



**THE RIGHTS OF GAY/LESBIAN CHILDREN IN SOUTH AFRICAN PUBLIC
SCHOOLS: AN OVERVIEW OF THE RELEVANT LEGAL AND INSTITUTIONAL
FRAMEWORK**

BY

ZANELE NKABINDE (216074721)

**A dissertation submitted in partial fulfilment of the requirements for the Master of
Laws degree at the**

UNIVERSITY OF KWAZULU-NATAL
COLLEGE OF LAW AND MANAGEMENT STUDIES
SCHOOL OF LAW

LL.M (CHILDRENS RIGHTS)

SUPERVISOR:

MRS. C.E STEVENS

SUBMISSION DATE:

FEBRUARY 2019

DECLARATION

I, Zanele Pretty Nkabinde, hereby declare that:

- i. the research reported in this dissertation, except where otherwise indicated, is my original work;
- ii. this dissertation has not been submitted for any degree or for examination at any other institution;
- iii. this dissertation does not contain other persons' data, pictures, graphs, or other information, unless specifically acknowledged as being sourced from other persons;
- iv. this dissertation does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then
 - a. their words have been re-written, but the general information attributed to them has been referenced;
 - b. where the exact words have been used, their writing has been placed inside quotation marks, and referenced.
- v. Where I have reproduced a publication of which I am author, co-author or editor, I have indicated in detail which part of the publication was actually written by myself alone and have fully referenced such publications.
- vi. This dissertation does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the source detailed in the thesis and in the bibliography sections.

.....

216074721

ABSTRACT

South Africa has a history of discrimination against gay and lesbian (GL) learners in public schools, despite the fact that it was the first country to adopt a constitution protecting all people from discrimination in terms of sexual orientation, and despite that it is a signatory to various international human rights treaties and declarations. The research study will be underpinned by the study of relevant literature, policies and laws from the international, regional and national levels. While international and regional legal frameworks, and basic education policies and guidelines, have been adopted for the protection of GL learners, teachers are often ignorant and hence have no skills for dealing with these learners. There are currently no programs in the curriculum for training teachers with regards to GL learners. Most teachers therefore perceive GL learners as people who are mentally disturbed, sinners and/or carriers of HIV/AIDS, or as people who are weak and unsure of their culture – and all of this brings about bullying in the form of name-calling. The existing gender hierarchy thus forces GL learners not to come out, and nor can they express themselves freely without prejudice. The Department of Basic Education (DBE) has different structures mandated by the Constitution and by schools' policies, which are applicable to GL learners. However, despite the policies, guidelines and ample pertinent legal frameworks, GL learners still experience name-calling, harassment inflicted by heterosexual learners, harassment from teachers, rejection and isolation. This negates the intention that schools should be regarded as safe places for learners. There are therefore still enormous challenges facing the country in this regard. The Constitution, which is the supreme law of the land, in Section 9 (1) states that everyone is equal before the law and everyone has the right to equal protection and benefit from the law. The Bill of Rights, Clause 28 (2), and the Children's Act, Section 9, enshrines the principle that a child's best interest is of paramount importance in every matter concerning the child.

KEY WORDS

Gay and Lesbian learners; human rights; basic education; the South African Constitution; public schools; international and regional human rights; equality; dignity; sexual orientation.

ACKNOWLEDGEMENTS

I would like to thank God for giving me the strength and opportunity to undertake this research study and to complete it successfully. I would not have achieved my goal without you, Lord, by my side. I give you praise and glory.

To my hard-working supervisor, Mrs. Clydenia Edwina Stevens, I would like to express my deep and sincere gratitude for your support during my journey. You worked tirelessly even during holidays. Thank you for your support and your words of encouragement. Without your support and enthusiasm, this research would have been impossible to complete. You are a shining star that never fades. I cannot thank you enough. I thank God to have had you as my supervisor.

To my husband, Sizwe Nkabinde, and my son, Luyanda, I cannot thank you enough for your love, support, encouragement and understanding. I could not ask for a better family. To my mother, Mavis Duma, thank you so much, Mum. It was not easy to raise all four children alone as a widow. You have proven to me that nothing is impossible when you trust in God. I am who I am today because of you, Mum. To my siblings, Simon, Bongsi and Thembi, my friends and fellow students, thank you for your support and encouragement. A special thanks goes out to my friend Bathabile Ngubane for her assistance in more ways than one. To my in-laws, the Nkabinde's, thank you family for your kind words and support. God bless you.

To Dr. Goodier and Mrs. Holness, thank you for your valuable support. I would also like to thank UKZN library staff for their support, and the postgraduate law faculty staff and administrative staff, especially Mr. Pradeep. Thank you all from the bottom of my heart.

This goes out to my late father who was taken by God when I was at a tender age. He taught me to love and respect people unconditionally.

TABLE OF CONTENTS

| | |
|--|-----------|
| DECLARATION..... | 1 |
| ABSTRACT..... | 2 |
| ACKNOWLEDGEMENTS | 3 |
| TABLE OF CONTENTS..... | 4 |
| LIST OF ABBREVIATIONS AND ACRONYMS | 7 |
| | |
| CHAPTER 1: INTRODUCTION..... | 9 |
| 1.1 INTRODUCTION | 9 |
| 1.2 STATEMENT OF PROBLEM AND RATIONALE | 13 |
| 1.3 RESEARCH QUESTIONS AND OBJECTIVES | 15 |
| 1.4 RESEARCH METHODOLOGY | 15 |
| 1.5 LITERATURE REVIEW | 16 |
| 1.6 LIMITATION OF STUDY | 22 |
| 1.7 CHAPTER BREAKDOWN | 22 |
| 1.8 CONCLUSION..... | 23 |
| | |
| CHAPTER 2: EXISTING INTERNATIONAL AND REGIONAL LEGAL FRAMEWORKS FOR THE PROTECTION OF GAY AND LESBIAN LEARNERS' HUMAN RIGHTS..... | 24 |
| 2.1 INTRODUCTION | 24 |
| 2.2 THE INTERNATIONAL FRAMEWORK | 27 |
| 2.2.1 The Universal Declaration of Human Rights, 1948..... | 27 |
| 2.2.2 Particular provisions | 32 |
| 2.2.2.1 Freedom of Expression..... | 32 |
| 2.2.3 The International Covenant on Civil and Political Rights (ICCPR)..... | 33 |
| 2.2.4 The International Covenant on Economic, Social and Cultural Rights (ICESCR)..... | 37 |
| 2.2.5 The United Nations Convention on the Rights of the Child (1989) (CRC) | 41 |
| 2.2.6 Role of the United Nations International Children's Emergency Fund (UNICEF) | 45 |

| | | |
|-------|---|----|
| 2.3 | REGIONAL FRAMEWORK..... | 46 |
| 2.3.1 | The African Charter on the Rights and Welfare of the Child (ACRWC) | 46 |
| 2.4 | CONCLUSION..... | 49 |

CHAPTER 3: THE SOUTH AFRICAN CONSTITUTION AND THE DEPARTMENT OF BASIC EDUCATION POLICIES AND GUIDELINES51

| | | |
|---------|--|----|
| 3.1 | INTRODUCTION | 51 |
| 3.2 | BASIC EDUCATION | 54 |
| 3.2.1 | Purpose of basic education..... | 57 |
| 3.2.2 | The structure of the basic education system in South Africa..... | 60 |
| 3.2.2.1 | The role(s) of the Minister of Basic Education..... | 62 |
| 3.2.2.2 | The provincial structure of basic education with particular focus on KwaZulu-Natal..... | 63 |
| 3.2.2.3 | District offices..... | 66 |
| 3.2.2.4 | Circuit management..... | 67 |
| 3.2.2.5 | School Governing Bodies..... | 69 |
| 3.3 | OTHER POLICIES AND FRAMEWORKS..... | 72 |
| 3.4 | ROLE OF OTHER INSTITUTIONS OR NGOS..... | 74 |
| 3.5 | CONCLUSION..... | 76 |

CHAPTER 4: PARTICULAR PROBLEMS FACED BY GAY AND LESBIAN LEARNERS IN SOUTH AFRICAN PUBLIC SCHOOLS.....77

| | | |
|-------|------------------------------------|----|
| 4.1 | INTRODUCTION | 77 |
| 4.2 | PARTICULAR PROBLEMS | 78 |
| 4.2.1 | Name-calling / Labelling | 79 |
| 4.2.2 | Teachers' lack of response..... | 84 |
| 4.2.3 | Curriculum related challenges..... | 89 |
| 4.2.4 | Culture..... | 93 |
| 4.3 | CONCLUSION..... | 97 |

| | |
|--|------------|
| CHAPTER 5: FINDINGS, RECOMMENDATIONS AND CONCLUSION | 99 |
| 5.1 INTRODUCTION | 99 |
| 5.2 KEY FINDINGS | 100 |
| 5.3 RECOMMENDATIONS..... | 103 |
| 5.3.1 The Department of Basic Education | 103 |
| 5.3.2 Schools..... | 105 |
| 5.3.3 Community | 106 |
| 5.4 CONCLUSION..... | 107 |

| | |
|--------------------------|------------|
| BIBLIOGRAPHY..... | 108 |
|--------------------------|------------|

LIST OF FIGURES

| | |
|---|----|
| Figure 1: The Basic Education Structure according to School Governance of Basic Education | 61 |
| Figure 2: The Provincial Offices Four Pillars of Basic Education..... | 64 |

