ Hansberry 2009:120; Warren & Williams 2007:20; Hopkins 2004:104-105; Amstutz & Mullet 2005:60-61.

²⁴⁶ Hopkins 2004:35; Hansberry 2009:120; Warren & Williams 2007:28. These are used to address serious issues that directly or indirectly affect a large number of learners and/or staff. Conflict in a community due to different points of view or due to an event that has caused distress can harm relationships and therefore require reparation. The same principles and procedures applied to the large-group conference can also be used as a problem-solving mechanism in this circumstance. This practice is therefore also called "problem-solving circles", "peace-making circles" and "healing circles".

²⁴⁷ Hopkins 2004:35. Some incidents have an impact on the community or the community may have an interest in the matter. The focus is on addressing the harm caused by misconduct.

²⁴⁸ Zehr 2002:26-27. A face-to-face meeting between the victim and the offender is sometime inappropriate and/or impossible. Therefore, alternative ways to facilitate contact between the parties should be investigated to facilitate understanding of the extent of the harm done, and to enable opportunities for questions to be asked and apologies to be rendered. Videos, letters, a substitute person or representatives can be used. Special care should be taken to ensure that parties are still properly prepared and that secondary victimisation does not occur. This process requires highly skilled facilitators.

6. POSITIVE-DISCIPLINE APPROACH

General Comment 13 of the CESCR on the right to education refers to positive discipline and welcomes initiatives taken by some states parties to “actively encourage schools to introduce ‘positive’, non-violent approaches to school discipline”.²⁴⁹

As was highlighted in chapter 3,²⁵⁰ the General Comment fails to provide a definition of what constitutes positive discipline. The lack of certainty and guidance is exacerbated by the use of the inverted commas. One can only speculate as to what would constitute “positive” discipline.

The uncertainty as to the exact ambit of positive discipline is further highlighted by the lack of a uniform definition in the literature.²⁵¹ Naker and Sekitoleko²⁵² define positive discipline as:

a different way of guiding children. It is about guiding children's behaviour by paying attention to their emotional and psychological needs. It aims to help children take responsibility for making good decisions and understand why those decisions were in their best interest. Positive discipline helps children learn self-discipline without fear. It involves giving children clear guidelines for what behaviour is acceptable and then supporting them as they learn to abide by these guidelines.

Some authors do not refer to positive discipline as such, but rather to “positive classroom management strategies”.²⁵³ For instance, Sprick²⁵⁴ provides guidance on a “positive approach to behaviour management” and emphasises that this management process should be proactive, positive and instructional. “Proactive” in this context refers to strategies to prevent disciplinary problems through proper classroom management. “Instructional management” refers to the educator's responsibility to teach high expectations in respect of behaviour and to use instances of misconduct as opportunities to teach replacement behaviour. Positive management of conduct, according to him:

means that effective teachers build collaborative relationships with students and provide them with meaningful, positive feedback to enhance motivation and performance.

²⁴⁹ CESCR 11 1999:par 41.

²⁵⁰ See ch 3, par 5.8.3.1 herein.

²⁵¹ Oosthuizen 2006:19; Nelsen, Lott & Glenn 2000:1-2; Rossouw 2003:427-433.

²⁵² 2009:27.

²⁵³ Korb 2012; Sprick 2006; Clarizio 1986.

²⁵⁴ 2006:1.

The former Department of Education provided a booklet, *Alternatives to Corporal Punishment: the Learning Experience*,²⁵⁵ to assist educators to understand why corporal punishment was abolished and what alternatives should be used instead. Yet, it does not give a definition of what exactly constitute positive discipline. Four broad approaches to discipline are identified and educators can choose which approach, or combination of approaches, suits them best. These approaches are the democrat,²⁵⁶ the community builder,²⁵⁷ the behaviourist²⁵⁸ and the emphasiser.²⁵⁹ The focus is on what best suits the educator's management style and not what is in the best interests of the children.²⁶⁰ The booklet covers what should be included in the code of conduct²⁶¹ and provides examples of disciplinary actions that can be taken, most of them punitive in nature.²⁶² This reinforces the idea that positive discipline is about being respectful towards children, about understanding their needs, and about allowing them to participate to some extent in the drafting of the code of conduct and classroom rules, but that, once they transgress, they should be punished.

Despite the lack of a uniform definition, descriptions of positive discipline or positive classroom management strategies display the following commonalities: they focus primarily on the prevention of misconduct through respectful relationships between educators and learners; and they have a developmental aim and focus on building learners' self-esteem, cooperation, empowerment, proper classroom management strategies, creating a caring environment and participation.²⁶³

²⁵⁵ DoE 2000.

²⁵⁶ DoE 2000:15. This approach encourages learners to participate in disciplinary process. It is, however, limited to the developing of classroom rules and the code of conduct, and to consequences for misconduct.

²⁵⁷ DoE 2000:16-17. It entails "a holistic approach to create a classroom based on commitment, respect, care and dignity". A few strategies are provided, which include respectful adults, communication, discussions in class on issues that affect learners, and conflict resolution.

²⁵⁸ DoE 2000:17-18. This approach is based on the premise that people learn most effectively when their behaviour is reinforced by reward or by recognition.

²⁵⁹ DoE 2000:18-19. This approach tries to see things from the child's point of view and takes into account that the child can face problems at home, has a learning barrier and feels alienated.

²⁶⁰ DoE 2000:14.

²⁶¹ DoE 2000:20-24.

²⁶² DoE 2000:25-28.

²⁶³ Oosthuizen 2006:19; Nelsen, Lott & Glenn 2000:1-2; Rossouw 2003:427-433; Sprick 2006.

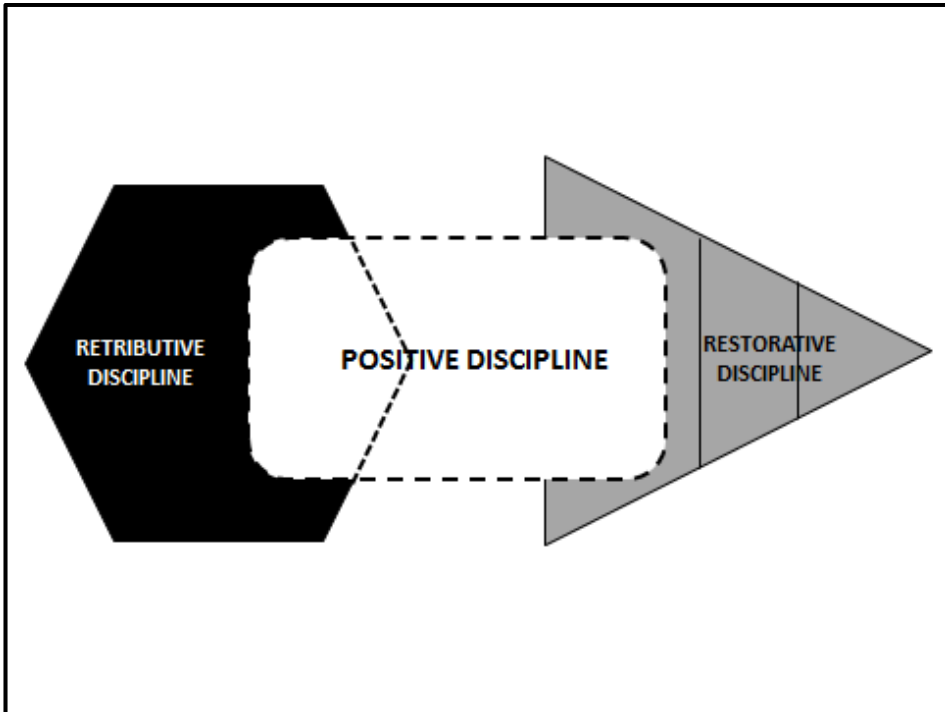


Figure 7: Relationship between positive discipline and other approaches to discipline

Figure 7 provides a visual explanation of the relationship between positive discipline and the retributive and restorative approaches to discipline. For the sake of this explanation, these two approaches should be regarded as two polar opposites.²⁶⁴ As was indicated above, these approaches differ fundamentally.²⁶⁵ On the other hand, the positive-discipline approach displays elements of both approaches. The extent of the elements of the two different approaches displayed in the positive-discipline approach depends on the implementation strategies applied. In some schools, or specific situations in a particular school, the measures applied to instil discipline would lean more or less to the restorative or retributive approaches to discipline.

Thus the strategies employed by educators to implement positive discipline determine what positive discipline means in a specific context. Consequently, numerous nuances exist as to what constitutes positive discipline.²⁶⁶ The different nuances will not be discussed explicitly in this study. Suffice it to indicate, with reference to the Social Discipline Window discussed

²⁶⁴ See Zehr's explanation and warning in this regard in par 5.4 above.

²⁶⁵ See par 5.4 above.

²⁶⁶ Cf Oosthuizen 2006:19-20; Naker & Sekitoleko 2009:50-52; Rossouw 2003:427-433; Coetzee, Van Niekerk & Wydeman 2008:96-100; Nelsen, Lott & Glenn 2000:2-7.

earlier,²⁶⁷ that the nuances are mainly due to the level of control and authority exerted by the educators and the level of support given to learners, with or without expecting learners to take some level responsibility for their actions. Owing to the nuances in implementation, it is impossible to plot the positive-discipline approach, in general, on the Social Discipline Window. However, it should be clear from the discussion below that it is an approach that is generally high in structure and limits. This notwithstanding, there is more care and support than in a purely punitive approach, thus exposing it to the risk of becoming excusing and rescuing, which is typical of the permissive approach. Child participation is higher than in the punitive approach, but is still limited, and participation is controlled by the person in a position of authority. Therefore, a positive-discipline approach followed in a particular school will fit in somewhere on the grid, depending on the combination of the different elements discussed above, except to be fully restorative, because it does not have an explicit focus on repairing relationships.

In what follows, positive discipline will be compared with the restorative approach to discipline. It should be kept in mind that the evaluation of a specific strategy to implement “positive discipline” is not the main aim of the study, but rather to determine the compatibility of a specific broad approach to discipline with the best-interests-of-the-child standard. The distinction between the restorative and positive-discipline approaches is aimed at enhancing understanding of the positive-discipline concept and the different nuances to it.

6.1 Comparison of the positive-discipline and restorative-discipline approaches

6.1.1 Parties involved in the disciplinary process

Wachtel²⁶⁸ highlights the importance of including everyone with a stake in a matter in the restorative justice approach. He distinguishes between processes that are partly restorative, mostly restorative and fully restorative. The restorative process focuses on addressing the emotional needs of everyone concerned in matters. He therefore claims that, even if a programme includes compensation or retribution, but only one group of stakeholders is involved in the process, it is only partly restorative. This will include instances where an educator instructs a learner to apologise or to financially compensate a victim or the school. If two of the parties are involved in the process, for instance the victim and the transgressor, the process would be regarded as mostly restorative. In the latter instance, the communities of care and their interests are not included in the process. A process will be only fully restorative if all those with a stake in a matter are included in the process and their needs are addressed.

²⁶⁷ See par 2 above.

²⁶⁸ 2012:3-4.

In a positive-discipline approach, the response to misconduct can be partly restorative, because transgressors are often instructed to apologise or to compensate, but the latter is normally not included in the process. The decision is made by the person in a position of authority and the victims and third parties are not included in the process of deciding that an apology is what is needed to address the harm.²⁶⁹

6.1.2 Focus on harm and the restoration of relationships

There is a clear focus on establishing the harm caused by misconduct as well as the needs and interests of the victims and the community affected by misconduct in the restorative approach to discipline. The reparation of harm plays a vital role in the process and is aimed at minimising the effect of the misconduct. In addition, the restoration of relationships is also an integral part of the restorative approach.²⁷⁰

A similar focus is absent from the positive-discipline approach. The consequences of misconduct might be highlighted in the process and there might even be a link between the consequences and the eventual punishment, but the needs and interests of the victim are not an integral part of the approach.²⁷¹ There is also not an explicit focus on the repair of relationships, although this might be one of the consequences of the implementation of positive disciplinary measures.²⁷²

The lack of focus on the reparation of relationships and the processes followed in the positive-discipline approach is illustrated by the guidance provided by Korb²⁷³ on how to manage conflict between learners. The process, which prescribes the use of peer mediators, is quite formal and strict and includes rules such as no eye contact between participants while they voice their concerns, participants being excluded from the process after they have interrupted another speaker, that solutions be offered, that future conduct be agreed upon, and that an agreement be signed. Although the notion of mediation and resolving conflict is noble, the controlling and authoritarian atmosphere prescribed by the procedure does not seem to create an environment conducive to repairing relationships and is not an explicit focus of the process.

²⁶⁹ Naker & Sekitoleko 2009:46-58.

²⁷⁰ See par 5.6.5 above.

²⁷¹ Amstutz & Mullet 2005:21-24. See the discussion above in par 5.9, and figure 6 on the discipline continuum.

²⁷² Cf, for instance, Coetzee, Van Niekerk & Wydeman 2008:96-100; Naker & Sekitoleko 2009:48-49. Their four categories of positive-discipline responses include: allowing the learner time to reflect on the misconduct, deciding on a penalty, reparation, and last-resort strategies such as steps to exclude.

²⁷³ 2012:77-80.

Nelsen, Lott and Glenn,²⁷⁴ who are proponents of positive discipline, warn against the consequences approach²⁷⁵ applied in some positive-discipline strategies and propose that the focus should rather be on finding solutions. They highlight the difference in outcomes when learners focus on solutions instead of consequences and caution that the consequences approach can disguise an actual punitive approach.

Problem-solving is an integral part of restorative justice and can be part of positive-discipline strategies. There is thus a clear overlap between the approaches as regards this element. However, as was highlighted above, the explicit focus on repairing harm and relationships in the problem-solving phase is lacking from the positive-discipline approach, but it can be an outcome as well.

The impact of educator control on addressing the harm is illustrated by the guidance provided by Naker and Sekitoleko²⁷⁶ on how to implement positive discipline. Their four categories of positive-discipline responses include: allowing the learner time to reflect on the misconduct; deciding on a penalty; reparation; and last-resort strategies, such as steps to exclude. With regard to reparation they write: "A teacher could insist that a child undertake public reparation, such as": an apology at an assembly attended by the whole school; replacing or repairing damaged property by doing specified chores; a written warning being given to the child which is reflected in the disciplinary record of the school; and the child committing to reform; and the parents being called upon to prevent the reoccurrence of the conduct. Analysing their suggestions for reparation reveals that, apart from the fact that these measures are forced on the child, all of them can be construed as a form of punishment.

6.1.3 Focus on proactive and reactive steps to address discipline

The restorative-discipline approach adopted in this study has a clear focus on the prevention of misconduct through building and maintaining relationships among all in the school. The positive-discipline approach is in line with this approach and it is evident from figures 5 and 7 that the strategies employed on level 1 of the restorative approach overlap to a large extent with the strategies employed with regard to positive discipline. However, the literature on proposed strategies to implement positive discipline pays much more attention to prevention strategies than to strategies to deal with misconduct after it has occurred and is therefore rather limited in

²⁷⁴ Nelsen, Lott & Glenn 2000:125-126.

²⁷⁵ This approach entails that punishment should be linked to the consequence of the misconduct.

²⁷⁶ Naker & Sekitoleko 2009:48-49.

scope.²⁷⁷ On the other hand, there are numerous strategies proposed to address misconduct in the restorative approach to discipline, strategies that address the vast range of misconduct and suggest suitable responses to it. Figure 6 provides a summary of the different responses to different levels of misconduct and the varying time frames set to respond to it.

This provides educators with a wide range of responses to misconduct, while maintaining the same principles and values. Thus there is continuity in the restorative approach from the prevention level up to the highest level of intervention for the most serious forms of misconduct. Building, maintaining, repairing and rebuilding of relationships, imbedded in values, are central features of this approach and are followed through on all the levels.²⁷⁸

In contrast, in the positive-discipline approach, respect, building of the learner's self-esteem and positive relationships between educators and learners are emphasised. However, once the learner transgresses, educators often resort to the punitive approach. Although attempts are made to be more respectful in the process of punishing the learner, the focus shifts from building and maintaining relationships to control, retribution and consequences for rule-breaking.²⁷⁹

6.1.4 Doing to children as opposed to doing *with* children

It is evident from proposed strategies in the literature that the positive-discipline approach displays varying degrees of authoritarianism and that educator control plays an important role. It is conceded that the approach highlights respectful conduct towards children, but, in this

²⁷⁷ See, for instance, the seven strategies proposed by Nelsen, Lott & Glenn 2000:3. They propose the following to implement positive discipline: creating an atmosphere of caring based on kindness and firmness, dignity and mutual respect; using positive-discipline classroom management tools; holding regularly scheduled classroom meetings; holding parent/teacher/learner conferences; understanding the four mistaken goals of behaviour; using teachers-helping-teachers problem-solving steps, and using encouragement. See Coetzee, Van Niekerk & Wydeman 2008: These authors provide a 20-step discipline model which includes prevention steps, steps to redirect the conduct of the learner, consequence steps (eliciting the consequences of the misconduct, but with no explicit focus on the impact of conduct on others), and team-support steps (which range from time out with another educator to referral to the principal and a formal request to remove the learner from class, which can include suspension and expulsions). Although the learners are included in the drafting of rules, and even in problem-solving activities, addressing the harm explicitly is not one of the 20 steps. Many of these steps are compatible with the prevention strategies followed in a restorative approach. See also Naker & Sekitoleko 2009:48-49. The literature on positive discipline referred to in this footnote focuses mainly on prevention steps and devotes only one or two chapters to how to address misconduct. These suggestions are often punitive in nature, although some works also emphasise problem-solving. See also Sprick 2006.

²⁷⁸ See figure 5 above and the accompanying discussion in par 5.9.

²⁷⁹ The suggestions of Naker & Sekitoleko 2009:48-50 on how to respond to misconduct are inherently punitive and illustrate this point. See also Sprick 2006:129-140.

approach, power is often still mainly vested in the educator to make important decisions and to control the outcome.²⁸⁰

The persistence of educator control is evident from the guidance given to educators. Oosthuizen²⁸¹ provides the following advice for educators where two learners argue about taking turns with a toy. The educator is directed to respectfully tell the one learner that he or she has to wait his or her turn, to explain the appropriateness of waiting one's turn, and to say that he or she may play with the toy in 10 minutes. The child is then gently removed from the situation. After 10 minutes, the educator will take the child back to the scene of the incident and politely tell the learner playing with the toy to hand over the toy, because it is now the other learner's turn. Again, the importance of sharing and cooperation will be explained to the learners. The educator thus clearly makes the decisions and takes responsibility for maintaining peace on the playground. The educator determines the solution to the problem and respectfully enforces it, while the reasons for the decisions and actions are provided.²⁸²

In contrast, the restorative approach prescribes that the educator should play a facilitation role only, and that the learners should be guided to insight and finding solutions themselves. The application of the restorative questions provides further guidance on the differences between the restorative- and positive-discipline approaches discussed above. The first question is: "What happened?" Both learners are afforded an opportunity to tell their versions of what happened and of who did what. The second question focuses on: "Who was harmed by the conflict?" Both learners are guided to relate how the conflict affects them, why they want to play with the toy, why they do not want to give up the toy, what their emotions are, why they for instance used verbal or physical force to address these needs, and how they felt by being subjected to the verbal or physical force used against them. Depending on the circumstances, the educator can also highlight the impact of their fight on the rest of the class by asking questions in this regard. Once the harm is explored, it is time to move to the next phase, namely finding a solution to the problem. The third question would thus be: "How can we fix this?" The educator will then help them to brainstorm possible solutions and guide them to decide what would be an acceptable outcome that would satisfy both of them. It is important to focus not only on how to make practical arrangements for sharing the toy, but also on how to address the emotional harm caused to both parties and the third parties affected by it. This may result in both learners apologising to each other and to the class for their conduct. Other solutions in this regard are also possible. The fourth question is: "What can we do differently in future?" The focus is clearly

²⁸⁰ Hopkins 2002:145.

²⁸¹ 2006:19-20.

²⁸² Oosthuizen 2006:20.

on using this teachable moment to educate learners to act in a socially responsible way in future. This is in contrast to the traditional response of educators “preaching” or “cautioning” or even setting “ultimatums”. If learners do not have the necessary skills or are unable to deal with these questions, they should be guided in an age-appropriate way. In addition, the educator should notice that the learners do not have the necessary skills and should consciously work on this in the curriculum and/or other activities in order to strengthen such skills.

It is highly likely that the learners will arrive at the same solution of sharing the toy as that imposed by the educator. However, the mechanism and teaching and learning process followed differ. Although the positive-discipline strategy to deal with the situation is respectful and even educational to some extent, it is still an educator-controlled approach.²⁸³ Analysing the solution proposed by Oosthuizen to address the issue, with reference to the Social Discipline Window, reveals an extensive margin of structure and limits set by the educator, albeit in a respectful way. What is lacking is the child’s active participation in the process, high expectations to act responsibly without the external control of the educator, taking responsibility for addressing the harm, and an explicit focus on the needs of the third parties.

6.1.5 Support for learners

The availability of support measures and structures for counselling is an important feature of both the restorative- and positive-discipline models. These measures would normally include professional social services and support provided by trained guidance educators.²⁸⁴

The restorative approach adds an additional layer to this support. Support is offered to learners, who then have to address the harm through some action. Facilitators would thus ask learners if they need assistance in complying with their responsibilities, for instance accompanying the learner when he or she goes to apologise to the victim, ensuring that safety measures are in place if the child has to clean up after vandalism or providing advice on how to clean up after such an incident. Support during and after the restorative process can also be provided by other members of the community, which can include fellow learners, parents, sports coaches or pastoral carers.²⁸⁵ Facilitators would also assist, especially young transgressors, to formulate an apology and ensure that they not only apologise for the wrongful conduct, but also for the specific harm caused to the victim and third parties.

²⁸³ See, for instance, Sprick 2006:30-131 on educators’ prerogative to establish classroom rules without input from learners.

²⁸⁴ Naker & Sekitoleko 2009:49; Sprick 2006:203-228.

²⁸⁵ Jansen & Matla 2011:49-50.

In the example provided above relating to the positive-discipline response, the educator took responsibility for controlling the situation by ensuring that the 10 minutes of playtime was not exceeded. He or she thus relieved the learners of the duty to act in a self-disciplined way. The approach was rather permissive because the response protected both learners' interests on their behalf and they were rescued from further conflict. The educator was excusing their conduct because they were probably still very young and without the necessary skills. The expectations of the educator were also undemanding, because he or she took responsibility for the outcome of the situation.²⁸⁶ In contrast, the restorative approach requires the learners to manage the outcome of the situation on their own, with the support of the educator where necessary. Thus the educator could have asked the learners if they needed any assistance in implementing their decision to share the toy, and what they needed. For instance, the learners might have been unable to tell the time. Practical solutions could have been found, such as showing them where the arms of the clock should be for the toy to be handed over or that the one child should come back to the educator after he or she has cycled a specific number of laps to check whether 10 minutes have lapsed. The educator thus provides support, but without taking control and depriving the learners of the opportunity to gain skills in the process.

More support and guidance are needed for younger learners and/or more complex issues. The evolving capacities of the learners are thus still considered and factored into the level of support and guidance provided so as to arrive at mutually acceptable solutions and implementation strategies.²⁸⁷

6.1.6 The role of punishment

There are different views on the role of punishment in the application of positive discipline. In a comprehensive guide on positive discipline, developed for Ugandan schools, the following four principles are highlighted for responding to misconduct. In a positive-discipline approach, the response should be as follows:

1. Relevant to misbehaviour
2. Proportional to the offence
3. Focused on correcting the behaviour not humiliating the student
4. Aimed at rehabilitation (learning from mistakes) not retribution (payback)²⁸⁸

²⁸⁶ See the discussion on the Social Discipline Window in par 2 above.

²⁸⁷ See Hansberry 2009:66-74 on implementing restorative practices with the very young.

²⁸⁸ Naker & Sekitoleko 2009:46.

The punitive and authoritarian roots of these principles are to be seen especially in the first two principles, which are in line with the traditional aims and principles of punishment found in the criminal justice system. Reference to the child as an offender in the school discipline context is indicative of the traditional punitive approach to misconduct. The measures proposed to deal with the misconduct are also mostly punitive in nature and are imposed by the educator.²⁸⁹ Some of the proposed strategies require the child to spend some time thinking about his or her behaviour, about what he or she could learn from it and/or about what to do differently in future.²⁹⁰

According to this guide, the following would constitute acceptable punishments: physical work such as cleaning the school or slashing grass; withdrawal of privileges, such as not being allowed to go out for break or to take part in games; and detention.²⁹¹ In chapter 3,²⁹² the role of punishment in the application of positive discipline in the South African context was highlighted and it was pointed out that, despite the Guidelines' insistence on the use of positive discipline, they prescribe punitive measures only.

It would thus be fair to conclude that, in many instances, positive discipline refers to the view that prevention strategies should be followed, but that once the learner has transgressed the educator should take control of the situation. The educator can then decide on what support measure should be introduced and/or on which punishment would be appropriate. In addition, alternative or more prevention measures can be introduced to ensure that the misbehaviour does not reoccur, for example a class discussion on the effect of late-coming, and on measures to avoid it, will follow an incident of late-coming.²⁹³

Since the restorative approach focuses on addressing the harm, the main focus is not on finding an appropriate punishment. Yet, punishment is not excluded from the restorative-discipline process, but is rather reserved as a last option, as explained above.²⁹⁴

²⁸⁹ Naker & Sekitoleko 2009:46; see also Sprick 2006:129-140, 203-228.

²⁹⁰ Naker & Sekitoleko 2009:48. These include time out to think about misconduct, writing a letter indicating why he or she misbehaved and what will be done to avoid this behaviour in future, and the educator instructing the learner to apologise and to ask for forgiveness.

²⁹¹ Naker & Sekitoleko 2009:49; see also Parker-Jenkins 1999:88 for a list of alternative punishments for corporal punishment.

²⁹² See ch 3, par 5.5.2, 5.5.3, 5.5.5, 5.8.3, 5.8.3.2 herein.

²⁹³ See also Naker & Sekitoleko 2009:27, 52-58; Coetzee, Van Niekerk & Wydeman 2008:96-100.

²⁹⁴ See par 5.7.8 above.

6.1.7 Accountability and responsibility

Niewenhuis²⁹⁵ defines accountability as follows:

To be accountable i.e. to be called on to render an account and to bear the consequences for failure to perform as expected. Accountability places a duty or obligation on a person to act in accordance with a standard or expectation set for his/her behaviour and to account for his/her actions in relation to the standard or expectation set for the actions in a specific situation.

According to Hopkins,²⁹⁶ accountability is:

understanding the impact of actions, taking responsibility for choices and suggesting ways to repair the harm.

“Accountability” thus means to be responsible for the consequences and outcomes of actions. It also obliges one to act according to a set standard. Accountability also requires one to show some insight into the impact of the actions on others and emphasises empathy and repair of harm. To fix the harm done is an important component of accountability.²⁹⁷ Accountability also entails taking active steps to prevent reoccurrence of the harm.²⁹⁸

In a retributive approach to discipline, accountability is equated with punishment. If the learner gets what he or she deserves, this is regarded as being held accountable.²⁹⁹ It was indicated above that punishment is often a consequence of misconduct despite the application of a restorative approach to discipline.³⁰⁰ In schools which are leaning towards positive discipline, the punishments might be different and might take the form of community service, repairing damage and instructing the learner to apologise. These schools might be more inclined to fix the harm by connecting the punishment to the harm. In this sense, the process expects the learner to fix the problem to some extent, but the decision as to what should be done is made by the principal, educator or SGB and is not a collective decision by all involved.³⁰¹

²⁹⁵ 2007:239.

²⁹⁶ 2002:145.

²⁹⁷ Amstutz & Mullet 2005:13, 28-29, 31; see also Morrison & Vaandering 2012:141.

²⁹⁸ Boyens-Watson 2008:110-111.

²⁹⁹ Hopkins 2002:145.

³⁰⁰ McCluskey *et al.* 2011:111-112.

³⁰¹ Amstutz & Mullet 2005:21-22.

Advice provided by Korb³⁰² on how to convince learners to take responsibility for their actions, using a positive-discipline management approach, illustrates the underlying retributive mind-set and a narrow understanding of taking responsibility, that is, admitting guilt and facing the eventual consequences that come with it, namely punishment. He describes a process reminiscent of a police investigation for discovering the truth about what happened by asking the learner to relate what happened, isolating possible witnesses, taking statements, eliminating tampering with statements and evidence, evaluating statements, and repeating requests for a confession of guilt. Then, he includes the following advice:

8. Keep working for a confession while explaining that you want to trust the student. Offer the student the choice: If he admits the error now, all will be forgiven. If he continues to resist, it will lead to a parent phone call and an office referral. Tell the student to think about it.
9. Leave the student alone.
10. Come back in a few minutes and ask about the situation again. If an admission is still not forthcoming, make the parent phone call and office referral.

This advice means that, if the learner admits to the wrongdoing, everything will be forgiven and there will be no consequences. This disregards the impact of misconduct on others. In addition, the question is why it would be necessary to go to all the trouble to elicit a confession without any consequences. It might therefore be a dishonest and unlawful attempt to elicit a confession and punish the learner in any case. This is clearly not a voluntary process and indicates undue pressure on the learner to confess to something that he or she might not have done. It is further indicative of the misuse of power and control, yet it is portrayed as a positive classroom management strategy. This advice also does not include any indication that, if the learner confesses to wrongdoing, he or she will have an opportunity to address the harm done as a result of the misconduct.

To take responsibility for harm caused to others is one of the important features of the restorative approach. The offender should come up with solutions to fix the problem and to repair the damage. This must be acceptable to the victim and the dialogue will continue until a mutually acceptable solution is reached.³⁰³

³⁰² 2012:80-81.

³⁰³ Amstutz & Mullet 2005:27-28; 30-32.

6.1.8 Level of child participation

With reference to Lundy's model of participation, it is evident that the positive-discipline model envisages creating a safer space for learners to express their views, that more effort is made to facilitate their voices, and that there is a better understanding of providing an audience. In the positive-discipline approach, learners are, for instance, encouraged to take part in the drafting of classroom rules and determining the values and ethos of the school.³⁰⁴ They can also be involved in finding solutions to problems through structures such as classroom meetings. Learner participation is thus more visible on the prevention level.³⁰⁵ However, the level of influence in decision-making is still questionable. Educators would normally make decisions on what is negotiable and open for discussion and would often have the final say in decisions on the appropriate alternative solutions to a problem.³⁰⁶ For instance Nelsen, Lott and Glenn³⁰⁷ propose class meetings as part of the positive-discipline approach to address problems. They propose that learners should be taught to put issues they need to discuss on the agenda to be dealt with during a class meeting. However, the educators' ability to control and determine the level of participation is highlighted by the following remark:

If you know that you'll never agree with the students or that they are trying to change something in the school policy that is non-negotiable, be honest with them. Let them know they can brainstorm about how to cope with the situation instead of how to change it.

It is conceded that some things can never be negotiable, such as learners' safety. However, despite all the positive attributes and success of the positive-discipline approach, the above-mentioned remark is disconcerting. It leaves the door open for educators to arbitrarily decide on what is negotiable and what is not. Furthermore, it allows the educator to impose his or her personal views on the class, but without being willing to entertain any discussion on changing the root causes of learners' frustrations. They are merely afforded an opportunity to think of ways of coping better with policies.

It is also evident from the strategies proposed in the literature that learners mostly participate only in prevention strategies and do not play an active role in determining the outcome after misconduct has occurred. Decisions on guilt, punishment and other consequences of

³⁰⁴ Coetzee, Van Niekerk & Wydeman 2008:92; Sprick 2006:130-131 are of the opinion that educators using a positive-discipline approach can choose whether they want to involve learners in deciding on classroom rules or not. If they are uncomfortable with including children in the drafting process, they do not have to do so.

³⁰⁵ Nelsen, Lott & Glenn 2000:154-155.

³⁰⁶ Naker & Sekitoleko 2009:46-58.

³⁰⁷ 2000:154-155.

misconduct remain largely the prerogative of the educator, limiting the learner's opportunity to participate in matters affecting him or her.

In contrast, the restorative approach encourages learners to take part in decision-making on every level, from the drafting of the code of conduct to the most serious incidents of misconduct. The point of departure is that everyone has a say in the outcome of every matter that affects them, and learners are much more actively involved in determining the outcomes of matters affecting them.

7. CONCLUSION

In this chapter, the Social Discipline Window was discussed as the conceptual framework for examining the different approaches followed for managing behaviour. The retributive and restorative approaches to discipline were discussed and their respective features were highlighted. Methods employed to implement these approaches were also highlighted. The methods employed in the retributive approach to discipline are mostly punitive in nature.

The restorative approach, on the other hand, focuses on repairing harm and restoring relationships. It also has a clear preventative focus through the creation of a sense of belonging, care, respect, and building relationships with, and among, learners. This approach is embedded in values and is applied on the prevention level as well as on the two intervention levels after misconduct has occurred. There is a vast range of restorative practices available to create a restorative school culture and to address harm caused by misconduct. The features of these two approaches are quite clear.

In contrast, the exact content and ambit of the positive-discipline approach are not clear, and several disparities in the content given to it were emphasised in the discussion. It is evident that the positive-discipline approach is not well defined and is open to different interpretations. However, the main focus of this approach is to prevent misconduct through the development of respectful relationships. Uncertainty regarding what the positive-discipline approach entails is most obvious in the guidance given on how to deal with misconduct. Although there are indications that problem-solving methods can be employed to address the consequences of misconduct, it is clear that this approach leaves the door open to resort to a retributive approach after misconduct has occurred. To plot the positive-discipline approach on the Social Discipline Window depends on the specific implementation strategies employed by a particular school.

The restorative approach and the retributive approach to discipline will form the background to the evaluation of these approaches in the next chapter. The positive-discipline approach will not

be included in the evaluation, owing to the lack of uniform features and the variation in the implementation of this approach. However, the restorative and retributive approaches will be evaluated against the best-interests-of-the-child standard, which will also be clarified in the next chapter.