LIST OF ABBREVIATIONS AND ACRONYMS

| | |
|--------|---|
| ACHPR | AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS |
| ACRWC | THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD |
| AIDS | ACQUIRED IMMUNE DEFICIENCY SYNDROME |
| CA | CHILDREN'S ACT |
| UNCRC | UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD |
| CRC | CONVENTION ON THE RIGHTS OF THE CHILD |
| DBE | DEPARTMENT OF BASIC EDUCATION |
| DHE | DEPARTMENT OF HIGHER EDUCATION |
| GL | GAY AND LESBIAN LEARNERS |
| HIV | HUMAN IMMUNODEFICIENCY VIRUS |
| ICCPR | INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS |
| ICESCR | INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS |

| | |
|--------|---|
| LGBT | LESBIAN, GAY, BISEXUAL AND TRANSGENDER |
| LO | LIFE ORIENTATION |
| NCS | NATIONAL CURRICULUM STATEMENT |
| NDE | NATIONAL DEPARTMENT OF EDUCATION |
| NEPA | NATIONAL EDUCATION POLICY ACT |
| PEPUDA | PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT |
| SAPS | SOUTH AFRICAN POLICE SERVICE |
| SASA | SOUTH AFRICAN SCHOOLS ACT |
| SGB | SCHOOL GOVERNING BODY |
| UDHR | UNIVERSAL DECLARATION OF HUMAN RIGHTS |
| UN | UNITED NATIONS |
| UNESCO | UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANISATION |
| UNICEF | UNITED NATIONS CHILDREN'S FUND |

CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

The dangers and inhumane treatment faced by the gay and lesbian (GL) community have become an issue of international and national importance. In South Africa, there are ample such horrid tales of members of the GL community that have been murdered, raped, and sexually and verbally assaulted, merely because of their sexual orientation. For instance, a study conducted by Bhana revealed that in 2012 four men were arrested and sentenced to 18 years imprisonment as they were found guilty for the murder of a person believed to be a lesbian.¹ Further, in February 2006 a young girl, by the name of Zoliswa Nkonyane, was brutally murdered by a mob because of her sexual orientation.² According to the authors, in 2008, Eudy Simelane, the first woman to live openly as a lesbian in Kwa-Thema township was robbed, stabbed twelve times, gang raped and then dragged naked towards a stream, where she was dumped.³ She died from wounds of the abdomen caused by being raped.⁴ In view of these incidents, it is clear that GL members are not able to openly exercise their rights and freedoms without fear or prejudice, while within the school community GL learners are having to face similar trauma on a daily basis from discrimination against them by other learners and teachers.

¹ D Bhana 'Understanding and addressing homophobia in schools' (2012) 32 *South African Journal of Education* 307.

² WJ van Vollenhoven and CJ Els 'The human rights paradox of lesbian, gay, bisexual and transgender students in South African education' 2003 *De Jure* 267 – 268.

³ *Ibid* 267-268.

⁴ *Ibid* 267-268.

The purpose of this study is therefore to discuss the extent to which particular South African laws adequately protect the rights of gay and lesbian learners in South African public schools, with particular emphasis on the violation of the rights to equality⁵, human dignity⁶ and basic education⁷ insured by the Constitution of the Republic of South Africa (hereinafter “the Constitution”). Further, the study will specifically discuss the extent to which issues such as name-calling/ labelling have been dealt with in public schools.

Studies conducted by various authors (including Bhana, Msibi, Butler, Alpaslan, Astbury, Strümpher and Richardson) indicate that South African schools are homophobic.⁸ There is no “uniform definition of homophobia” but, according to Herek, homophobic involves a “dislike, fear, avoidance and denial of homosexuality”.⁹ It is a tragedy that this is the case in schools which should be places encouraging social transformation rather than sites of social discrimination. Learning institutions are places where learning starts and schools should be a safe environment for all learners.¹⁰ Labelling or name-calling undermines the principle of safe schools and makes learning difficult. According to the United Nations Educational, Scientific

⁵ S9 of the Constitution of the Republic of South Africa.

⁶ S10 of the Constitution of the Republic of South Africa.

⁷ S29 (1)(a) of the Constitution of the Republic of South Africa.

⁸ A Butler, A Alpaslan, J Strümpher & G Astbury ‘Gay and lesbian youth experiences of homophobia in South African secondary education’ (2003) 2 *Journal of Gay and Lesbian Issues in Education* 3-28. See also Bhana ‘Understanding and addressing homophobia in schools’ (2012) 32 *South African Journal of Education* 307-318; T Msibi ‘I’m used to it now: experiences of homophobia among queer youth in South African township schools’ (2012) 24 (5) *Gender and Education* 515-533; and E Richardson ‘A ripple in the pond’ (2004) 8 *Education as Change* 146-186

⁹ G.M Herek Beyond “Homophobia”: Thinking About Sexual Prejudice and Stigma in the Twenty-First Century *Sexuality Research & Social Policy* April 2004 Vol. 1, No. 2, 06-24. Also see D Bhana ‘Understanding and addressing homophobia in schools’ (2012) 32 *South African Journal of Education* 307.

¹⁰ R Davis ‘Homosexuality in South African schools: Still largely a silent taboo’ *Daily Maverick* 17 February 2015, available at <http://www.dailymaverick.co.za/article/2015-02-17-homosexuality-in-south-african-schools-still-largely-a-silent-taboo> : accessed on 2 July 2017.

and Cultural Organisation (UNESCO) schools “should be safe sanctuaries”.¹¹ Despite ample legislative protection for GL in South Africa, homosexuality is still generally forbidden.¹² In a post-apartheid South Africa, homophobic behaviour and attitudes are anti-constitutional, as being in direct violation of the right to equality. Sexual orientation is one of the listed grounds by which discrimination will be viewed as unfair. However, despite the Constitution providing for the right to basic education¹³, GL learners in schools have not been able too fully enjoy these rights. The Constitution endeavours to protect every person’s rights, but current studies reveal that GL learners are in effect devoid of such protection especially in South African public schools.¹⁴

This issue is of great importance as these violations have a severe impact on such learners, their communities, and the country at large. A survey conducted by Smith and Sharp¹⁵ shows that children who are worried or upset do not learn well, as they find it hard to concentrate or solve problems effectively. Moreover, in 2017, it was revealed that:

- Black members of this community are twice as likely (49%) as white respondents (26%) to know of someone who was murdered on these grounds;
- Black individuals in the LGBT community appear most likely to be victims of physical violence (8%, against 7% nationally); white individuals appear most likely to be verbally

¹¹ The Salamanca Statement did focus on children with special needs but the statement ideals especially with respect to inclusive educational system, is also of relevant to GL learners. UNESCO (1994) *The Salamanca Statement and Framework for Action on Special Needs Education Adopted by the World Conference on Special Needs Education: Access and Quality* Salamanca, Spain, 7-10 June 1994 <https://unesdoc.unesco.org/> accessed 26 February 2019.

¹² D Bhana *Under Pressure. The Regulation of Sexualities in South African Secondary Schools* (2014), 42.

¹³ S29 (1) (a) of the Constitution of the Republic of South Africa.

¹⁴ AH Butler, N Alpaslan, N Strümpher & G Astbury ‘Gay and lesbian youth experiences of homophobia in South African secondary education’ (2003) 2 (1) *Journal of Gay and Lesbian Issues in Education* 3-28.

¹⁵ P K Smith and S Sharp *School bullying: Insights and perspective* (2002); See also P K Smith ‘School Bullying’ *SOCIOLOGIA, PROBLEMAS E PRÁTICAS* 71 (2013) pp. 81-98. DOI:10.7458/SPP2012702332 available at <http://www.scielo.gpeari.mctes.>: accessed on 16 July 2017.

insulted (45% against 39% nationally); and Indian/Asian individuals appear most likely to experience violence or physical abuse from a family member (11% against 7% nationally).¹⁶

Interestingly, researchers who conducted a study on depression and gay youth found that “depression strikes homosexual youth four to five times more severely than it does their non-gay peers”.¹⁷ Shockingly the extent of the discrimination of persons within the LGBT community in our country, revealed in an article by Luiz De Barros, that: ¹⁸

More than half (55%) of LGBT people in South Africa, including children, live with the fear that they will experience discrimination due to their sexual orientation. 44% from the survey confirmed that they have experienced discrimination in the past two years due to their LG status.

Further, in a report “Hate crimes against LGBT people in South Africa” which was published in Pretoria by “Out LGBT” and the “Love not Hate” campaign, revealed that 56% of the respondents were younger than 24 years and had experienced discrimination in schools, while it was also reported that 88% of LGBT cases were not reported to the police.¹⁹ According to the “Dynamics of Violence in South African Schools” report by the University of South Africa (UNISA),²⁰ there is a “culture of silence which surrounds gender violence in schools”.

¹⁶ M Morris ‘LGBT community still faces high levels of violence’ 2017-12-04 12:07 <https://www.news24.com> : Accessed 26 February 2019. According to ‘I am Gay website’: “28% of gay and lesbian high school students in a national study were seen to have dropped out of school because of harassment resulting from their sexual orientation; 80% of lesbians, gay and bisexual youth reported severe isolation problems. They experienced social, emotional and cognitive isolation; 53% of students report hearing homophobic comments made by school staff.” <http://www.iamgay.co.za/explaining-gay/lesbian-and-gay-statistics/> : accessed 26 February 2019.

¹⁷ ‘LGBTI Statistics’ *Ibid.*

¹⁸ L De Barros ‘Shocking scale of LGBT discrimination in South Africa’ *Mamba online* (29 November 2016), available at <https://www.mambaonline.com/2016/11/29/shocking-scale-lgbt-discrimination-south-africa-revealed/>; accessed on 16 July 2017.

¹⁹ *Ibid.* About 2,130 South Africans participated in the online study.

²⁰ V Mncube and C Harber *The Dynamics of Violence in South African Schools: Implications for Policy Makers in South African Education* (2012) 79.

Tragically, teachers who are culprits and who violate such learners' rights often get away with it, as victims do not report these cases of violence because of fear. Thus, such learners do not regard schools as safe havens. This finding is also supported by research conducted by the Nelson Mandela Foundation, which suggests that schools are not happy or safe havens for many GL learners as they suffer abuse, maltreatment and discrimination at the hands of educators as well as from their peers.²¹

1.2 STATEMENT OF PROBLEM AND RATIONALE

The problem to be discussed in this research is therefore whether South African legislation adequately protects the constitutional rights of gay and lesbian learners in public Schools. As noted above, and as has emerged from the work of other scholars such as Bhana, Msibi, Butler, Alpaslan, Strumpher, Astbury, and Richardson, the overwhelming view is that South African Schools are homophobic.²² This problem is concerning in light of the various constitutional provisions which condemn such actions/omissions. Along with the other constitutional provisions, Section 9 (3) of the Constitution (generally known as the “equality clause”) states that:²³

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

²¹ N Mandela Foundation. *Emerging Voices: A Report on Education in South African Rural Communities* (2005) 60-61.

²² D Bhana ‘Understanding and addressing homophobia in schools’ (2012) 32 *South African Journal of Education* 307-318 accessed on 2 July 2017; See T Msibi ‘I’m used to it now: experiences of homophobia among queer youth in South African township schools’ (2012) 24 (5) *Gender and Education* 515-533; Also see AH Butler, N Alpaslan, N Strumpher & G Astbury ‘Gay and lesbian youth experiences of homophobia in South African secondary education (2003) 2 (1) *Journal of Gay and Lesbian Issues in Education* 14-20.

²³ The Constitution of the Republic of South Africa, 1996.

origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The research will reveal that a violation of Section 9 of the Constitution can also lead to a violation of other rights, such as the right to human dignity. Indeed, there is known to be a continuous vicious cycle of abuse of GL learners. As such, it is important that the South African Department of Basic Education (DBE) make a direct commitment to protect all children in schools who are GL, as a vulnerable neglected group, which has suffered discrimination. This is also borne out by the three examples mentioned above, which illustrate the extent to which for example name-calling of GL learners in schools has affected them.²⁴

South African schools are therefore failing the community and are partly to blame for the perpetual victimisation of GL learners. Nthabiseng Mokeana of Transgender and Intersex Africa (TIA) reports that “bullying results in people dropping out of school”, and the organization of TIA has further reported that “32% of GL pupils do not have a matric certificate because they experienced deeply entrenched homophobia and transphobia”.²⁵ It therefore appears that going to school has become a nightmare for GL learners since the school environment is not safe, peers, teachers, staff members and the community, bully them and this causes psychological and emotional trauma.²⁶

²⁴ AH Butler et al ‘Gay and lesbian youth experiences of homophobia in South African secondary education’ (2003) 2 (1) *Journal of Gay and Lesbian Issues in Education* 14-20.

²⁵ S King ‘Sharp rise in classroom homophobia’ *Mail & Guardian* (29 August 2014), available at <https://mg.co.za/article/2014-08-29-> accessed on 2 July 2017.

²⁶ A Lass and T Boezaart ‘The legislative framework regarding bullying in South African schools’ (2014) (17) 6 *PER* 2667-2702, available at <http://www.scielo.org.za/pdf/pej/v17n6/13.pdf>; Also see, T Boezaart "Child Law, the Child and South African Private Law" in Boezaart T (ed) *Child Law in South Africa* (Juta Cape Town 2009) 3-37.

1.3 RESEARCH QUESTIONS AND OBJECTIVES

In view of this, the study aims to discuss the following questions, which encapsulate the problem:

- To what extent does the international and regional legal frameworks offer protection for gay and lesbian learners in South African Schools?
- To what extent does the Constitution, and the current policies and guidelines of the South African Department of Basic Education, address the position of gay and lesbian learners?
- What are the daily struggles faced by gay and lesbian learners attending schools, and to what extent does this amount to a violation of their entrenched rights?

In view of these research questions, the study intends to:

- Explore and analyse the views of both national and international scholars.
- Identify local and international policy and legal frameworks regarding the protection of GL children in the school environment.
- Draw conclusion and make recommendations.

1.4 RESEARCH METHODOLOGY

This research will be underpinned by the study of relevant literature, policies and laws. For contextual details information was gathered from international and national sources, which include primary sources such as international conventions (for example the International Covenant on Civil and Political Rights), national legislation (the Constitution and the South African Schools Act), policy documents and reports from relevant government departments. Secondary sources will include journal articles, textbooks, information gathered from international and non-government organisations (NGOs), and relevant newspaper articles.

1.5 LITERATURE REVIEW

Authors such as Smith and Macbeth et al, affirm the importance of the right to education and the protection of it through international, regional and national legal frameworks.²⁷ In addition, Churr also reaffirms that education is indeed a human right and that the importance of the right to education is acknowledged and emphasized worldwide.²⁸ This author further explains that there are ample factors such as “inequalities in the school environment, the lack of quality education in a safe environment, insufficient funds for the provision of basic education, inadequate buildings, a shortage of qualified and skilled educators, and the inability of the school system to cater for learning differences” that indeed cause the dysfunctional ties currently visible in the South African school system.²⁹ The study recognises that all of these factors do negatively affect the school system generally, but the study will only focus only on particular aspects of these factors.

McBeth *et al* further emphatically recognise that, despite the ample international legal frameworks, some children are being denied their rights to education.³⁰ This study agrees with Smith who further points out that the realization of the right to education is indeed dependent

²⁷ RKA Smith *Textbook on International Human Rights* (5th ed) (2012) 330; A McBeth, J Nolan and S Rice *The International Law of Human Rights* (2013) 426.

²⁸ C Churr ‘Realisation of a child’s right to basic education in the South African school system: Some lessons from Germany (2015) 18 (7) *PER* 2405.

²⁹ *Ibid* 2406.

³⁰ A McBeth, J Nolan and S Rice ‘*The international law of human rights*’ (2013) Oxford: Oxford University Press, 148.

on the availability of education and access to it for all persons.³¹ In this respect, it is important to highlight Govindjee *et al* who emphasise that the right to basic education in the South African context is an unqualified socio-economic right and thus it is not dependent on, or subject to, the qualifications of “reasonable measures” and “progressive availability of resources” like other rights such as housing and the environment, which are classified as qualified socio-economic rights.³² Further, Smith reiterates that there can be no discrimination in providing education.³³ Of concern, the unfair discrimination and maltreatment of GL learners appears to be quite common in South Africa. There is ample literature dealing with the discrimination in public schools against GL learners and these sources will be used to determine the extent to which South African law adequately protects the rights of gay and lesbian children in schools.

There are particular elements that have emerged from previous surveys and literature and thus these themes will be used to further the discussion. According to Butler, Alpaslan, Strumpher and Astbury, who, discusses the topic in the context of GL youth homophobic experiences in secondary schools, still illustrates the problem that there is a lack of information and training in schools regarding the treatment of such learners.³⁴ These scholars found that there is a lack of GL literature and information on school settings. This lack of information creates an impression that GL discrimination does not exist in schools.³⁵ Furthermore, German Lopez, who is an American author, writes that:

³¹ Smith *Textbook on International Human Rights* (5th ed) (2012) 330.