CHAPTER 7

CONTEXTUALISED LIST OF FACTORS TO DETERMINE THE BEST INTERESTS OF THE CHILD AND EVALUATION OF APPROACHES TO SCHOOL DISCIPLINE

1. INTRODUCTION

The content of different human rights and their relevance to disciplinary measures were discussed in chapter 5. That discussion was aimed at determining content for the best-interests-of-the-child concept within the context of school discipline. The best interests of the child are the umbrella provision regarding children's rights and encompass different dimensions of the rights discussed in chapter 5. To apply the best-interests-of-the-child standard within the context of school discipline, a list of factors will be compiled that is informed by the discussions on the different human rights. This list of factors should guide decision-makers in determining disciplinary measures compatible with the best-interests-of-the-child standard.

In addition, every factor is applied to the retributive and restorative approaches to discipline in order to determine the compatibility of the different approaches with the best-interests-of-the-child standard captured in the different factors. Although the positive-discipline approach was discussed in chapter 6, it is not included in the evaluation of the different approaches because of the varying content given to it.¹

Not all aspects of every factor are discussed in detail here, thereby minimising repetition of the detailed discussions in chapters 4 and 5. In what follows, the different factors will be listed, the content of each factor will be discussed briefly, and then the content will be applied to the retributive and restorative approaches.

2. BEST-INTERESTS FACTORS TO BE CONSIDERED IN EVALUATING APPROACHES TO SCHOOL DISCIPLINE

The indeterminacy and vagueness of the best-interests-of-the-child concept were highlighted in chapter 4.² Yet, it was also indicated that this concept provides a useful and flexible tool to safeguard the well-being of children. To enhance the usefulness of this concept, a list of factors

¹ See the discussion in ch 6, par 6 herein on the varying content given to the positive-discipline approach.

² See ch 4, par 7.1 herein.

is drafted in this chapter to inform decision-makers of relevant factors to be considered in decision-making related to school discipline. This list therefore acts as an indicator of compliance with the best-interests-of-the-child standard. Non-compliance with any of these factors would be indicative of the inconsistency of disciplinary measures, including the different approaches to discipline, when assessed against the constitutional imperative of the paramountcy of the child's best interests.

2.1 Disciplinary measures must be aimed at the holistic development of the individual child

Maintaining sound school discipline is a teaching and learning process which should be aligned with the aims of education and should guide the child towards reaching his or her full potential.³ It was also indicated in chapter 5 that the acceptability of education has a clear quality dimension which is linked to the aims of education.⁴ The holistic development of the child, through discipline, should include physical, emotional, creative, associational, mental, spiritual, intellectual, social, practical, childhood and lifelong capabilities and dimensions.⁵ It should also include the development of values and skills.

These values include reconciliation, tolerance, mutual respect, dignity, equality, freedom, justice, fairness, reasonableness, respect for differences, non-discrimination, respect for the natural environment, non-racialism, non-sexism, supremacy of the constitution, the rule of law, accountability, responsiveness, openness and democracy. These aspirations as set out in the Constitution should guide disciplinary measures and develop the child's understanding and practice of these values. The question inevitably arises whether the disciplinary approach followed in schools is able to develop and, if necessary, change the value system of learners where this is not aligned with the above-mentioned constitutional values. All these values will not be discussed explicitly in the evaluation to follow, but will be discussed throughout the chapter.

Skills development is not limited to academic skills but includes the development of the child's ability to make well-balanced decisions, resolve conflicts in a non-violent manner, participate in a meaningful way, and develop a healthy lifestyle, good social relationships, responsibility, critical thinking, creative talents and other abilities that will give him or her the tools needed to pursue his or her options in life.⁶

³ See ch 5, par 2.1 herein.

⁴ See ch 5, par 2.2.4.2 herein.

⁵ See ch 5, par 3.3.6 herein; Liebenberg 2005:7.

⁶ CRCGC 1 2001:par 9.

These values and skills should be taught as part of the curriculum, but should also be practised in the way discipline is instilled and maintained in schools.⁷ As with values, reference will be made to all these skills in the remainder of this chapter.

2.1.1 Evaluation of the retributive approach to discipline

The retributive approach mainly uses punishment to address misconduct, which risks the physical development and well-being of children. There are ample examples of the misuse of power during the enforcement of physical punishment, such as instances of serious assault resulting in the disablement or even the death of learners.⁸ Learners' psychological and emotional development and well-being are also threatened by other forms of humiliating punishment, such as name-calling, belittling and sarcasm.⁹

Compliance with rules and punishment for non-compliance characterise the retributive approach. However, punishment has very little, if any, value in teaching learners the reasons and values behind the rules.¹⁰ A retributive approach does not facilitate value changes. For instance, without understanding the value of dignity and the equal worth of people, learners would not be able to embrace non-discrimination. Concepts such as non-racism and non-sexism depicted as rules do not foster understanding among people.¹¹ However, if the learners do transgress these norms, they will be at risk of being punished for discriminating against others or infringing on their other rights, which could result in further resentment of the other group.¹² Without any intervention focused on values, which is mostly the case, the transgressors' values and perception of the rights of others do not change.¹³ They merely adhere to rules out of fear of punishment and their value system and self-discipline are consequently not developed.¹⁴

Decisions are mostly made by those in a position of authority in a retributive approach to discipline. Learners are therefore deprived of the opportunity to develop skills such as decision-making, participation, engaging in dialogue and negotiation, creative problem-solving and taking responsibility for their actions. Furthermore, corporal punishment and other forms of humiliating punishment are also still administered in many schools. The opportunity to model non-violent

⁷ CRCGC 1 2001:par 15.

⁸ See ch 2, par 7.2 herein.

⁹ See ch 2, par 7.2 herein.

¹⁰ Amstutz & Mullet 2005:11-12.

¹¹ See par 2.9 below on the requirement that disciplinary measures must build and repair relationships.

¹² Badenhorst, Steyn & Beukes 2007:305, 313; Van Wyk 2001:196; Amstutz & Mullet 2005:12; SAHRC 2008:21.

¹³ See par 2.2 below on human rights education.

¹⁴ See the discussion on self-discipline in par 2.2 below.

(verbal and non-verbal) mechanisms to solve disputes is accordingly lost. The retributive approach to discipline is thus unlikely to contribute to developing the child's full potential through skills development and the inculcation of values. In addition, the child's physical and psychological development are at risk.

2.1.2 Evaluation of the restorative approach to discipline

Shaw¹⁵ indicates that restorative-justice practices align very well with important educational issues such as order, justice, social relationships, educational inclusion, and the whole aim of education. The restorative-justice approach actually challenges existing, punitive disciplinary measures and highlights the different values underpinning the different approaches.

The holistic development of the child is enhanced through this approach and is reflected in the improved academic performance of schools which have an explicit focus on prevention of misconduct by creating a caring and supportive school climate and programmes to address conflict and rebuild relationships through restorative processes.¹⁶ Hopkins¹⁷ explains this by stating that, as a result of working in an environment where harm to relationships is repaired, "people are more likely to want to work, more likely to achieve and less likely to be or feel excluded".

The restorative approach to discipline has a clear focus on teaching children appropriate social skills, on developing resilience and emotional intelligence, on building communities of care to support children, and on addressing harm after misconduct has occurred.¹⁸ Children are taught appropriate conflict-resolution skills, non-violent responses to harm, problem-solving skills, listening skills and participation skills.¹⁹ In addition, the process impacts positively on, *inter alia*, learners and peer mediators' self-esteem, confidence, assertiveness, articulacy and, by extension, literacy so that they can make choices and take responsibility for the choices made.²⁰

¹⁵ 2007:128, 130, 132; see also Karp & Breslin 2001:260.

¹⁶ Mirsky 2007:6, 9; Moloï & Kamper 2010:262; Ofer 2011:1404-1409. The schools in this study also used a three-tiered approach as discussed in chapter 6, paragraph 5.9 herein. However, the approach differed slightly from that proposed in the present study. The approach used in the schools also consisted of interventions to prevent misconduct on the first level, and, on the second level, programmes such as conflict-resolution programmes were used. Explicit restorative interventions were only used for the most serious forms of misconduct. The only significant difference between the two approaches is that the proposed approach uses the restorative values and principles explicitly on all three levels, while it was only used on the third level by the schools in Ofer's study. See the discussion in ch 6, par 6 herein on the overlapping dimensions in the positive-discipline and the restorative approaches.

¹⁷ 2002:148.

¹⁸ McCluskey, Kane, Lloyd, Stead, Riddell & Weedon 2011:108.

¹⁹ Hopkins 2004:134. Reference to the development of different skills is made throughout chapter 6 and 7 herein.

²⁰ Hopkins 2004:110.

Respect for one another, which is clearly aligned with dignity, is the foundation of this approach to discipline.²¹ The principals of schools where restorative justice is practised have, in particular, stressed the beneficial effect of reinforcing positive values through this process.²²

Other values include participation, honesty, humility, responsibility, empathy, trust, reliability, acceptance, empowerment, mutual commitment, self-control, self-discipline, reconciliation, democracy,²³ understanding and tolerance of diversity, openness, integrity and congruence.²⁴ These values are aligned with the constitutional values mentioned above.

There is clearly a positive relationship between a restorative approach to discipline and the holistic development of the child, as illustrated by improved academic performance, skills development and the infusion of values.

2.2 Disciplinary measures must be aimed at developing the child's ability to function in a socially responsible manner in society

It should be kept in mind that it is impossible and inappropriate to separate the optimal holistic development of the child and his or her responsible functioning in society into watertight compartments. Thus all the dimensions of the child's development, skills and values referred to above are also necessary for the development of the child's ability to function in a socially responsible manner. "Responsible life" for purposes of this study means a life in which one's own rights, needs and interests are acknowledged and respected and are balanced with the needs and interests of society at large.²⁵

Disciplinary measures should therefore also be aligned with notions such as fostering respect, participation, equality, non-discrimination and peace, as well as preventing human rights abuses and violent conflicts, all of which are indicative of living a responsible life.²⁶ These goals can be attained through, *inter alia*, human rights education through the curriculum and in practice.²⁷ Thus children should be provided with opportunities to observe the application of human rights, to practise this and to see it being modelled for them. Disciplinary measures should contribute to

²¹ Warren & Williams 2007:7; Wearmouth, McKinny & Glynn 2007:39.

²² Fields 2003:48; Varnham 2005:97.

²³ Through processes that enable everyone with a stake in a matter to take part, it focuses on creating understanding and tolerance of diversity.

²⁴ Amstutz & Mullet 2005:25; Pranis 2005:25; Warren & Williams 2007:7; Shaw 2007:128; Hopkins 2002:148.

²⁵ See ch 5, par 2.1.2 herein.

²⁶ See ch 5, par 2.1.3 herein; UDHR 1948:a 26(2); UNWPP 1 2006:foreword; Vienna Declaration and Programme of Action 1993:par 8; CRCGC 1 2001:par 8. See also Detrick 1999:512.

²⁷ See ch 5, par 2.1.3, 2.3.1.1 herein on human rights education.

learners' understanding of those human rights related to discipline, such as the right to dignity, equality and participation.²⁸ Learners should also be provided with opportunities to be assertive about human rights and should be taught to "identify and address their human rights needs and to seek solutions consistent with human rights standards".²⁹ Not only should they be taught to reflect on human rights values, but they should also be inspired by the way such values are implemented and given effect to.³⁰ Therefore, they should be able to take part in processes to realise human rights in education, and also through education and disciplinary measures.³¹

One of the main aims of education is to instil self-discipline in the learner. Self-discipline results in positive behaviour because of the learner's belief that specific conduct is the right thing to do. Learners thus act responsibly not merely because of force or fear.³² Self-discipline also demands the use of one's own reason to decide on the best course of action and not to give in to one's own desires, which can be detrimental to the self and others. In the context of the current discussion, self-discipline would thus entail learners acting in accordance with human rights standards because they believe this is the right thing to do, and not because they are bound by rules and legislation that give effect to human rights standards.

The multifaceted dimensions of human rights education should be reflected in disciplinary measures and should be evident from: the development of rights-based policies and legislation related to discipline and policy implementation; the creation of a learning environment conducive to respect for and promotion of human rights; the adoption of rights-based teaching and learning processes which include disciplinary process; the education and professional development of staff to facilitate the learning and practise of human rights in education and the way discipline is instilled and maintained.³³

Teaching children skills, values and human rights should have due regard for their evolving capacities, should be suitable for the child's social, cultural, environmental and economic context, and should address the current and future needs of the child. Disciplinary measures should accordingly reflect these realities of children and should maximise the child's ability and opportunity to participate fully and responsibly in a free society.³⁴

²⁸ CRCGC 1 2001:par 15.

²⁹ UNWPP 1 2006:1.

³⁰ See ch 5, par 2.1.3.1 herein; CRCGC 1 2001:par 15; UNWPP 1 2006:1.

³¹ UNWPP 1 2006:18; CRCGC 1 2001:par 15.

³² Coetzee, Van Niekerk & Wydeman 2008:216.

³³ See ch 5, par 2.1.3 herein; UNWPP 1 2006:18.

³⁴ CRCGC 1 2001:par 12.

2.2.1 Evaluation of the retributive approach to discipline

External power and control through rules and people in a position of authority are dominant features of the retributive approach to discipline.³⁵ Amstutz and Mullet³⁶ are of the opinion that, if a child's life and behaviour are too regulated, they feel no need to control themselves, since adults will do it on their behalf. Consequently, this impacts negatively on the learner's ability to learn self-discipline. Punishment serves to retrain the child only temporarily, but does little to teach self-discipline directly. Therefore, it is found that children obey rules while the enforcer of the rules is present, but often break the rules when external control is absent.³⁷

Although the retributive approach acknowledges the rights of different parties and that these should be balanced, it vests the power to make decisions regarding the extent of the rights and the weight thereof in a person (educator) or organ (School Governing Body [SGB]) with power.³⁸ Children are thus not part of the content-giving or balancing process, which inhibits their ability to maximise the opportunity to participate fully and responsibly in a free society.

Disciplinary measures should prevent human rights abuses and violence. Yet, the risks of actual human rights abuses in the retributive approach to discipline are well known and include corporal punishment and other humiliating punishment. The unacceptability of this approach is further underlined by the fact that human rights violations are modelled for children by those in a position of power. This can create the perception that human rights violations are acceptable if one is in a position of authority. The inconsistency in what is taught in the curriculum and what happens in practice can also confuse children who are still developing.

2.2.2 Evaluation of the restorative approach to discipline

The practices applied in the restorative-discipline approach, on the prevention as well as the intervention levels,³⁹ are aimed at building and repairing relationships. This is in line with the notion of acknowledging and balancing one's own rights and those of others. The restorative practices discussed in chapter 6 are all aligned with developing children's sense of awareness of the impact of their conduct on others and are highlighted by the restorative questions guiding the restorative process.⁴⁰

³⁵ Hopkins 2002:145.

³⁶ 2005:9.

³⁷ Amstutz & Mullet 2005:11-12; Nelsen, Lott & Glen 2000:118.

³⁸ Hopkins 2004:145.

³⁹ See figure 5 and the accompanying discussion in ch 6, par 5.8 herein.

⁴⁰ See ch 6, par 5.6 herein.

On the other hand, the process is also empowering because it provides learners with the opportunity to be assertive about their human rights. They thus have an opportunity to voice their opinions about infringements of their rights and have a say in how to address the infringements.⁴¹ Specific attention can be given to the content of human rights in, for instance, problem-solving circles. A concerted effort is made, even from a very young age, to teach children the necessary skills and values to give effect to human rights in their lived worlds through the restorative approach.⁴² Human rights education through the curriculum and through disciplinary processes is aligned in this approach. Furthermore, disciplinary measures model, on a prevention and intervention level, the implementation of human rights.

In addition, this approach is compatible with the establishment and maintenance of a society characterised by peace, respect, participation, equality, non-discrimination and the absence or reduction of human rights abuses and violent conflicts.

2.3 Disciplinary measures should create a safe environment conducive to teaching and learning

The teaching and learning environment must be physically and emotionally safe, must be enabling, and must guarantee every learner the opportunity to develop his or her capabilities and to reach his or her full potential as an individual and a social being.⁴³ The Committee on the Rights of the Child⁴⁴ endorses a rights-based environment which fosters reciprocal understanding, respect and responsibility, a sense of belonging, self-sufficiency, dignity and a healthy self-esteem on the part of everyone in the education system. Everyone in the system is co-responsible for creating such an enabling environment through the enforcement of rights and responsibilities.

Disciplinary measures should therefore contribute to the establishment of such an environment. This, in turn, contributes to the child's feeling of, *inter alia*, safety, security and belonging and does not leave the child fearful, anxious, intimidated or overwhelmed.⁴⁵ Disciplinary measures should therefore not only address issues such as school-based violence, bullying and harassment, but also strategies for creating a culture of care and belonging. In addition, disciplinary processes should protect learners from inhuman conditions, treatment or

⁴¹ Hopkins 2004:145.

⁴² Hansberry 2009:66-79.

⁴³ Liebenberg 2005:13.

⁴⁴ UNWPP 1 2006:3-4, 44.

⁴⁵ See the discussion in ch 5, par 3.3.2 herein.

punishment that cause fear, anxiety, humiliation, degradation, hostility, stigmatisation and labelling.⁴⁶

2.3.1 Evaluation of the retributive approach to discipline

Corporal punishment and other humiliating forms of punishment clearly impact on the physical and emotional safety of learners. Furthermore, the processes followed in a retributive approach to discipline are adversarial in nature, focusing on finding the transgressing learner guilty and determining a suitable punishment. Pain and unpleasantness are used to punish transgressors and to act as deterrent, creating fear and anxiety in learners.⁴⁷ In addition, learners exposed to a punitive system, such as the zero-tolerance system, do not regard their schools as safe communities and experience high levels of unjustified fear.⁴⁸

Measures, such as the use of an intermediary, can be introduced to address the effect of an adversarial process. However, measures regarding intermediaries in formal disciplinary proceedings can be ineffective if they are not implemented effectively and if they are not available to all children who need them.⁴⁹ In addition, the roles of people who should support learners in formal disciplinary proceedings should be clear. The functions assigned to them should ensure that the negative impact of the adversarial process is minimised as far as possible.⁵⁰ However, the *School Act*⁵¹ does not clarify the position of intermediaries and parents.

Apart from the fact that punishment creates fear, it also fails to afford victims of misconduct the required sense of security, because punishment does not always have the required deterrent effect. This is due to the fact that action is taken only after the incident and that punishment does not guarantee that there will not be reoffending, that it will effectively deter others from doing the same or that it will prevent retaliation.⁵² In fact, punishment can create rebellion, which can exacerbate disciplinary problems and violence in schools.⁵³

It is fair to conclude that, considering that punishment is associated with not only physical punishment but also with some learners becoming, inter alia, anxious, depressed and even

⁴⁶ See the discussion in ch 5, par 3.3.2 herein.

⁴⁷ Hopkins 2002:145.

⁴⁸ Gonzales 2011:14-15.

⁴⁹ See ch 3, par 5.6.1, 6.5 and ch 5, par 5.4.2.1 herein.

⁵⁰ See the lack of certainty on the role of parents in formal disciplinary proceedings in the *South African Schools Act 84/1996:s 8(6)*.

⁵¹ 84/1996:s 8(6)-(9).

⁵² Nelsen, Lott & Glenn 2000:xv.

⁵³ Holtham 2009:6; Bloomenthal 2011:309; Nelsen, Lott & Glenn 2000:118.

suicidal, the hostile and punitive climate created by the retributive approach is not in line with the requirements of a safe environment.⁵⁴

2.3.2 Evaluation of the restorative approach to discipline

Gonzales,⁵⁵ who refers to several studies, found that, when school policies regarding discipline focus on responsive, reiterative and restorative mechanisms, they are more effective in creating and maintaining safe school communities. Learners feel safer and more connected to their schools in an environment where there are high expectations of good behaviour on the one hand, and where, on the other, they experience their educators as caring and administering discipline fairly and tolerantly.

In schools following a restorative approach, those who were harmed by the misconduct reported feeling empowered, because they felt safer at school and were more confident about handling similar situations in future.⁵⁶ In one school, the reporting of minor incidents involving harassment increased after the restorative-justice programme had been running for some time. This was attributed to the fact that learners started to feel safe about reporting misconduct and knew that their complaints would be dealt with. They were thus enabled to come forward in order to enforce their rights.⁵⁷ Those who were harmed also reported that their sense of rejection and displacement decreased significantly after they had participated in a restorative justice-programme.⁵⁸

Previously, it was pointed out that the prevention of recidivism is not one of the main aims of the restorative process.⁵⁹ Yet, a meta-analysis of restorative-justice programmes found that these programmes are “significantly more effective at preventing recidivism than non-restorative programmes”.⁶⁰ Reduced recidivism would also eventually result in a safer school environment.

Human beings have an inherent and fundamental need to feel that they belong somewhere and are part of a group.⁶¹ The restorative justice approach fosters the sense of belonging of both the harmed and transgressor.⁶² The victim is afforded the opportunity to tell his or her story to a group of people who have an interest in him or her and the school community. The group takes

⁵⁴ Nelsen, Lott & Glenn 2000:xv.

⁵⁵ 2011:14-15; see also Moloi & Kamper 2010:256-276.

⁵⁶ Fields 2003:48; Morrison 2002:4-5; Varnham 2005:96.

⁵⁷ Mirsky 2007:8.

⁵⁸ Morrison 2002:5; Morrison 2005:105-106.

⁵⁹ See ch 6, par 5.7.3 herein.

⁶⁰ Bloomenthal 2011:319-320.

⁶¹ Wearmouth, McKinny & Glynn 2007:38.

⁶² Morrison 2006:371-392; Varnham 2005:92; McCluskey *et al.* 2011:115.

note of his or her hurt and needs and helps him or her to satisfy these needs and to repair the harm. On the other hand, the same group listens to the transgressor and helps him or her to come up with solutions to the problem. The transgressor is not stigmatised, but is reintegrated into the group.⁶³ This contributes to an emotionally safe school environment. The restorative approach is also a non-violent approach. Learners are thus not at risk physically and the danger of emotional and psychological harm is reduced.

2.4 Disciplinary measures should address all the needs and interests of everyone involved in, or who has an interest in, the disciplinary matter

The multifaceted dimensions of the child's development were highlighted above.⁶⁴ To give effect to the best interests of the child, all these dimensions, representing different interests of children, should be addressed. It is therefore apposite that disciplinary measures respect, protect, promote and fulfil all these dimensions of the child's interests. Furthermore, the best interests of every child should be addressed by disciplinary measures, because every child is entitled to the constitutional guarantees of section 28(2). Consequently, the best interests of every child affected, directly or indirectly, by any disciplinary matter should be considered.⁶⁵ This will include, in instances of misconduct, the transgressor, the victim of the misconduct and third parties to the misconduct. Nevertheless, all matters connected to discipline do not necessarily involve misconduct, but can relate to problem-solving, for instance addressing possible conflict or determining future conduct through a code of conduct. In the latter instance, the best interests of all children who are affected by the matter should be considered.

The need for an individualised approach to determine the best interests of every child was highlighted in chapter 4.⁶⁶ The practical difficulty in adhering to this requirement, where large groups of children are involved, is also acknowledged and the suitability of a principled approach to determine the best interests of the group was therefore proposed in that discussion. However, despite the possibility of applying a principled approach for large groups of children, the disciplinary measures should still allow individual learners an individualised investigation of their best interests in the circumstances. The point of departure should, however, always be to give effect to an individualised approach to determine the best interests of every child.

⁶³ Zehr 2002:13; Holtham 2009:9; McCluskey *et al.* 2011:108-109; Balcaen 2011:56.

⁶⁴ See par 2.1 above.

⁶⁵ See ch 4, par 4.4.2 on the direct and indirect needs of children.

⁶⁶ See ch 4, par 8.1 on individualisation as opposed to a principled approach to determining the best interests of the child.

An individualised approach implies focused attention on the needs and interests of minorities and other marginalised groups. Furthermore, the individual circumstances and needs of every child would also require an individual response to give effect to the paramountcy of the best-interests concept.⁶⁷ The quest to determine the best interests of every child includes consideration of the child's short-, medium- and long-term best interests.⁶⁸

2.4.1 Evaluation of the retributive approach to discipline

In a retributive approach, the focus is on the transgressor, the breach of rules and the determination of a suitable punishment. The needs and interests of the victims and of third parties affected by the misconduct are not an explicit focus of the process.⁶⁹ Thus, unless someone in a position of authority takes the initiative to address the needs and interests of the victim and/ or third parties, these will not receive any attention. The effect of the misconduct on the victims is merely used to determine an appropriate punishment for the transgressor.⁷⁰ The impact on third parties is considered to an even lesser degree.

2.4.2 Evaluation of the restorative approach to discipline

The needs and interests of everyone with a stake in a disciplinary matter are considered and appropriate steps are taken to ensure that these needs and interests are addressed. Depending on the circumstances, "everyone" includes the transgressor, victim, third parties to misconduct, parents, educators, other staff and members from the broad community or any other person with an interest in the matter. This is a highly individualised approach which recognises the responsibility not only of the transgressor, but also of everyone else who was part of the process, to address the needs and interests of the others.⁷¹ This is in line with the prescriptions of the best-interests-of-the-child standard, which requires the optimisation and individualisation of the best interests of every child.⁷²

Restorative-justice processes have numerous advantages for the different stakeholders and address their different needs, which can include financial restitution, reintegration into the community, professional support or a mere apology. For instance, victims reported satisfaction with the process, because their need to voice their pain and frustrations caused by misconduct was fulfilled. They were empowered to propose solutions and have a say in the outcome which would affect their future. The process satisfies victims' needs to have their dignity and self-

⁶⁷ See ch 4, par 4.2.3, 4.3, 7.2 herein.

⁶⁸ See ch 4, par 4.2.4 herein.

⁶⁹ Hopkins 2002:145.

⁷⁰ See Müller & Van der Merwe 2006:647 on victim-impact statements.

⁷¹ Hopkins 2004:145.

⁷² See ch 4, par 4.2.3, 4.3, 7.2 herein.

esteem restored or for specific conduct, such as bullying, to stop.⁷³ They also experience a sense of justice.⁷⁴ Since it is an inclusive approach, socio-economic realities and other needs of everyone are considered in the proposals to address the harm.⁷⁵

The needs of transgressors differ from those of the victims. Apart from identifying the need for professional support, transgressors often need to be relieved of stigmatisation and labelling caused by their conduct, need to be reintegrated into the school community and class, need to take responsibility for their actions and need to address the harm. Victims may also need to be reintegrated in some instances.⁷⁶

Parents of both those who have been harmed and the transgressors have perceived the process and its outcomes to be positive, indicating that the different needs of their children were satisfactorily addressed. Parents might also have needs, such as guidance on how to deal with their children's challenging behaviour or the harm caused to their children. This process has proven to open the door for improved parental involvement in schools.⁷⁷ Community involvement is enhanced, and the community is afforded an opportunity to be heard in matters affecting it.⁷⁸ Thus the process leads to an increase in the social capital of the school and to a shared vision of reform in the school. This is further linked to a reduction in learner delinquency and misconduct.⁷⁹

2.5 Disciplinary measures should give effect to the intrinsic worth and value of every child and should foster and develop the child's autonomy, self-respect, self-worth, self-actualisation, self-fulfilment, self-identification and self-determination

Dignity is about acknowledging the intrinsic worth of human beings never to be treated as a means to an end or be objectified. Thus children should not simply be seen as objects of punishment or rehabilitation.⁸⁰ Disciplinary measures should not merely respect and protect the dignity of learners, but should also promote and fulfil their dignity within their concrete realities.⁸¹ The state is obliged to role-model this for its citizens through, *inter alia*, the disciplinary measures it prescribes or allows. Inaction in addressing forms of undignified disciplinary

⁷³ Hopkins 2004:105.

⁷⁴ Fields 2003:46; Hopkins 2002:146.

⁷⁵ See ch 6, par 5.6.5 herein.

⁷⁶ Varnham 2005:96; Fields 2003:46-47; Shaw 2007:130, 132.

⁷⁷ Fields 2003:48; Varnham 2005:97.

⁷⁸ Drewery 2004:336; see also Varnham 2005:94.

⁷⁹ Gonzalez 2011:34.

⁸⁰ Liebenberg 2005:6; Schachter 1983:853; Raath 2007:159-191.

⁸¹ Capps 2009:108-122; Cheadle, Davis & Haysom 2010:5-5.

measures is thus contrary to this obligation of the state and signals to learners that the state has failed to acknowledge their inherent worth and to protect it.

Dignity can not only be infringed through punishment, but also through treatment and conditions. Disciplinary measures should thus reflect the need to create conditions conducive to teaching and learning, to assist learners to develop to their full potential, to be safe and to feel safe, and to enable them to act in accordance with human rights standards.⁸²

This will entail, *inter alia*, the creation of conditions and disciplinary processes which will develop the child's autonomy, self-respect, self-worth, self-actualisation, self-fulfilment, self-identification, and self-determination.⁸³ This is in line with the notion of individualisation and optimisation of the best interests of the child. Disciplinary measures should thus provide opportunities to develop these dimensions of being human through self-governance, participation, opportunities to make decisions, and own choices, to be the best one can be, and to be who you are. Respect for human dignity entails the recognition that every person is entitled to his or her own choices, preferences, ideas, beliefs, attitudes and feelings.⁸⁴

However, rights are normally not exercised in isolation, but within a community, which brings about inevitable conflict of rights. Cheadle, Davis and Haysom⁸⁵ indicate that dignity plays an important role in crafting the boundaries between "personal and social demands", and thus between individual autonomy and the needs of society at large. Dignity is indispensable in balancing conflicting interests with regard to all disciplinary measures.

2.5.1 Evaluation of the retributive approach to discipline

The risks of a punitive approach to discipline infringing on the right to dignity of learners are acknowledged in a number of international instruments, and states parties are cautioned in this regard.⁸⁶ There are numerous examples of current infringements of this right, such as the persistent use of corporal punishment, belittlement, sarcasm and other degrading punishments. This is in sharp contrast to the specific dimensions of the right to dignity, such as the right not to be subjected to any form of violence (physical and psychological) and that nobody should be

⁸² Liebenberg 2005:13.

⁸³ See ch 5, par 3.3–3.3.8 herein.

⁸⁴ Schachter 1983:850. The inseparable link between dignity and one's cultural and religious identity was acknowledged in *MEC for Education, KwaZulu Natal, and Others v Pillay* 2008(2) BCLR 99 (CC):par 53, 62. 2002:132.

⁸⁵ United Nations Declaration on the Rights of the Child 1959:principle 2; ICESCR 1966:a 13(1); European Union 2000:a 1; ACHPR 1981:a 5; CRC 1989:a 28(2).

treated merely as an object of punishment to deter them or others from future misconduct.⁸⁷ The same arguments apply to the dangers of treating children as mere objects of rehabilitation and not as rights bearers with inherent inner worth.⁸⁸ Furthermore, a retributive system does not provide for learner's autonomy and for being part of decision-making processes.⁸⁹ The negative consequences of punishment are also not in line with the right to dignity.

There are real risks attached to the retributive system of infringing on the rights of the transgressor. For this reason, strict prescriptions must be followed to ensure that the dignity of the transgressor is respected and protected in disciplinary proceedings and in metering out punishment. This approach does not focus on the needs and interests of those harmed by misconduct or of third parties to it. Thus their right to dignity is not explicitly respected or protected. Furthermore, the retributive approach to discipline is renowned for its hostile and stressful environment and constitutes an affront to learners' dignity.

2.5.2 Evaluation of the restorative approach to discipline

The restorative approach recognises the infinite worth and equality of every person affected by misconduct or harm, and, consequently, processes are developed to ensure that everybody is treated with equal respect and concern.⁹⁰ Everyone's needs and interests are determined in the process and appropriate steps are taken to address these. Morrison⁹¹ states that listening to someone's story "is a way of empowering them and of validating their intrinsic worth as a human being". She argues that feeling respected and connected is inherent in one's sense of self-worth and is a basic human need. The restorative processes recognise individual qualities and the uniqueness of everyone involved and include self-actualisation, self-fulfilment, self-identification and self-determination.

This approach to discipline models how learners should deal with conflict and harm without resorting to violence and infringing on the dignity of others. It is a process that allows everyone involved to experience a sense of self-respect and self-worth. Conflicting rights and interests are balanced in a restorative approach, while the dignity of everyone is considered. Victims of misconduct have reported that they were satisfied with the process and that it helped them to feel better about themselves.⁹² Transgressors, on the other hand, experienced less stigmatisation and, since they had to find a solution to the problem concerned, they developed

⁸⁷ See ch 5 par 3.3–3.3.8.

⁸⁸ Schachter 1983:849; Woolman 2005:36-9, 36-36-36-39.

⁸⁹ See ch 5 par 3.3.4.

⁹⁰ Hopkins 2002:145; Drewery 2004:335-336; Wachtel 2012:3.

⁹¹ 2005:9-100; see also Ashworth, Van Bockeren, Donnelly, Erikson & Woltemann 2008:23-24.

⁹² Fields 2003:46; Hopkins 2002:146; 2004:105.

their problem-solving skills. This had a positive impact on their self-worth.⁹³ Those who were harmed also reported that their sense of rejection and displacement decreased significantly after they had participated in a restorative-justice programme.⁹⁴ Restorative discipline also focuses explicitly on creating an environment where relationships can flourish and individuals can develop their unique capabilities and talents.

It is thus concluded that the restorative approach to discipline not only respects and protects the right to dignity, but also has an explicit focus on promoting and fulfilling the dignity of everyone involved in the process.

2.6 Disciplinary measures should be non-discriminatory and should contribute to the transformation goals of equal outcomes for everyone and to a just and equal society

The transformational goals prescribe that disciplinary measures should reflect the movement towards a society of greater equality in which it is recognised that, though humanity is diverse, it is also of equal dignity and value.⁹⁵ Such goals are further captured in the notion of substantive equality as opposed to formal equality. Substantive equality allows for differential treatment and takes account of socio-economic and other realities of different learners. It aims to protect the equal worth of learners who find themselves in inferior positions, often due to circumstances beyond their control.⁹⁶ These circumstances can be due to, *inter alia*, their socio-economic background, race, gender, religion or culture. Consequently, the aim is not to ensure equal treatment for all, but rather that the equal treatment does not perpetuate inequality. A concerted effort should thus be made to determine the impact of similar or differential treatment in disciplinary measures.⁹⁷ In addition, the harm that flows from decisions or treatment should be investigated, focusing on the broader advancement of equality.⁹⁸ Differences between learners and groups of learners should be affirmed in disciplinary measures and should be reasonably accommodated to prevent difference from becoming the source of socially embedded exclusion, marginalisation and stigmatisation of certain groups.⁹⁹ Substantive equality thus focuses on equality of opportunity and equality of outcomes and should be reflected in the disciplinary measures adopted. In addition, disciplinary measures should not only prevent and address direct forms of discrimination, on either the prohibited grounds or any analogous grounds, but

⁹³ Varnham 2005:96.

⁹⁴ Morrison 2002:105-106.

⁹⁵ Ngwena & Pretorius 2012:82.

⁹⁶ Rautenbach 2008:74; see also ch 5, par 3.3.3, 4.2.1 herein.

⁹⁷ Albertyn & Goldblatt 2007:35-7; Currie & De Waal 2005:232-233; Rautenbach 2008:74.

⁹⁸ Albertyn 2005:45-46.

⁹⁹ Ngwena & Pretorius 2012:83-84.

also any indirect discrimination.¹⁰⁰ Therefore, disciplinary measures should take account of the social and economic realities of learners, should give effect to the need for transformation and social justice, and should contribute to the dismantling of systemic inequalities.

In the discipline context, this does not mean that every child should necessarily be treated the same, but that the focus should rather be on equal outcomes. Keeping the focus of this study in mind, the overarching equal outcome would be that the best interests of every child should be optimised. Disciplinary measures should ensure equality of opportunity for learners to optimise their best interests, for instance the interests of pregnant learners, learners with serious behavioural problems or those affected by misconduct. Every child must have an equal opportunity to have all his or her interests considered as being of paramount consideration so that they can be given effect to in any disciplinary measures. Children's needs and interests differ, thus requiring an individualised approach which would inevitably result in different treatment of learners. Disciplinary measures should therefore provide for unequal treatment to ensure the best interests of all the children. This is also in line with the discussion on the adaptability of education and disciplinary measures.¹⁰¹

2.6.1 Evaluation of the retributive approach to discipline

The retributive approach to discipline focuses on attention to rules and adherence to due process. The consistent observance of rules and the infliction of similar or comparable punishments are key to this approach.¹⁰² Rules and punishments are often applied irrespective of the socio-economic background or other circumstances of the learners. In addition, the harm that flows from the consistent focus on treatment and not outcomes, is not recognised. This can lead to further marginalisation of individuals or groups of learners as was illustrated in the discussion on the wearing of religious symbols and on the impact of a lack of financial resources for complying with dress codes and the refusal of exemptions.¹⁰³ The individualisation of the best interests of individual learners or groups of learners is sacrificed on the altar of consistent treatment. In addition, this approach is not focused on future change, but merely on addressing what happened in the past.¹⁰⁴ Thus, its capacity to contribute to social justice, to play an active role in attaining the transformation goals and to dismantle systemic inequalities are limited.

¹⁰⁰ See ch 5, par 4.2.3, 4.2.4 herein.

¹⁰¹ See ch 5, par 2.2.4.4, herein.

¹⁰² Hopkins 2002:145.

¹⁰³ See ch 5, par 2.2.4.2.2 herein; *MEC for Education, KwaZulu Natal, and Others v Pillay* 2008 (2) BCLR 99 (CC).

¹⁰⁴ See ch 6, par 5.9.1 herein for the restorative questions.

2.6.2 Evaluation of the restorative approach to discipline

The importance of an investigation into the needs and interests of every learner in the restorative approach to discipline has been highlighted several times thus far. This approach is clearly aligned with the notion of equality of opportunity and outcome, and not equality of treatment. The restorative approach has a clear focus on change and on ensuring that things will be done differently in future.¹⁰⁵ This has the potential to bring about change and to create the type of society the Constitution aspires to.

2.7 Disciplinary measures must promote the child's ability to participate, which includes a safe environment, proper facilitation to elicit the child's voice, appropriate audience by an adult or specified body, and the ability to influence decisions

Disciplinary measures should provide learners with the opportunity to express their views in a safe and enabling space. They must be facilitated to speak freely and voluntarily on disciplinary matters that affect them on a prevention and intervention level. A safe environment is one free of intimidation, hostility, insensitivity or any inappropriate conduct that is not in line with the child's age and maturity. Special attention should be given to the needs of minority groups and marginalised learners throughout the participation process.¹⁰⁶

Disciplinary measures should ensure that it is easy and possible for children to express their views. Thus active steps should be taken to ensure that processes facilitate this. These steps include changes to the environment, an appropriate level of support, content and format of documentation provided for children, and methods adopted to elicit the views of children. Those who need to elicit the views of children should be sensitised accordingly and should be empowered, through training, to ensure that they are able to facilitate participation of children in an age-appropriate way. Disciplinary measures should not unduly restrict the participation of children because of perceived immaturity. Children's views should be elicited and due weight should be given to them, having due regard for the age and maturity of the child.¹⁰⁷

Children's right to participate also includes affording children audience. Thus children should have the opportunity to communicate their views to an identifiable individual or body that has the responsibility to listen to them. Disciplinary measures should thus clearly stipulate who is responsible for listening to the views of children. In addition, they should also provide for

¹⁰⁵ See ch 6, par 5.9.1 herein for the restorative questions.

¹⁰⁶ See ch 5, par 6.2.2.2.1 herein.

¹⁰⁷ See ch 5, par 6.2.2.3 herein.

representation, but measures should be taken to ensure that representatives convey the views of those they represent and not their own views.¹⁰⁸

Disciplinary measures should also clearly distinguish between learners giving evidence and learners expressing their views on the outcome of a matter and on the way forward.¹⁰⁹ The right to discipline entails a dimension of influence.¹¹⁰ Thus learners should be empowered to influence the outcomes of decisions, and it is not enough to merely listen to them. Their views should be considered as a significant factor in settling issues and should be regarded with the necessary seriousness. In addition, disciplinary measures should also include actions to ensure that learners receive feedback on their input and how their views influenced the outcome of an eventual decision. However, this does not oblige decision-makers to take all decisions in accordance with the views of children. It should be kept in mind that different degrees of participation are appropriate for different children and different situations, within the parameters of the basic requirements of the right.

Shier's model for child participation¹¹¹ provides for the inclusion of children in decision-making processes, which is above and beyond the requirements of the *Children's Act*¹¹² and the Convention on the Rights of the Child (CRC).¹¹³ Thus any processes that include children in decision-making exceed the minimum requirement. Shier¹¹⁴ argues that to include children in decision-making processes provides additional advantages for children, namely an increase in the quality of service provision, children's sense of ownership and belonging, self-esteem and empathy, and responsibility. In this way, the underpinning for citizenship and democratic participation is laid. These advantages illustrate the interrelatedness of rights and are in line with the aims of education as well as the aims of discipline, namely the holistic development of the child and teaching the child to act in a socially responsible manner.

2.7.1 Evaluation of the retributive approach to discipline

The outcomes of disciplinary measures are determined by those in a position of authority and do not provide for opportunities to accommodate the views of learners. The community is a mere spectator in the process.¹¹⁵ Dialogues and debates surrounding a particular incident of

¹⁰⁸ See ch 5, par 6.2.2.2.1, 6.2.2.2.2 herein.

¹⁰⁹ See ch 5, par 6.2.2.3.2 herein.

¹¹⁰ See ch 5, par 6.2.2.3.3 herein.

¹¹¹ See ch 5, par 6.3 herein; Shier 2001:110-116.

¹¹² 38/2005:s 10.

¹¹³ CRC 1989:a 12.

¹¹⁴ 2001:114.

¹¹⁵ Hopkins 2002:145.

misconduct are mainly focused on determining who is guilty of exactly what. Once it is established what happened and who is responsible for breaking the rules, the educator and disciplinary committee make a finding. The victim's role is limited to providing testimony on what happened. At best, the victim might be afforded an opportunity to relate the impact that the transgression has had. Often, that does not even happen and deductions regarding the severity and impact of what happened are made by the educator or disciplinary committee. The focus of victim-impact statements, if required, is to ensure that the punishment is in line with the transgression and is not aimed at determining and addressing the needs and interests of the victim.¹¹⁶

The adversarial processes of the retributive approach to discipline are not really suitable to creating a child-friendly space conducive to eliciting the views of children. Cavanagh¹¹⁷ found that learners who are in a punitive disciplinary system experience it as confusing, inconsistent, pointless, lacking in continuity, and a "quick fix". The learners are of the opinion that the system does not afford them the opportunity to talk and does not assist them in resolving problems so that they can be restored and feel safe. They believe that the system plunges them into trouble rather than helping them to sort out their problems. The learners experience the system as being characterised by determining blame, the destruction of relationships, and a general feeling of lack of control or limited control over most aspects of their lives. In addition, they feel that they are not accountable for their choices. Taking all of the above into account, it would be fair to conclude that the space created in a retributive environment is not really child-friendly or inviting or one created to ensure an environment conducive to the expression of personal views.

Research indicates that learners are of the opinion that they have no voice, because they are not involved, or are rarely involved, in rule-making, not even through the school council.¹¹⁸ They claim that there are normally no agreed procedures to challenge the fairness, necessity, relevance, ambiguity or inconsistency of rules. Furthermore, even if appeal procedures exist in school rules, it is often futile to appeal decisions of educators. They aver that appeals, even in informal disciplinary matters or regarding other issues, are seldom successful, because successful appeals would undermine the authority of the educators.¹¹⁹ It is clear that learners subjected to a retributive approach to discipline are not often afforded the opportunity to express their views.

¹¹⁶ Hopkins 2002:145; Joubert & Prinsloo 2008:135-137; Oosthuizen, Roos, Smit & Rossouw 2009:161-167.

¹¹⁷ 2009:68.

¹¹⁸ See international research on this topic in Canada in Raby 2008:83-84, 86; in Northern Ireland: Lundy in 2007:929; in Sweden in Thornberg 2009:395, 407-409; in the United Kingdom in Wyness 2009:535-552; and in South Africa in Carrim 2011:77-78.

¹¹⁹ Raby 2008:84-86.

Children in a retributive system are of the opinion that their views are not listened to.¹²⁰ They therefore claim they have no audience. Even if it is clear what the views of children are, there is no guarantee that their views will be communicated to adults or, if communicated, that adults will accept their views and give effect to them.¹²¹

To comply with the standards set for the right to participate, learners need to feel that they can influence decisions. However, lack of influence is one of the major stumbling blocks in schools according to learners. They are of the opinion that the issues they are allowed to influence are predetermined by adults. They do not really have the opportunity to initiate and bring their own issues to the table.¹²² Furthermore, as far as discipline is concerned, those affected by the misconduct are not involved in the disciplinary process. The focus of the process is on the transgressing learner and not the victim. Victims of misconduct are represented by those in a position of authority, are mere spectators of the process and often experience a sense of powerlessness. They are only expected to provide evidence to find the transgressor guilty and have no influence on the outcome of the process.¹²³

In an authoritarian approach to discipline, learners would not play any role, or would play only a very limited role, in the drafting of the code of conduct and classroom rules. The educator would decide on the rules for his/her classes and expect learners to obey them. Once a transgression occurs, a person in a position of authority would decide on the guilt or innocence of the offender. It is thus clear that the punitive approach to discipline provides little or no opportunity for learners to participate in disciplinary processes.

2.7.2 Evaluation of the restorative approach to discipline

Dialogue is a continuous process in this approach and not a once-off action, for instance to draft a code of conduct. Members of the school community are granted an opportunity to draft policies and to reflect on the values and principles of the school. Opportunities are thus created to discuss issues of mutual interest. Discussions are also guided by mutually agreed-upon values.¹²⁴

¹²⁰ Lundy 2007:936.

¹²¹ Lundy 2007:934.

¹²² Lundy 2007:934; Mabovula 2009:226-230; Mabovula 2010:5-10; Carrim 2011:75-77.

¹²³ Hopkins 2002:145; Joubert & Prinsloo 2008:135-136; Oosthuizen *et al.* 2009:161-167.

¹²⁴ Amstutz & Mullet 2005:26-27.

If a transgression occurs, everyone with a stake in the matter can take part in the process to resolve the matter. Dialogue to encourage insight, empathy and arriving at mutually acceptable solutions is key in the restorative approach.¹²⁵ Everyone's views must be considered and the solution to the problem must be acceptable for all involved.¹²⁶ This approach clearly differs from reducing the role of the victim to a witness and provides everyone with the opportunity to take part in a democratic process. Amstutz and Mullet¹²⁷ are of the opinion that, in an open society, people do not resort to violence to solve their problems, because they talk to each other and know how to listen to each other. A restorative approach fosters communication in schools in order to solve differences and it enhances the voice of the victims.

With regard to the restorative approach, Amstutz and Mullet¹²⁸ are further of the opinion that conflict-resolution education focuses on finding a fair and acceptable solution to a problem, while the restorative-justice approach "adds the additional layer of working on the relationship that was harmed". The creation of a safe environment and flourishing relationships throughout the whole school is the point of departure of a restorative approach to discipline.¹²⁹

Although there are different programmes, methods and practices for utilising restorative-justice principles,¹³⁰ the key components of restorative practices are non-negotiable and include the child's participation on a voluntary basis. Another important aspect of restorative practices is that the child will receive support and information throughout the process and will be able to take part in the process in an age-appropriate way.¹³¹ Educators are therefore required to use a process that makes it easy for children to express their views and voice their opinions.¹³²

In a restorative approach, everyone with a stake in a matter is included in the process and has an opportunity to voice their needs and interests. Facilitators are responsible for listening to the needs of everyone and have to facilitate the process in such a way that everyone experiences a sense of being heard and of being given a proper audience. Everyone should eventually be satisfied with the outcome of the process.¹³³ Learners affected by the misconduct are part of the whole process and have the opportunity to give their opinions on how they think the harm can

¹²⁵ Amstutz & Mullet 2005:25-32.

¹²⁶ Amstutz & Mullet 2005:27-28.

¹²⁷ 2005:25-32.

¹²⁸ 2005:20.

¹²⁹ Warren & Williams 2007:10.

¹³⁰ Reimer 2011:30; Cavanagh 2009:65-66; Warren & Williams 2007:10; Amstutz & Mullet 2005:46-72.

¹³¹ Zehr 2002:22-25, 38; Amstutz & Mullet 2005:32.

¹³² Hansberry 2009:66-79.

¹³³ Zehr 2002:24-28.

be made good. Since they are part of the process, they experience their influence on the decisions that are being made first-hand.

In a restorative approach, the child's right to participate is promoted through a deliberate process of creating a safe space where children can voice their opinions, are given a proper audience and can influence the outcomes of the processes.

The restorative approach to discipline not only provides learners with the opportunity to meet the basic requirements for the right to participation, but also opens the door for children to take part in decision-making processes. Restorative practices, such as problem-solving circles, provide learners with the opportunity to function on the fourth and fifth levels of Shier's¹³⁴ model for participation. As mentioned above, this has additional advantages for children. To allow a learner to take part, in appropriate circumstances and in an-age appropriate manner would thus provide him or her with an opportunity to optimise his or her best interests. Thus, although disciplinary measures may comply with the minimum requirements regarding the right to participate, they may still fall short of the provisions regarding the optimisation of the best interests of the child. It might be hard to justify processes that meet only the basic requirements of the right to participate while there are processes and approaches available that can be more favourable to the best interests of the child.

2.8 Disciplinary measures should foster learner accountability and responsibility

The *Children's Act*¹³⁵ explicitly provides for children's age-appropriate responsibilities towards their family, community and the state. According to Niewenhuis,¹³⁶ accountability entails being called upon to give an explanation for failure to act in accordance with a specified standard or expectation and to endure the accompanying consequences. Hopkins¹³⁷ adds another dimension and argues that accountability requires one to show some insight into the impact of the actions on others, and emphasises empathy and repair of harm. To fix the harm done is an important component of accountability.¹³⁸ In addition, accountability entails taking active steps to prevent the reoccurrence of the harm.¹³⁹

¹³⁴ See ch 5, par 6.3 herein; Shier 2001:110-116.

¹³⁵ 38/2005:s 16.

¹³⁶ 2007:239.

¹³⁷ Hopkins 2002:145.

¹³⁸ Amstutz & Mullet 2005:13, 28-29, 31.

¹³⁹ Boyens-Watson 2008:110-111.

2.8.1 Evaluation of the retributive approach to discipline

Accountability is equated with punishment in the retributive approach. The transgressor is punished for breaking rules and letting the school down. These violations create guilt and the transgressor should therefore be punished.¹⁴⁰ This approach does not require the transgressor to show any insight into the consequences of his or her actions or a commitment to refrain from repeating it. It therefore does not contribute to teaching the transgressor to act in a socially responsible manner. Thus it is often left to the transgressor to figure out what the acceptable norm for conduct is.¹⁴¹

Furthermore, punishment also places the learner in a position to blame the educator for the harsh and unfair punishment (especially if extreme measures are used). This provides the learner with an opportunity to move the blame from himself or herself, and to focus on the actions of the educator and not on the cause of the punishment or the consequences of the misconduct. Consequently, the learner escapes responsibility for addressing the consequences of the misconduct.¹⁴² Once punished, the learner receives a proverbial clean slate, because his or her dues have been paid to the community. Yet, this approach does not require the learner to face the harm caused by the misconduct and be held accountable for putting it right. For many learners, it is much easier to deal with punishment than to face up to the consequences of their actions.¹⁴³

It is understandable that learners would try to escape responsibility for their actions, since they know that punishment is the likely outcome after being found guilty of misconduct. There is thus no positive incentive to acknowledge wrongdoing and to take responsibility for their actions. They would thus rather try to avoid a guilty verdict through protracted adversarial processes and by advancing technical and procedural points, or lie about what happened.¹⁴⁴

2.8.2 Evaluation of the restorative approach to discipline

To take responsibility for the harm caused to others is one of the important features of the restorative approach. In fact, a restorative process cannot commence before the transgressor acknowledges responsibility, or at least partial responsibility, for his or her actions,¹⁴⁵ failing which the retributive approach will be resorted to where evidence will be produced to find the learner guilty. If responsibility is acknowledged, the transgressor should find creative ways to

¹⁴⁰ Hopkins 2002:145.

¹⁴¹ Drewery 2004:332.

¹⁴² Amstutz & Mullet 2005:12.

¹⁴³ See the discussion herein in ch 6, par 5.7.9 on restorative justice not being a soft option.

¹⁴⁴ See ch 2, par 8.2.3 herein on parents supporting their children's actions through litigation.

¹⁴⁵ See ch 6, par 5.6.3 herein.

address the problem and to repair the harm. The solution must be acceptable to the victim and others involved in the process. Therefore, dialogue and negotiations will continue until a mutually acceptable solution is reached.¹⁴⁶

Fields¹⁴⁷ avers that transgressors comply satisfactorily with restorative agreements. The compliance rate is actually reported to be high.¹⁴⁸ Ashworth, Van Bockeren, Donnelly, Erikson and Woltemann¹⁴⁹ report that many learners who make things such as posters and apology cards to make good the harm done actually “find a sense of joy and pride in their work”. Research also indicates that the restorative-justice approach has increased levels of accountability amongst learners for their actions, which is linked with the decrease in learner misconduct and the use of non-punitive disciplinary measures.¹⁵⁰

2.9 Disciplinary measures should be focused on building and repairing relationships

Quality education entails the development of the child’s full personality, talents and abilities, as well as skills, which include the ability to build and maintain good relationships and to act responsibly.¹⁵¹ To live in community with others, to be part of the broader community and to share in the experience of humanity was highlighted in *S v Makwanyane and Another*.¹⁵² The importance of building and repairing relationships was also highlighted in chapter 6 in the discussion on *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)*¹⁵³ and *Afri-Forum and Another v Malema and Another (Vereniging van Regslui vir Afrikaans as Amicus Curiae)*.¹⁵⁴ The importance of respect for dignity, reconciliation and apology were highlighted in both cases. The latter emphasised the following dimensions of ubuntu jurisprudence:

Ubuntu is a concept which is contrasted with vengeance. It dictates that a high value be placed on the life of a human being. It places a high premium on dignity, compassion, humaneness and respect for the humanity of others. It enjoins good attitudes and shared concern, and a shift from confrontation to mediation and conciliation. It favours the re-establishment of harmony in the relationship between parties, and for such harmony to restore the dignity of a plaintiff without ruining the defendant. It favours restorative rather

¹⁴⁶ Amstutz & Mullet 2005:27-28, 30-32.

¹⁴⁷ 2003:48; see also Varnham 2005:96.

¹⁴⁸ Varnham 2005:96.

¹⁴⁹ 2008:26.

¹⁵⁰ Gonzales 2011:34.

¹⁵¹ CRCGC 1 2001:par 9; CRC 1989:a 29(1); UNWPP 1 2006:16.

¹⁵² 1995 (2) SACR (CC) 1:par 326.

¹⁵³ 2011 (3) SA 274 (CC).

¹⁵⁴ 2011 (12) BCLR 128 (EqC).

than retributive justice, and operates in a direction favouring reconciliation rather than estrangement of disputants. It seeks to sensitise a disputant or a defendant in litigation to the hurtful impact of his or her actions on the other party, and to change such conduct rather than merely punishing the disputant. It promotes mutual understanding rather than punishment. It favours face-to-face encounters of disputants with a view to facilitating the resolution of their differences rather than awarding victory to a winner. It favours civility and civilised dialogue premised on mutual tolerance.¹⁵⁵

Several of these dimensions mentioned above in the context of ubuntu have been discussed under other headings in this chapter and will not be repeated here. However, these dimensions of the ubuntu concept highlight different aspects of human relationships and the importance of these in the new constitutional dispensation.

2.9.1 Evaluation of the retributive approach to discipline

Revenge is one of the acknowledged aims of the traditional retributive criminal justice system. The same attitude is also sometimes evident in school discipline where the transgressor should be punished and “get what he or she deserves”.¹⁵⁶ Learners in conflict with each other or educators are at risk of become estranged and even enemies if conflict is not addressed constructively or if one or all of the parties are punished due to the conflict. The retributive approach also lacks vision in sensitising the transgressor to the impact of misconduct, mutual understanding among conflicting parties and mutual tolerance. The adversarial processes followed to deal with misconduct and conflict also perpetuate the notion of a win–lose outcome. Reconciliation is not a focus of the retributive approach. In fact, in many instances, the pain and humiliation suffered by those who are punished exacerbates the divide between conflicting parties. The approach does not develop learners’ understanding of diversity. Rather, it provides rules to oblige people to be tolerant, and, if they are not, they are punished for infringing on the rights of others. There is also no effort to reintegrate the offender into the community.¹⁵⁷

The retributive approach to discipline has the potential to harm transgressors and victims, because it does not focus on the restoration of the dignity of the victims and often leads to stigmatising and labelling of the transgressor.

Other negative results of the retributive approach and punishment are that learners often experience anger and frustration, become rebellious and take it out on their peers and staff. For

¹⁵⁵ *Afri-Forum and Another v Malema and Another (Vereniging van Regslui vir Afrikaans as Amicus Curiae)* 2011 (12) BCLR 128 (EqC):editorial summary of case.

¹⁵⁶ Hopkins 2002:145.

¹⁵⁷ See ch 5, par 5.6.8 herein.

instance, in Bessels Leigh School, management believed that more severe punishments would curb the escalation in school disruptions. However, the learners defied this approach and this exacerbated the problem. It resulted in a costly increase in broken windows, the sense of community was eroded in the school, and staff–pupil relationships turned into an “us versus them” situation.¹⁵⁸ Punishment also “instils a narrow, selfish way of thinking; the focus is on oneself rather than on others”.¹⁵⁹ Furthermore, it makes people resentful and not reflective, and the transgressor does not really have to face up to all the people affected directly or indirectly by the misconduct. Punishment can be dangerous and ineffective, and could well be reinforcing the very values and behaviours which are discouraged and denounced.

Relationships between learners and educators are affected by a retributive approach. Learners tend to blame the educators who sent them to senior staff for disciplinary action, as well as the senior staff who actually imposed the punishment. Thus relationships between learners and senior staff are often characterised by resentment, fear, hostility and negativity. On the other hand, educators sometimes feel disempowered and disillusioned if they send a learner to a senior staff member who then only talks to the learner.¹⁶⁰

In addition, parents expressed a strong sense of powerlessness and hurt due to their children’s suspension and indicated that they had no voice in the suspension process.¹⁶¹ Relationships between educators and parents were thus also at stake. The retributive approach to discipline is thus not conducive to build sound relationships.

2.9.2 Evaluation of the restorative approach to discipline

Attempts to ensure reconciliation constitute one of the most important distinguishing features of the restorative approach.¹⁶² Building and repairing relationships, on a prevention as well as an intervention level, are the main focus of the restorative approach, as is evident from figure 5 and the accompanying descriptions in chapter 6.¹⁶³ Thus to live in community and harmony with others is important. The community is also part of the process and solutions are arrived at through democratic process.¹⁶⁴ Since the needs of everyone are addressed in the restorative approach to discipline, a win–win culture is created in the school through face-to-face

¹⁵⁸ Holtham 2009:6.

¹⁵⁹ Morrison 2002:6.

¹⁶⁰ Amstutz & Mullet 2005:12.

¹⁶¹ McCluskey *et al.* 2011:109.

¹⁶² Amstutz & Mullet 2005:25-32.

¹⁶³ See ch 6, par 5.9 herein.

¹⁶⁴ Hopkins 2002:145.

encounters.¹⁶⁵ In addition, the restorative questions mentioned in chapter 6 explicitly indicate that the impact of misconduct is addressed as well as what should be changed in future to prevent future misconduct and harm that will impact on future relationships.¹⁶⁶

A changed attitude to the management of antisocial behaviour is to be witnessed in schools using restorative-justice practices.¹⁶⁷ The literature indicates that the emphasis on punishment in the past has been replaced by an attitude of solving problems, by a position of treating all learners with respect, by the restoration of relationships, and by healing. Learners are encouraged to understand the consequences of their actions for themselves and others, rational thinking is developed, and understanding is elevated to a collective level.¹⁶⁸ In general, there is a positive change in the school culture.¹⁶⁹

2.10 Disciplinary measures should ensure the development of the child through adequate support measures and structures for counselling

The need to provide adequate support for learners who have behavioural problems was discussed at length in chapter 5 and need not be discussed further here. The relationship between the child's emotional and psychological development and the provision of support measures and structures for counselling will also not be elaborated on here.

2.10.1 Evaluation of the retributive approach to discipline

The traditional retributive approach to crime includes rehabilitation. The same notion is evident in the South African school-discipline context where reference is made to support measures and structures for counselling for learners who are involved in formal disciplinary proceedings.¹⁷⁰ Although this is a laudable aim, the retributive approach does not explicitly focus on similar services for victims.

In addition, the retributive approach is also at risk of jeopardising the effectiveness of rehabilitation programmes if it enforces rehabilitation programmes on transgressors without ensuring that the transgressors have gained insight into the impact of their conduct or without determining the causes of the misconduct. The transgressor is thus at risk of becoming a mere object of rehabilitation.¹⁷¹

¹⁶⁵ McCluskey *et al.* 2011:109.

¹⁶⁶ See ch 6, 5.9.1 herein.

¹⁶⁷ Fields 2003:48; Varnham 2005:97.

¹⁶⁸ Morrison 2002:6; Shaw 2007:131.

¹⁶⁹ McCluskey *et al.* 2011:109.

¹⁷⁰ See ch 3, par 6.4 herein for criticism on the legislative provision in this regard.

¹⁷¹ See ch 5, par 3.3.4 herein.

2.10.2 Evaluation of the restorative approach to discipline

Support is an important aspect of the restorative-discipline process. Through prevention strategies such as circles, learners with special emotional and psychological needs can be identified. Their needs can then be addressed by the educator if he or she is in a position to do so, otherwise, the child will be referred for assistance, because the approach focuses on care and support.¹⁷²

Victims and transgressors' needs for support and counselling will be addressed after misconduct. Another important aspect is the support offered to learners who have to fix the harm they have caused. Thus the facilitator will ensure that everyone who needs assistance in addressing the issues that emerged during the restorative process is in fact assisted in this regard.¹⁷³

2.11 Disciplinary measures should reflect consciousness of the impact of the availability of education, especially with regard to the availability of physical resources, adequate numbers of educators and education material

The discussion on the availability of education highlighted the relationship between the availability of physical resources, such as enough textbooks and chairs, and discipline, as well as between the availability of enough qualified educators and discipline.¹⁷⁴ Disciplinary measures should thus be sensitive to the socio-economic realities of the school and its learners, and to the impact of these on school discipline. For instance, a lack of textbooks can exacerbate violence, because learners fight about access to them. A lack of adequately trained and prepared educators was also stressed and should be taken into account in disciplinary measures. However, the provision of physical resources and educators cannot be addressed in disciplinary measures and should be addressed in the appropriate forums. Only consequences of these deficiencies in the system can and should be addressed in, *inter alia*, disciplinary measures.

2.11.1 Evaluation of the retributive approach to discipline

The retributive approach focuses on rules and punishment, which would include no fighting and non-violence rules. Misconduct due to these deficiencies in the system, for example fighting about a textbook, is thus likely to result in punishment for learners. The fairness of this approach is questionable, taking into account that the frustration and consequent behaviour of learners

¹⁷² See figure 5 herein for the different levels of support.

¹⁷³ Jansen & Matla 2011:46-49.

¹⁷⁴ See ch 5, par 2.2.4.1.3, 2.2.4.1.4 herein.

and educators who are in the situation would be normal reactions. To punish learners who react to an unsatisfactory situation beyond their control is not justifiable in a society which places a high premium on equality and dignity.

2.11.2 Evaluation of the restorative approach to discipline

Creating caring school climates is one of the key features of a restorative approach to discipline.¹⁷⁵ To build a caring school climate is not dependent on physical resources. Moloi and Kamper,¹⁷⁶ for instance, attribute the successes of schools in their study of poor communities to the culture of care in these schools.

2.12 Disciplinary measures should not jeopardise learners' access to education

School rules, such as dress codes and the time that schools start, can have an impact on the accessibility of education. A few examples of learners being punished for not wearing the required school attire were discussed in chapter 5. Learners who live far from school and do not have affordable transport to school are also subject to punishment due to late-coming. The discussion revealed the relationship between school rules, learners' socio-economic realities and the eventuality of these learners dropping out of school. Suspensions and expulsions are also examples of learners' access to education being limited or denied. Disciplinary measures should, however, ensure that learners' access to education is not unduly limited or denied. For instance, they should provide for exemptions to dress codes to ensure that financial constraints or adherence to religious prescriptions do not result in unjustified restrictions on learners' access to education. In addition, disciplinary measures should not unjustifiably limit learners access to education through suspensions and expulsions. In this regard, learner pregnancy policies come to mind.¹⁷⁷

2.12.1 Evaluation of the retributive approach to discipline

A retributive and authoritarian approach to discipline would make education inaccessible, because it would not be flexible enough to cater for the socio-economic needs of learners.¹⁷⁸ It is important to separate learners' responsibility to comply with the rules from learners' ability to comply with them. The best interests of the child also require a proper separation of issues which impact on the child, but which he or she is unable to control.¹⁷⁹

Punishment can include different forms of exclusion. It might be necessary to exclude a learner to ensure the safety and realisation of the right to education of all the learners in the class or school. However, it must also be kept in mind that some learners actually enjoy, and prefer,

¹⁷⁵ Morrison & Vaandering 2012:144-145 and figure 5 and accompanying discussion in ch 6, par 5.9 herein.

¹⁷⁶ 2010:258-270. These schools do not follow an explicit restorative-justice approach, but it is evident that the practices followed are aligned with the prevention strategies of the restorative approach.

¹⁷⁷ See ch 5, par 2.2.4.2, 4.3.3 herein.

¹⁷⁸ See ch 5, par 2.2.4.2 herein for examples.

¹⁷⁹ *S v M* 2007 (2) SACR 539 (CC).

being suspended.¹⁸⁰ This illustrates the necessity of proper interventions if a learner is excluded to ensure that the causes of the misconduct are addressed. If left unattended, the exclusion may exacerbate the problem.¹⁸¹ Currently, in the South African context, where a retributive approach is mostly applied, there are no legislative or other provisions prescribing what should happen to a child while suspended or after an expulsion, but before an alternative placement is found.

In addition, the learner falls behind with his or her academic work and, normally, no reintegration service is provided. Thus this creates an uncomfortable situation for the learner, educator and the other learners once the learner returns.¹⁸² On the other hand, these learners who were suspended or expelled are labelled and perceived to be troublemakers.¹⁸³ McCluskey *et al.*¹⁸⁴ indicate that suspension often fails to act as a deterrent.

Furthermore, suspensions are regarded by some as a useful exclusion tool.¹⁸⁵ Research indicates a link between the rate of out-of-class and out-of-school suspensions and the academic performance of learners and juvenile delinquency. The following observations were made in different studies. Firstly, higher rates of out-of-school suspension are associated with lower rates of achievement in numeracy and literacy (reading and writing).¹⁸⁶ Learners who have been suspended are at increased risk of being required to repeat a grade and eventually drop out.¹⁸⁷ Learners' educational progress is hampered because they receive no alternative education while suspended. If they do receive alternative instruction, the quality thereof is often non-existent or inadequate.¹⁸⁸

¹⁸⁰ Holtham 2009:4.