³² A Govindjee et al *Introduction to Human Rights Law* (2nd ed) (2016) 188-189.

³³ Smith *Textbook on International Human Rights* (5th ed) (2012) 330.

³⁴ A H Butler, N Alpaslan, N Strumpher, G Astbury ‘Gay and lesbian youth experiences of homophobia in South African secondary education’ (2003) 1:2 *Journal of Gay and Lesbian Issues in Education* : 3-28.

³⁵ *Ibid* 31.

Educators are learners' role models. It is important that they are also trained in educating GL learners. This needs to be addressed in curriculum development training and practice. In some instances the research revealed that teachers themselves mocked GL youth or joined the bullying. Lynette G. the mother of a young girl with a gay father in South Dakota, recalled that when her daughter was eight, she ran home because they were teasing her. Like, 'Oh, your dad is a cocksucker, a faggot, he sucks dick' ... She saw a teacher laughing and that traumatized her even more.³⁶

As stated, this information depicts a lack of understanding and basic respect for such persons. Moreover, Epstein (in Butler, Alpaslan, Strumpher and Astbury) writes, "homophobia is the real Cinderella of abusive behaviour".³⁷ Within the context of racial discrimination in South Africa, due to our past history of apartheid, there is ample understanding, supported by case law and other writings, and thus as Epstein explains (in Butler, Alpaslan, Strumpher and Astbury) "there is consensus about what you do about racism that is bad and not tolerated".³⁸ The same can be said for sexism, which is also not to be tolerated – but with homophobia, in schools especially, those who really want to do something are left uncertain as to what to do.

Thus, Epstein argues that the Department of Education curriculum must be changed and modified.³⁹ Education regarding homosexuality is included in the existing curriculum dealing with sexuality education. However, they are not arguing for a separate curriculum for the subject of homosexuality, rather to adopt an inclusive method of teaching.⁴⁰ This can contribute

³⁶ G Lopez 'A new report shows the hell LGBTQ kids go through in schools' Vox (9 December 2016), available at <https://www.vox.com/identities/2016/12/9/13884596/school-lgbtq-bullying> : accessed on 2 July 2017.

³⁷ A H Butler, N Alpaslan, N Strumpher, G Astbury 'Gay and lesbian youth experiences of homophobia in South African secondary education' (2003) 1:2 *Journal of Gay and Lesbian Issues in Education* : 20.

³⁸ *Ibid* 21.

³⁹ *Ibid* 32-33.

⁴⁰ *Ibid* 33.

to advocating equality amongst children and let them feel accepted and be part of their school networks and will resolve problems of isolation. According to Msibi, researchers have reported that verbal harassment begins early in primary schools, and therefore they suggest that education regarding tolerance of alternative lifestyles should commence at the lower primary school level.⁴¹ This is of paramount importance as it is crucial that all schoolchildren are safe within their school environment. Furthermore, there should be zero tolerance for homophobia and prejudice in schools.⁴² Thus Butler *et al* suggests that homophobic attacks and verbal abuse requires (similarly to racial abuse) appropriate action taken against perpetrators.⁴³ Further, Butler *et al* also points out that schools must develop a culture whereby all learners are taught that it is acceptable to be gay or lesbian or have different views on religion and sexuality.⁴⁴

Sears wrote that educators are professional people, and as such, they are duty bound to protect and promote the human and civil rights of all learners within the classroom.⁴⁵ This is regardless of the educators' culture or religion. Educators are duty bound to protect the rights of learners, as individuals and as a group. On the same note, according to Msibi, early beliefs about homosexuality included that homosexual persons are infected with some kind of a disease, which is contagious, and that they must therefore stay away from heterosexual people since they will infect them.⁴⁶ This information was first revealed 78 years ago by a researcher called

⁴¹ T Msibi 'I'm used to it now': Experiences of homophobia among queer youth in South African township schools' (2012) 24 (5) *Gender and Education* 515-524.

⁴² A H Butler, N Alpaslan, N Strumpher, G Astbury 'Gay and lesbian youth experiences of homophobia in South African secondary education' (2003) 1:2 *Journal of Gay and Lesbian Issues in Education* : 22.

⁴³ *Ibid* 22.

⁴⁴ *Ibid* 22.

⁴⁵ J.T Sears, Peering into the well of loneliness: The responsibility of educators to gay and lesbian youth. In A. Molnar (Ed.), *Social issues and education: Challenge and responsibility* (1987) 93 in Alexandria, VA: Association for Supervision and Curriculum Development. Also see, A H Butler, N Alpaslan, N Strumpher, G Astbury 'Gay and lesbian youth experiences of homophobia in South African secondary education' (2003) 1:2 *Journal of Gay and Lesbian Issues in Education* : 22.

⁴⁶ T Msibi 'I'm used to it now': Experiences of homophobia among queer youth in South African township schools' (2012) 24 (5) *Gender and Education* 523.

Waller⁴⁷ and evidently, it still holds weight even in this period.⁴⁸ In South African public schools, Msibi writes that teachers are currently seen as the ones disseminating views of discrimination and bullying when they make fallacious statements such as this belief that homosexuality is contagious and that GL learners will infect heterosexual learners.⁴⁹ Msibi further notes that teachers were concerned as they themselves struggled with supporting the GL learners whilst their religious and cultural beliefs did not approve of such issues. The teachers were quoted as saying “it is very difficult for us as we are seen as challenging our cultures and God”.⁵⁰ This shows conflict between the teachers’ rights and beliefs, and their work or obligation towards their learners.

According to Laas and Boezaart bullying causes psychological problems and even death, and also affects a child’s ability to develop and learn.⁵¹ Additionally Butler and Astbury, similarly to other authors, note that so-called “queer” learners in South Africa “experience discrimination, rejection, isolation, non-tolerance, marginalisation and harassment from peers, teachers and school administrators”.⁵² Smith adds that verbal abuse is highly prevalent in schools and discrimination against GL learners through language is a method used to isolate the gay student, which can lead to physical violence.⁵³ Wackerfuss notes that many American schools have policies of zero tolerance for homophobic bullying and that only a few schools

⁴⁷ W Waller *The Sociology of Teaching* (1932)147.

⁴⁸ T Msibi ‘I’m used to it now’: experiences of homophobia among queer youth in South African township schools’ (2012) 24 (5) *Gender and Education* 515-524.

⁴⁹ *Ibid.*

⁵⁰ *Ibid* 523-524.

⁵¹ A Laas and T Boezaart ‘The legislative framework regarding bullying in South African schools’ (2014) 17 (6) *PER* 2671.

⁵² The writer agrees with what Epstein has written and also agrees with Taylor and Waller quoted in Msibi: ‘I’m used to it now’: experiences of homophobia among queer youth in South African Township Schools’ (2012) 24 (5) *Gender and Education* 516-520.

⁵³ G Smith & D Smith ‘The ideology of ‘fag’: The school experience of gay students’ (1998) 39 (2) *Sociology Quarterly* 332.

actually address the problem.⁵⁴ Evidently, the discrimination of GL learners is not unique to South Africa, but the focus of this study will primarily be on South African public schools.

Thus, from the findings of various scholars, it is clear that GL learners are being discriminated against in schools by their peers, teachers, staff members and the community at large which also makes schools unsafe for GL learners, although schools should be regarded as safe spaces. Further, Archbishop Desmond Tutu made a speech in 2007 comparing homophobia to racism.⁵⁵ Teachers, learners know little about homosexuality, and there seems to be a dilemma when it comes to religion and homosexuality. As noted above, teachers may use their religion to unfairly discriminate against GL learners because of their sexual orientation. However, teachers are bound by their profession to treat all learners equally regardless of their sexual orientation, and teachers who support GL learners believe that it is their duty to protect all their learners equally without discrimination. According to a report by Human Rights Watch:

The government's job does not end with passing laws concerning rights, but also lies in ensuring that the laws translate into substantive rights for everyone, including the most marginalized groups and individuals".⁵⁶

In terms of the Section 7(2) of the South African Constitution, the South African government must respect, promote and fulfil the rights. However, it is unclear how this particular problem will be resolved in the relevant schools but the authors mentioned above have provided much insight into this challenge.

⁵⁴ A Wackerfuss 'Homophobic bullying and same-sex desire in Anglo-American schools' (2007) 19 (3-4) *Journal of Gay & Lesbian Social Services* 139-155.

⁵⁵ R Davis 'Why Tutu's support for gay rights matters' *Daily Maverick* (29 July 2013), available at <https://www.dailymaverick.co.za/article/2013-07-29/>: accessed on 30 July 2017.

⁵⁶ 'South Africa: LGBT rights in name only?' (2011) *Human Rights Watch*, available at <https://www.hrw.org/news/2011/12/05/south-africa-lgbt-rights-name-only/> : accessed on 2 July 2017.