¹⁸¹ Holtham 2009:6.

¹⁸² Warren & Williams 2007:46; Bloomenthal 2011:311.

¹⁸³ McCluskey *et al.* 2011:114.

¹⁸⁴ 2011:113-114.

¹⁸⁵ Bloomenthal 2011:311; Gonzalez 2011:7-9; Ofer 2011:1401. These authors refer to several relevant studies in this regard. For example, the Texas Appleseed Report found that more than a third of learners from public schools dropped out in 2005 and 2006. Furthermore, one in three juveniles who were sent to the Texas Youth Commission were school dropouts and more than 80% of Texas prison inmates were school dropouts.

¹⁸⁶ Amstutz & Mullet 2005:47; Gonzalez 2011:6-7.

¹⁸⁷ Bloomenthal 2011:311; Gonzales 2011:8.

¹⁸⁸ Bloomenthal 2011:310. Some learners in the United States end up in the criminal justice system owing to misconduct at school and subsequent suspensions and expulsions. Their education in juvenile detention centres is characterised by unqualified teachers, inappropriate facilities and materials, limited class time and often a complete lack of a meaningful curriculum. Similar problems were identified in the South African context in reform schools and schools of industry. See the discussion in ch 5, par 2.2.4.1.1.1, 2.2.4.3.2 on the lack of adequate physical resources for children with behavioural, psychological and emotional difficulties and the inappropriateness of therapeutic programmes offered in some of these facilities.

Secondly, there is a positive correlation between the rate of out-of-school suspensions and the overall rate of juvenile incarceration. Thus the more learners are suspended, the more learners end up in the juvenile justice system. Thirdly, there is a disproportionate representation of learners of low-income groups, colour groups, minority groups and disabled learners found in out-of-school suspensions. This disproportionality is also repeated in the juvenile justice system.¹⁸⁹ Taking these consequences into account, the high prevalence of suspensions in some countries is alarming.¹⁹⁰

Learners' inability to comply with, for instance, dress codes due to socio-economic circumstances and punishment in this regard are also aspects that threaten learners' access to education.¹⁹¹ The punitive nature of pregnancy policies also impacts negatively on pregnant learners' access to schools.¹⁹²

2.12.2 Evaluation of the restorative approach to discipline

Numerous schools that have introduced restorative-justice programmes in different countries have reported a significant reduction in suspensions since the inception of these programmes.¹⁹³ For example, the Denver Public School changed its school policies to follow a restorative approach and, before the programmes were fully implemented, referrals to law enforcement had dropped by 63% and out-of-school suspensions had dropped by 43%.¹⁹⁴

The suspension and expulsion of difficult learners are seen by many as the only effective way to deal with such learners. However, the reality is that the removal of the transgressor does not remove the problem, but simply relocates it in time and place, often exacerbating the problem.¹⁹⁵ Principals using restorative-justice principles indicate that they are now solving problems and not merely postponing or moving the problems in their schools.¹⁹⁶ Educators also have more confidence to address the learners' emotional needs and to become involved in

¹⁸⁹ Amstutz & Mullet 2005:47; Bloomenthal 2011:312; Gonzalez 2011:12-13; Ofer 2011:1374-1375, 1401. Currently, New York school are patrolled by the fifth-largest police force in the nation.

¹⁹⁰ Bloomenthal 2011:307 indicates that, in some states in the United States, the number of suspensions has exceeded the number of enrolled learners by 10%. In a Midwestern city, one-fifth of the enrolled learners were suspended at least once a year. In some pre-schools, the expulsion rate is over three times higher than that of the elementary schools.

¹⁹¹ See ch 5, par 2.2.4.2.2 herein.

¹⁹² See ch 5, par 4.3.3 herein.

¹⁹³ Fields 2003:49; Wearmouth, McKinny & Glynn 2007:40; Karp & Breslin 2001:257; Gonzales 2011:27-37; Ofer 2011:1375; McCluskey *et al.* 2011:106.

¹⁹⁴ Bloomenthal 2011:322-323; Gonzales 2011:28-37.

¹⁹⁵ Varnham 2005:95.

¹⁹⁶ Mirsky 2007:9.

problem-solving conversations with learners.¹⁹⁷

There has also been an overall decrease in disciplinary referrals, and discipline has improved significantly. This has included an improvement in the level of homework done, an increase in school attendance and reduction of tardiness. It has also included a decrease in fighting, disrespect towards educators, sussing and stealing.¹⁹⁸ Thus, once the school climate was changed from a punitive climate to a more supportive environment, learner misconduct and rebellious behaviour declined.¹⁹⁹

2.13 Disciplinary measures should be flexible enough to adapt to the needs of changing school communities and different learners

General Comment 13²⁰⁰ of the Committee on Economic, Social and Cultural Rights (CESCR) requires education to be adaptable to the changing needs of communities and to the needs of different learners within their diverse social and cultural settings. The composition of school communities can change over time, as has been apparent in the South African context after the abolition of apartheid. Diversity increased significantly in some schools and changed completely in other schools. It is thus pivotal to be sensitive to the different demands and needs of a changing or changed school community. The lack of prescriptions regarding the regular revision of the code of conduct was highlighted in chapter 3.²⁰¹ Disciplinary measures should be revised regularly to accommodate these changes, as well as prescriptions in the legal framework, which was also highlighted in chapter 3.²⁰² Disciplinary measures must enhance the quality of education and should therefore be scrutinised regularly to ensure that they are still vigorous enough to comply with increasing standards for quality education.

Disciplinary measures should also be responsive to changes in social problems which can impact on school discipline, such as the increase in child-headed households,²⁰³ in learners affected by HIV and Aids,²⁰⁴ in gang activities in some neighbourhoods,²⁰⁵ in bullying²⁰⁶ and

¹⁹⁷ Shaw 2007:131.

¹⁹⁸ Mirsky 2007:6; Shaw 2007:131; Hopkins 2002:146; Amstutz & Mullet 2005:49; Gonzales 2011:27-37; McCluskey *et al.* 2011:106.

¹⁹⁹ Bloomenthal 2011:309.

²⁰⁰ CESCRGC 13 1999:par 6(c).

²⁰¹ See ch 3, par 6.1 herein.

²⁰² See ch 2, par 8.6.1 herein.

²⁰³ See the *Children's Act 38/2005*:s 37 for provisions on what constitutes a child-headed house.

²⁰⁴ DBE 2012b:28; see also DBE 2010:2, 37.

²⁰⁵ See ch 2, par 5.1.2.2 herein.

²⁰⁶ See ch 2, par 6.1.3, 7.3 herein.

cyber-bullying in particular, and in learners active on social networks such as Facebook and Twitter.²⁰⁷

Adaptability requires decision-makers and disciplinary measures to take account of the social realities of learners and of the school community. A strict, uniform approach to discipline in the name of consistency should therefore not be acceptable in all circumstances. A flexible approach is also more in line with the best-interests-of-the-child concept where the needs of every child are assessed and acted upon.²⁰⁸

The unacceptable state of discipline and the continued use of unacceptable disciplinary measures impact on the learner's right to acceptable education. This must be rectified and acceptable disciplinary measures should be put in place which will contribute to learners' holistic development and their ability to reach their full potential, and which will furthermore contribute to their ability to learn to function in a socially acceptable manner. The acceptability of current approaches, for instance a very authoritarian approach to discipline, and their compatibility with the learner's right to education and his or her best interests have thus far not been tested explicitly in the courts. Yet, there are some approaches to discipline which are not reconcilable with the goals of education and which would therefore constitute unacceptable education.²⁰⁹

2.13.1 Evaluation of the retributive and authoritarian approach to discipline

An authoritarian approach to discipline is normally inflexible and compliance with rules is key.²¹⁰ This approach therefore requires constant evaluation and frequent updates to ensure that there are rules to address new problems related to discipline. This can be problematic if decision-makers have to respond to a new problem without existing rules and prescriptions. It also requires decision-makers to be alert to possible new transgressions and to act proactively in policy documents.

2.13.2 Evaluation of the restorative approach to discipline

The restorative approach to discipline is founded on values. Accordingly, rules do not need to be changed for every new event, because the foundation of respect, dignity, accommodation,

²⁰⁷ Rademeyer 2013:sp reports that 84% of learners know how to use social networks and that there is an increase in incidents of learner misconduct associated with social networks. Learners sometimes post comments on social networks which impact on the reputation of the school and should be addressed through proper disciplinary measures.

²⁰⁸ See ch 4, par 4.2.3 herein.

²⁰⁹ See ch 7 herein for an evaluation of the approaches to discipline and their compatibility with the best-interests-of-the-child standard.

²¹⁰ See Hopkins 2002:145.

reconciliation and the other values mentioned above remains the same and provides decision-makers with a framework to address any new problems.²¹¹

These values also provide consistency, because the same values are applied across the board. They also provide the flexibility to address the specific social realities of every child. In addition, to give effect to the best interests of every child is a valuable principle to adhere to in all circumstances. Rather than adherence to specified rules, which might prove not to be in the best interests of some children, equality of outcome prevails, namely optimising the best interests of the child.

2.14 Disciplinary measures should not infringe on learners' survival rights and should contribute to the improvement of the quality of life of learners

The right to survival and development is closely related to several other rights, especially the right to dignity.²¹² Everyone has a right to life, which includes preservation of life and a quality life.²¹³

Disciplinary measures should ensure the safety of learners and that their right to life is not infringed upon through punishment, treatment or conditions in the school which can result in death, disablement or the diminished emotional and psychological well-being and development of the child. In fact, the state has a positive obligation to protect possible infringements of the right to life in specific circumstances and should prevent learners from being exposed to such treatment and punishment. The more grave the infringement of the rights of children, the greater the responsibility of the state to prevent it. Inaction by the state with regard to the continued use of corporal punishment and other degrading forms of treatment comes to mind in this regard.²¹⁴ Disciplinary measures employed in schools should also contribute to the prevention of serious behavioural, psychological and emotional difficulties in learners to alleviate the pressure on the limited available physical resources and to optimise the available sources.²¹⁵ Other measures which can have an impact on the life and quality of life of children are disciplinary measures related to drug abuse, bullying and gangsterism. These measures should include prevention measures as well as support measures to ensure the child's physical, mental, spiritual, moral and social development.²¹⁶

²¹¹ See ch 6, par 5.6.9 herein.

²¹² See ch 5, par 5.1-5.2 herein; CRCGC 7 2005:par 10.

²¹³ Pieters 2011:39-1–39-2, 39-8.

²¹⁴ See ch 5, par 5.3.1 herein.

²¹⁵ See ch 5, par 2.2.4.1.1, 2.2.4.1.5 herein.

²¹⁶ CRC 1989:s 27.

Disciplinary measures should not infringe on learners' survival rights, such as the right to nutrition, water, food, shelter and basic healthcare services. Furthermore, disciplinary measures should ensure that learners are able to break the cycle of poverty and that they are not deprived of this opportunity by disciplinary requirements which do not take cognisance of their socio-economic background.²¹⁷

SGBs also have a responsibility to protect learners and should therefore provide mechanisms to empower learners through the code of conduct to report unlawful punishment and treatment that impacts on their right to life and survival.

2.14.1 Evaluation of the retributive approach to discipline

The risks of punishment leading to death, disablement and psychological and emotional problems have already been highlighted. The discussion above also stressed the unlawfulness of any punishment infringing on the survival and development of learners. The retributive and authoritarian approach to discipline clearly places the child at risk by infringing the right to life and survival, in particular the quality of life, which can be jeopardised through anxiety, stress and other negative consequences related to punishment and a hostile and stressful environment.

2.14.2 Evaluation of the restorative approach to discipline

The restorative approach does not include any violent responses to misconduct. In fact, all processes should be respectful and should lead to the restoration of everyone involved in the process. The socio-economic backgrounds of the learners involved play an important role. Infringements and insensitivity to their survival will thus be minimised. The holistic development of the child and of relationships is central to this process and is associated with the quality of life.

3. CONCLUSION

Fourteen factors indicating dimensions of the best-interests-of-the-child concept in the context of school discipline were identified in this chapter. These factors should all be considered in relation to any disciplinary measures taken so as to ensure that such measures comply with the best-interests-of-the-child standard.

Furthermore, the retributive and restorative approaches to discipline were evaluated for their compatibility with the best-interests-of-the-child standard, with reference to the identified factors.

²¹⁷ See ch 5, par 5.2, 5.3.3, 5.3.4.5 herein.

This evaluation revealed that the retributive approach to discipline is not compatible with the different dimensions of the best-interests-of-the-child standard as captured in the different factors. On the other hand, the restorative approach to discipline is compatible with all the dimensions of the best-interests-of-the-child standard.

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS

1. INTRODUCTION

This thesis started with a discussion of the development of children's rights in South African law and of the legislator's response to the constitutional imperatives brought about by the inclusion of section 28 on children's rights in the Constitution. The new *Children's Act*¹ and the *Child Justice Act*² have a clear focus on the best interests of the child. In addition, several Constitutional Court judgments,³ in particular *S v M*,⁴ have elevated the best interests of the child to a constitutional right and have indicated the need to give focused attention to these interests in all matters concerning the child.⁵ However, the same vigorous response to the best-interests-of-the-child constitutional injunction is not visible in the legal framework related to the education of children. This study therefore aimed to provide clarity on what would constitute the best interests of the child within the context of school discipline.

However, the best-interests-of-the-child standard is vague and indeterminate and cannot be applied in a vacuum. It is dependent on a specific context. Therefore, the social background to school discipline was investigated, which revealed that forms of misconduct vary considerably and range from modest misdemeanours, such as talking in class and failure to do homework, to more serious infringements, such as theft and very serious incidents including violent assaults, bullying, gangsterism and even murder.⁶ The prevalence of this misconduct and the severity thereof differ across a broad spectrum. In some schools, minor transgressions are the most prevalent, while other schools are basically dysfunctional owing to the lack of a disciplined environment and are plagued by high levels of different forms of violence.⁷ To generalise regarding the forms of misconduct and their prevalence would therefore be unscientific.

¹ 38/2005.

² 75/2008.

³ See ch 4, par 3.2 herein. See also *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC); *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC).

⁴ 2007 (2) SACR 539 (CC).

⁵ *S v M* 2007 (2) SACR 539 (CC):par 33.

⁶ See ch 2, par 5 herein.

⁷ See ch 2, par 5.1.6, 6 herein.

All the stakeholders in education play some part in the state of school discipline and numerous reasons for ill-discipline were identified.⁸ In addition, the impact of ill-discipline on learners ranges from almost no impact to serious and negative consequences such as fear, anxiety, loneliness, depression, absenteeism, dropout, suicide and post-traumatic stress disorder, to mention but a few.⁹ Educators experience many of the same symptoms, as well as low levels of work satisfaction and, sometimes, exposure to intimidation.¹⁰ This also has an impact on the availability of teaching time, on academic performance and on several human rights.¹¹

The urgency of intervening in school discipline is highlighted not only through these severe consequences of ill-discipline, but also by the extent of the problem. It is estimated that 80% of schools are highly ineffective.¹² The notion of a dysfunctional school is irreconcilable with the definition of discipline.¹³ Discipline is viewed, as a teaching and learning process with two distinct aims, namely to create an orderly environment conducive to teaching and learning so as to enable the holistic development of every learner, and to teach learners to behave in a socially responsible manner such that they develop self-discipline that will ultimately result in respect for the rights and needs of others. It would thus be fair to conclude that a very high percentage of schools do not comply with their responsibility to discipline learners. This statement should clearly be read in the context of the definition of discipline, which does not include control over children for the sake of uniformity or the equating of discipline with punishment.¹⁴ The focus of discipline is the development of the child in line with the best-interests-of-the-child standard. It can thus be concluded that school discipline is indeed a major problem in South African schools and that it should be addressed.

Not all causes of ill-discipline and the consequences thereof can be addressed by way of the legal framework, and this was not the intention of this study. Therefore, one of the main focal points of this study is to determine whether the existing legal framework pertaining to school discipline is compatible with the best-interests-of-the-child standard.

⁸ See ch 2, par 8 herein.

⁹ See ch 2, par 7.1-7.4 herein.

¹⁰ See ch 2, par 7.5, 7.6 herein.

¹¹ See ch 2, par 7.7, 7.8 herein.

¹² Taylor 2008:2-3; NPC 2011:282.

¹³ See ch 2, par 3.1 herein.

¹⁴ See ch 2, par 3.3 herein.

2. THE-BEST-INTERESTS-OF-THE-CHILD STANDARD INDICATED BY A LIST OF FACTORS

The best-interests-of-the-child standard is, however, not clear and, to determine what would be in the best interests of the child in this context, it was necessary to contextualise the best-interests-of-the-child concept.¹⁵ This was done through a textual analysis¹⁶ and an investigation of the content of other human rights which have informed this concept. The rights which have informed the best-interests concept were purposefully selected and include the right to education,¹⁷ the right to dignity,¹⁸ the right to equality,¹⁹ the right to life, survival and development,²⁰ and the right to participate.²¹

This discussion of the different rights culminated in a list of factors, indicating the substantive requirements which should be met before disciplinary measures can be regarded as being in line with the best-interests-of-the-child standard.²² The list of factors²³ indicates that disciplinary measures must:

- a) be aimed at the holistic development of the individual child;²⁴
- b) be aimed at developing the child's ability to function in a socially responsible manner in society;²⁵
- c) create a safe environment conducive to teaching and learning;²⁶
- d) address all the needs and interests of everyone involved in, or who has an interest in, a disciplinary matter;²⁷
- e) give effect to the intrinsic worth and value of every child, and foster and develop the child's autonomy, self-respect, self-worth, self-actualisation, self-fulfilment, self-identification, and self-determination;²⁸

¹⁵ See ch 1, par 4.1 herein.

¹⁶ See ch 4, par 4 herein.

¹⁷ See ch 5, par 2 herein.

¹⁸ See ch 5, par 3 herein.

¹⁹ See ch 5, par 4 herein.

²⁰ See ch 5, par 5 herein.

²¹ See ch 5, par 6 herein.

²² See ch 7 herein.

²³ In the footnotes related to the list of factors, cross-references are made to the specific factors identified in chapter 7 herein, and to the most important parts of other chapters that informed these factors. However, all the factors are interrelated and other parts of the thesis could have contributed to the specific factors and may not be included in the cross-reference. Furthermore, the cross-references to the list of factors and parts of other chapters that informed the list will not be repeated in the remainder of this chapter.

²⁴ See ch 7, par 2.1 herein; see also ch 5, par 2.1.1 herein.

²⁵ See ch 7, par 2.2 herein; see also ch 5, par 2.1.2, 2.1.3 herein.

²⁶ See ch 7, par 2.3 herein; see also ch 5, par 2.2.4.1.4, 5.3 herein.

²⁷ See ch 7, par 2.4 herein; see also ch 5, par 4 herein.

- f) be non-discriminatory and should contribute to the transformation goals of equal outcomes for everyone and a just and equal society;²⁹
- g) promote the child's ability to participate, which includes a safe environment, proper facilitation to elicit the child's voice, appropriate audience by an adult or specified body, and the ability to influence decisions;³⁰
- h) foster learner accountability and responsibility;³¹
- i) focus on building and repairing relationships;³²
- j) ensure the development of the child through adequate support measures and structures for counselling;³³
- k) reflect consciousness of the impact of the availability of education, especially physical resources, adequate numbers of educators, and appropriate education material;³⁴
- l) desist from jeopardising learners' access to education;³⁵
- m) be flexible enough to adapt to the needs of changing school communities and different learners;³⁶ and
- n) refrain from infringing on learners' survival rights, and should contribute to the improvement of the quality of life of learners.³⁷

3. EVALUATION OF THE COMPATIBILITY OF DIFFERENT APPROACHES TO DISCIPLINE WITH THE BEST-INTERESTS-OF-THE-CHILD STANDARD

Two major approaches to discipline, namely the retributive and restorative approaches, were evaluated for their compatibility with the identified factors.³⁸ This evaluation revealed that the retributive approach to discipline does not meet any of the above-mentioned criteria of the best-interests-of-the-child standard, while the restorative approach to discipline is compatible with all the factors indicating the best interests of the child.

In contrast, disciplinary measures in schools – which include disciplinary action, decisions, policies, legislative provisions and procedures – in South Africa are mostly retributive and

²⁸ See ch 7, par 2.5 herein; see also ch 5, par 3.3 herein.

²⁹ See ch 7, par 2.6 herein; see also ch 5, par 4 herein.

³⁰ See ch 7, par 2.7 herein; see also ch 5, par 6.2.2, 6.2.3 herein.

³¹ See ch 7, par 2.8 herein; see also ch 5, par 2.1, 2.1.2, 2.1.3, 5.3.4.2, 5.3.4.3 herein.

³² See ch 7, par 2.9; see also ch 6, par 5.3.

³³ See ch 7, par 2.10 herein; see also ch 5, par 2.2.4.1.1.1, 2.2.4.1.5, 2.2.4.2.4, 2.2.4.3.2, 3.3.3, 3.3.6, 4.3.2, 4.3.7, 5.3.2 herein.

³⁴ See ch 7, par 2.11 herein; see also ch 5, par 2.2.4.1 herein.

³⁵ See ch 7, par 2.12 herein; see also ch 5, par 2.2.4.2 herein.

³⁶ See ch 7, par 2.13 herein; see also ch 5, par 2.2.4.3 herein.

³⁷ See ch 7, par 2.14 herein; see also ch 5, par 5 herein.

³⁸ See ch 7 herein.

authoritarian in nature.³⁹ Disciplinary measures in South Africa, are therefore, in general, not compatible with the best-interests-of-the-child standard.

Recommendations:

- A fundamental change in the approach to discipline is called for and disciplinary measures should consciously move away from the current retributive and authoritarian approach. Legislation, regulations and guidelines should assist in facilitating this process of breaking with a retributive approach to discipline.
- A restorative approach to school discipline is instead recommended as an appropriate approach to discipline, since it is compatible with all the requirements of the best-interests-of-the-child standard indicated by the different factors.
- All decisions and actions regarding disciplinary measures, on all levels, national, provincial and local, should be evaluated and aligned with the best-interests-of-the-child standard. On a local level, this includes the decisions and actions of the school governing body (SGB) responsible for governance, as well as school management and individual educators.

4. EVALUATION OF THE EXISTING LEGAL FRAMEWORK

The retributive and authoritarian approach to discipline is reflected in the legal framework and is evident from specific provisions of the *South African Schools Act* (“*Schools Act*”),⁴⁰ Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (“*Guidelines*”)⁴¹ and regulations related to discipline, which provisions are indicated below. The retributive philosophy underlying the existing legal framework is evident in the accusatorial and adversarial processes prescribed for formal disciplinary hearings, processes that are akin to those of the criminal justice system. Power over and control of children are distinguishing features of this approach. The empowerment of children through the recognition of children’s rights is a bone of contention for some educators, who are of the opinion that they were disempowered as a result of the abolition of corporal punishment and that children now have more rights than they do.⁴² Despite prescriptions in the Guidelines that discipline should be positive and educational in nature, the processes and suggestions to address misconduct are all punitive in nature and very little evidence exists that the focus should be to teach children to act in a socially responsible manner. Instead, punishment is prescribed and strong language is used, such as references to learners as “offenders” and to the fact that they should “suffer” the

³⁹ See ch 2, par 5.1.1.1.1, ch 6, par 3 herein.

⁴⁰ 84/1996.

⁴¹ GN 776/1998.

⁴² See ch 2, par 8.1.5 herein.

consequences of their conduct.⁴³ Furthermore, this approach focuses on the transgressor only by determining guilt and inflicting a suitable punishment. It is unable to change future behaviour effectively, because it focuses mostly on what happened in the past.⁴⁴ The whole mind-set and philosophy underpinning discipline should thus change.

The restorative-justice philosophy is proposed as a suitable replacement for the above-mentioned retributive philosophy underlying discipline. Discipline founded on the restorative-justice philosophy focuses on the needs of everyone involved in an incident (educators and learners). Thus the hostility and power struggles created by the retributive approach are eliminated. This restorative approach also has a clear prevention focus through the establishment of relationships and a caring school climate. Harm caused by misconduct is addressed and the restoration and rebuilding of relationships play an integral part in this approach. In addition, punishment is not excluded, but is not a primary focus. Instead, this approach has a specific educational aim and measures and steps to prevent future misconduct are included, as well as the creation of insight into the consequences and harm caused by misconduct.⁴⁵

In what follows, specific manifestations of the retributive approach, captured in the existing legal framework, will be highlighted and recommendations will be made to address these issues. This is in addition to the main recommendation that the philosophy underpinning school discipline should change. Without a fundamental change in the way discipline is addressed in schools, these recommended changes can also become merely cosmetic in nature. The existing legal framework, captured mostly in legislative provisions, should be amended to facilitate the move away from the retributive approach to discipline and towards a child-centred and restorative approach to school discipline.

4.1 Ineffective inclusion of children in the process of drafting the code of conduct

Section 8(1) of the *Schools Act*⁴⁶ provides that the SGB should draft a code of conduct after “consultation with the learners, parents and educators of the school”. Although this provision ostensibly provides for child participation in the drafting of the code of conduct, it is not clear what consultation entails.

⁴³ See ch 3, par 5.8.3 herein.

⁴⁴ See ch 6, par 3.1 herein.

⁴⁵ See ch 6, par 5.6, 5.7 herein.

⁴⁶ 84/1996:s 8(1).

Therefore, the danger exists that the processes followed to “consult” with learners in the drafting of the code of conduct may not meet the best-interests-of-the-child standard as informed by the child’s right to participate.⁴⁷ Other dimensions of the best-interests-of-the-child concept relevant here are that the legislation does not provide for frequent review of the code of conduct. Consequently, the code of conduct is at risk of becoming an outdated document which does not keep track of the varying needs of changing communities and societies. Lack of sufficient inclusion of learners in consultation processes touches on learners’ intrinsic worth and self-determination, the consideration of every learner’s interests and the ability to build relationships among all the stakeholders. Lack of consultation holds the risk that school rules or disciplinary processes could jeopardise access to education and may discriminate against vulnerable and minority groups.

Recommendations:

- Legislation and accompanying regulations should ensure that the process of drafting and reviewing a code of conduct is in line with the best-interests-of-the-child standard and the child’s right to participate.⁴⁸ These provisions should be clear on:
 - the frequency and extent of consultation;⁴⁹
 - allowing children to participate in all disciplinary matters affecting them;⁵⁰
 - the weight to be accorded to the voice of different groups of children and individual learners;⁵¹
 - having due regard to the child’s age, maturity and development, without unduly limiting the right to participate;⁵²
 - allowing individual learners as well as representation of learners in the consultation process;⁵³
 - eliminating possible role confusion of learner representatives on the SGB;⁵⁴
 - processes to elicit information from learners in an-age appropriate way;⁵⁵
 - the influence of learners’ voice on the content of the code of conduct;⁵⁶
 - the inclusion of the views and needs of minorities in the code of conduct;⁵⁷

⁴⁷ See ch 3, par 6.1 herein.

⁴⁸ See ch 5, par 6 herein.

⁴⁹ See ch 5, par 6.2.2.2 herein.

⁵⁰ See ch 5, par 6.2.2.5 herein.

⁵¹ See ch 5, par 6.2.2.3 herein.

⁵² See ch 5, par 6.2.2.3.3 herein.

⁵³ See ch 5, par 6.2.2.2 herein.

⁵⁴ See ch 5, par 6.2.2.2 herein.

⁵⁵ See ch 5, par 6.2.2.2 herein.

⁵⁶ See ch 5, par 6.2.2.3.2 herein.

- providing clear guidance on what the appropriate way to participate will be by creating, *inter alia*, appropriate structures and processes for child participation.⁵⁸
- Extensive research should be conducted to determine the extent of learner participation in the drafting of the code of conduct, as well as the impact of excluding learners from this process, from the perspective of all stakeholders but of learners specifically.
- Furthermore, the research should investigate the issues that learners would want to be addressed in a code of conduct, as well as children's desired level of participation in drafting the code. This should assist policy-makers to make better-informed decisions on learner participation in the drafting of the code of conduct.
- A concerted effort should be made to facilitate learners' participation in the proposed redrafting of legislation, regulations and guidelines pertaining to discipline.

4.2 Creation of a safe environment conducive to teaching and learning

Section 8(2) of the *Schools Act*⁵⁹ provides for the establishment of:

a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.

This provision is, at first glance, in line with the best interests of the child. However, it requires clarification and elaboration. A more critical reading, informed by the real-life situation in schools and a critical reading of the Guidelines, reveals that, if this provision is read against the backdrop of a generally retributive approach to discipline, it is open to an interpretation consistent with authoritarianism, control, uniformity and punishment.⁶⁰ An orderly environment is indeed necessary, but not for purposes of mere control over learners. Rather, it should ensure the holistic development of the child and teach the child to act in a socially responsible manner, respecting the human rights of others. Unlawful measures used to create order and to maintain quality of education, such as corporal punishment, are in conflict with the notion of a safe environment. Without appropriate elaboration on this provision in legislation, regulations and guidelines, the provision fails to adequately steer decision-makers away from the retributive

⁵⁷ *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC); *Antonie v Governing Body, Settlers High School, and Others* 2002 (4) SA 738 (C).

⁵⁸ See ch 5, par 6.2.2.6 herein.

⁵⁹ 64/1996.

⁶⁰ See ch 3, par 8.8.3.1 herein.

approach and to have due regard for the development of the child through the school environment.

Recommendations:

- Legislation, regulations and guidelines should clearly indicate the inappropriateness of a retributive approach to discipline, explicitly highlighting all the dimensions of a retributive approach to discipline.⁶¹
- Specific attention should be given to the psychological and emotional safety of learners and not only the physical safety of children. This implies that the legislation, regulations and guidelines should highlight the need to create calm school environments free of fear, anxiety and hostility created through, *inter alia*, disciplinary measures.

4.3 Provision of guidelines to assist school governing bodies in the drafting of a code of conduct

Section 8(3) of the *Schools Act*⁶² provides that the Minister has a discretion to determine guidelines for the consideration of SGBs in adopting a code of conduct. However, it is also apposite to assist SGBs and school management to stay abreast of legal and other developments related to school discipline to ensure that effect is always given to the best-interests-of-the-child standard. Furthermore, the lack of knowledge, skills and access to legal sources that many SGBs experience must be kept in mind.⁶³ This creates a real risk that codes of conduct in many schools will not be in line with the best-interests-of-the-child standard and will not be amended timeously. It is thus not in the best interests of children to afford the Minister a discretion to provide guidance.

Recommendation:

- The Minister must be compelled, through legislation, to draft regulations and guidelines for consideration by SGBs. These regulations and guidelines must be reviewed annually to ensure that the latest developments in the law and other fields, such as psychology, are reflected therein. This will ensure that prescriptions related to the best interests of the child are regularly updated for implementation by schools and SGBs.

⁶¹ See ch 6, par 3 herein.

⁶² 84/1996.

⁶³ See ch 2, par 8.6.1 herein.

4.4 Provisions of the Guidelines for the drafting of a code of conduct

The Guidelines published to assist SGBs to draft a code of conduct are outdated and do not reflect any legal developments since 1998. Currently, they are not suitable for steering SGBs and schools away from a retributive approach and towards adherence to the best-interests-of-the-child standard. Although the Guidelines proclaim the use of non-punitive measures, they do not provide any tangible guidelines regarding appropriate alternatives, they use authoritarian language, and they contradict themselves by prescribing only punitive alternatives. They also do not even provide the most basic of definitions pertaining to alternative approaches to discipline.⁶⁴ Furthermore, the Guidelines have no binding legal effect and *may* be considered by SGBs,⁶⁵ thus opening the door for codes of conduct not adhering to the minimum requirements of the best-interests-of-the-child standard.

International documents such as General Comment 13 of the Committee on Economic, Social and Cultural Rights (CESCR)⁶⁶ and General Comment 8 of the Committee on the Rights of the Child⁶⁷ are equally vague as to what would constitute acceptable disciplinary measures. These documents mostly prohibit corporal punishment and cruel or degrading forms of punishment, but do not give clear guidance on what exactly constitutes positive discipline or other disciplinary measures which not only respect and protect human rights, but also promote and fulfil human rights and the best interests of the child in particular.

Recommendations:

- A clear distinction should be made between enforceable legislation and regulations on the one hand and guidelines on the other. Regulations should be drafted to ensure that legislation regarding the drafting of the code of conduct is implemented in accordance with the best-interests-of-the-child standard.
- Guidelines should merely assist SGBs to draft a code of conduct in accordance with the best-interests-of-the-child standard. Thus SGBs should have discretion with regard to the content of a code of conduct only in so far as this discretion is aligned with the requirements set in the legislation and regulations.
- Legislation, regulations and guidelines should be much more directive in nature in order to consciously guide schools away from a punitive system to a constitutionally compliant system which will be in the child's best interests.

⁶⁴ See ch 3, par 5.8.3 herein.

⁶⁵ GN 776/1998:preamble.

⁶⁶ CESCRGC 13 1999:par 41.

⁶⁷ CRCGC 8 2006.

- Legislation should also ensure that not only it, but also the regulations and guidelines with regard to school discipline remain in line with developments in other areas of child law such as child care in terms of the *Children's Act*⁶⁸ and child justice in terms of the *Child Justice Act*.⁶⁹
- The Guidelines should provide proper definitions of the proposed approach to discipline and should provide proper guidance on its implementation.⁷⁰
- International guidance in the form of general comments, especially by the Committee on the Rights of the Child, should be drafted to give states parties more explicit guidance on what would constitute acceptable disciplinary measures. Existing general comments relevant to school discipline do not have an explicit focus on school discipline, but deal primarily with other issues such as the right to education⁷¹ and to development,⁷² the child's right to be heard⁷³ or the prohibition of corporal punishment and cruel, inhuman or degrading forms of punishment.⁷⁴
- In such a general comment on school discipline, special attention should be given to the underlying philosophy of discipline and to steering states parties away from retribution, power, control and authoritarianism towards relationship-building, teaching children to act in a socially responsible manner, and enhancing learners' responsibilities by prescribing the necessity for children to learn to address the harm caused by their actions. The provisions should guide states parties towards compliance with all the factors indicating the best interests of the child. General comments and guidelines on school discipline should provide more detail on the content of different human rights related to school discipline. For instance, the right to dignity has numerous dimensions, and many of these dimensions are relevant to school discipline. Consequently, they should be explicitly highlighted to ensure that children are afforded the full ambit of these rights when realised and to prevent a narrow interpretation of a specific right. On the other hand, without proper content, claims can be made in terms of rights which do not exist, that is, if rights are interpreted too widely.

⁶⁸ 38/2005.

⁶⁹ 75/2008.

⁷⁰ See ch 3, par 5.8.3 herein.

⁷¹ CRCGC 1 2001; CESCRGC 13 1999.

⁷² CRCGC 4 2003.

⁷³ CRCGC 12 2009.

⁷⁴ CRCGC 8 2006.

4.5 Exemptions in respect of compliance with the code of conduct

Section 8(4) of the *Schools Act*⁷⁵ provides as follows:

Nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct of the school attended by such learner.

This is in sharp contrast with the findings of the Constitutional Court in *MEC for Education, KwaZulu-Natal, and Others v Pillay* (“*Pillay case*”)⁷⁶ and is not in line with several factors related to the best-interests-of-the-child standard, namely: the holistic development of the child; to be taught to act in a socially responsible manner; to address the needs of everyone; to give effect to the child’s dignity; non-discrimination; participation; building and repairing relationships; and not jeopardising access to education. The said provision in the *Schools Act* also indicates an inflexibility to adapt to the needs of varying societies and communities and to changing societies and communities.

Recommendation:

- Legislation, regulations and guidelines should be clear on the need to allow learners to apply for exemptions from school rules. The principles laid down for exemptions from school rules in the *Pillay*⁷⁷ case should be explicitly specified in the regulations and Guidelines.

4.6 Support measures or structures for counselling

Section 8(5)(b) of the *Schools Act*⁷⁸ prescribes that the code of conduct should provide for support measures or structures for counselling learners involved in disciplinary proceedings. However, this provision is flawed in a number of respects, including the following: the ambit of the phrase “support measure or structures for counselling” is unclear;⁷⁹ and the word “or” is used, allowing SGBs a discretion to provide only one of the measures, something which might be contrary to the best interests of a particular learner or group of learners. The provision also does not take account of the economic and social realities of schools that do not have the financial means or human capital to provide these services.

⁷⁵ 84/1996.

⁷⁶ 2008 (1) SA 474 (CC); see also ch 3, par 5.5.5.3 herein.

⁷⁷ 2008 (1) SA 474 (CC); see also ch 3, par 5.5.5.3 herein.

⁷⁸ 84/1996.

⁷⁹ See ch 3, par 6.4 herein.

This provision is not in line with the best-interests-of-the-child standard on the following grounds: it is not aligned with the holistic development of the child or with assisting the child to learn to act in a socially responsible manner; it does not contribute to the creation of a physically and emotionally safe environment; it infringes on the dignity of individuals and the collective; it does not contribute adequately to relationship-building or to repairing relationships; it can impact on learners' access to education and on the availability of education; and it hampers learners' right to life, survival and development.

Recommendations:

- Provisions, including legislation, regulations and/or guidelines, with regard to support measures and structures should be amended and should address the following matters:⁸⁰
 - Clarify the term “support measures or structures for counselling learners”.
 - Eliminate the choice of providing only one of the two in the discretion of the SGB. Both should be available and accessible.
 - Clarify the roles of educators in providing the support measures, structures for counselling services and social services.
 - Indicate what support can be provided by educators and what level of training is required.
 - Ensure that all these services are available to all learners as a prevention strategy, as well as a measure to address the needs and interests of all those learners involved in formal and informal disciplinary matters.
 - Take steps to guide the establishment of networks to ensure that learners have access to support measures and counselling services provided by other state departments and other service providers.
 - Indicate the acceptable level or type of support measures or structures for counselling which should be provided in different situations, and indicate who is primarily responsible for providing these. Thus, clarify the respective roles of the state and the SGB. Provision of these services should be regarded as, first and foremost, the responsibility of the state and not the SGB, for the SGB does not necessarily have access to the financial and human resources for such provision. However, this does not absolve the SGB from the obligation to assist in providing these services for learners.

⁸⁰ See ch 5, par 2.2.4.1.1.1, 2.2.4.1.5, 2.2.4.2.4, 2.2.4.3.2, 3.3.3, 3.3.6, 4.3.2, 4.3.7, 5.3.2 herein.

- Support measures and structures for counselling services should, in particular, provide for services to learners who have been subjected to unlawful disciplinary practices such as corporal punishment.⁸¹

4.7 Formal disciplinary proceedings

Formal disciplinary proceedings, as provided for in section 8(5)(a) and 8(8) of the *Schools Act*, are adversarial in nature with a consequent focus on the transgressor.⁸² The focus is primarily on due-process interests and not on the other interests of learners.⁸³ This provision also does not distinguish between the due-process needs and interests of adults and children who may be affected by the misconduct. The approach is very narrow, because the other needs and interests of child victims and children who are third parties to the misconduct are not mentioned. The legislation does not provide for any alternative process, such as a restorative process to deal with instances where transgressors admit responsibility for their actions.

These provisions of the *Schools Act* do not comply with the best-interests-of-the-child standard, because they do not have an explicit focus on the holistic development of the child during the process. Furthermore, they do not focus on: teaching the development of responsible conduct; addressing the needs and interests of all the children involved in the process; and safeguarding and promoting the dignity of all involved. They also do not foster child participation and do not encourage learners to take responsibility for their actions and to address the harm they have caused. Instead, the provisions focus on finding the transgressor guilty within the confines of due process, and do not facilitate the repair of relationships after a hostile disciplinary hearing. The outcome of this process, namely a possible suspension or expulsion, can further impact on the learner's access to education and on the availability of education.

Recommendations:

- Provisions regarding formal disciplinary proceedings should safeguard not only the due-process interests of learners, but also all the other interests of all learners directly and indirectly affected by the misconduct.⁸⁴
- Alternative processes aligned with the best interests of the child, such as restorative processes, should be available to learners who accept responsibility for their actions.⁸⁵

⁸¹ CRCGC 8 2006:par 43.

⁸² See ch 3, par 6.2 herein.

⁸³ See ch 3, par 6.3 herein.

⁸⁴ See ch 4, par 4.1, 4.2, 4.4 herein.

⁸⁵ See ch 6, par 5.7.7, 5.9.3 herein.

- Sanctions such as suspensions and expulsions should be limited to instances where learners pose a danger to others and/or their needs and interests cannot be properly met in a particular school but can be better addressed in another education institution.
- On the other hand, the interests of the other learners, in particular the right to education, should be properly accounted for in any decisions. The undue protection and overemphasis of the rights of transgressors at the expense of the best interests of other learners should be highlighted.

4.8 The role of the intermediary in formal disciplinary proceedings

Although the inclusion of provisions for the appointment of an intermediary in terms of section 8(7) and (8) of the *Schools Act*⁸⁶ are laudable, they do not necessarily comply with the best-interests-of-the-child standard. Their practical implementation is further hampered by the lack of regulations to guide the process of appointment of intermediaries.⁸⁷ Furthermore, the provisions require the appointment of an intermediary only in instances where it is “practicable”, which opens the door for unequal outcomes of similarly situated learners. This is not compatible with the requirement of the equal best interests of all children.

Recommendations:

- Existing legislation should be amended to ensure compliance with the best-interests-of-the-child standard, especially with regard to substantive equality.
- Proper regulations must be drafted on the appointment of intermediaries. However, since these regulations will be implemented by members of the SGB who do not have legal training, the regulations should be detailed enough to guide their proper application.

4.9 Decisions of the Head of Department after an expulsion is recommended

Section 1(D) of the *Schools Act*⁸⁸ provides that the Head of Department (HoD) must consider the recommendation of the SGB within 14 days of receiving it. However, there are examples of HoDs not complying with this provision.⁸⁹ This leaves the school, and the learner who faces an expulsion, in the dark, which is clearly not in the best interests of anyone. This position is further exacerbated by the provisions of section 1(E) of the *Schools Act*⁹⁰ which allow SGBs to suspend

⁸⁶ 84/1996.

⁸⁷ See ch 3, par 6.5, ch 5, par 5.3.4.6 herein.

⁸⁸ 84/1996.

⁸⁹ See ch 3, par 5.9.2 herein.

⁹⁰ 84/1996.

or extend a precautionary suspension, for 14 days only. The HoDs' disregard for the legislative provisions regarding a decision within 14 days has an impact on the dignity of those involved, in particular the transgressing learner who is uncertain as to his or her future. Moreover, it impacts on the learner's access to education.

Recommendation:

- Schools, SGBs and transgressing learners should have legal certainty and affordable recourse to have the matter resolved if the HoD fails to respond timeously, for instance to have the Member of the Executive Council (MEC) or an independent body finalise the matter.

4.10 The duty of the Head of Department to find an alternative placement for expelled learners of compulsory school-going age

Section 9(5) of the *Schools Act*⁹¹ provides that, if a learner of compulsory school-going age is expelled, the HoD has to find an alternative placement for the learner.⁹² This, however, poses a few problems, which include the misuse of power by HoDs who refuse expulsions on frivolous grounds, thus escaping responsibility for finding alternative placement for the transgressing learner.⁹³ There are no guidelines stipulating what the HoD should take into account in deciding whether to expel a learner or not, which opens the door for unreasonable and subjective decision-making. If the expulsion is refused, the school is compelled to take the learner back and to deal with the learner, without assistance from the Department. Alternatively, the school can approach the court to review the decision. The lack of support measures and counselling services has already been highlighted.

This provision also distinguishes between children above 15 years of age and those under 15 years of age, and between learners posing disciplinary problems and those who do not pose disciplinary problems. Apart from discrimination on a listed prohibited ground, namely age, the provision also constitutes discrimination on an unlisted ground, which has an impact on the dignity of learners (e.g. a learner with behavioural problems) and this despite the fact that the best interests of all children under the age of 18 years should be regarded as of paramount importance.⁹⁴

⁹¹ 84/1996.

⁹² See ch 3, par 6.7, ch 5, par 4.3.5, 4.3.6 herein.

⁹³ See ch 3, par 5.9.2 herein; see also *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government, and Others* Eastern Cape Provincial Division: unreported case 454/08.

⁹⁴ See ch 5, par 5.3.5, 5.3.6 herein.

These provisions of the *Schools Act*⁹⁵ are further contrary to the following dimensions of the best interests of the child standard, namely the intrinsic worth of children, non-discrimination, the availability of support measures and structures for counselling, access to education, and the right to development.

Recommendations:

- The proposed list of factors indicating the best interests of the child should be used by the HoD to decide on the expulsion or not. It should also be used to guide any appeal processes by the transgressing learner or SGB. Courts should also apply it to determine the reasonableness of the HoD's decision.
- The HoD should be responsible for finding a suitable alternative placement for all expelled learners under the age of 18 years. If a child is not of compulsory school-going age and chooses to continue with his or her education, the Department must assist the learner.
- The alternative placement should not only address the academic needs of the child, but should also be suitable for addressing the causes of the misconduct. If these services cannot be provided at a specific school, the Department of Education should ensure that the learner has access to the necessary support measures, counselling and social services to address all the learner's needs and interests related to the misconduct.

4.11 Limitation of the School Governing Body's right to appeal decisions of the Head of Department

Section 9(5) of the *Schools Act*⁹⁶ provides that, if the HoD decides to expel a learner, the learner or parent of the learner can appeal to the MEC. The SGB, on the other hand, may only take the decision of the HoD not to expel on review to the courts, since the legislation does not provide for the possibility of the SGB appealing to the MEC or the courts.⁹⁷ This has financial implications for schools and can negatively impact schools' ability to challenge the decisions of the HOD in order to ensure that the best interests of all learners are respected, protected, promoted and fulfilled.

This is not in line with the requirements set in the list of factors indicating the best interests of the child, in particular the need to address all the needs of all the learners on an equitable basis.

⁹⁵ 84/1996.

⁹⁶ 84/1996.

⁹⁷ See ch 3, par 6.6, ch 5, par 4.3.4 herein.

Recommendations:

- Decisions to expel a learner should be made by an independent body, such as an ombudsman, arbitrator or a school discipline commission, and not by the HoD or MEC of the Department of Education to ensure that there is no misuse of power.
- An inexpensive appeal process should be available for all parties to deal with appeals before they need to approach the courts for relief.

4.12 Lack of measures to deal with children after any form of suspension or during detention

After a learner is suspended as a precautionary measure or is suspended pending the decision of the HoD, the learner lawfully does not attend school. There are currently no legal prescriptions to direct what measures must be taken while the learner is not attending school. However, it serves no purpose to have any form of out-of-school or out-of-class suspension, expulsion or detention if the time is not used constructively to address the root causes of the problem and/or to address the harm caused by the misconduct.

The lack of provisions in this regard is contrary to the following requirements of the best-interests-of-the-child standard, namely: the holistic development of the child; teaching the child to act in a socially responsible manner; the dignity of all involved; fostering accountability and responsibility; providing support measures and structures for counselling; being flexible in addressing the needs of different learners; and ensuring quality of life for the transgressing learner.

Recommendation:

- Legislation and regulations should prescribe proper procedures indicating what should happen to a child while suspended or expelled from class or school. These procedures should ensure that proper effect is given to respecting, protecting, promoting and fulfilling the rights of the learner. Possible provisions can include compulsory evaluations by professionals to determine the causes of the misconduct and the needs and interests of the learners and to provide the necessary support and counselling for the learner. Harm caused to others should also be addressed while the transgressing learner is expelled or suspended. The procedures should also make provision for the proper reintegration of the suspended learner into the school or into a new school environment when the learner is expelled and

alternative placement is necessary.⁹⁸ Measures taken while the learner is suspended must be aligned with the aims of discipline, namely to enhance the holistic development of the child and to ensure that the child learns to act in a socially responsible manner.

4.13 The best interests of the child as opposed to the best interests of the school

The *Schools Act*⁹⁹ provides that the SGB is responsible for promoting the best interests of the school, while the Constitution lays down that the best interests of every child are of paramount importance. Therefore, the SGB has an obligation to ensure that any decisions taken in the context of school discipline optimise the best interests of all the learners and groups of learners in the school. The Constitutional Court¹⁰⁰ has also held that not only the interests of children of the particular school should be considered, but also the interests of children in the community at large. This would require a proper balancing of every child's needs and interests as well as the best interests of the larger school community. This can only be achieved if there is focused attention on all the competing needs and interests during the decision-making process.¹⁰¹

Recommendation:

- These broadened responsibilities of the SGB should be captured in legislation or regulations to ensure proper compliance and that children's best interests are secured.

4.14 Provisions regarding corporal punishment

The continued application of corporal punishment, its negative impact on learners, and its contribution to school violence, as well as the fact that it impacts on several human rights of learners, have been highlighted.¹⁰² Although section 10 of the *Schools Act*¹⁰³ prohibits corporal punishment, it does not provide a definition of corporal punishment. The definition provided by the Department of Education is very narrow and refers to physical punishment only. This definition is not in line with the international prescriptions of General Comment 8 of the Committee on the Rights of the Child.¹⁰⁴

⁹⁸ See ch 6, par 5.6.2, 5.6.5, 5.6.8 herein.

⁹⁹ 84/1996:s 20(1)(a), see ch 3, par 6.8, ch 4, par 4.2.1 herein.

¹⁰⁰ *Head of Department Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC):par 80.

¹⁰¹ See ch 4, par 4.3, 8.1 herein; see also *S v M* 2007 (2) SACR 539 (CC):par 33.

¹⁰² See ch 2, par 5.1.1.1.1, 7.1 herein.

¹⁰³ 84/1996:s 10.

¹⁰⁴ CRCGC 8 2006:par 16.

Educators found guilty of inflicting corporal punishment should be sentenced as if found guilty of assault. The legality of the provision is questionable in the absence of a clear definition of what constitutes corporal punishment, and this opens the door for acquittals on technical grounds.

Recommendations:

- Legislation should include a clear definition of what constitutes corporal punishment, which definition should be aligned with the international standard. Specific attention should be given to non-physical forms of punishment and to cruel, inhuman and degrading treatment such as belittlement, sarcasm and humiliation.
- Given the fact that children are a vulnerable group and that educators act from a position of authority and power, sentences for using corporal punishment should reflect its seriousness and detrimental impact. Minimum sentences for corporal punishment can be considered in order to emphasise the condemnation of such conduct and that the educator's actions are contrary to the constitutional imperative to create a non-violent society. Thus the community at large is harmed through his or her actions.
- On the other hand, in the spirit of restorative justice, educators who still use corporal punishment should be afforded an opportunity to take responsibility for their actions and to address the harm caused through the infliction of corporal punishment. Therefore, legislative provisions should provide for an alternative response to the unlawful actions of educators who admit their guilt. The normal criminal processes with punitive outcomes should be applicable to those who are unwilling to accept responsibility for their actions.
- The lawfulness of other forms of punishment, such as out-of-class suspensions, merit and demerit systems, and detention should be investigated and measured against their compatibility with the best interests of the child. Legislation and regulations should be clear on the application of such other forms of punishment and on the conditions for applying these measures so as to be regarded as lawful and in accordance with the best-interests-of-the-child standard.

4.15 Lack of focus on informal discipline

The legislative provisions regarding school discipline focus on formal disciplinary proceedings only. There is nothing in the *Schools Act*¹⁰⁵ which provides clarity as to informal disciplinary measures applied by educators on a daily basis. The provisions in the Guidelines, as mentioned above, are also not adequate. To determine what would be in line with the best-interests-of-the-

¹⁰⁵ 84/1996.

child standard is currently left to the discretion of the educator and the SGB, the latter being responsible for the drafting of the code of conduct.

Recommendations:

- Explicit provisions with regard to informal discipline should be included in legislation, regulations and guidelines to steer informal disciplinary measures away from a retributive approach.
- A restorative approach would be an acceptable alternative and should be included in these provisions to prevent misconduct and to address it after its occurrence.

4.16 Admission policies

Currently, legislation and regulations with regard to admission are contradictory, with legislation allowing learners under the age-grade norm to be admitted to schools.¹⁰⁶ The large numbers of underage learners is illustrated in table 1 in chapter 2.¹⁰⁷ These learners tend to clog the education system and contribute to high repetition rates and large classes, which impact negatively on discipline. It is thus apposite to ensure that learners who are not ready to start on a formal school career are not admitted to schools, because the risks of repetition, disciplinary problems and eventual dropout increase, which is not in line with the best interests of these children..¹⁰⁸

Recommendations:

- The legislation and regulations should be aligned and should ensure that only learners who are ready to access formal education are admitted.
- Regulations should be implemented properly.

4.17 Policy on promotion to the next grade

Current policies prescribe that learners may repeat only one grade in every phase. Thus learners are promoted without attaining the academic outcomes of a particular grade. The policy states that the repetition of grades “seldom results in significant increases in learning attainment”. Therefore, repetition is almost outlawed by the policy, although it states that this is not the intention of the policy. It is thus fair to deduce that learners would not have any motivation to take responsibility for their own learning, which impacts on discipline. For instance, in terms of this policy, there is no incentive for doing homework or for paying attention

¹⁰⁶ See ch 3, par 5.1.3 herein.

¹⁰⁷ See ch 2, par 8.4.7 herein.

¹⁰⁸ See ch 3, par 5.13, 6.11 herein.

in class, because learners know that they cannot repeat grades. Yet, there is no research on the impact of this policy on learners' motivation to take responsibility for their own learning and the other requirements of the best-interests-of-the-child standard. There is also no definitive research on the impact of this policy on school discipline.

On the other hand, research also indicates that the repetition rate in South African schools is higher than the international standard.¹⁰⁹ It is also evident from tables 1 and 2 in chapter 2 that there are large numbers of overage learners and that the age differentials are exceptionally high, exceeding the limit of a maximum of three years above the age-grade norm by quite a margin. The tables also reveal the number of learners above 18 years of age not protected by the best-interests-of-the-child imperative. Yet, the *Schools Act*¹¹⁰ does not contain any provisions to secure or balance the best interests of children against those of adult learners.

The lack of provisions to balance the best interests of children as opposed to the interests of adult learners is in sharp contrast to the best-interests-of-the-child requirements regarding the holistic development of the child, teaching the child to act responsibly, dignity, quality of life and optimising the best interests of children.¹¹¹

Recommendations:

- The educational soundness of the policy should be investigated, especially within the South African context where the availability of support for learners with learning difficulties and class sizes are, for instance, not on a par with what is available in developed countries.
- The impact of this policy on school discipline should be investigated.
- The research results, together with the best-interests-of-the-child requirements, should be used to inform amendments to regulations, if necessary.
- The quality of education should be improved in order to reduce the number of learners repeating grades, and to improve the unacceptable academic outcomes of the education system.¹¹²
- Measures should be introduced to safeguard the interests of children when they are receiving education with adult learners. In addition, the reality of huge age differentials should also be addressed in legislation.

¹⁰⁹ See ch 2, par 8.4.6 herein.

¹¹⁰ 84/1996.

¹¹¹ See ch 4, par 4.3.

¹¹² See ch 2, par 2 herein.

- School policies should provide that learners are enrolled in a school until they reach the age of 18 years. At that stage, they can reapply to continue their education in the school. Their conduct until that stage should play a significant role in the decision to readmit them to the school. In addition, from then on, they should apply annually for readmission as an overage learner. This might contribute to learners' sense of responsibility to behave in a socially responsible manner to ensure readmission. This is also in line with the notion that children do not only have rights, but also duties, and that non-compliance with these duties will have consequences in the long run. It will also ensure that the rights of learners who are under the age of 18 years' are duly prioritised in relation to the rights of those who are not protected by the provisions of section 28(2). Yet, this is a very simplistic solution to a politically charged context. Furthermore, this solution may be too simplistic to give due cognisance to: the overage learner's right to education, dignity and equality; the influence of a lack of alternative modes of education to address the needs of these adult learners; the limited number of Further Education and Training Colleges; and the low quality of education. It is therefore recommended that a proper research project should be launched to gather enough statistical and social information to inform legislative reform in this regard.

4.18 Role of the South African Council for Educators

Educator misconduct, which includes the use of corporal punishment, should be reported to the South African Council for Educators (SACE). However, it is clear that not all incidents of corporal punishment are reported, and that reporting mechanisms are not well known to parents and learners. In addition, the unacceptably high turnaround time for finalisation of complaints by the Council is indicative of its lack of efficiency.¹¹³

Recommendations:

- Existing legislation pertaining to the reporting of the use of corporal punishment should be implemented properly.¹¹⁴ To enhance compliance with the reporting duty, non-compliance with this duty should also constitute misconduct on the part of principals and fellow educators. All educators, as professionals, should be held accountable for allowing infringements of children's rights.
- Legislation should contribute to the effectiveness of the SACE and should therefore set strict time limits for responding to complaints and finalising disciplinary action

¹¹³ See ch 2, par 8.1.2 herein.

¹¹⁴ See ch 2, par 8.1.2.

against educators. Failure in this regard will allow offending educators to continue infringing on the best interests of learners exposed to them.

- Reporting mechanisms in respect of educator misconduct should be made more accessible to parents, learners and the general public. School management should thus be obliged, through legislation, to inform parents and learners annually of the reporting mechanisms available to them. These provisions should clearly set out what constitutes educator misconduct in the context of school discipline.
- The responsibility of SGBs to curb corporal punishment and other forms of punishment not compatible with the best-interests-of-the-child standard should be increased. The liability of SGB members who fail to report educators who use unlawful disciplinary methods should be outlined properly in legislation and regulations. Research in this regard should be conducted to inform proper policy amendments.
- Yet, this approach would probably perpetuate hostile relationships between educators and learners and could contribute to the disempowerment of educators. Legislation should thus make provision for alternatives such as locally facilitated restorative processes to deal with educator misconduct.

4.19 Parents' role in school discipline

Parents' role in school discipline is not clearly set out in the legislation. Some of these aspects include the consultation process to draft the code of conduct and the role of parents during a formal disciplinary hearing.¹¹⁵ Parents are primarily responsible for the upbringing of their children and should play an integral part in securing the best interests of the child in the context of school discipline.

Recommendation:

- The role of parents in securing the best interests of their children in the context of school discipline warrants an independent study to inform amendments to existing legislation. These amendments should include clear descriptions of what parents' role should be and of measures to determine the balance between parental rights and responsibilities on the one hand and children's rights on the other.

4.20 Training

If the recommendations set out above are followed and legislation, regulations and guidelines are amended, educators, school management, SGBs, parents and learners should be properly

¹¹⁵ *Schools Act 84/1996:s 8(1), (6).*

informed about this. Specific attention should be given to training regarding alternatives to corporal punishment. The use of restorative-justice practices is recommended in this regard, but its successful implementation is dependent on proper training.

4.21 Establishment of a school discipline commission or other monitoring mechanism

There is currently no independent body which focuses explicitly on the promotion of school discipline in accordance with the best-interests-of-the-child standard. Furthermore, expensive court proceedings are the only recourse for SGBs or learners who are the victims of misconduct or who are aggrieved by the decisions of the HoD. The same applies to informal disciplinary measures which are not compatible with the best-interests-of-the-child standard.

Recommendations:

- The establishment of a school discipline commission and/or an ombudsman or arbitrator office for school discipline is recommended. This is in line with General Comment 2 of the Committee of the Rights of the Child, which encourages the establishment of independent national human rights institutions to “promote and ensure the implementation of the Convention”.¹¹⁶
- The activities of a school discipline commission should be in line with the recommended activities set out in General Comment 2 of the Committee on the Rights of the Child.¹¹⁷
- Such a school discipline commission should focus in particular on: the adequacy of disciplinary measures; fostering and promoting accountability of educators and learners with regard to school discipline; raising awareness with regard to human rights violations and infringements of the best interests of the child in school discipline matters; and carrying out advocacy for disciplinary measures that comply with the best-interests-of-the-child standard.¹¹⁸
- It is explicitly recommended that such a school discipline commission be endowed with enough power to investigate school discipline and either make recommendations to the relevant authorities and/or preferably be in a position to finalise the matter.¹¹⁹
- The aim of the school discipline commission or monitoring mechanism should be to decrease hostility among educators, parents and learners and to steer schools and policy-makers away from a retributive approach to discipline. Further, it should aim

¹¹⁶ CRCGC 2 2002:par 1.

¹¹⁷ CRCGC 2 2002:par 19.

¹¹⁸ De Groof & Lauwers 2009:25.

¹¹⁹ CRCGC 2 2002:par 13.

to facilitate programmes and processes to build and rebuild relationships among the stakeholders in education, ultimately focusing on the best interests of the child and the realisation and promotion of the human rights of all involved. The empowerment of educators to use alternatives to corporal punishment and other unlawful practices should be a clear focus of the commission or monitoring mechanism.¹²⁰ Such a monitoring mechanism should also have a clear restorative-justice approach to discipline.

- Appropriate measures should be taken to ensure proper access to such a school discipline commission or other monitoring mechanism. Children should be afforded child-sensitive advice, advocacy and assistance in any legal action taken with regard to discipline.¹²¹
- The school discipline commission should evaluate existing programmes and practices in schools to determine compatibility with the best-interests-of-the-child standard and ensure that programmes are developed in accordance with this standard.¹²²
- The monitoring and evaluation functions of the school discipline commission should include independent reporting to Parliament or other bodies and the Committee on the Rights of the Child to ensure progression in the eradication of disciplinary measures that are incompatible with the best interests of the child.¹²³
- General Comment 8 of the Committee on the Rights of the Child provides that states parties should develop appropriate indicators to facilitate the monitoring and realisation of children's rights.¹²⁴ The list of factors indicating the best interests of the child developed in this study can be a useful starting point for the development of such indicators for monitoring the realisation of the best interests of the child within the context of school discipline.

4.22 Establishment of an independent body for appeals and other decisions

The possibility of misuse of power is illustrated by the refusal of HoDs to expel learners and by the limited availability of affordable appeal processes for SGBs, as was highlighted above.¹²⁵

¹²⁰ CRCGC 8 2006:par 44-49.

¹²¹ CRCGC 2 2002:par 13,14; CRCGC 8 2006:par 43.

¹²² CRCGC 8 2006:par 48.

¹²³ CRCGC 8 2006:par 50-52.

¹²⁴ CRCGC 8 2006:par 50.

¹²⁵ See par 4.9-4.11 above.

Recommendations:

- Alternatively, or in addition to the school discipline commission, an ombudsman or arbitrator should be appointed to deal independently with decisions regarding the expulsion of learners and any other complaints regarding school discipline which constitute human right violations and infringements of the best interests of the child.
- Procedures should provide that courts only be approached as a measure of last resort.

5. CONCLUSION

The Constitutional Court held as follows in *Centre for Child Law and Others v MEC for Education, Gauteng, and Others*:

As a society we wish to be judged by the humane and caring manner in which we treat our children. Our Constitution imposes a duty upon us to aim for the highest standard, and not to shrink from our responsibility.¹²⁶

It is evident from this study that the state of discipline in schools is worrying at the least, and is heading towards a crisis if the necessary interventions are not undertaken. It is also clear that the current retributive approach to discipline is not compatible with the best-interests-of-the-child standard captured in the identified factors and indicating the best interests of the child in the context of school discipline. To change the mind-set of those who have to instil and maintain discipline in schools is a mammoth task. Yet, the legislator can play an important role in steering decision-makers away from a retributive approach to discipline towards a restorative approach to discipline. Failing to heed the call for the humane and caring treatment of children in the context of school discipline would be contrary to the constitutional imperative of the paramountcy of the best interests of the child.

¹²⁶ 2008 (1) SA 223 (T):228.

REFERENCES

A

ABRAMJEE Y

2012. Late Coming Sets Education Back. We Need to Bring Back Basic Discipline. *Star*. 22 February:35.

ACHPR [SEE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS]

ACRWC [SEE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD]

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

1981. Organization of African Unity. OAU doc CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf (Retrieved 2/7/2012)

AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD.

1990. Organization for African Unity. OAU doc. CAB/LEG/24.9/49 (1990).
<http://www1.umn.edu/humanrts/africa/afchild.htm> (Retrieved 2/7/2012)

ALBERTYN C

2005. Equality. In *South African Constitutional Law: The Bill of Rights* edited by MH Cheadle, DM Davis & NRL Haysom. 2nd edition. Durban: LexisNexis.

ALBERTYN C & GOLDBLATT B

1998. Facing the Challenges of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality. *South African Journal on Human Rights* 14(2):248-276.

2007. Equality. In *Constitutional Law of South Africa* edited by S Woolman, M Bishop & J Brickhill. Cape Town: Juta.

ALDERSON P

2000. UN Convention on the Rights of the Child: Some Common Criticisms and Suggested Responses. *Child Abuse Review* 9(6):439-443.

ALEXY R

2005. Balancing, Constitutional Review and Representation. *International Journal of Constitutional Law* 3:572-581.

2009. On Constitutional Rights to Protection. *Legisprudence: International Journal for the Study of Legislation* 3(1):1-17.

ALSTON P

1994. The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights. *International Journal of Law and the Family* 8(1):1-25.

ALUEDE O, ADELEKE F, OMOIKE D & AFEN-AKPAIDA J

2008. A Review of the Extent, Nature, Characteristics and Effects of Bullying Behaviour in Schools. *Journal of Instructional Psychology* 35(2):151-158.

AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE

2008. Are Zero Tolerance Policies Effective in the Schools? *American Psychologist* 63(9):852-862.

AMSTUTZ LS & MULLET JH

2005. *The Little Book of Restorative Discipline for Schools*. Intercourse: Good Books.

ANDERSON N, PAREDES-SOLÍS S, MILNE D, OMER K, MAROKOANE N, LAETSANG D & COCKCROFT A

2012. Prevalence and Risk Factors for Forced or Coerced Sex among School-going Youth: National Cross-sectional Studies in 10 Southern African Countries In 2003 and 2007. *BMJ Open* 2:e000754.doi:10.1136/bmnopen-2011-000754.

ASHWORTH J, VAN BOCKEREN S, AILTS J, DONNELLY J, ERIKSON K & WOLTEMANN J

2008. An Alternative to School Detention. *Reclaiming Children and Youth* 17(3) 22-26.

AULL EH

2012. Zero-Tolerance, Frivolous Juvenile Court Referrals, and the School-to-Prison Pipeline: Using Arbitration as a Screening-Out Method to Help Plug the Pipeline. *Ohio State Journal on Dispute Resolution* 27:179-206.

B

BABBIE E & MOUTON J

2001. *The Practice of Social Research*. Oxford: Oxford University Press.

BADENHORST J, STEYN M & BEUKES L

2007. Die Dissiplinedilemma in Post-apartheid Suid-Afrikaanse Hoërskole : 'n Kwalitatiewe Ontleding. *Tydskrif vir Geesteswetenskappe* 47(3):301-319.

BALCAEN L

2012 Herstelgericht Werken op School. *Tijdschrift voor Onderwijsrecht & Onderwijsbeleid* Mei/Juni:51-57.

BANTJES J & NIEWOUDT J

2011. A Group-analytic Formulation of an Incident of Disruptive Behaviour in a School. *Psycho-analytic Psychotherapy in South Africa* 19(2):30-65.

BATEMAN B

2007. Inside City's School from Hell. Teachers at Mercy of Unruly, Armed Pupils Who Daily Assault and Abuse Them at Silverton High. *Pretoria News* 28 May 2007:1.