1.6 LIMITATION OF STUDY

The research is primarily focused on the rights of GL learners in South African public schools. However, the study recognises that GL individuals are part of the LGBT community thus, statistics or research that reflect the discrimination or ill-treatment of the community and or such persons are included. The study may refer to practices from outside the country or region but this will be limited. The reason for limiting the study to such learners is because of the extent of the discrimination faced over the years. Evidently, such learners have suffered great negative personal and social consequences.

1.7 CHAPTER BREAKDOWN

This study is organised as follows:

Chapter 1: Introduction. This chapter provides the foundation of the study to be conducted. Further, the research methodology, significance and limitations of the study are discussed and research questions are identified.

Chapter 2: Existing international and regional legal frameworks for the protection of gay and lesbian learners' human rights. This chapter will discuss the international and regional legal framework to determine the extent to which such laws in particular protect the human rights of GL learners.

Chapter 3: The South African Constitution and the Department of Basic Education's policies and guidelines in respect of gay and lesbian learners. The chapter will give an overview of the South African DBE policies and guidelines relevant to the protection of GL learners in public schools, in view of the protective framework provided for in the Constitution. In addition, the

chapter will also discuss the roles of relevant stakeholders and the reporting structure of DBE officials.

Chapter 4: Particular problems faced by GL learners in South African public schools. The chapter will give an overview of experiences faced by GL learners in public schools as detailed by a number of authors and will reveal the extent to which GL learners experience unfair discrimination based on their sexual orientation.

Chapter 5: Findings, recommendations and conclusion. The final chapter will provide the findings of the study and will give relevant recommendations. Final conclusions will be drawn from the study.

1.8 CONCLUSION

This study is of great significance as there is a need to address the plight of GL learners in South African schools. They have rights similar to heterosexual learners, which must be protected and respected by all. With this in mind, the next chapter will identify the relevant international, regional and national legal frameworks to determine the extent of the legal protection provided for GL learners in these systems.

CHAPTER 2

EXISTING INTERNATIONAL AND REGIONAL LEGAL FRAMEWORKS FOR THE PROTECTION OF GAY AND LESBIAN LEARNERS' HUMAN RIGHTS

2.1 INTRODUCTION

As alluded to in Chapter One, human rights are protected in both international and regional spheres. Dugard describes these rights as being “inherent in human nature, equal for all human beings, and quintessentially universal in character”.⁵⁷ In general terms, it has been stated “human rights are the basic rights and freedoms to which all human beings are entitled”.⁵⁸ International human rights scholars have grouped these rights into three categories, namely, first generation rights (civil political rights), second-generation rights (socio-economic rights) and third generation rights.⁵⁹ First generation rights include the right to life and liberty, dignity, freedom of thought and speech/expression, and the right to equality.⁶⁰ Furthermore, first generation rights, or “blue rights”, can be directly and immediately enforceable as they are generally not dependent on state resources.⁶¹ On the other hand, second generation rights include the right to food, the right to safe and healthy working conditions, the right to social security, and (of particular relevance to this study) the right to education (with a particular focus on primary or basic education).⁶² Additionally, according to Stevens and Ntlama, the

⁵⁷ J Dugard *International Law, a South African Perspective* (4th ed) (2011) 320.

⁵⁸ *Ibid* 320-322.

⁵⁹ *Ibid* 327-338.

⁶⁰ *Ibid* 327.

⁶¹ P Macklem 'Human rights in international law: three generations or one?' *London Review of International Law*, Volume 3, Issue 1, 1 March 2015, Pages 61–92.

⁶² Dugard *International law, a South African perspective* (4th ed) (2011) 330.

group of socio-economic rights are generally further classified as “qualified” or “unqualified rights”, which may only be “progressively realized”.⁶³ As discussed in Chapter One, Govindjee *et al* also provide a similar explanation.⁶⁴ Lastly, third generation rights, also at times referred to as “solidarity” rights, are rights which can only be exerted collectively and not only by an individual.⁶⁵ These third generation rights include the right of people to self-determination, to peace, to development, to humanitarian assistance and to a clean environment.⁶⁶ According to Dugard, “human rights are freedoms established, by custom or international agreement, that protect the interests of human beings and the conduct of governments, in every nation”.⁶⁷ Of particular relevance to this study is the argument that “all people are afforded human rights simply by virtue of the fact that they are human beings, regardless of their status”.⁶⁸ Further, human rights are rights embedded in all human beings and this indicates that all children, regardless of their sexual orientation, have rights that are provided for in the supreme law, or any other domestic legislation, of a person’s country. As such, it could be argued that gay and lesbian learners, who have experienced discrimination in schools mainly due to their sexual orientation, are also entitled to the protection offered by international, regional and national legal human rights frameworks.

Arguably, legal frameworks protect persons human rights by imposing a duty on relevant on relevant institutions and particular persons to ensure their protection. A study of the workings of these international and regional human rights frameworks is important, as it will situate the protection offered to gay and lesbian learners in South African public schools, which is the focus of the study. In this regard, the international documents that will be examined are: the

⁶³ C Stevens and N Ntlama ‘An overview of South Africa’s institutional framework in promoting women’s right to development’ 2016 *Law Democracy and Development* 52.

⁶⁴ Govindjee *et al* *Introduction to Human Rights Law* (2nd ed) (2016) 188-189.

⁶⁵ Dugard *International law, a South African perspective* (4th ed) (2011) 338.

⁶⁶ Dugard *International Law, a South African Perspective* (4th ed) (2011) 338.

⁶⁷ *Ibid* 320.

⁶⁸ *Ibid* 320-321.

Universal Declaration of Human Rights (hereafter ‘UDHR’, 1948) together with the International Covenant on Civil and Political Rights (hereafter ‘ICCPR’); the International Covenant on Economic, Social and Cultural Rights (hereafter ‘ICESCR’); the United Nations Convention on the Rights of the Child (hereafter ‘CRC’ 1989) and the United Nations Children's Fund (hereafter ‘UNICEF’). The aforementioned international legal frameworks are the foundation for the development of the human rights framework. Collectively, the UDHR, the ICCPR, and the ICESCR are commonly known as the “International Bill of Human Rights” since they form the foundation of international human rights law.⁶⁹ The main objective of these covenants is the protection and promotion of the human rights of all persons and their realisation.

Further, since we are part of Africa, it is essential to discuss the regional human rights framework which mainly includes the African Charter on Human and Peoples’ Rights (hereafter ‘ACHPR’)⁷⁰ and the African Charter on the Rights and Welfare of the Child (hereafter ‘ACRWC’)⁷¹ which provides for example the freedom of expression, and the principle of non-discrimination along with the best interests of the child.⁷² Similar, to the international framework, the regional legal framework provides a comprehensive set of rights and obligations for children’s rights and advancement in Africa, which will be elaborated further in this chapter.⁷³

⁶⁹ P Vrancken ‘Historical background, international context and constitutional environment’ in A Govindjee & P Vrancken (eds) *Introduction to Human Rights Law* (2009) 9. Furthermore, other relevant instruments include General Comment 13 on the right to education and Declarations such as the World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs and the Dakar Framework for Action, is of great significance. Adopted by the World Conference on Education for All: Meeting Basic Learning Needs, Jomtien, Thailand, 5 – 9 March 1990.

⁷⁰ Date of Adoption: June 01, 1981 Date of last signature: May 19, 2016 Date entry into force: October 21, 1986. <https://au.int/en/treaties/> : accessed 26 February 2019

⁷¹ Date of Adoption: July 01, 1990; Date of last signature: August 01, 2016; Date entry into force: November 29, 1999 <https://au.int/en/treaties/>: accessed 26 February 2019.

⁷² Article 3, 4 and 7 of the African Charter on the Rights and Welfare of the Child.

⁷³ ‘African Charter on the Rights and Welfare of the Child’: available at <http://www.acerwc.org/download/african-charter-on-the-rights-and-welfare-of-the-child/?wpdmdl=9406> : accessed on 27 July 2017.

2.2 THE INTERNATIONAL FRAMEWORK

2.2.1 The Universal Declaration of Human Rights, 1948

The UDHR was the first effort to address the rights of the child at a global or international level.⁷⁴ Because of its creation, the UDHR condemns past atrocities committed all over the world and advocates a democratic society based on the respect for human rights of all. Further, Mrs. Eleanor Roosevelt⁷⁵ was a pioneer in the drafting of the document, the main focus of which was for every human being to have the right to live in a peaceful environment and to have dignity.⁷⁶ The UDHR comprises of many articles but only those articles of value to this dissertation will be discussed in this chapter. The UDHR has a common objective as other covenants which is the protection and realisation of human rights. It was adopted by the UN General Assembly, on 10 December, 1948, as a non-binding document to at least have states pledge to not allow or to not participate in such atrocities committed that resulted the wars.⁷⁷ The UDHR was created and proclaimed as a bold vision “for all peoples and all nations”.⁷⁸ Furthermore the UDHR was created in the belief that the state is a predator that must be contained.⁷⁹ According to Dugard, the Declaration is not a binding treaty but merely “a recommendatory resolution of the General Assembly which is not legally binding on

⁷⁴ ‘UDHR’, available at <http://www.un.org/en/sections/universal-declaration/history-document/index.html>: accessed on 14 July 2017.