BATSCHE GM & KNOFF HM

1994. Bullies and Their Victims. Understanding a Pervasive Problem in Schools. *School Psychology Review* 23(2):165-175.

BEAR G

2010. *Discipline: Effective School Practices*. Bethesda: National Association of School Psychologists.

http://www.nasponline.org/resources/handouts/Effective_School_Discipline_18-1_S4-18.pdf (Retrieved 1/1/2013)

BEKINK M

2012. "Child Divorce": A Break from Parental Responsibilities and Rights Due to the Traditional Socio-cultural Practices and Beliefs of the Parents. *Potchefstroom Electronic Law Journal* 15(1):178 -212.

BEKINK B & BEKINK M

2004. Defining the Standard of the Best Interest of the Child: Modern South African Perspectives. *De Jure* 37(1):21-40.

BERG BL

2009. *Qualitative Research Methods for the Social Sciences*. Boston: Pearson.

BEUKES M

2003. Administrative Action Affecting the Public: Section 4 of the Promotion of Administrative Justice Act 3 of 2000 and the Regulations Made in Terms of Section 10 of the Act. *SA Public Law* 18(2):289-305.

BEZUIDENHOUT B

2007. Restorative Justice with an Explicit Rehabilitative Ethos: Is This the Resolve to Change Criminality? *Acta Criminologica* 20(2):43-60.

BLAINE S

2010. Teachers Insist on Strike Option. *Business Day*. 12 February:4.

BLOCH G

2009. *The Toxic Mix. What's Wrong with South Africa's Schools and How to Fix It*. Cape Town: Tafelberg.

BLOOMENTHAL E

2011. Inadequate Discipline: Challenging Zero Tolerance Policies as Violating States Constitutions Education Clauses. *N.Y.U Review of Law & Social Change* 35:303-356.

BONTHUYS E

2006. The Best Interests of Children in the South Africa Constitution. *International Journal of Law, Policy and the Family* 20:23-43.

BOSWORTH M (ed)

2005. *Encyclopedia of Prisons and Correctional Facilities*. Thousand Oaks: Sage.

BOYES-WATSON C

2008. *Peacemaking Circles & Urban Youth*. St Paul: Living Justice Press.

BRAGG S

2007. "But I Listen to Children Anyway!" – Teacher Perspectives on Pupil Voice. *Educational Action Research* 15(4):505-518.

BRAY E

2005. Codes of Conduct in Public Schools: A Legal Perspective. *South African Journal of Education* 25(3):133-138.

BRENTRO LK, BROKENLEG M & VAN BOCKERN S

2002. *Reclaiming Youth at Risk. Our Hope for the Future*. Bloomington: Solution Tree.

BRENTRO LK, MITCHELL ML & McCALL HJ

2010. *Deep Brain Learning. Pathways to Potential with Challenging Youth*. Circle of Courage Institute: Lennox.

BROODRYK J

2002. *Ubuntu. Life lessons from Africa*. Pretoria: Ubuntu School of Philosophy.

BROWNLIE I & GOODWIN-GILL GS

2006. *Basic Documents on Human Rights*. 5th edition. Oxford: Oxford University Press.

BURGER R, VAN DER BERG S & VON FINTEL D

2012. The Unintended Consequences of Education Policies on South African Participation and Unemployment. Stellenbosch Economic Working Papers: 11/12. Also available at:

http://scholar.google.co.za/scholar?hl=en&q=Fast+tracking+of+overaged+learners+in+South+Africa&btnG=&as_sdt=1%2C5&as_sdt (Retrieved 4/1/2013)

BURTON P

2005. Snapshot Results of the 2005 National Youth Victimization Study. *Research Bulletin: Centre for Justice and Crime Prevention* 1 May 2006.

2007. Introduction. In *Someone Stole My Smile. An Exploration into the Causes of Youth Violence in South Africa*, edited by P Burton. Cape Town: Centre for Justice and Crime Prevention. Also available at:

<http://www.cjcp.org.za/admin/uploads/stolen%20smile.final.pdf> (Retrieved 17/12/2012)
2008. *Merchants, Skollies and Stones: Experiences of School Violence in South Africa*.
Cape Town: Centre for Justice and Crime Prevention. Also available at:
<http://www.cjcp.org.za/admin/uploads/NSVS-final-internet-ready.pdf>
(Retrieved 17/12/2012)

C

CAPPS P

2009. *Human Dignity and the Foundations of International Law*. Oxford: Hart Publishing.

CARNELLEY M

2007. Constitutional Challenges to School Rules: Notes. *Obiter* 28(1):143-153.

CARPENTER G

2008. Constitutionally Protected Rights for Parents? *Tydskrif vir Suid-Afrikaanse Reg* 3:397-411.

CARRIM N

2011. Modes of Participation and Conceptions of Children in South African Education. *Perspectives in Education* 29(1):74-82.

CASSIM F

2003. The Rights of Child Witnesses Versus the Accused's Right to Confrontation: A Comparative Perspective. *Comparative and International Law Journal of Southern Africa* 36(1):65-82.

CAVANAGH T

2009. Creating Schools of Peace and Nonviolence in a Time of War and Violence. *Journal for School Violence* 8(1): 64-80.

CEDAW [SEE UNITED NATIONS]

CESCR [SEE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS]

CHARLES CM

1989. *Building Classroom Discipline. From Models to Practice*. 3rd edition. New York: Longman.

CHASKALSON A

2000. The Third Bram Fischer Lecture. Human Dignity as a Foundational Value of Our Constitutional Order. *South African Journal on Human Rights* 16(2):193-205.

CHAUKE A

2012. No Drop in Drop-outs. Pupil Retention Remains a Big Problem in the Country's Schooling System. *The Times* 20 January:7.

CHEADLE MH, DAVIS DM & HAYSOM NRL

2002. *South African Constitutional Law: The Bill of Rights*. Durban: Butterworths.

2010. *South African Constitutional Law: The Bill of Rights*. 2nd edition. Durban: LexisNexis.

CHIGONA A & CHETTY R

2008. Teen Mothers and Schooling: Lacunae and Challenges. *South African Journal* 28:261-281.

CHIRWA DM

2002. The Merits and Demerits of the African Charter on the Rights and Welfare of the Child. *The International Journal of Children's Rights* 10(2):157-177.

CHUENYANE G

2009. Strike over Nepotism. But Union Denies the Charges. *City Press* 15 June:10.

CLARIZIO HF

1986. *Towards Positive Classroom Discipline*. 3rd edition. New York: MacMillan.

CLARK B

1992. Custody: The Best Interests of the Child. *The South African Law Journal* 109(3):391-391.

2000. A "Golden Thread"? Some Aspects of the Application of the Standard of the Best Interests of the Child in South African Family Law. *Stellenbosch Law Review* 11(1):3-20.

CLARK D, DAVIS L & BOOYENS K

2003. A Silver Era for Victims of Crime: Reassessing the Role That Victim Impact Statements Can Play in Improving Victim Involvement in Criminal Justice Procedures. *Acta Criminologica* 16(2):43-56.

CLUVER L, BOWES L & GARDNER F

2010. Risks and Protective Factors for Bullying Victimization among AIDS-affected and Vulnerable Children in South Africa. *Child Abuse & Neglect* 34:793-803.

COETZEE C

2009. "Ons Sal Nie Skollied Duld," Sê ANC oor Onnie-staking. *Beeld* 16 June 2009.

COETZEE SA, VAN NIEKERK EJ & WYDEMAN JL

2008. *An Educator's Guide to Effective Classroom Management*. Pretoria: Van Schaik.

COMMITTEE OF MINISTERS, COUNCIL OF EUROPE

1984. Parental Responsibilities. Committee of Ministers to Member States. Recommendation No. R (84)4.

<http://www.coe.int/t/dgh/standardsetting/family/Rec.84.4.%20E.pdf>

(Retrieved 30/4/2012)

2012. Recommendation CM/Rec (2012) 2 of the Committee of Ministers to Member States on the Participation of Children and Young People under the Age of 18. Committee of Ministers.

<https://wcd.coe.int/ViewDoc.jsp?id=1927229> (Retrieved 4/2/2013)

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (CESCR)

1999. (CESCRGC 11) General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant), E/1992/23.

<http://www.unhcr.org/refworld/docid/4538838c0.html> (Retrieved 3/7/2012)

1999. (CESCRGC 13) General Comment No. 13. The Right to Education (Art.13) E/C.12/1999/10.

<http://www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?OpenDocument> (Retrieved 3/7/2012)

2000. (CESCRGC 14) General Comment No. 14. The Right to the Highest Attainable Standard of Health: 11/08/2000. E/C.12/2000/4. General Comments. Committee on Economic, Social and Cultural Rights.

[http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En) (Retrieved 15/2/2013)

2009. (CESCRGC 20) General Comment No. 20. Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights. E/C.12/GC/20. 2 July 2009.

<http://www.unhcr.org/refworld/docid/4a60961f2.html> (Retrieved 4/2/2013)

COMMITTEE ON THE RIGHTS OF THE CHILD (CRC)

2001. (CRCGC 1) General Comment No. 1: The Aims of Education (Art. 29 (1). CRC/GC/2001/1.

[http://daccess-dds-](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/412/53/PDF/G0141253.pdf?OpenElement)

[ny.un.org/doc/UNDOC/GEN/G01/412/53/PDF/G0141253.pdf?OpenElement](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/412/53/PDF/G0141253.pdf?OpenElement) (Retrieved 3/7/2012)

2002. (CRCGC 2) General Comment No. 2. The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child. CRC/GC/2002/2.

http://www2.ohchr.org/english/bodies/crc/docs/GC2_en.doc (Retrieved 5/3/2013)

2003. (CRCGC 4) General Comment No 4. Adolescent Health and Development in the Context of the Convention on the Rights of the Child. CRC/GC/2003/4.

[http://daccess-dds-](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/427/24/PDF/G0342724.pdf?OpenElement)

[ny.un.org/doc/UNDOC/GEN/G03/427/24/PDF/G0342724.pdf?OpenElement](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/427/24/PDF/G0342724.pdf?OpenElement) (Retrieved 24/2/2013)

2003. (CRCGC 5) General Comment No. 5. General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para.6) CRC/GC/2003/5.

http://www2.ohchr.org/english/bodies/crc/docs/GC5_en.doc (Retrieved 12/10/2010)

2005. (CRCGC 7) General Comment No. 7. Implementing Child Rights in Early Childhood. CRC/C/GC/7/Rev.1.

http://www2.ohchr.org/english/bodies/crc/docs/GC7.Rev.1_en.doc

(Retrieved 12/10/2010)

2006. (CRCGC 8) General Comment No. 8. The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (arts 19; 28, para.2; and 37, *inter alia*). Committee on the Rights of the Child. CRC/C/GC8.

[http://daccess-dds-](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/407/71/PDF/G0740771.pdf?OpenElement)

[ny.un.org/doc/UNDOC/GEN/G07/407/71/PDF/G0740771.pdf?OpenElement](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/407/71/PDF/G0740771.pdf?OpenElement). (Retrieved 7/10/2010)

2009. (CRCGC 11) General Comment No.11. Indigenous Children and Their Rights under the Convention. CRC/C/GC/11.

<http://www2.ohchr.org/english/bodies/crc/comments.htm> (Retrieved 12/10/2010)

2009. (CRCGC 12) General Comment No 12. The Right of the Child to be Heard. CRC/C/GC/12. <http://www2.ohchr.org/english/bodies/crc/comments.htm> (Retrieved 12/10/2010)

CONDÉ HV

1999. *A Handbook of International Human Rights Terminology*. Lincoln: University of Nebraska Press.

COUNCIL OF EUROPE

1950. The European Convention for the Protection of Human Rights and Fundamental Freedoms.

<http://www.echr.coe.int/nr/ronlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf> (Retrieved 3/7/2012)

1952. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11. Paris, 20.III.1952. <http://conventions.coe.int/Treaty/en/Treaties/html/009.htm> (Retrieved 3/7/2012)

1984. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11. Strasbourg, 22.XI.1984. <http://conventions.coe.int/Treaty/en/Treaties/html/117.htm>. (Retrieved 3/7/2012)

1994. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Strasbourg, 11.V.1994 <http://conventions.coe.int/Treaty/en/Treaties/html/155.htm/> (Retrieved 3/7/2012)

1996. European Convention on the Exercise of Children's Rights. Council of Europe. <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=160&CL=ENG> (Retrieved 4/2/2013)

2006. *Violence in Schools – How to Make a Difference*. Strasbourg: Council of Europe Publishing. http://www.coe.int/t/dg3/children/pdf/ViolenceHandbook_en.pdf. (Retrieved 15/12/2012)

COUZENS M

2010. The Best Interests of the Child and Its Collective Connotations in the South African Law. *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 73(2):266–287.

2012. Procurement Adjudication and the Rights of Children: *Freedom Stationary (Pty) Ltd v MEC for Education, Eastern Cape* 2011 JOL 26927 (E). *Potchefstroom Electronic Law Journal* 15(1):392-428.

COWEN S

2001. Can "Dignity" Guide South Africa's Equality Jurisprudence. *South African Journal on Human Rights* 17(1):34-58.

CRC [SEE COMMITTEE ON THE RIGHTS OF THE CHILD]

CUNNEEN C & HOYLE C

2010. *Debating Restorative Justice*. Oxford: Hart Publishing.

CURRIE I & DE WAAL J

2001. *The Bill of Rights Handbook*. 4th edition. Lansdowne: Juta.

2005. *The Bill of Rights Handbook*. 5th edition. Lansdowne: Juta.

D

DALL FP

1995. Children's Right to Education: Reaching the Unreached. In *Implementing the Convention on the Rights of the Child. Resource Mobilization in Low-income Countries*, edited by JR Himes. The Hague: Kluwer Law International.

DAVEL T

2002. The African Charter on the Rights and Welfare of the Child, Family Law and Children's Rights. *De Jure* 35(2):281-295.

2007. General principles. In *Commentary on the Children's Act* edited by CJ Davel & AM Skelton. Cape Town: Juta.

DAVEL T & DE KOCK P

2001. In 'n Kind Se Beste Belang. *De Jure* 34(2):272-291.

DAVEL CJ & JORDAAN RA

1997. Het die Kind se Belange Uiteindelik Geseëvier? *De Jure* 30(2):331-338.

DAVIS DM

1999. Equality: The Majesty of Legoland Jurisprudence. *South African Law Journal* 116 (2):398-413.

DAVIS G

2012. State Fires Sex Abuse Teachers. *Independent Newspapers*:7 November 2012.
<http://www.iol.co.za/news/crime-courts/state-fires-sex-abuse-teachers-1.1419059>
(Retrieved 8/3/2013)

DAVIS L & SAFFY J

2004. Young Witnesses: Experiences of Court Support and Court Preparation Officials.
Acta Criminologica 17(1):17-23.

DAVIS MF & POWELL R

2003. The International Convention on the Rights of the Child: A Catalyst for Innovative
Childcare Policies. *Human Rights Quarterly* 25(3):689-719.

DAVIS D & YOUENS PJ

2005. Life. In *South African Constitutional Law: The Bill of Rights* edited by MH Cheadle,
DM Davis & NRL Haysom. 2nd edition. Durban: LexisNexis.

DBE [SEE DEPARTMENT OF BASIC EDUCATION]

DE GROOF J & LAUWERS G

2009. IV. Formal 4-A's as a Tool for Measuring the Quality of the Framework for the
Implementation of Educational Rights. Report – UNESCO Chargé de Mission.
September:24-52.

DE KLERK J & RENS J

2003. The Role of Values in School Discipline. *Koers* 68(4):353-371.

DENNIS MJ

2000. Newly Adopted Protocols on the Convention on the Rights of the Child. *The
American Journal of International Law* 94(4):789-796.

DEPARTMENT OF BASIC EDUCATION (DBE)

2009. Teenage Pregnancy in South Africa – With a Specific Focus on School-going
Learners. Pretoria: Department of Basic Education.
<http://www.education.gov.za/LinkClick.aspx?fileticket=ulqj%2bsyycM%3d&tabid=358&mid=1300> (Retrieved 20/12/2012)

2010. *Report on the 2008 and 2009 Annual Surveys for Ordinary Schools*. Pretoria: Department of Basic Education.

<http://www.education.gov.za/LinkClick.aspx?fileticket=EMOCsHBX%2f8g%3d&tabid=358&mid=1261> (Retrieved 20/12/2012)

2011. NEIMS (National Education Infrastructure Management System) Reports May 2011.

<http://www.education.gov.za/LinkClick.aspx?fileticket=hHaBCAerGXc%3d&tabid=358&mid=1802> (Retrieved 20/12/2012)

2011a. Macro Indicator Trends in Schooling: Summary Report 2011.

<http://www.education.gov.za/LinkClick.aspx?fileticket=2W%2fLLyKAfNA%3d&tabid=358&mid=126> (Retrieved 20/12/2012)

2011b. Report on the National Senior Certificate Examination 2011. Technical Report. Pretoria: Department of Basic Education. Also available at:

<http://www.education.gov.za/LinkClick.aspx?fileticket=BSCw6quGBwk%3d&tabid=358&mid=1325> (Retrieved 20/12/2012)

2011c. Report on the Annual National Assessments of 2011. Pretoria: Department of Basic Education. Also available at:

<http://www.education.gov.za/LinkClick.aspx?fileticket=1U5igeVjiqq%3d&tabid=358&mid=1325> (Retrieved 20/12/2012)

2012. Annual Report 2011/2012. Pretoria: Department of Basic Education. Also available at:

<http://www.education.gov.za/LinkClick.aspx?fileticket=YI%2bhMxe4mVU%3d&tabid=358&mid=1263> (Retrieved 17/12/2012)

2012a. Report on the Annual National Assessments 2012. Grades 1 to 6 & 9. Pretoria: Department of Basic Education. Also available at:

<http://www.education.gov.za/LinkClick.aspx?fileticket=YyzLTOk5IYU%3d&tabid=358&mid=1325> (Retrieved 20/12/2012)

2012b. Report on the 2009/2010 Annual Surveys for Ordinary Schools. Pretoria: Department of Education. Also available at:

<http://www.education.gov.za/LinkClick.aspx?fileticket=%2b5BphKZWqLA%3d&tabid=358&mid=1261> (Retrieved 20/12/2012)

2012c. School Realities 2012.

<http://www.education.gov.za/LinkClick.aspx?fileticket=MMXRVCugRQ4%3d&tabid=93&mid=1952> (Retrieved 20/12/2012)

2012d. IQMS Annual Report 2011/12. Pretoria: Department of Basic Education. Also available at:

<http://www.education.gov.za/LinkClick.aspx?fileticket=bhwUHsWNFIA%3d&tabid=358&mid=1263> (Retrieved 20/12/2012)

2012e. General Household Survey (GHS) 2010: Focus on Schooling. Pretoria: Department of Basic Education. Also available at:

<http://www.education.gov.za/LinkClick.aspx?fileticket=B%2bHsGNjcYyo%3d&tabid=358&mid=1261> (Retrieved 20/12/2012)

2012f. National Support Pack. Available at:

<http://www.education.gov.za/NationalSupportPack/tabid/673/Default.aspx>
(Retrieved 1/1/2013)

DEPARTMENT OF EDUCATION (DoE)

1995. White Paper on Education and Training. Pretoria: Department of Education. Also available at:

<http://www.education.gov.za/ResourceCentre/Legislation/WhitePapers/tabid/1191/Default.aspx> (Retrieved 18/3/2011)

1996. White Paper on the Organisation, Governance and Funding of Schools (Education White Paper 2). Pretoria. Department of Education. Also available at: <http://www.education.gov.za/LinkClick.aspx?fileticket=rX5JM3JBN7A%3D&tabid=191&id=484> (Retrieved 1/1/2013)

2000. Alternatives to Corporal Punishment. The Learning Experience. Pretoria: Department of Education. Also available at:

<http://www.endcorporalpunishment.org/pages/pdfs/SouthAfrica-AlternativetoCP2000.pdf>
(Retrieved 4/1/2013)

2005. Education Statistics in South Africa at a Glance in 2004. Pretoria: Department of Education.

<http://www.education.gov.za/LinkClick.aspx?fileticket=9SvZuGqsx1!%3d&tabid=462&mid=1326> (Retrieved 26/6/2012)

DEPARTMENT OF GOVERNMENT COMMUNICATIONS AND INFORMATION SYSTEMS

2012. Statement on Cabinet Meeting of 10 October 2012. Department of Government Communications and Information Systems.

<http://www.gcis.gov.za/content/newsrooms/media-releases/cabstatements/111ct2012>
(Retrieved 12/10/2012)

DEPARTMENT OF HIGHER EDUCATION AND TRAINING

2012. Green Paper for Post-school Education and Training. Pretoria: Department of Higher Education and Training. Also available at:

<http://www.dhet.gov.za/portals/0/Documents/GreenPaper.pdf> (Retrieved 19/2/2013)

DETRICK S

1999. *A Commentary on the United Nations Convention on the Rights of the Child*. The Hague: Martinus Nijhoff Publishers.

DEVENISH GE

1992. *Interpretation of Statutes*. Cape Town: Juta.

DE VENDE-BIJKER T

2012. Leer die Onderwysers Leer. *Vrouekeur* Maart:10-11.

DE WAAL J, CURRIE I & ERASMUS G

2001. *The Bill of Rights Handbook*. 4th edition. Lansdowne: Juta.

DE WAAL E & VAN STADEN J

2007. School Governing Body Membership. In *Public School Governance in South Africa* edited by R Joubert & E Bray. Pretoria: Interuniversity Centre for Education Law and Education Policy.

DE WET C

2003. Misdaad in die Suid-Afrikaanse Onderwys Soos Weerspieël in die Gedrukte Media. *South African Journal of Education* 23(2):113-121.

2003a. Skoolveiligheid en Misdaadbekamping: Die Sieninge van 'n Groep Vrystaatse Leerders en Opvoeders. *South African Journal of Education* 23(2):85-93.

2003b. Free State Educators' Perceptions of the Scope of Learner Crime. *South African Journal of Education* 23(3):168-175.

2005. The Nature and Extent of Bullying in Free State Secondary Schools. *South African Journal of Education* 25(2):82-88.

2005a. The Voices of Victims and Witnesses of School Bullying. *Koers* 70(4):705-725.

DE WET T

2012. Seun (17) Gestraf oor Meisies. Slagoffer Is Gedreig, Aangerand. *Volksblad* 24 Julie:1.

DHET [SEE DEPARTMENT OF HIGHER EDUCATION AND TRAINING]

DLODLO C

2010. Onderwysprentjie in Vrystaat "Donker". Ongekwalifiseerde Onderwysers Eis Tol. *Volksblad* 6 Mei:4.

DOE [SEE DEPARTMENT OF EDUCATION]

DOFA [SEE DEPARTMENT OF FOREIGN AFFAIRS]

DREWERY W

2004. Conferencing in Schools: Punishment, Restorative Justice, and the Productive Importance of the Process of Conversation. *Journal of Community and Applied Social Psychology* 14(5):332-344.

DU PLESSIS L

2008. Interpretation. In *Constitutional Law of South Africa*, edited by S Woolman, M Bishop & J Brickhill. 2nd edition. Revision Service 3. Cape Town: Juta.

DWANE Y & ISAACS D

2011. The School Crusade. *Financial Mail* 11 March:30.

E

EDITOR

2007. Teachers Have Rights and Responsibilities. *Pretoria News* 24 October:11.

ERASUMS D

2010. "There Is Something You Are Missing; What About the Children?" Separating the Rights of Children from Those of Their Caregivers. *SA Public Law* 25(1):124-136.

EUROCHILD

2012. *Speak Up! Giving a Voice to European Children in Vulnerable Situations*. Brussels: Eurochild. Also available at:

<http://www.eurochild.org/fileadmin/Projects/Speak%20Up/SpeakUpreportFINAL.pdf>

(Retrieved 29/1/2013)

EUROPEAN UNION

2000. European Union Charter of Fundamental Rights. European Union. Also available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf (Retrieved 4/2/2013)

F

FENGU M

2011. New Ways Agreed to Transport, Feed Pupils. *Daily Dispatch* 11 April:3.

FERREIRA S

2010. The Best Interests of the Child: From Complete Indeterminacy to Guidance by the Children's Act. *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 73(2):201-213.

FIELDS BA

2003. Restitution and Restorative Justice. *Youth Studies Australia* 22(4):44-51.

FLEISCH B

2009. Intimidation Rife among Teachers. *Business Day* 15 June:6.

FORTIN J

1999. Rights Brought Home for Children. *The Modern Law Review* 62(3):350-370.

FOTTRELL D

2000. One Step Forward or Two Steps Sideways? Assessing the First Decade of the Children's Convention on the Rights of the Child. In *Revisiting Children's Rights. 10 Years of the UN Convention on the Rights of the Child*, edited by D Fottrell. The Hague: Kluwer Law International.

FOURIE C

2007. Gesonder Skole Begin Tuis. *Rapport* 8 April:19.

FRANKLIN INSTITUTE

Renew – Stress on the Brain. <http://www.fi.edu/learn/brain/stress.html> (Retrieved 26/6/2012)

FREDERICKS I

2010. WCED to Tackle School Infrastructure Backlog. *Cape Argus* 20 January:5.

2012. It's back to School for Teachers – but Now They Are the Students. *Cape Argus* 31 January:4.

FREDERICKS I & KINNEAR J

2011. School Security to be Bolstered. Alarm Systems, Burglar Proofing and Metal Detectors to be Introduced. *Cape Argus* 21 February:3.

FREEDMAN W

2010. The Rights of the Child - the Right to Testify through an Intermediary. *South African Journal of Criminal Justice* 23(2):299-305.

FREEMAN M

2007. *A Commentary on the United Nations Convention on the Rights of the Child*. Article 3. The Best Interests of the Child. Leiden: Martinus Nijhoff Publishers.

FREE STATE DEPARTMENT OF EDUCATION (FSDE)

2012. Annual Report of the Free State Department of Education for the Financial Year 2010/11. Available at http://www.education.fs.gov.za/?page_id=1785 (Retrieved 29/12/2012)

FRIEDMAN A, PANTAZIS A & SKELTON A

2009. Children's Rights. In *Constitutional Law of South Africa*, edited by S Woolman, M Bishop & J Brickhill. 2nd revision edition. Cape Town: Juta.

FROYEN LA

1988. *Classroom Management: Empowering Teacher-Leaders*. Columbus: Merrill Publishing Company.

FSDE [SEE FREE STATE DEPARTMENT OF EDUCATION]

G

GENERAL ASSEMBLY OF THE UNITED NATIONS

Resolution 1386(XIV) of 20 November 1959. Available at: <http://www.unhchr.ch/html/menu3/b/25.htm> (Retrieved 23/5/2008)

GERARDY J

2003. 3 Psychologists in EC Education Dept. *Daily Dispatch* 23 June:4.

GERNETZKY K

2012. Motshekga Appeal for Help with Schools Backlog. *Business Day* 11 April:4.

GOLEMAN D

1998. *Working with Emotional Intelligence*. London: Bloomsbury Publishing.

GONZALEZ T

2011. Restoring Justice. Community Organizing to Transform School Discipline Policies. *UC Davis Journal of Juvenile Law & Policy* 15(1):2-36.

GOVENDER P & LAGANPARSAD M

2011. School Head on the Block for Hose Beating. Pupils and Parents at Gauteng School up in Arms over Harsh Punishment for Tardy Teen. *Sunday Times* 24 July:1 & 5.

GROBBELAAR R

2011. Grim Outlook as Children Miss Schooling. *The Times* 11 August:5.

GROBBELAAR R & MASUKU SNE

2011. Lack of Infrastructure in Schools a Major Problem. *Daily Dispatch* 22 June:4.

H

HAMMARBERG T

1995. Foreword. In *Implementing the Convention on the Rights of the Child. Resource Mobilization in Low-income Countries*, edited by JR Himes. The Hague: Martinus Nijhoff Publishers.

2008. The Principle of the Best Interests of the Child – What It Means and What It Demands from Adults. Lecture. Warsaw, Strasbourg. Council of Europe, CommDH/Speech (2008)10, 30 May. <https://wcd.coe.int/ViewDoc.jsp?id=1304019> (Retrieved 27/6/2012)

HANSBERRY B

2009. *Working Restoratively in Schools*. Victoria: Inyahead Press.

HARMSSEN R

2001. The European Convention on Human Rights after Enlargement. *The International Journal of Human Rights* 5(4):18-43.

HEATON J

1990. Some General Remarks on the Concept "Best Interests of the Child". *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 53(1):95-99.

2007. Parental Responsibilities and Rights. In *Commentary on the Children's Act*, edited by CJ Davel & AM Skelton. Cape Town: Juta Law.

2009. An Individualised, Contextualised and Child-centred Determination of the Child's Best Interests, and the Implications of Such an Approach in the South African Context. *Journal for Juridical Science* 34(2):1-18.

HENNING E, VAN RENSBURG W & SMIT B

2004. *Finding Your Way in Qualitative Research*. Pretoria: Van Schaik.

HERADIEN S

2013. You Are Free in God's Name... Victims' Amazing Act of Forgiveness. *Daily Sun* 1 February:1-2.

HIMES JR

1995. Introduction. In *Implementing the Convention on the Rights of the Child. Resource Mobilization in Low-income Countries*, edited by JR Himes. The Hague: Martinus Nijhoff Publishers.

HODGKIN R & NEWELL P

2002. *Implementation Handbook for the Convention on the Rights of the Child*. Fully revised 2nd edition. Geneva: UNICEF.

2007. *Implementation Handbook for the Convention on the Rights of the Child*. Fully revised 3rd edition. Geneva: UNICEF.

HOLLELY K

2002. Children in Court: The Role and Scope of the Support Person. *Child Abuse Research in South Africa* 3(1):14-18.

HOLTHAM J

2009. *Taking Restorative Justice to Schools. A Doorway to Discipline*. United States of America: Homestead Press.

HOPKINS B

2002. Restorative Justice in Schools. *Support for Learning* 17(3):144-149.

2004. *Just Schools. A Whole School Approach to Restorative Justice*. London: Jessica Kingsley Publishers.

HORSTEN D & LE GRANGE C

2012. The Limitation of the Educator's Right to Strike by the Child's Right to Basic Education. *South African Public Law* 27:509-538.

HOYLE C (Ed)

2010. *Restorative Justice. Critical Concepts in Criminology*. Abington: Routledge.

HUMAN RIGHTS COMMITTEE (HRC)

1981. (HRCGC 4) CCPR General Comment No. 4: Article 3 (Equal Right of Men and Women to the Enjoyment of All Civil and Political Rights). Available at: <http://www.unhcr.org/refworld/category,LEGAL,,GENERAL,,453883ffa,0.html> (Retrieved 4/2/2013)

1982. (HRCGC 6) CCPR General Comment No. 6: Article 6 (The Right to Life). Available at: <http://www.unhcr.org/refworld/docid/45388400a.html> (Retrieved 4/2/2013)

1989. (HRCGC 17) CCPR General Comment No. 17: Article 24 (Right of the Child). Available at: <http://www.unhcr.org/refworld/pdfid/45139b464.pdf> (Retrieved 29/1/2013)

1989. (HRCGC 18) CCPR General Comment No. 18: (Non-discrimination). Available at: <http://www.unhcr.org/refworld/type,GENERAL,453883fa8,0.html> (Retrieved 4/2/2013)

1992. (HRCGC 20) CCPR General Comment No. 20: (Replaces General Comment No. 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (art 7)). Available at: <http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5> (Retrieved 4/2/2013)

1994. (HRCGC 23) CCPR General Comment No. 23: (The Rights of Minorities (art 27)). Available at: <http://www.unhchr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111> (Retrieved 4/2/2013)

HUMAN RIGHTS WATCH

2001. Scared at School: Sexual Violence against Girls in South African Schools. Available at: <http://www.unhrc.org/refworld/docid/3bdfdade4.html> (Retrieved 21/12/2012)

I

ICCPR [SEE UNITED NATIONS]

ICESCR [SEE UNITED NATIONS]

ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY

sa. *Implementing Restorative Justice. A Guide for Schools*. Chicago: Illinois Criminal Justice Information Authority. Available at:

<http://www.icjia.state.il.us/public/pdf/BARJ/SCHOOL%20BARJ%20GUIDEBOOK.pdf>
(Retrieved 5/2/2013)

J

JACK M

2008. Still No Action on Blind School Embezzlement. *The Herald (EP Herald)* 6 August:5.

JANSEN G & MATLA R

2011. Restorative Practice. "A Change of Heart." Workbook for training workshop attended from 30 November – 1 December. Christchurch, New Zealand.

JEFTHAS D & ARTZ L

2007. Youth Violence: A Gendered Perspective. In *Someone Stole My Smile. An Exploration into the Causes of Youth Violence in South Africa*, edited by P Burton. Cape Town: Centre for Justice and Crime Prevention. Also available at: <http://www.cjcp.org.za/admin/uploads/stolen%20smile.final.pdf> (Retrieved 17/12/2012)

JENKINS B

2011. Of Rats and Men: How Stress Affects the Brain. The Scientific Learning Blog. <http://www.scilearn.com/blog/how-stress-affects-the-brain.php> (Retrieved 27/07/2012)

JOHNSON DW & JOHNSON RT

2012. Restorative Justice in the Classroom: Necessary Roles of Cooperative Context. Constructive Conflict and Civic Values. *Negotiation and Conflict Management Research* 5(4):4-28. Also available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1750-4716.2011.00088.x/abstract> (Retrieved 2/3/2013)

JOHWA W

2008. Education Quality Still Too Low, Says Race Relations Institute. *Business Day* 24 November:3.

JOUBERT R

2007. The Supportive Role of the School Governing Body. In *Public School Governance in South Africa* edited by R Joubert & E Bray. Pretoria: Interuniversity Centre for Education Law and Policy.

2007a. Administrative Functions of School Governing Bodies. In *Public School Governance in South Africa* edited by R Joubert & E Bray. Pretoria: Interuniversity Centre for Education Law and Policy.

JOUBERT R, DE WAAL E & ROSSOUW JP

2004. Discipline: Impact on Access to Equal Educational Opportunities. *Perspectives in Education* 22(3):77-87.

2005. A South African Perspective on the Impact of Discipline on Access to Equal Educational Opportunities. In Russo C, Beckman J & Jansen JD (eds.). *Equal Educational Opportunities. Comparative Perspectives in Education Law. Brown v Board of Education at 50 and Democratic South Africa at 10*. Pretoria: Van Schaik.

JOUBERT HJ & PRINSLOO S

2001. *Education Law: A Practical Guide for Educators*. Pretoria: Van Schaik.

2008. *The Law of Education in South Africa*. 2nd edition. Pretoria: Van Schaik.

K

KARLSSON J

2002. The Role of Democratic Governing Bodies in South African Schools. *Comparative Education* 38(3):327-336.

KARP DR & BRESLIN B

2001. Restorative Justice in School Communities. *Youth and Society* 33(2):249-272.

KILKELLY U

2000. The Impact of the Convention on the Case-law of the European Court of Human Rights. In *Revisiting Children's Rights. 10 Years of the UN Convention on the Rights of the Child*, edited by D Fottrell. The Hague: Kluwer Law International.

KIPPERBERG E

2007. The TRC Structures and Resulting Violence. In *Someone Stole My Smile. An Exploration into the Causes of Youth Violence in South Africa*, edited by P Burton. Cape Town: Centre for Justice and Crime Prevention. Also available at: <http://www.cjcp.org.za/admin/uploads/stolen%20smile.final.pdf> (Retrieved 17/12/2012)

KORB R

2012. *Motivating Defiant & Disruptive Students to Learn. Positive Classroom Management Strategies*. California: Corwin.

KOSKO SJ

2010. Parental Consent and Children's Rights in Europe: A Balancing Act. *Journal of Human Development and Capabilities: A Multi-Disciplinary Journal for People-centred Development* 11(3):425-448.

KRITZINGER MSB & LABUSCHAGNE FJ

1980. *Verklarende Afrikaanse Woordeboek*. 7de uitgawe. Pretoria: Van Schaik.

KRUGER C

2009. Applous uit Alle Oorde oor die Dood van UGO. *Rapport* 8 November:14.

2010. Leerlinge Sonder Boeke oor Politiekery. *Rapport* 31 Januarie:9.

L

LEAGUE OF NATIONS

1924. Geneva Declaration of the Rights of the Child. League of Nations. <http://www.un-documents.net/gdrc1924.htm> (Retrieved 10/1/2013)

LE MOTTEE S

2005. Avoiding polarisation – building healthy relationships at school by developing approaches to school discipline which build a culture of learning and teaching. Paper presented at the National Union of Educators Conference. <http://www.eisa.org.za/EISA/slm.htm> (Retrieved 8/3/2013)

LEOSCHUT L

2009. Running Nowhere Fast: Results of the 2008 National Youth Lifestyle Study. Centre for Justice and Crime Prevention Monograph Series 6. Cape Town: Centre for Justice and Crime Prevention.

LEOSCHUT L AND BONORA A

2007. Offender Perspectives on Violent Crimes. In *Someone Stole My Smile. An Exploration into the Causes of Youth Violence in South Africa*, edited by P Burton. Cape Town: Centre for Justice and Crime Prevention. Also available at: <http://www.cjcp.org.za/admin/uploads/stolen%20smile.final.pdf> (Retrieved 17/12/2012)

LE ROUX JF

2007. *The child and adolescent mental health centre. A guide*. The Child and Adolescent Mental Health Centre.

LE ROUX CS & MOKHELE PR

2011. The Persistence of Violence in South Africa's Schools: In Search of Solutions. *Africa Education Review* 8(2):318-335.

LESSING AC AND DE WITT MW

2010. Karakterbou en Christelike Waardes vir die Bevordering van Gedissiplineerde Klaskamergedrag: 'n Kritiese Beskouing. *Tydskrif vir Christelike Wetenskap* 46(1) (Spesiale Uitgawe):21-37.

2011. Stemme uit die Suid-Afrikaanse Onderwysunie-geledere oor dissipline. *Tydskrif vir Geesteswetenskappe* 51(3): 403-418.

LEWIS TL & SHORT C

1962. *A Latin Dictionary. Founded on Andrew's Edition of Freund's Latin Dictionary*. Revised, enlarged and in great part rewritten. Oxford: Clarendon Press.

LIEBENBERG S

2005. The Value of Human Dignity in Interpreting Socio-economic Rights. *South African Journal on Human Rights* 21(1):1-31.

LININGTON V, EXCELL L & MURRIS K

2011 Education for Participatory Democracy: A Grade R Perspective. *Perspectives on Education* 29(1):36-45.

LLOYD A

2002. Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee: Raising the Gauntlet. *The International Journal of Children's Rights* 10(2):179-198.

LOPATKA A

1996. An Introduction to the United Nations Convention on the Rights of the Child. *Transnational Law & Contemporary Problems* 6(2):251-262.

1999. The Convention on the Rights of the Child: Universal Dilemmas, an Essay. *Whittier Law Review* 21:83-94.

LOUW AE

2004a. Die Bevoegdheid van Kinders as Getuies I: Die Rol van Ouderdom en Ontwikkelingsvlak in Geheue. *Child Abuse Research in South Africa* 5(2):3-15.

2004b. Die Bevoegdheid van Kinders as Getuies II: Die Rol van Sosiaal-emosionele Kontekste in Geheue. *Child Abuse Research in South Africa* 5(2):16-24.

2005a. Die Bevoegdheid van Kinders as Getuies: Die Rol van Taalvaardigheid. *Child Abuse Research in South Africa* 6(2):19-28.

2005b. Die Bevoegdheid van Kinders as Getuies: Die Rol van Kognitiewe Faktore in die Vatbaarheid vir Suggestie. *Child Abuse Research in South Africa* 6(1):18-27.

LUNDY L

2005. Family Values in the Classroom? Reconciling Parental Wishes and Children's Rights in State Schools. *International Journal of Law, Policy and the Family* 19(3):346-372.

2007. 'Voice' Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child. *British Educational Research Journal* 33(6):927-942.

M

MABASA LT

2011. Preparing Student Teachers in Dealing with Disciplinary Issues in Schools. *South African Journal for Higher Education* 25(8):1541-1552.

MABOVULA N

2009. Giving voice to the voiceless through deliberative democratic school governance *South African Journal of Education* 29(2):219-233.

2010. Revisiting Jürgen Habermans' notion of communicative action and its relevance for South African school governance: can it succeed? *South African Journal of Education* 30: 1-12.

MAHLOMAHOLO SMG

2011. Gender Differentials and Sustainable Learning Environments. *South African Journal of Education* 31:312-321.

MAKWABE B & GOVENDER P

2007. Pupil Choked by Protesting Teacher. *Sunday Times* 10 June:4.

MALHERBE R

2001. Administrative Justice and Access to Information: Implications for Schools. *Perspectives in Education* 19(4):65-88.

2008. The Constitutional Dimension of the Best Interests of the Child as Applied in Education. *Tydskrif vir die Suid-Afrikaanse Reg* 2:267-285.

MAPHOSA C & MAMMEN KJ

2011. How Chaotic and Unmanageable Classrooms Have Become: Insights into Prevalent Forms of Learner Indiscipline in South African Schools. *Anthropologist* 13(3):185-193.

2011a. Learners' Views on the Effects of Disciplinary Measures in South African Schools. *Journal for Social Science* 28(3):153-160.

2011b. Maintaining Discipline: How Do Learners View the Way Teachers Operate in South African Schools? *Journal for Social Science* 28(3):213-222.

MAPHOSA C & SHUMBA A

2010. Educators' Disciplinary Capabilities after the Banning of Corporal Punishment in South African Schools. *South African Journal of Education* 30:387-399.

MAQHINA M

2007. Anonymous Threats Made to Non-striking Teachers. *Daily Dispatch* 28 June:4.

2012. School Ready to Sue for Infrastructure. *Daily Dispatch* 17 March:3.

MAREE JG

2010. Critical Appraisal of the System of Education and Prospects of Meeting the Manpower and Developmental Needs of South Africa. *Africa Insight* 40(2):85-108.

MAREE JG & CHERIAN L

2004. Hitting the Headlines – The Veil on Corporal Punishment in South Africa Lifted. *Acta Criminologica* 17(3):72-85.

MARSHALL D

1999. The Construction of Children as an Object of International Relations: The Declaration of Children's Rights and the Child Welfare Committee of the League of Nations, 1900-1924. *The International Journal of Children's Rights* 7(2):103-147.

MASH EJ & WOLFE DA

2007. *Abnormal Child Psychology*. 3rd edition. Belmont USA: Thomson Wadsworth.

MASHALA P

2011. Workers' and Students' Unions Demand Transport for Farm Children. *Farmers Weekly* 9 December:15.

MASHAU S, STEYN ES, VAN DER WALT J & WOLHUTER C

2008. Support Services Perceived Necessary for Learner Relationships by Limpopo Educators. *South African Journal of Education* 28(3):415-430.

MASITSA G

2006. Drop-out in Township Secondary Schools: Educator's Perspectives. *Acta Academica* 38(3):165-191.

2008. Discipline and Disciplinary Measures in the Free State Township Schools: Unresolved Problems. *Acta Academica* 40(3):234-270.

MATLALA A

2010. 20 000 without Classrooms. *Sowetan* 13 January:5.

MATOMELA D

2010. Slow Start as School Waits for Supplies. Vandalism, Late Registration Also Delay Beginning of Teaching Year. *The Herald (EP Herald)* 12 January:1.

MAYER JD, CARUSO DR & SALOVEY P

2000. Emotional Intelligence Meets Traditional Standards for an Intelligence. *Intelligence* 27(4):267-298.

MBABELA Z

2010. Teachers Fight for Right to Strike. DA Blames Union for Dire Schooling. *The Times* 9 February:7.

MBANJWA B

2012: "38% the Real Pass Rate." Matric Results Artificial, Misleading, Says Nody. Why the 70.2% Is a Red Herring. *Daily News* 6 January:1.

MBAZIRA C

2008a. "Appropriate, Just and Equitable Relief" in Socio-economic Rights Litigation : The Tension between Corrective and Distributive Forms of Justice. *South African Law Journal* 125(1):71-94.

2008b. Enforcing Socio-economic Rights as Individual Rights. The Role of Corrective and Distributive Forms of Justice in Determining "Appropriate Relief". *ESR Review* 9(1):4-9.

MBUYAZI N

2010. Pupils Leaving Forgotten School. *Daily News* 13 January:2.

McCLUSKEY G, KANE J, LLOYD G, STEAD J, RIDDELL S & WEEDON E

2011. "Teachers Are Afraid We Are Stealing Their Strength": A Risk Society and Restorative Approaches in School. *British Journal of Educational Studies* 59(2):105-119.

Also available at: <http://dx.doi.org/10.1080/00071005.2011.565741> (Retrieved 12/12/2012)

McCOLD P & WACHTEL T

2003. In Pursuit of Paradigm: A Theory of Restorative Justice. Paper presented at the XIII World Congress of Criminology, 10-15 August, Rio de Janeiro, Brazil. Also available at: http://www.iirp.edu/article_detail.php?article_id=NDI0 (Retrieved 15/2/2013)

McDOUGAL MS, LASSWELL HD & CHEN L-C

1980. *Human Rights and the World Public Order. The Basic Policies of an International Law of Human Dignity*. New Haven: Yale University Press.

McGOLDRICK D

1991. The United Nations Convention on the Rights of the Child. *International Journal of Law and the Family* 5(2):132-169.

McLAREN T

2005. "The Best Interests of the Child": A Right or a Principle? *Responsa Merdiana* 15(4):119-135.

McMILLAN JH & SCHUMACHER S

2001. *Research in Education. A Conceptual Introduction*. New York: Longman.

MEMELA M

2012. "Killer" Fired as Principal over Rape of Pupil. *Sowetan* 19 October:2.

MERCURY CORRESPONDENT

2012. Shoe Thief's Sentence Set Aside. *The Mercury (South Africa)* 17 August:3.

MESTRY R, VAN DER MERWE M & SQUELCH J

2006. Bystander Behaviour of School Children Observing Bullying. *SA-eDUC Journal* 3(2):46-59.

METZ T

2007. The Motivation for "Toward an African Moral Theory". *South African Journal of Philosophy* 26(4):331-335.

2007a. Ubuntu as a Moral Theory: Reply to Four Critics. *South African Journal of Philosophy* 26(4):369-387.

MGWANGQA V & LAWRENCE L

2008. Why Do Children Drop out of School? Learner Perceptions in the Fort Beaufort District, Eastern Cape District, South Africa. *Commonwealth Youth and Development* 16(2):16-32.

MGWATYU X

2011. 34 Pupils Packed into 13-Seater Taxi. Driver Arrested for Drunk Driving. *Daily Dispatch* 3 August:5.

MHLONGO A

2008. Anger over 'Unlawful' Strike by Teachers. *Daily News* 21 April:3.

MILLUM J

2010. How Do We Acquire Parental Rights? *Social Theory and Practice* 36(1):112-132.

MINGAT A & TAN JP

2003. *Tools for Education Policy Analysis*. Washington: The World Bank.

MIRSKY L

2007. Safer Saner Schools: Transforming School Cultures with Restorative Practices. *Reclaiming Children and Youth* 16(2):5-12.

MJEKULA L

2011. Dedication Doubles School's Pass Rate. *Cape Times* 7 January:4.

MKHWANAZI S

2010. Education Crisis Lies with Black Children. Motshekga Blames Poor Teacher Discipline for It. *Pretoria News* 26 February:4.

MNGAMBI XOLI

2012. No More Long Walks to School. *Vukuzenzele* 1 April:8.

MOLETSANE R, MITCHELL C & LEWIN T

2010. A Critical Analysis of Gender Violence and Inequality in and around Schools in South Africa in the Age of Aids. Progress or retreat? Paper delivered at the E 4 Conference 17-20 May, Dakar, Senegal. Also available at: <http://www.e4conference.org/e4e/w3/attachment/d-moletsane>. (Retrieved 8/3/2013)

MOLOI C & KAMPER G

2010. Socio-economically Challenged Learners: Two South African Case Studies. *Acta Academica* 42(4):256-279.

MOLOTO M

2012. School Guard with a History of Rape. He Had Received a 12 Year Sentence in 2002. *Star* 23 May:6.

MOMBERG E

2006. Our Hands Are Tied, Say Teachers as Culture of Violence Poisons Schools. *Sunday Independent* 15 October:2.

MONAMA T

2011. Principal Accused of Rape. *Sowetan* 23 August:5.

MONTAGUE P

2000. The Myth of Parental Rights. *Social Theory and Practice* 26(1):47-68.

MORRISON B

2002. Bullying and Victimisation in Schools: A Restorative Justice Approach. *Trends and Issues in Crime and Criminal Justice* 219 February:1-6.

2005. Building Safe and Healthy School Communities: Restorative Justice and Responsive Regulation. Plenary speaker "Building a Global Alliance for Restorative Practices and Family Empowerment, Part 3," the IIRP's Sixth International Conference on Conferencing Circles and Other Restorative Practices, Penrith, New South Wales, Australia. March 3-5.

2006. School Bullying and Restorative Justice: Toward a Theoretical Understanding of the Role of Respect, Pride and Shame. *Journal of Social Issues* 62(2):371-392.

MORRISON BE AND VAANDERING D

2012. Restorative Justice: Pedagogy, Praxis, and Discipline. *Journal of School Violence* 11:138-155.

MOTALA S & DIELEIENS V

2010. Educational Access in South Africa. Also available at: http://www.create-rpc.org/pdf_documents/South_Africa_Country_Research_Summary.pdf (Retrieved 8/3/2013)

MOTALA S, DIELEIENS V & SAYED Y

2009. Physical Access to Schooling in South Africa: Mapping Dropout, Repetition and Age-grade Progression in Two Districts. *Comparative Education* 45(2):251-263.

MOTSEKE M

2010. Learner Discipline after Corporal Punishment in the Township Primary Schools. *Interim: Interdisciplinary Journal* 9(2):117-133.

MOUTON

2001. How to Succeed in Your Master's and Doctoral Studies – A South African Guide and Resource Book. Pretoria: Van Schaik.

MULINGE MM

2002. Implementing the 1989 United Nations Convention on the Rights of the Child in sub-Saharan Africa: The Overlooked Socioeconomic and Political Dilemmas. *Child Abuse and Neglect* 26(11):1117-1130.

MÜLLER K

2003. The Enigma of the Child Witness: A Need for Expert Evidence. *Child Abuse Research in South Africa* 4(2):2-9.

MÜLLER K & VAN DER MERWE A

2006. Recognising the Victim in the Sentencing Phase: The Use of Victim Impact Statements in Court. *SAJHR* (22):647-663.

MULLIS IVS, MARTIN MO, FOY P & ARORA A

2012. *TIMSS 2011 International Results in Mathematics*. Chestnut Hill, MA: TIMSS & PIRLS International Study Centre. Also available at: <http://timssandpirls.bc.edu/timss2011/international-results-mathematics.html> (Retrieved 15/2/2013)

MULLIS IVS, MARTIN MO, FOY P & DRUCKER KT

2012. *PIRLS 2011 International Results in Reading* Chestnut Hill, MA : TIMSS & PIRLS International Study Centre. Also available at: <http://timssandpirls.bc.edu/pirls2011/international-results-pirls.html> (Retrieved 15/2/2013)

N

NAGL A

2012. Evaluation of Restorative Justice in Colorado. http://csuglobal.blackboard.com/bbcswebdav/courses/KEY_ORG581/ORG581/ORG581%20-%20Evaluating%20Restorative%20Justice_Criminal%20Justice.pdf (Retrieved 12/12/2012)

NAKER D & SEKITOLEKO D

2009. Positive Discipline: Creating a Good School without Corporal Punishment. Kapala: Raising Voices. Available at: <http://resourcecentre.savethechildren.se/content/library/documents/positive-discipline-creating-good-school-without-corporal-punishment>. (Retrieved 8/3/2013)

NATIONAL PLANNING COMMISSION (NPC)

2011. National Development Plan. Vision 2030. National Planning Commission. http://us-cdn.creamermedia.co.za/assets/articles/attachments/36224_npc_national_development_plan_vision_2030_-_lo-res.pdf (Retrieved 19/1/2013)

NCANA N

2008. Schoolchildren Demand Security. *The Times* 19 February:8.
2010. "OBE Has Failed Our Country." *The Times* 8 January:6.

NDAMANI PL

2008. Factors Contributing to Lack of Discipline in Selected Secondary Schools in the Mangaung Area of Bloemfontein and Possible Solutions. *Interim: Interdisciplinary Journal* 7(2):177-197.

NELSEN J, LOTT L & GLEN HS

2000. *Positive Discipline in the Classroom*. Revised 3^d edition. Roseville: Prima Publishing.

NESER J

2005. An Exploration of Learners' Views on Certain Aspects of School Safety. *Acta Criminologica* 18(3):61-81.

NIEUWENHUIS J

2007. Qualitative Research Designs and Data Gathering Techniques. In *First Steps in Research*, edited by K Maree. Pretoria: Van Schaik.

2008. *Growing Human Rights and Values in Education*. Pretoria: Van Schaik.

NGWENA C & PRETORIUS L

2012. Substantive Equality for Disabled Learners in State Provision of Basic Education: A Commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*. *South African Journal on Human Rights* 28:81-115.

NPC [SEE NATIONAL PLANNING COMMISSION]

NTUTA NP & SCHURINK WJ

2010. Towards Sustaining Performance in a Gauteng Secondary School. *SA Journal of Human Resource Management/ SA Tydskrif vir Menslikshulpbronbestuur* 8(1):1-9.

NUSSBAUM MC

2000. *Women and Human Development. The Capabilities Approach*. Cambridge: Cambridge University Press.

O

OAS [SEE ORGANIZATION OF AMERICAN STATES]

OFER U

2011. Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools. *New York Law School Law Review* 56:1374-1411.

OLIFANT K

2012. You're Late for School Again! *Star* 11 May:2.

OLIVIER M

2000. The Status of International Children's Rights Instruments in South Africa. In *Introduction to Child Law in South Africa*, edited by CJ Davel. Lansdowne: Juta Law.

OLOWU D

2002. Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child. *The International Journal of Children's Rights* 10(2):127-136.

OOSTHUIZEN IJ (Red)

2006. *Praktiese Wenke vir Leerderdisipline*. Pretoria: Van Schaik.

2010. Metodes vir die Handhawing van Leerderdisipline in die Kenneth Kaunda-streek van Noordwes. *Tydskrif vir Christelike Wetenskap* 46(1):227-243.

OOSTHUIZEN IJ, ROOS MC, SMIT MH & ROSSOUW JP

2009. The South African Constitution. In *Aspects of Education Law*. 4th edition edited by IJ Oosthuizen. Pretoria: Van Schaik.

OOSTHUIZEN IJ, ROSSOUW JP & DE WET A

2004. *Introduction to Education Law*. Pretoria: Van Schaik.

OOSTHUIZEN IJ, ROSSOUW JP & SMIT M

2009. School Governance. In *Aspects of Education Law*. 4th edition edited by IJ Oosthuizen. Pretoria: Van Schaik.

OOSTHUIZEN IJ, ROUX JM & VAN DER WALT JL

2003. A Classical Approach to the Restoration of Discipline in South African Schools. *Koers* 68(4):373-390.

OOSTHUIZEN I & VAN STADEN J

2007. Opvoeders Se Persepsie van die Effektiviteit van Dissiplinemetodes in die Vrystaatse, Oos-Kaapse en Vaaldriehoekskole. *Tydskrif vir Geesteswetenskappe* 47(3):359-371.

OOSTHUIZEN IJ, WOLHUTER CC & DU TOIT P

2003. Preventive or Punitive Disciplinary Measures in South African Schools: Which Should Be Favoured? *Koers* 68(4):457-479.

ORGANIZATION OF AMERICAN STATES (OAS)

1969. American Convention on Human Rights. http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm (Retrieved 19/1/2013)

1988. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. <http://www.oas.org/juridico/english/treaties/a-52.html> (Retrieved 19/1/2013)

OTTO SAS

1999a. Die Gedragskode: 'n Nuwe Benadering tot Dissipline in Skole. *Die Unie* 95(4):8.

1999b. Die Gedragskode: 'n Nuwe Benadering tot Dissipline in Skole. Deel 2. *Die Unie* 96(1):7-8.

P

PAHAD S & GRAHAM TM

2012. Educators' Perceptions of Factors Contributing to School Violence in Alexandra. *African Safety Promotion Journal* 10(1):3-15.

PALMER A

1996. The Best Interests Criterion: An Overview of Its Application in Custody Decisions Relating to Divorce in the Period 1985-1995. *Acta Juridica* 12(4):98-113.

PANDOR N

2007. Affirming Excellence and Challenging Mediocrity. Speech by Mrs Naledi Pandor, MP, Minister of Education, tabling departmental Budget Vote for 2007/08 financial year. 29 May 2007. <http://www.polity.org.za/article/pandor-education-dept-budget-vote-200708-29052007-2007-05-299> (Retrieved 2/7/2012)

PARKER-JENKINS M

1999. *Sparing the Rod. Schools, Discipline and Children's Rights*. Oakhill: Trentham Books.

PATEL L

2005. *Social Welfare and Social Development in South Africa*. Cape Town: Oxford University Press.

PATTON CV

1999. Steps for a Successful Policy Analysis. <http://trochim.cornell.edu/tutorial/barrien/barrien.htm> (Retrieved 23/4/2004)

PHAKATI B

2012. Education Standard Worries Chamber of Commerce. *Business Day* 20 April:4.

2012a. Motsekga Faces New Threat of Legal Action. *Business Day* 8 March:4.

PHASWANA E

2010. Learner Councillors' Perspectives on Learner Participation. *South African Journal of Education* 30:105-122.

PIENAAR G

2003. A Different Approach to Classroom Discipline Problems. *Educare* 32(1&2):261-274.

PIETERS M

2011. Life. In *Constitutional Law of South Africa*, edited by S Woolman, M Bishop & J Brickhill. 2nd edition. Revision Service 3. Cape Town: Juta.

PORTEUS K, VALLY S & RUTH T

2001. *Alternatives to Corporal Punishment. Growing Discipline and Respect in Our Classrooms*. Sandown: Heinemann Publishers.

PRANIS K

2005. *The Little Book of Circle Processes*. Intercourse: Good Books.

PREST C & WILDBLOOD S

2005. *Children Law. An Interdisciplinary Handbook*. Bristol: Family Law.

PRETORIUS G

2011. Kinders by Skool Praat oor Verkragte. Meisue Sê Sy Is Kwaad, Hartseer en Aggressief. *Beeld* 22 Februarie:5.

PRINSLOO IJ

2005. How Safe Are South African Schools? *South African Journal of Education* 25(1):5-10.

PRINSLOO J

2008. In the Best Interest of the Child: The Protection of Child Victims and Witnesses in the South African Criminal Justice System. *Child Abuse Research in South Africa* 9(2):49-64.

2008a. The Criminological Significance of Peer Victimization in Public Schools in South Africa. *Child Abuse Research in South Africa* 9(1):27-36.

2010. The Constitutional Right to Protection of Child Victims and Witnesses in the South African Criminal Justice System: Director of Public Prosecutions, *Transvaal v Minister of Justice and Constitutional Development, and Others*. *Child Abuse Research in South Africa* 11(1):1-10.

Q

QUENNERSTEDT A

2009. Balancing the Rights of the Child and the Rights of Parents in the Convention on the Rights of the Child. *Journal of Human Rights* 8(2):162-176.

R

RAATH A

2007. Human Personhood and Social Benevolence – Reformational Reflections on the Right to Human Dignity. *Koers* 72(2):159-191.

RADEBE M

2012. “We Will Fix Bad Schools” – MEC. Matric Results: KZN Improving Steadily. *Witness* 6 January:4.

RABY R

2008. Frustrated, resigned, outspoken: Students' Engagement with School Rules and Some Implications for Participatory Citizenship. *The International Journal of Children's Rights* 16: 77-98.

RADEMEYER A

2007. Leerlinge Se Regte in Klas Frustreer Onderwysers. Internasionale Konferensie Hoor van Stres. *Volksblad* 5 April:11.

2013. Geskors As Jy Kla. <http://www.beeld.com/Suid-AfricaNuus/Geskors-as-jy-kla-20130205> (Retrieved 7/2/2013)

RAMPHELE M

2009. Another Generation Betrayed. *Sunday Times* 18 January:19.

RAPPORT VERSLAGSPAN

2011. Onnies Trek Glo Ore, Breek Arms, Val Aan Met 'n Pyp. *Rapport* 19 Julie:13.

RAUTENBACH IM

2008. Bill of Rights Compendium. Available at:

<http://bwpubs.uovs.ac.za/nxt/gateway.dll?f=multiview&mh=1000&mkb=5120&d=2b>

(Retrieved 24/1/2012)

RAUTENBACH IM & MALHERBE EFJ

2004. *Constitutional Law*. 4th edition. Durban: Lexis Nexis Butterworths.

REIMER K

2011. An exploration of the implementation of restorative Justice in an Ontario public school. *Canadian Journal of Educational Administration and Policy Issue*. Issue 119. March:1-42.

REYNEKE JM & KRUGER HB

2006. Sexual Offences Courts: Better Justice for Children? *Journal for Juridical Science* 31(2):73-107.

REYNEKE M & REYNEKE R

2011. Implementation of Preliminary Inquiries at the Mangaung One-stop Child Justice Centre. *Acta Criminologica* 23(3):123-142.

ROACH K

1991. The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies. *Arizona Law Review* 33(4):859-905.

ROBINSON JA

1993. Divorce Settlements, Package Deals and the Best Interests of the Child. *Van Vuuren v Van Vuuren* 1993 1 SA 163 (T). *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 56(3):495-499.

2002. An Introduction to the International Law on the Rights of the Child Relating to the Parent-Child Relationship. *Stellenbosch Law Review* 13(2):309-320.

ROEDERER C

2005. Founding Provisions. In *Constitutional Law of South Africa*, edited by S Woolman, M Bishop & J Brickhill. 2nd edition. Revision Service 3. Cape Town: Juta.

2011. Founding Provisions. In *Constitutional Law of South Africa*, edited by S Woolman, M Bishop & J Brickhill. 2nd edition. Revision Service 3. Cape Town: Juta.

ROOS R

2003. Legal Requirements for School Rules and Disciplinary Sanctions. *Koers* 68(4):481-498.

2003a. The Legal Nature of Schools, Code of Conduct and Disciplinary Proceedings in Schools. *Koers* 68(4):499-520.

ROOS MC, OOSTHUIZEN IJ & SMIT MH

2009. Common Law. In *Aspects of Education Law*, edited by IJ Oosthuizen. Pretoria: Van Schaik.

ROSSOUW JP

2003. Learner Discipline in South African Schools – A Qualitative Study. *Koers* 68(4):413-435.

2007. The Role of the Governing Body in School Discipline. In *Public School Governance in South Africa*, edited by R Joubert & E Bray. Pretoria: Interuniversity Centre for Education and Education Policy (CELP).

RUNHARE T & VANDEYAR S

2011. Loss of Learning Space within a Legally Inclusive Education System: Institutional Responsiveness to Mainstreaming of Pregnant Learners in Formal Education. *Gender and Behaviour* 9(2):4100-4124.

S

SACE [SEE SOUTH AFRICAN COUNCIL FOR EDUCATORS]

SAHRC [SEE SOUTH AFRICAN HUMAN RIGHTS COMMISSION]

SA MEDIA

2012. www.samedia.uovs.ac.za/cgi-bin/SamWeb/BuildResults (Retrieved 27/8/2012)

SAPA

2012. NGO Takes on Motsekga. *IOL News* 20 August. www.iol.co.za/news/crime-courts/ngo-takes-on-notsekga-1.1366441#.UDMqjd0geac (Retrieved 21/8/2012)

2012. Class Bully Shot. 12 November. Available at: http://www.iol.co.za/news/south-africa/gauteng/class-bully-shot-dead-1.1427304#.UQKHhr-R_To (Retrieved 25/1/2013)

SCHACHTER O

1983. Human Dignity as a Normative Concept. *The American Journal of International Law* 77(4):848-854.

SCHOONEES PC, SWANEPOEL CJ, DU TOIT SJ & BOOYSEN CM

1972. *HAT. Verklarende Handboek van die Afrikaanse Taal*. Johannesburg: Perskor.

SEDIBE M & FRASER WF

2012. The Role of Teachers in Enhancing a Culture of Teaching and Learning in Disadvantaged High Schools. *Journal of Social Sciences* 31(2):151-157.

SERRAO A

2009. Wits Prof Gives SA Schools a Big Fat F. *Star* 4 March:6.

2009a. Striking Teachers Will Be Arrested. Officials Says Soweto Branch a Law Unto Themselves. *Star* 15 June:2.

2009b. Premier Threatens Teachers with Arrest. *Pretoria News* 15 June 2009.

SHAW G

2007. Restorative Practices in Australian Schools: Changing Relationships, Changing Culture. *Conflict Resolution Quarterly* 25(1):127-135.

SHIELDS N, NADASEN K & PIERCE L

2009. A Comparison of the Effects of Witnessing Community Violence and Direct Victimization among Children in Cape Town, South Africa. *Journal of Interpersonal Violence* 24(7):1192-1208.

SHIER H

2001. Pathways to Participate: Openings, Opportunities and Obligations. A new Model for Participating in Decision-making, in Line with Article 12 of the United Nations Convention on the Rights of the Child. *Children & Society* 15(2):107-117.

SIERS M

2003. RAPCAN'S Positive Discipline Programme in Schools: An Overview. *Article 19* 3(1):1-4.

SKELTON A & BATELY M

2006. *Charting Progress, Mapping the Future: Restorative Justice in South Africa*. Pretoria: Restorative Justice Centre.

SKELTON A & GALLINETTI J

2008. A Long and Winding Road: The Child Justice Bill, Civil Society and Advocacy. *SA Crime Quarterly* 25:3-9.

SKELTON A & PROUDLOCK P

2007. Interpretation, Objects, Application and Implementation of the Children's Act. In *Comments on the Children's Act*, edited by CJ Davel & AM Skelton. Cape Town: Juta.

SLOTH-NIELSEN J

1996. Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's Rights in South Africa. *Acta Juridica* 6:6-27.

2001. The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*. *South African Journal of Human Rights* 17: 210-231.

2002. Children's Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child. *The International Journal of Children's Rights* 10(2):137-156.

SMIT MH AND OOSTHUIZEN IJ

2011. Improving School Governance through Participative Democracy and the Law. *South African Journal of Education* 31(1):55-73.

SOCIAL SURVEYS AFRICA

2010. *Access to Education in South Africa. Submissions to the Portfolio Committee on Basic Education.* <http://edulibpretoria.files.wordpress.com/2008/01/access-to-education-in-south-africa-social-surveys-febr-2010.pdf> (Retrieved 12/12/2012).

SONN B, SANTENS A & RAVAU S

2011. Hearing Learner Voice in Health Promoting Schools through Participatory Action Research. *Perspectives in Education* 29(1):93-104.

SOUTH AFRICAN COUNCIL FOR EDUCATORS (SACE)

2011. School-based Violence Report. An overview of School-based Violence in South Africa. <http://www.sace.org.za/upload/files/School%20Based%20Violence%20Report-2011.pdf> (Retrieved 15/12/2012)

2012. Annual Report 2011/2012. Centurion: South African Council for Educators. Also available at: <http://www.sace.org.za/upload/files/SACE%20Annual%20Report%202011-2012.pdf> (Retrieved 29/12/2012).