⁷⁵ Eleanor Roosevelt (1884-1962), was the widow of former United State President Franklin D. Roosevelt (1882-1945), and was a delegate of the UN General Assembly and a world-renowned advocate for human rights amongst other things.

⁷⁶ ‘UDHR’: available at <https://www.humanrights.ch/en/standards/udhr/> accessed on 14 July 2017.

⁷⁷ *Ibid.*

⁷⁸ PG Lauren *The Evolution of International Human Rights Visions Seen* (3rd ed) (2011) 3.

⁷⁹ *Ibid* 115.

states”.⁸⁰

Again, according to Vrancken (in Govindjee) the UDHR is a UN General Assembly Resolution having no force of law on its own, and thus “the purpose of UDHR is limited to providing a common understanding” of the human rights fundamental freedoms referred to in the UN Charter, and was designed to serve as a “common standard of achievement for all peoples and all nations”.⁸¹ Additionally, according to Dugard, although the UDHR is not binding, “it has undoubtedly guided the political organs of the UN in their interpretation and application of the human rights clauses in the Charter”.⁸²

Generally, it is argued that in the South African context, the UDHR is binding in terms of customary law in South Africa as it is referred to in Section 232 of the Constitution.⁸³ Furthermore, Section 39 1(b) of the Constitution is relevant as the declaration can be argued to be an instrument of international law which South African courts must consider in their interpretation of the Bill of Rights.⁸⁴ Moreover, in *S v Petane*, the honourable Conradie, in relation to section 39 (1) (b) stated that:

It is dangerous to denaturant the practice-oriented character of customary law by making it comprise methods of law-making which are not practice-based at all. This undermines the certainty and clarity, which the sources of international law have to provide. The UDHR may be taken as an example in this respect. It has been asserted that in the course of time its provisions have grown into rules of customary and international law. This view is often substantiated by citing abstract statements by

⁸⁰ Dugard *International Law, a South African Perspective* (4th ed) (2011) 325.

⁸¹ Vrancken ‘Historical background, international context and constitutional environment in Govindjee & Vrancken (eds) *Introduction to Human Rights Law* (2009) 8.

⁸² Dugard *International Law, a South African Perspective* (4th ed) (2011) 325.

⁸³ S232 provides that: ‘Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’.

⁸⁴ Section 39 states that: When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

States supporting the Declaration or references to the Declaration in subsequent resolutions or treaties. Sometimes it is pointed out that its provisions have been incorporated in national Constitutions. But what if States making statements like these, or drawing up their Constitutions in conformity with the Universal Declaration, at the same time treat their nationals in a manner which constitutes a flagrant violation of its very provisions, for instance, by not combating large-scale disappearances, by practising torture or by imprisoning people for long periods of time without a fair trial? Even if abstract statements or formal “provisions in a Constitution” are considered a State practice, they have at any rate to be weighed against concrete acts like the ones mentioned.’⁸⁵

In this respect, Dugard states that the:

The basic principles of the UDHR comprise some of the following: non-discrimination, prohibition of torture, and cruel, inhuman and degrading treatment.⁸⁶

The UDHR can thus be described as the starting point in the realization and protection of human rights.⁸⁷ The devastation of the Second World War encouraged states too collectively work towards advancing the rights and bettering the position of their citizens. In addition, it provided a commitment by states not to violate the rights of the citizens within their territory.⁸⁸ In particular, the UDHR embodies the right to equality of all persons, and entitles all individuals to all the rights articulated in the document, without distinction on the grounds listed which

⁸⁵ 1988 (3) SA 51 (C) at 58G-J. See, too, *S v Rudman* 1989 (3) SA 368 (C) at 376A-B.

⁸⁶ Dugard *International Law, a South African Perspective* (4th ed) (2005) 326.

⁸⁷ ‘UNHR’ available at <http://www.ohchr.org/244BCAC0-131C-4B5E>; accessed on 27 August 2017.

⁸⁸ Preamble UDHR, “Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”.

include, inter alia, sex, race and other status.⁸⁹ Further, the uniqueness of the UDHR in the historical context is that it in fact includes civil, political rights and economic, social and cultural rights, like the right to social security, health and education.⁹⁰ The Preamble of the UDHR cements the above assertions as it provides that:

Whereas recognition of the inherent dignity, and of the equal and inalienable rights, of all members of the human family is the foundation of freedom, justice and peace in the world; and whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want, has been proclaimed as the highest aspiration of the common people.⁹¹

In particular, Article 1 of the Declaration provides that: “All human beings are born free and equal in dignity and rights.”⁹² This provision is broad and includes all persons irrespective of their race, religion, sex or gender. Article 2 of the UDHR asserts that “all human beings are entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁹³ Interestingly, Article 2 does not refer to sexual orientation. Article 3 of the Declaration claims that “everyone has the right to life, liberty, and security of person”.⁹⁴ Article 6 of the Declaration claims that:

⁸⁹ Article 2 of the UDHR.

⁹⁰ Vrancken ‘Historical background, international context and constitutional environment in Govindjee & Vrancken (eds) *Introduction to Human Rights Law* (2009) 8.

⁹¹ ‘UDHR’ available at <http://www.un.org/en/universal-declaration-human-rights/> : accessed on 28 August 2017.

⁹² Article 1 of the UDHR, see Lauren: *The evolution of international human rights visions seen* (3rd ed) (2011) 318.

⁹³ Article 2 of the UDHR.

⁹⁴ Article 3 of the UDHR.

Everyone has the right to recognition everywhere as a person before the law.⁹⁵

Of particular relevance to the study is the right to education, which is provided for in Article 26. The provision states that:

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. 2. 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. 3. Parents have a prior right to choose the kind of education that shall be given to their children.⁹⁶

Notably, the UDHR has had an influence on the development of the international human rights framework as it is indeed a manifestation of the fundamental values shared by all parties of the universal community. There is an argument that, since it has been there for more than 60 years, it is binding as a part of customary international law.⁹⁷ Despite critical comments in respect of the binding nature of the UHDR, hereinafter scholars like J. Von Bernstorff,⁹⁸ A. De Baets⁹⁹ and Calamari approve that it has had a great impact on the development of human rights

⁹⁵ Article 6 of the UDHR.

⁹⁶ Article 26 of the UDHR.

⁹⁷ Vrancken 'Historical background, international context and constitutional environment in Govindjee & Vrancken (eds) *Introduction to Human Rights Law* (2009) 8.

⁹⁸ J Von Bernstorff 'The changing fortunes of the Universal Declaration of Human Rights: Genesis and symbolic dimensions of the turn to rights in international law' (2008) 19 (5) *European Journal of International Law* 903.

⁹⁹ A De Baets 'The impact of the universal declaration of human rights on the study of history' (2003) 48 *History and Theory* 20-43, available on <https://pdfs.semanticscholar.org/5495/6387674aede72aa9e1f3a1eaf055de937129.pdf> : accessed on 27 July 2017.

internationally.¹⁰⁰ In addition, it was used as a stepping-stone for creating human rights frameworks, regionally and nationally.¹⁰¹ Additionally, the United Human Rights Office of the High Commissioner, the Secretary General of the United Nations, reported on 10 December 2010 that:

Protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards.¹⁰²

Ultimately, these provisions impose a duty on States to ensure that human beings are protected by law within their territory, and that, when such persons want to seek legal remedies, they should be able to do so without facing any discrimination. Moreover, States must be responsible for implement laws, programmes and policies that does not consider or discriminate against specific persons.

2.2.2 Particular provisions

2.2.2.1 Freedom of expression

Freedom of expression is a considered an essential human right.¹⁰³ The right to freedom of expression and non-discrimination are articulated in the UDHR.¹⁰⁴ The right to freedom of expression and non-discrimination are prerequisites for the promotion and protection of

¹⁰⁰ H Calamari ‘The foundation of human rights law’ [s.n.], available at <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> : accessed on 27 July 2017.

¹⁰¹ *Ibid.*

¹⁰² ‘Combating discrimination based on sexual orientation and gender identity’, available at <https://www.ohchr.org/en/issues/discrimination/pages/lgbt.aspx> : accessed on 17 August 2018.

¹⁰³ Govindjee ‘Historical background, international context and constitutional environment’ in Govindjee & Vrancken (eds) (2009) *Introduction to Human Rights Law* 119-126.

¹⁰⁴ Article 2 and 19 of the UDHR.

democracy.¹⁰⁵ The two provisions underpin most other rights, which allow people to develop and to be successful. Freedom of expression and non-discrimination are the pillars of democracy. Access to information is another principal means of development and schools are a good market place for learners to develop and to learn about democracy and be able to express themselves. It is imperative for GL learners to have the right to freedom of expression in order to be able to express their opinions, acknowledge their sexuality and access information freely, without discrimination from teachers and peer learners. Additionally, it could be argued that expressing one's sexuality is indeed an aspect of the right to freedom of expression.¹⁰⁶ However, a person may express his opinion or thoughts but not in such a way, that it impedes the dignity or self-worth of another.