2012a. A Report on Disciplinary Cases Referred to the South African Council for Educators in 2008 and 2009 and Their Policy Implications in the Context of International Professional Practice. Also available at: [http://www.sace.org.za/upload/files/3%20REPORT%20ON%20DISCIPLINARY...SACE\(Email\).pdf](http://www.sace.org.za/upload/files/3%20REPORT%20ON%20DISCIPLINARY...SACE(Email).pdf) (Retrieved 29/12/2012)

SOUTH AFRICAN HUMAN RIGHTS COMMISSION (SAHRC)

2006. Report of the Public Hearing on the Right to Basic Education. <http://www.sahrc.org.za/home/21/files/Reports/Right%20to%20basic%20education%20006.pdf> (Retrieved 17/12/2012)

2008. Report of the Public Hearing on School-based Violence. <http://www.sahrc.org.za/home/index.php?ipkContentID=15&ipkMenuID=19> (Retrieved 2/7/2012)

SPRICK RS

2006. *Discipline the Secondary Classroom*. San Francisco: Jossey-Bass.

SQUELCH J

2001. Do School Governing Bodies Have a Duty to Create Safe Schools? An Education Law Perspective. *Perspectives in Education* 19(4):137-149.

STATISTICS SOUTH AFRICA

2012. Census 2011. Statistical Release. Pretoria: Statistics South Africa. Also available at: <http://www.statssa.gov.za/Publications/P03014/P030142011.pdf> (Retrieved 8/3/2013)

2012a. General Household Survey 2011. Pretoria: Statistics South Africa. Also available at: <http://www.statssa.gov.za/publications/P0318/P0318April2012.pdf> (Retrieved 12/12/2012)

T

TANG KL

2003. Implementing the United Nations Convention on the Rights of the Child. The Canadian Experience. *International Social Work* 46(3):277-288.

TAU S

2008. Silence over Absent Teachers. *Citizen 2* April:4.

TAYLOR N

2008. *What's Wrong with South African Schools?*. Presentation to the conference, What's Working in School Development. JET Education Services 28-29 February 2008.

TAYLOR N, MABOGOANE T, SHINDLER J & AKOQBHAI B

2010. Seeds of Their Struggle: The Features of Under- and Overage Enrolment among Grade 4 Learners in South Africa. Research Monograph No 47.

THAKALI T

2011. Matrics' Fate in Balance. Senaoane Teachers Said to Have Passed Pupils to Avoid High Failure Rates. *Saturday Star* 5 November:4.

THEYTAZ-BERGMAN L & DETRICK S

1996. Practice and Implementation. Eleventh and Twelfth Sessions of the Committee on the Rights of the Child: Consideration of State Party Reports. *The International Journal of Children's Rights* 4(3):299-301.

THORNBERG R

2009. Rules in Everyday School Life: Teacher Strategies Undermine Pupil Participation. *International Journal of Children's Rights* 17:393-413.

TOBIN J

2005. Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights. *South African Journal on Human Rights* 21(1):86-126.

U

UDHR [SEE UNITED NATIONS]

UN [SEE UNITED NATIONS]

UNESCO

1960. Convention against Discrimination in Education. UNESCO. http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html (Retrieved 19/1/2013)

1994. World Declaration on Education for All and the Framework for Action to Meet Basic Learning Needs. Adopted by the World Conference on Education for All: Meeting Basic Learning Needs, Jomtien, Thailand, 5-9 March 1990. UNESCO: Paris. http://www.unesco.org/edffucation/pdf/JOMTIE_E.PDF (Retrieved 3/7/2012)

<http://unesdoc.unesco.org/images/0014/001478/147853e.pdf> (Retrieved 3/7/2012)

2007. Experts' Consultation on the Operational Definition of Basic Education. United Nations Educational, Scientific and Cultural Organization. ED/BAS/RVE/2009/PI/1. <http://unesdoc.unesco.org/images/0018/001802/180253e.pdf> (Retrieved 2/7/2012)

2012. School and Teaching Resources in sub-Saharan Africa. Analysis of the 2011 UIS Regional Data Collection on Education. UNESCO. <http://www.uis.unesco.org/Education/Documents/ib9-regional-education-africa=2012-env5.pdf> (Retrieved 17/1/2013)

UNICEF

2005. Convention on the Rights of the Child. Frequently Asked Questions. http://www.unicef.org/crc/index_30229.html (Retrieved 11/1/2013)

UNITED NATIONS (UN)

1945. Charter of the United Nations. United Nations. Available at: <http://www.un.org/en/documents/charter/> (Retrieved 24/2/2013)

1948. (UDHR) Universal Declaration of Human Rights. General Assembly of the United Nations Resolution 217 (III). <http://www.un.org/en/docudents/udhr/> (Retrieved 3/7/2012)

1959. (UN) United Nations Declaration on the Rights of the Child. United Nations General Assembly. Resolution 1386 (XIV).

<http://www.un.org/cyberschoolbus/humanrights/resources/child.asp>

(Retrieved 10/1/2013)

1966. (ICCPR) International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. <http://www1.umn.edu/humanrts/instreet/b3ccpr.htm>

(Retrieved 3/7/2012)

1966. (ICESCR) International Covenant on Economic, Social and Cultural Rights. General Assembly of the United Nations Resolution 2200 A (XXI). UN doc. A/6316.

<http://www2.ohchr.org/english/law/pdf/cescr.pdf> (Retrieved 3/7/2012)

1979. (CEDAW) Convention on the Elimination of All Forms of Discrimination against Women. <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (Retrieved 10/1/2013)

1986. Declaration on the Right to Development. United Nations General Assembly. A/RES/41/128. Available at: <http://www.un.org/documents/ga/res/41/a41r128.htm>

(Retrieved 26/2/2013)

1989. (CRC) Convention on the Rights of the Child. Resolution: UN doc A/44/49.

<http://www2.ohchr.org/english/law/crc.htm> (Retrieved 2/7/2012)

2006. (UNWPP 1) Plan of Action. World Programme for Human Rights Education. First Phase. Office of the United Nations High Commissioner for Human Rights.

UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL

2005. Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime. Economic and Social Council. Available at:

http://www.un.org/en/pseataaskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf (Retrieved 27/7/2012)

V

VAN BUEREN G

2000. The United Nations Convention on the Rights of the Child: An Evolutionary Revolution. In *Introduction to Child Law in South Africa*, edited by CJ Davel. Lansdowne: Juta Law.

VAN DEN BERG S

2012. First Get the Basics Right Before Pouring More Resources into Schools. *Sunday Independent* 8 January:7.

VAN DER MERWE P

2012. 'n Skoolgebaseerde Sosiaal-emosionele Program as Strategie teen Misdaad en Geweld (2). *Tydskrif vir Geesteswetenskappe* 52(4):646-659.

VAN GASS C

2007. Recovery Plan for Western Cape Schools. Learners Lag after Teachers' Four Week Strike. *Business Day* 2 July:4.

VAN GENUGTEN W

2012. The Universalisation of Human Rights: Reflections on Obstacles and the Way Forward. State of the Art: Four Warnings against Simplistic Answers. In *Global Values in a Changing World*. Amsterdam: KIT Publishers.

VAN ROOYEN F

2008. Onnies Wat Wegbly Is Groter Problem as Leerlinge Wat Wegbly, Wys Studie. *Beeld* 1 April:2.

VAN ROOYEN J & ROSSOUW JP

2007. School Governance and Management: Background & Concepts. In *Public School Governance in South Africa*, edited by R Joubert & E Bray. University of Pretoria: Interuniversity Centre for Education Law and Education Policy.

VAN WAGENINGEN J

1965. *Latijnsch Woordenboek*. Vierde druk. Groningen: JB Wolters.

VAN WYK N

2001. Perceptions and Practices of Discipline in Urban Black Schools in South Africa. *South African Journal of Education* 21(3):195-201.

2004. School Governing Bodies: The Experiences of South African Educators. *South African Journal of Education* 24(1):49-54.

VARNHAM S

2005 Seeing Things Differently: Restorative Justice and School Discipline. *Education and the Law* 17(3):87-104.

VARNHAM S & SQUELCH J

2008. Rights, Responsibilities and Regulation – The Three Rs of Education: A Consideration of the State's Control over Parental Choice in Education. *Education and the Law* 20(3):193-208.

VIENNA DECLARATION AND PROGRAMME OF ACTION [SEE WORLD CONFERENCE ON HUMAN RIGHTS]

VILJOEN F

2000. The African Charter on the Rights and Welfare of the Child. In *Introduction to Child Law in South Africa*, edited by CJ Davel. Lansdowne: Juta Law.

VISSER PJ

2004. Dispatch High School v Head, Department of Education, Eastern Cape 2003 1 SA 246 (CKH). *De Jure* 37(1):150-154.

2007. Some Ideas on the "Best interests of a Child" Principle in the Context of Public Schooling. *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 70(3):459-469.

VOLLGRAFF R

2011. SA's Education Woes Laid Bare. *Sunday Times* 24 July:7.

W

WACHTEL T

2012. Defining Restorative. International Institute for Restorative Practices: OORP Graduate School. Available at: <http://www.iirp.edu/pdf/Defining-Restorative.pdf> (Retrieved 8/3/2013)

WARD CL

2007. *Young People's Violent Behaviour: Social Learning in Context*. In *Someone stole my smile: an exploration into the causes of youth violence in South Africa* edited by P Burton. Cape Town: Centre for Justice and Crime Prevention. Available at: <http://www.cjcp.org.za/admin/uploads/stolen%20smile.final.pdf> (Retrieved 8/3/2013)

WALLACE RMM & DALE-RISK K

2001. *International Human Rights Text and Materials*. 2nd edition. London: Sweet & Maxwell.

WARREN C & WILLIAMS S

2007. Restoring the Balance 2. Changing culture through restorative approaches: the experience of Lewisham schools. Lewisham: Lewisham Council Restorative Approaches Partnership.

WCED [SEE WESTERN CAPE EDUCATION DEPARTMENT]

WEARMOUTH J, MCKINNY R & GLYNN T

2007. Restorative Justice in Schools: A New Zealand Example. *Educational Research* 49(1):37-49.

WESTERN CAPE EDUCATION DEPARTMENT (WCED)

2007. Learner Discipline and School Management. Cape Town: Western Cape Education Department. Available at: http://wced.pgwc.gov.za/documents/LearnerDiscipline/Learner_Discipline_and_School_Management.pdf (Retrieved 8/3/2013)

WILLEMS I & BAUWENS S

2012. Geweld op School: De Bescherming van de Integriteit van het Kind: Reflecties van Directies uit het Basis-en Secundair Onderwijs. *Tijdschrift voor Onderwijsrecht & Onderwijsbeleid* September-Oktober:68-77.

WOLHUTER CC & MEYER L

2007. 'n Leerderperspektief op Dissipline in Histories Swart Sekondêre Skole: 'n Kwalitatiewe Ontleding. *Tydskrif vir Geesteswetenskappe* 47(3):349-35.

WOLHUTER CC, OOSTHUIZEN IJ & VAN STADEN JG

2010. Skoolfase/Leerderouderdom as Faktor in Leerderdissipline in Suid-Afrikaanse Skole. *Tydskrif vir Christelike Wetenskap* 46(1):169-186.

WOLHUTER CC & STEYN SC

2003. Learner Discipline at School: A Comparative Educational Perspective. *Koers* 68(4):521-538.

WOLHUTER CC & VAN STADEN JG

2008. Bestaan Daar 'n Dissiplinekrisis binne Suid-Afrikaanse Skole? Belewens van Opvoeders. *Tydskrif vir Geesteswetenskappe* 48(3):389-398.

WOOLMAN S

2005. Dignity. In *Constitutional Law of South Africa*, edited by S Woolman, M Bishop & J Brickhill. 2nd edition. Cape Town: Juta.

WOOLMAN S & BISHOP M

2011. Education. In *Constitutional Law of South Africa*, edited by S Woolman, M Bishop & J Brickhill. 2nd edition. Cape Town: Juta.

WOOLMAN S & FLEISCH B

2009. *The Constitution in the Classroom. Law and Education in South Africa 1994-2008*. Pretoria: Pretoria University Law Press.

WORLD CONFERENCE ON HUMAN RIGHTS

1993. Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights. 25 June 1993. <http://www2.ohchr.org/english/law/pdf/vienna.pdf> (Retrieved 19/1/2013)

WYNESS M

2009. Children Representing Children. Participation and the Problem of Diversity in UK Youth Councils. *Childhood* 16:535-552.

X

XABA M

2006. The Difficulties of School Development Planning. *South African Journal of Education* 26(1):15-26.

Y

Z

ZEHR H

2002. *The Little Book of Restorative Justice*. Intercourse: Good Books.

ZEHR H & MIKA H

2010. Fundamental Concepts of Restorative Justice. In *Restorative Justice. Critical Concepts in Criminology*, edited by C Hoyle. Vol 1. Abington: Routledge.

ZERMATTEN J

2003. The Best Interests of the Child from the Literal Analysis to the Philosophical Scope. Institut International Des Droits De Lenfant. Working Report 3-2003. http://www.childsrights.net/html/documents/wr/2003-3_en.pdf (Retrieved 2/7/2012)

ZULU BM, URBANI G, VAN DER MERWE A & VAN DER WALT JL

2004. Violence as an Impediment to a Culture of Teaching and Learning in Some South African Schools. *South African Journal of Education* 24(2):170-175.

ZWEIGERT K & KÖTZ H

1998. *An Introduction to Comparative Law*. 3rd edition. New York: Oxford University Press.

CASE LAW

South Africa

A

Advance Mining Hydraulics (Pty) Ltd and Others v Botes NO and Others 2000 (2) BCLR 119 (T)

African Christian Democratic Party v The Electoral Commission and Others 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC)

Afri-Forum and Another v Malema and Another (Vereniging van Regslui vir Afrikaans as Amicus Curiae) 2011 (12) BCLR 128 (EqC)

Anna Jonker v The Manager, Gali Thembani/JJ Serfontein School Unreported case 94/2011: judgment delivered in the Eastern Cape Division, Grahamstown High Court

Antonie v Governing Body, Settlers High School, and Others 2002 (4) SA 738 (C)

August and Another v Electoral Commission and Others 1999 (3) SA 1 CC; 1999 (4) BCLR 363 (CC)

B

B v S 1995 (3) SA 571 (A)

Bailey v Bailey 1979 (3) SA 128 (A)

Bannatyne v Bannatyne 2003 (2) SA 363 (CC)

Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another 2005 (1) BCLR 1 (CC)

Brandt v S [2005] 2 All SA 1 (SCA)

Brink v Kitshoff 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC)

C

Camps Bay Residents and Ratepayers Association v Augoustides 2009 (6) SA 190 (WCC)

C and Others v Department of Health and Social Development, Gauteng, and Others 2012 (2) SA 208 (CC)

Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC); 2002 (1) SACR 79 (CC); 2001 (10) BCLR 995 (CC)

Centre for Child Law and Others v MEC for Education, Gauteng, and Others 2008 (1) SA 223 (T)

Centre for Child Law and Others v Minister of Basic Education and Another Case 1749/2012
Eastern Cape High Court, Grahamstown

Centre for Child Law v Minister for Justice and Constitutional Development and Others 2009 (6)
SA 632 (CC); 2009 (2) SACR 477 (CC); 2009 (11) BCLR 1105 (CC)

Centre for Child Law v Minister of Home Affairs 2005 (6) SA 50 (T)

Christian Education SA v Minister of Education 1999 (4) SA 1092 (SE)

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC); 2000 (10)
BCLR 1051 (CC)

*Christian Lawyers South Africa v Minister of Health and Others (Reproductive Health Alliance
as Amicus Curiae)* 2005 (1) SA 509 (T); 2004 (10) BCLR 1086 (T)

Clarke v Hurst 1992 (4) SA 630 (D)

Coetzee v Government of the Republic of South Africa 1995 (4) SA 631 (CC); 1995 (10) BCLR
1382 (CC)

College v Dlamini NO and Others [2005] JOL 15075 (N)

D

*Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of
Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*
2000 (8) BCLR 837 CC

Dayimani v S [2006] JOL 17745 (E)

Deijl v Deijl 1966 (4) SA (R) 260

De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others 2003
(12) BCLR 1333 (CC); 2003 SACR (2) 445 (CC); 2004 (1) SA 406 (CC) 2003 (3) SA 389
(W); [2003] 1 All SA 449 (W)

Despatch High School v Head, Department of Education, Eastern Cape and Others 2003 (1) SA
246 (CKH)

Dikoko v Mokhatla 2006 (6) SA 235 (CC)

Director of Public Prosecutions v Thabete [2011] JOL 27881 (SCA)

*Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development
and Others* 2009 (2) SACR 130 (CC); 2009 (4) SA 222 (CC)

*Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian
and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC)

Du Toit v Minister for Safety and Security and Another 2009 (6) SA 128 (CC)

E

- Ex parte Commissioner of Child Welfare, Durban: In re Kidd* 1993 (4) SA 671 (N)
Ex parte Commissioner of Child Welfare: In re Adopted Child 1966 (2) SA 301 (C)
Ex parte Commissioner for Child Welfare: In re Adoption Volczer 1960 (2) SA 312 (O)
Ex parte Commissioner of Child Welfare: In re Bromfield 1971 (1) SA 323 (N)
Ex parte Commissioner of Child Welfare: In re Smidt 1956 (4) SA 787 (T)
Ex parte Kommissaris van Kindersorg: In re Steyn Kinders 1970 (2) SA 27 (NK)
Ex parte Kommissaris van Kindersorg: In re Van Wyk 1964 (4) SA 601 (GW)
Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB Ex parte Kommissaris van Kindersorg, Oberholzer: In re AGF 1973 (2) SA 699 (T)

F

- Federation of School Governing Bodies of SA and Others v MEC for the Department of Basic Education, Eastern Cape, and Others* [2011] 6 BLLR 616 (ECB)
Ferreira v Levin NO and Others 1996 (1) SA 984 (CC)
Fletcher v Fletcher 1948 (1) SA 130 (A)
Fraser v Children's Court, Pretoria North, and Others 1997 (2) SA 261 (CC)
Freedom Stationery (Pty) Ltd and Another v MEC for Education, Eastern Cape, and Others (Centre for Child Law as Amicus Curiae) [2011] JOL 26927 (E)
French v French 1971 (4) SA 298 (W)

G

- George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province and Others* [2010] JOL 26363 (ECB)
Girdwood v Girdwood 1995 (4) SA 698 (C)
Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae 2011 (8) BCLR 761 (CC)
Governing Body of the Mikro Primary School and Another v Western Cape Minister of Education and Others [2005] 2 All SA 37 (C); 2011 (8) BCLR 761 (CC)
Governing Body of Rivonia Primary School and Another v MEC for Education, Gauteng Province, and Others Unreported case in the Supreme Court of Appeal: case 161/12 – judgment delivered on 30 November 2012
Governing Body, Tafelberg School v Head, Western Cape Education Department 2000 (1) SA 1209 (C)

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC)

Greenshields v Wyllie 1989 (4) SA 898 (W)

Grove Primary School v Minister of Education and Others 1997 (4) SA 982 (C)

H

Harksen v Lane NO and Others 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC)

Harris v Minister of Education 2001 (8) BCLR 796 (T)

Hay v B and Others 2003 (3) SA 492 (W)

Head of Department: Department of Education, Free State Province v Welkom High School and Another; Head of Department: Department of Education, Free State Province v Harmony High School and Another (766/2011, 767/2011) [2012] ZASCA 150; 2012 (6) SA 525 (SCA); [2012] 4 All SA 614 (SCA) (28 September 2012)

Head of Department, Mpumalanga Department of Education, and Another v Hoërskool Ermelo and Another 2010 (3) BCLR 177 (CC)

Head of Western Cape Education Department and Others v Governing Body of Point High School and Others [2008] 3 All SA 35 (SCA)

Heystek v Heystek 2002 (2) SA 754 (T); [2002] 2 All SA 401 (T)

High School Ermelo and Another v Head of the Department and Others [2008] 1 All SA 139 (T)

Hoërskool Ermelo en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere [2007] JOL 19629 (T)

Horsford v De Jager 1959 (2) SA 152 (N)

Howells v S [1999] 2 All SA 233 (C)

Howells v S [2000] JOL 6577 (A)

I

In re Adoption of Child 1974 (3) SA 835 (N)

In re Former Highlands Residents: Sonny and Others v Department of Land Affairs 2000 (2) SA 351 (LCC)

In Re Moatsi 2002 (4) 712 (T)

J

J v Director General, Home Affairs 2003 (5) SA 621 (CC); 2003 BCLR 463 (CC)

J v J 2008 (6) SA 30 (C)

Jacobs v Chairman, Governing Body, Rhodes High School, and Others 2011 (1) SA 160 (WCC)

Jooste v Botha 2000 (2) SA 199 (T)

K

Kaiser v Chambers 1969 (4) SA 224 (C)

Kastan v Kastan 1985 (3) SA 235 (C)

Khosa and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC)

Kimberley Girls' High School and Another v Head, Department of Education, Northern Cape Province and Others 2005 (5) SA 251 (NC)

Klink v Regional Court Magistrate NO and Others 1996 (3) BCLR 402 (SE)

Kotze v Kotze 2003 (3) SA 628 (T)

L

Laerskool Gaffie Maree and Another v Member of the Executive Council for Education, Training, Arts and Culture, Northern Cape, and Others 2003 (5) SA 367 (NC); 2005 (2) All SA 37 (C)

Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere 2003 (4) SA 160 (T)

Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC)

Long and Another v Jacobs (145/11) [2012] ZASCA 58 (2 April 2012)

M

Maritzburg College v Dlamini NO and Others [2005] JOL 15075 (N)

Märtens v Märtens 1991 (4) SA 287 (T)

McCall v McCall 1994 (3) SA 201 (C)

MEC for Education, KwaZulu-Natal, and Others v Pillay 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC)

MEC for Health, Mpumalanga v M-Net 2002 (6) SA 714 (T)

Member of the Executive Council for Education, Eastern Cape Province, and Others v Queenstown Girls High School Unreported case 1041/07 in the Eastern Cape Division

Mineworkers Investment Co (Pty) Ltd v Modibane 2002 (6) SA 512 (W)

Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another 2006 (1) SA 1 (SCA); 2005 (3) SA 504 (C)

Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (7) BCLR 713 (CC); 2000 (3) SA 422 (CC)

Mose (Legal Guardian of Luzuko Mose) v Minister of Education, Provincial Government of the Western Cape, Gabru and Others [2008] JOL 22623 (C)

Motaung v S [2005] JOL 16071 (SE)

Mpumalanga Education Department and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC)

Myers v Leviton 1949 (1) SA 203 (T)

N

National Association of Welfare Organisations and Non-governmental Organisations and Others v MEC for Social Development, Free State and Others [2010] JOL 26056 (FB)

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC)

Ndokwane v S [2011] JOL 27316 (KZP)

Noradien v Andrews 2002 (3) SA 500 (K)

O

Observatory Girls Primary School and Another v Head of Department of Education, Gauteng 2003 (4) SA 246 (W)

P

P and Another v P and Another 2002 (6) SA 105 (N)

Patel and Another v Minister of Home Affairs and Another 2000 (2) SA 343 (D)

Pearson High School v Head of Department, Eastern Cape Province, and Others [1999] JOL 5517 (Ck)

Peterson v Maintenance Officer and Others 2004 (2) SA 56 (C); 2004 (2) BCLR 205 (C); [2004] All SA 117 (C)

Pinion v Pinion 1994 (2) SA 725 (D)

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC)

President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC)

Prinsloo v Van der Linde 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC)

Q

Qozeleni v Minister of Law and Order 1994 (3) SA 625 (E)

Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government, and Others Eastern Cape Provincial Division, unreported case 454/08

R

Rail Commuters Action Group v Transnet t/a Metrorail 2005 (2) SA 359 (CC)

S

S v Coetzee 1997 (3) SA 527 (CC)

S v Dodo 2001 (1) SACR 594 CC; 2000 (2) BCLR 119 (T)

S v Dube 2000 (2) SA 583 (N)

S v Francke [1999] JOL 4451 (C)

S v Hartnick [2001] JOL 8576 (C)

S v Howells [2000] JOL 6577 (A); 1999 (1) SACR 675 (C)

S v Isaacs 2002 (1) SACR 176 (C)

S v Jaipal 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC); 2005 (1) SACR 215 (CC)

S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) ; 2007 (2) SACR 539 (CC)

S v Makwanyane and Another 1995 (2) SACR 1 (CC); 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC)

S v Malatji [2005] JOL 15716 (T)

S v Maluleke 2008 (1) SACR 49 (T)

S v Manamela 2000 (3) SA 1 (CC)

S v Mathebula [1996] 4 All SA 168 (T)

S v Mokoena 2008 (5) SA 578 (T)

S v Nagef [1998] JOL 4098 (T)

S v Saayman 2008 (1) SACR 393 (E)

S v Shilubane 2008 (1) SACR 295 (T)

S v T 2000 (2) SACR 658 (Ck)

S v Tabethe [2009] JOL 23082 (T)

S v Williams and Others 1995 (3) SA 632 (CC); 1995 (7) BCLR (CC)

S v Z en 4 Ander Sake 1999 (1) SACR 427 (E)

S v Z and 23 Similar Cases 2004 (2) SACR 410 (E)

S v Zinn 1969 (2) SA 537 (A)

Sanderson v Attorney General, Eastern Cape 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC)

Schoonbee and Others v MEC for Education, Mpumalanga, and Another 2002 (4) SA 877 (T)

Section 27 and Others v Minister of Basic Education and Another Unreported case 24565/2012, Gauteng North High Court

Seodin Primary School and Others v MEC of Education, Northern Cape and Others [2006] 1 All SA 154 (NC)

Settlers Agricultural High School and Another v Head of Department: Department of Education, Limpopo Province and Others [2002] JOL 10167 (T)

Shawzin v Laufer 1968 (4) SA 657 (A)

Sonderup v Tondelli and Another 2001 (1) SA 1171 (CC)

Soobramoney v Minister of Health (KwaZulu-Natal) 1997 (12) BCLR 1698 (CC)

Stefaans v S [1999] 1 All SA 191 (C)

St Michael's School for Girls and Others v The Head of the Free State Education Department and Others, Free State Provincial Division, Unreported case 5597/2008

Suid-Afrikaanse Onderwysunie v Departementshoof, Departement van Onderwys, Vrystaat, en 'n Ander 2001 (3) SA 100 (O)

Swarts v Swarts 2002 (3) SA 451 (T)

T

T v C 2003 (2) SA 298 (W)

Terblanche v Terblanche 1992 (1) SA 501

The Teddy Bear Clinic for Abused Children and Another v Minister of Constitutional Development and Others Unreported case 73300/10 in the North Gauteng High Court: judgment delivered on 4 January 2013

Thomas and Another v Minister of Home Affairs and Others 2000 (8) BCLR 837 (CC)

Tshona v Principal, Victoria Girls High School and Others [2006] JOL 18445 (E)

U

V

V v V 1998 (4) SA 169 (C)

Van der Linde v Van der Linde 1996 (3) SA 509 (O)

Van Oudenhove v Gruber 1981 (4) SA 857 (A)

Van Pletzen v Van Pletzen 1998 (4) SA 95 (O)

Van Rooyen v S [2006] JOL 16675 (W)
Van Rooyen v Van Rooyen 1994 (2) SA 325 (W)
Van Vuuren v Van Vuuren 1993 1 SA 163 (T)
Venton v Venton 1993 (1) SA 763 (D)

W

Welkom High School and Another v Head, Department of Education, Free State Province, and Another 2011 (4) SA 531 (FB)
Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa 2011 (5) SA 87 (WCC)
Western Cape Minister of Education v Governing Body of Mikro Primary School 2005 (10) BCLR 973 (SCA); 2005 (2) All SA 37 (C)
Western Cape Residents' Association v Parow High School 2006 (3) SA 542 (C)
Wicks v Fisher 1999 (2) SA 504 (N)
Willers v Serfontein en 'n Ander 1985 (2) SA 591 (T)

Canada

Egan v Canada (1995) 29 CRR (2d) 79
Law v Canada (Minister of Employment and Immigration) [1999] 1 SCR 497; 170 DLR (4th) 1; 170 DLR (4th) 1
Singh-Multani v Marguerite-Bourgeois (Commission scolaire) 2006 SCC 6, J.E. 2006-508; 2006 CarswellQue 1368

European Court

Osman v United Kingdom 29 EHHR 245

United Kingdom

R (on the application of Begun (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High school (House of Lords) 2006] UKHL 15

United States of America

Brown v Board of Education 347 U.S. 483 (1954)

Brown v Board of Education II 349 U.S. 294 (1955)

Roper, Superintendent, Patosi Correctional Center v Simmons 543 US 551 (2005)

LEGISLATION

Republic of South Africa

Basic Education Laws Amendment Act 15 of 2011
Child Care Act 74 of 1983
Child Justice Act 75 of 2008
Children's Act 38 of 2005
Choice on Termination of Pregnancy Act 92 of 1996
Constitution of the Republic of South Africa 1996
Constitution of the Republic of South Africa 200 of 1993
Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
Criminal Procedure Act 51 of 1977
Divorce Act 70 of 1979
Domestic Violence Act 116 of 1998
Education Laws Amendment Act 24 of 2005
Education Laws Amendment Act 31 of 2007
Education Laws Amendment Act 50 of 2002
Employment of Educators Act 76 of 1998
Further Education and Training Colleges Act 16 of 2006
Mediation in Certain Divorce Matters Act 24 of 1987
National Education Policy Act 27 of 1996
National Qualifications Framework Act 67 of 2008
Natural Fathers of Children Born Out of Wedlock Act 86 of 1997
Promotion of Administrative Justice Act 3 of 2000
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
Social Assistance Act 13 of 2004
South African Schools Act 84 of 1996
South African Social Security Agency Act 9 of 2004

Illinois

705 ILCS 405/Juvenile Court Act

New Zealand

Children, Young Persons and Their Families 24 of 1989

GOVERNMENT NOTICES (GN)

Republic of South Africa

GN R1374/1993. Persons or Categories or Classes of Persons Who Are Competent to be Appointed as Intermediaries. *Government Gazette* 15024.

GN 776/1998. Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners. *Government Gazette* 18900:395.

GN 2432/1998. Admission Policy for Ordinary Public Schools. *Government Gazette* 19377:400.

GN 2433/1998. Age Requirements for Admission to an Ordinary Public School. *Government Gazette* 19377:400.

GN 82/2000. Norms and Standards for Educators. *Government Gazette* 20844.

GN 1589/2002. Regulations to Prohibit Initiation Practices in Schools. *Government Gazette* 24165.

GN 869/2006. Amended National Norms and Standards for School Funding. *Government Gazette* 29179.

GN 586/2012. Level Descriptors for the South African National Qualifications Framework. *Government Gazette* 35548.

GN 972/2012. Guidelines on Strategy and Priorities for the National Qualifications Framework (NQF). *Government Gazette* 35915:569.

GN 1040/2012. Determination of the Sub-frameworks that Comprise the National Qualifications Framework. *Government Gazette* 36003:570.

PROVINCIAL LEGISLATION

Eastern Cape Provincial Education Act 1 of 1999

Eastern Cape Provincial Education Amendment Act 5 of 2004

Free State School Education Act 2 of 2000

Kwazulu-Natal School Education Act 3 of 1996

Limpopo Province School Education Act 9 of 1995

Mpumalanga School Education Act 8 of 1995

Mpumalanga School Education Amendment Act 7 of 1998

Northern Cape School Education Act 6 of 1996

North West Schools Education Act 3 of 1998

Western Cape Provincial School Education Act 12 of 1997

Western Cape Provincial School Education Amendment Act 7 of 2010

PROVINCIAL NOTICES

Eastern Cape Provincial Notice on Regulations and Rules – Behaviour by Learners in Public Schools which may Constitute Serious Misconduct, the Disciplinary Proceedings to be Followed and Provisions of Due Process Safeguarding the Interests of the Learner and Any Party Involved in Disciplinary Proceedings 32 of 1999.

Eastern Cape Provincial Notice on Regulations Relating to the Governing Bodies of Public Schools (excluding Public Schools for Learners with Special Education Needs) 51 of 2003.

Free State Provincial Notice on Code of Conduct for Members of Governing Bodies of Public Schools 181 of 2005.

Gauteng Provincial Notice on Determination of Minimum Requirements of Constitution and Standing Orders of Governing Bodies of Public Schools 993 of 1997.

Gauteng Provincial Notice on Misconduct of Learners at Public Schools and Disciplinary Proceedings 6903 of 2000.

Gauteng Provincial Notice on Code of Conduct for Members of Governing Bodies of Public Schools 1182 of 2004.

KwaZulu-Natal Provincial Notice on the Code of Conduct for Members of Governing Bodies 331 of 2005.

Mpumalanga Provincial Notice on the Code of Conduct for Members of Governing Bodies 40 of 2011.

This PhD thesis explores the best-interests-of-the-child standard within the context of school discipline in South Africa. The best-interests-of-the-child principle captured in section 28(2) of the *Constitution of the Republic of South Africa, 1996* provides that the best interests of the child are of paramount importance in every matter concerning the child. The Constitutional Court elevated this standard to a constitutional right in South Africa. This thesis aims to provide content to this constitutional right. The concept is contextualised through a process of constitutional interpretation which includes *inter alia* a textual analysis of the constitutional provision and informing the concept with reference to other constitutional rights and values, international law and foreign law.

The contextualisation process culminates in a list of factors indicating the different dimensions of this concept which should be taken into account in any disciplinary measures. These factors are then applied to the retributive and restorative approaches to discipline. It is concluded that the retributive approach to discipline is not compatible with the best-interests-of-the-child standard, while the restorative approach to discipline is fully compatible with this standard.



Mariëtte (JM) Reyneke obtained her B.Com (Law) and LLB degrees from the University of

the North West (formerly known as the Potchefstroom University for Christian Higher Education) and LLM (*cum laude*) from the University of the Free State. She practiced as an advocate, was part of a family business and was the faculty manager of the faculty of law at the University of the Free State where she started lecturing in 2003 and is currently a senior lecturer. Her research interests are children's rights, education law and restorative justice. She has delivered various national and international papers and has published a number of journal articles on these topics. She is currently the vice-president of the South African Education Law Association. She and her husband, Dr Roelf Reyneke, spearhead a number of projects at South-African schools aimed at the implementation of *inter alia* this research.