2.2.3 The International Covenant on Civil and Political Rights (ICCPR)

The UN Commission on Human Rights, was aware of the difficulty of enforcing the UDHR, thus it was tasked with establishing the International Bill of Human Rights, which would comprise the UDHR, ICCPR and the ICESCR.¹⁰⁷ To deal with the problem, the ICCPR was enacted by the UN in 1966¹⁰⁸ and came into force in 1976.¹⁰⁹ Vrancken notes that the ICCPR was drafted “with greater juridical specificity and lists more rights than the UDHR”.¹¹⁰ As such, Part III of the ICCPR articulates the protection of human rights in terms of the right to

¹⁰⁵ Article 2 and 19 of the UDHR.

¹⁰⁶ Article 19 of the UDHR.

¹⁰⁷ Govindjee ‘Historical background, international context and constitutional environment’ in Govindjee & Vrancken (eds) (2009) *Introduction to Human Rights Law* 119-126.

¹⁰⁸ The Covenant was adopted in 1966 and opened for signatories and ratification by the General Assembly on 19 December 1966. International Covenant on Civil and Political Rights, 16 December 1966, UNTS 999.

¹⁰⁹ Dugard *International Law, a South African Perspective* (4th ed) (2001) 118.

¹¹⁰ Vrancken ‘Historical background, international context and constitutional environment’ in Govindjee & Vrancken *Introduction to Human Rights Law* (2009).

dignity, freedom of association, free trial and equality.¹¹¹ South Africa signed the Convention in 1994 and ratified it in 1998.¹¹² As mentioned earlier, this treaty provides for the first generation of human rights considering the protection and enjoyment of civil and political rights of the individual.¹¹³

The Preamble of the ICCPR recognizes that:

the ideal of free human beings enjoying civil and political freedom, and freedom from fear and want, can only be achieved if conditions are created whereby everyone may enjoy civil and political rights, as well as economic, social and cultural rights.¹¹⁴

As South Africa is one of the signatories of the ICCPR, therefore the provisions of the Convention also apply to it.¹¹⁵ This obligation relates to the enactment of laws and policies to safeguard such rights. Further, Article 2 proclaims that all state parties who have signed and ratified the Covenant have a legal obligation to ensure that the rights recognized in the ICCPR are respected and are available to everyone within its territory.¹¹⁶ This provision resonates with the earlier argument regarding the UDHR.

¹¹¹ *Ibid* 8.

¹¹² Dugard *International Law, a South African Perspective* (4th ed) (2001) 118.

¹¹³ *Ibid* 117-118.

¹¹⁴ International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49. Paragraph 3.

¹¹⁵ In South Africa, in particular, s231 of the Constitution provides for the 'international ratification' of international law. International law must be ratified by parliament. See 'Appendix A: South Africa's obligations under international and domestic law' *Human Rights Watch*, available at <https://www.hrw.org/legacy/reports98/sareport/App1a.htm> : accessed on 27 August 2017. Also, submission of Human Rights Watch to the Green Paper Task Force on International Migration. Human Rights Watch, "The Human Rights of Undocumented Migrants, Asylum Seekers and Refugees in South Africa," dated April 11, 1997

¹¹⁶ Article 2 of the ICCPR.

The following provisions are of particular relevance to the study. Article 1 states that the Covenant ensures that all people have the right to self-determination, and it provides people with the right to freely determine and enjoy their political status, and to benefit from economic, social and cultural development. Accordingly, it could be argued that GL learners as human beings have freedom to choose or to decide for themselves who they want to socialize with or to choose the culture they want to associate themselves with, freely, without fear or discrimination. The aforementioned obligation of the ICCPR is to ensure the protection of everyone, including GL learners, from being mistreated. Thus, no one has a right in terms of this Convention to degrade such learners or ban them from their rights.

Further, Article 24(1) of the Covenant provides that:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.¹¹⁷

Thus, GL learners (in fact all learners) should not be discriminated against because of their sexual orientation – and the more so, since they are minors (minors are regarded as persons below the age of 18).¹¹⁸ States thus have to develop measures to ensure their protection.

What emerges from these different articles is that the ICCPR guarantees the protection of the civil and political rights of all human beings in terms of the equality of persons without

¹¹⁷ Article 24(1) of the ICCPR.

¹¹⁸ Children's Act 38 of 2005.

distinction and in order to ensure that the law prohibits any discrimination. All human beings should thus have effective protection against discrimination on the grounds of sex, religion, colour and other status. Also, freedom of thought should enable gay and lesbian learners to participate within the school curriculum by voicing their thoughts or opinions on their experiences, without fear.

As stated previously, sexual orientation is not explicitly provided for in article 26¹¹⁹, however, it is argued the word ‘other status’ accommodates the protection of lesbians or any other groups that may be potentially discriminated against.¹²⁰ This reasoning was elaborated by the court in *Toonen v Australia*,¹²¹ where it was held that sexual orientation was covered by the ICCPR because of the reference to ‘sex’.¹²² However, this court case decision was a foreign judgment and therefore not necessarily binding in South Africa.¹²³ In South Africa, the Constitutional court relied on the case of the *National Coalition for Gay and Lesbian Equality v Minister of Justice* for persuasive value in deciding to abolish laws against sodomy in the Constitutional Court of South Africa.¹²⁴ In order to come to that decision the court considered the position of homosexual persons in South Africa and the ill treatment experienced by them in our society. As will be explained later, the country’s Constitution is regarded as advanced and progressive and, as such, does include sexual orientation as a ground for discrimination.

¹¹⁹ Article 26 of the ICCPR.

¹²⁰ *Ibid.*

¹²¹ *Toonen v Australia* 1992 (50) UN Doc 488(CCP).

¹²² E Bonthuys & C Albertyn *Gender, Law and Justice* (2007) 21. According to *Bonthuys*, sex refers to the biological or physiological differences between men and women whilst gender signifies the differences which societies and cultures ascribe to people on the basis of their sex.

¹²³ Section 39(2) of the Constitution provides that when interpreting the Bill of Rights, the courts may consider foreign law and must consider *international law*.

¹²⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC).

As indicated above the ICCPR is monitored by the UN Human Rights Committee (UNHRC).¹²⁵ This body consists of 18 independent experts, persons of high moral character who are solely responsible for monitoring and ensuring that states party to the Convention implement the provisions within their territories.¹²⁶ These experts are chosen for a term of four years and they are responsible for compliance review, monitoring of state reports and compliance with the Convention.¹²⁷ According to the UNHRC, state parties “must report initially one year after acceding to the Covenant and when the committee requests (usually every four years)”.¹²⁸ Of importance, the UNHRC also examines these reports and informs relevant state parties of its concerns. Lastly, the UNHRC will provide recommendations to the state party in the form of ‘concluding observations’, which need to be met within a particular time frame.¹²⁹

2.2.4 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

Similar to the ICCPR, the ICESCR is a multilateral treaty, which as mentioned above, constitutes ‘second generation’ human rights, and was also drafted to make the principles of

¹²⁵ Article 28 of the ICCPR provides: 1. There shall be established a Human Rights Committee (hereafter referred to in the present covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided. 2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience. 3. The members of the Committee shall be elected and shall serve in their personal capacity.

¹²⁶ ‘UNHRC’ available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx> accessed on 12 October 2017.

¹²⁷ Article 40 of the ICCPR: 1. The States Parties to the present covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights.

¹²⁸ ‘UNHRC’ available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx> : accessed on 12 October 2017.

¹²⁹ UNHRC ‘Monitoring civil and political rights’ <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>: accessed 26 February 2019.

the UDHR into a binding instrument.¹³⁰ Also adopted and opened for signature, ratification and accession by the General Assembly.¹³¹ The Preamble of the ICESCR states that:

The inherent dignity of, and the equal and inalienable rights of, all members of the human family is the foundation of freedom, justice and peace in the world.¹³²

Unlike the ICCPR ratification, South Africa only ratified the ICESCR on 18 January and it was intended to come into force on 12 April 2015.¹³³ The Covenant compels state parties under the UN Charter to promote, fulfil and protect those human rights, stipulated in the text.¹³⁴ The ICESCR is a treaty, which regulates the provision on human rights, which also serves as a reminder for freedom and enjoyment in terms of social, economic and cultural rights. This treaty is dependent on the availability of resources in order to be implemented.¹³⁵ This is one of the reasons for states lacklustre approach in signing and or ratifying the Covenant. Similar to the ICCPR, the Preamble of the ICESCR recognizes that the principles of equality of all persons and their freedom to enjoy all rights free from discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, birth or other status, is taken into consideration under this covenant.¹³⁶

¹³⁰ Office of the United Nations High Commissioner for Human Rights, The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies Fact Sheet no 30 p3-5 <https://www.ohchr.org/Documents/Publications/FactSheet30en.pdf>: accessed 26 February 2019.

¹³¹ Resolution 2200A (XXI) of 16 December 1966 and entry into force 3 January 1976, in accordance with Article 27. <https://www.ohchr.org>: accessed 26 February 2019.

¹³² Preamble of ICESCR, paragraph 2. See also “United Nations Human Rights” ICESCR available at <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>: accessed on 20 January 2019.

¹³³ “The Government of South Africa ratifies the ICESCR” available at <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr>: accessed on 02 July 2017.

¹³⁴ Preamble of ICESCR, paragraph 5.

¹³⁵ ‘Summary of ICCPR and ICESCR’ *Compass* (n.d.), available at http://www.eycb.coe.int/compass/en/pdf/6_4.pdf: accessed on 14 July 2017.

¹³⁶ Preamble of ICESCR. Also see J Fortin *Children’s Rights and the Developing Law* (1998) 39.

In respect of the study, Article 2 is fundamental and provides that everyone is entitled to the same rights and should be treated equally without any discrimination.¹³⁷ Article 3 of the Convention adds support to Article 2.2 of the Covenant when it re-affirms, “the equal right of men and women to the enjoyment of all human rights set out in the Covenant”. Furthermore, Article 13 of the Covenant provides for the right to education, namely, that everyone has an equal right to free primary education.¹³⁸ These provisions recognize the right to education for everyone, thereby categorizing it as a social, economic and cultural right.¹³⁹ Indeed, education is regarded as a powerful tool which can assist with the alleviation of poverty, and which provides a person with the means to participate fully in their communities, for instance, in terms of community development. When people are educated, they can be an asset to their family, community and country. As such, children can also safeguard themselves from exploitative and hazardous labour.¹⁴⁰ Education has the potential to develop a strong character in a person in terms of self-discipline and moral strength. It is indeed a shield against today’s economic problems which bring about unemployment and poverty, and which are major problems in South Africa and all around the world.¹⁴¹

Specifically, Article 13(2) (e) of the ICESCR states that:

The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

¹³⁷ Article 2 of the ICESCR.

¹³⁸ Article 13 and 14 of the ICESCR.

¹³⁹ K Tomasevski ‘Has the right to education a future within the United Nations? A behind-the-scenes account by the Special Rapporteur on the right to education 1998-2004’ (2005) 5 (2) *Human Rights Law Review* 205- 224.

¹⁴⁰ Article 13 (1) of the ICESCR.

¹⁴¹ *Ibid.*

The two provisions assert the principle that education must be available to all without discrimination, and that, therefore, the right to education accrues to everyone equally.

Similar to the ICCPR Committee, the ICESCR Committee consists of 18 experts who are persons of high moral character, competence, and solely responsible for ensuring that states which are parties to the Convention implement the provisions within their territories.¹⁴² These experts are elected for a term of four years by state parties, and are responsible for reviewing state reports, and monitoring states' compliance with the Convention.¹⁴³ The Convention is monitored by the UN Human Rights Committee, which was established under United Nations Economic and Social Council (ECOSOC) under resolution 1985/17.¹⁴⁴ The ICESCR has no provision for inter-state complaints.¹⁴⁵ However, States must report within two years of accepting the Covenant and thereafter every five years. The Committee examines the reports and concerns and recommendations are addressed to the state party in the form of 'concluding recommendations.'¹⁴⁶ The committee holds two sessions per year in Geneva consisting of a three-week plenary, and a one-week pre-sessional, working group.¹⁴⁷ The treaty bodies of ICESCR publish the interpretation of the provisions of the human rights treaty known as 'general comments' or 'general recommendations'.¹⁴⁸

¹⁴² 'CESCR' available at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/Membership.aspx> : accessed on 25 August 2017.

¹⁴³ OHCHR: The Committee on Economic, Social and Cultural Rights <https://www.ohchr.org>: accessed 25 August 2017.

¹⁴⁴ OHCHR: The Committee on Economic, Social and Cultural Rights. <https://www.ohchr.org>: accessed 25 August 2017.

¹⁴⁵ Vrancken 'Historical background, international context and constitutional environment' in Govindjee & Vrancken *Introduction to Human Rights Law* (2009) 10.

¹⁴⁶ 'Economic social and cultural rights', available at www.ijrcenter.org/un-treaty-bodies/committee-on-economic-social-and-cultural-rights : accessed on 25 August 2017; 'CESCR' available at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> : Accessed on 25 August 2017.

¹⁴⁷ 'CESCR' available at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> : accessed on 25 August 2017.

¹⁴⁸ *Ibid.*

As such, the ICESCR and the ICCPR Covenants developed the rights enshrined in the UDHR which became the International Bill of Human Rights.¹⁴⁹ The importance and relevance of these collection of human rights instruments, lies in the fact that they:

“lay down the obligations of Government to act in certain ways or to refrain from certain acts in order to promote and protect human rights and fundamental freedom of individuals or groups.”¹⁵⁰

These obligations include the rights to respect, to protect and to fulfil human rights.¹⁵¹

2.2.5 The United Nations Convention on the Rights of the Child (1989) (CRC)

Adopted by the General Assembly in 1989, the CRC is collective “international statement of the civil, political, economic, social and cultural rights of children”.¹⁵² For South Africa, in 1993, former President De Klerk and late former President jointly signed jointly, the 1990 Declaration and Plan of Action of the World and Children (the CRC).¹⁵³ Interestingly, in 1995 South Africa wanting to affirm its position as new democratic government also ratified the CRC, which was the first International instrument to be ratified under the new regime.¹⁵⁴

¹⁴⁹ ‘International human rights law’ available at <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> : accessed on 14 July 2017.

¹⁵⁰ ‘Human rights’ available at <http://www.un.org/en/sections/issues-depth/human-rights/> : accessed on 28 March 2017.

¹⁵¹ ‘UDHR’ available at <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> : accessed on 14 July 2017.

¹⁵² Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49. See UN Doc. A/44/49 (1989).

¹⁵³ SAHRC available at <https://www.sahrc.org.za/index.php/sahrc-media/news/item/58-twenty-five-years-of-children-s-rights>: accessed on 25 August 2018.

¹⁵⁴ *Ibid.*

The CRC states that:

States Parties to the Convention should Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit.¹⁵⁵

Interestingly, the CRC is regarded as “the Convention [that] protects the broadest scope of fundamental human rights ever brought together within one treaty”.¹⁵⁶ Thus, the CRC is considered:

the first legally binding international instrument to address specifically children’s rights comprehensively and is considered as the most widely ratified human rights treaty in the world.¹⁵⁷

It is regarded as comprehensive because it particularly provides a cluster of rights specifically addressing the needs of children.¹⁵⁸ Further, according to the UN Committee of the Rights of the Child, explains the difference between the CRC and other international instruments by emphasising that the CRC allows children to be respected as well for their individuality, to be able to be heard in matters affecting them freely, giving due weight to the age and maturity of the child.¹⁵⁹

¹⁵⁵ Preamble of the Convention on the Rights of the Child.

¹⁵⁶ Jan Martenson, under Secretary General for Human Rights Committee in 1991. See OHCHR available at <https://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf>: accessed on 17 July 2017.

¹⁵⁷ Article 1 of the Convention on the Rights of the Child. See also OHCHR available at <https://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf>: accessed on 17 July 2017.

¹⁵⁸ Article 2 of the Convention on the Rights of the Child deals with the principle of non-discrimination; Art 3 on the best interest of the child; Art 6 every child has inherent right to life, survival and development, and Art 12 on the right to express views and have them taken into account.

¹⁵⁹ UN Committee on the Rights of the Child ‘General Comment No. 12 (2009): The right of the child to be heard’, available at [http://www2.ohchr.org/english/bodies/crc/docs/ AdvanceVersions/CRC-C-GC-12](http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12) : accessed on 17 July 2017, 8.

The CRC defines a child as:

Every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.¹⁶⁰

Furthermore, the Preamble of the CRC provides that the basic aim of the Covenant is to protect children since they are a vulnerable group in society and, because of their tender age, generally in need of protection.¹⁶¹ Article 12 of the CRC provides for children to be given the opportunity to be heard:

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.¹⁶²

Article 13 (the right to freedom of expression), can also be linked with the above provision. Of particular relevance to the study, the right to education is extensively provided for in Article

¹⁶⁰ A Lopatka 'An introduction to the United Nations Convention on the Rights of the Child' (1996) 6 *Transnational Law and Contemporary problems* 263-286; S Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999); UNICEF *Implementation Handbook for the Convention on the Rights of the Child* (1998) 569-584; M Santos Pais 'The Convention on the Rights of the Child', in *UN Manual on Human Rights Reporting* (1997) 393-504.

¹⁶¹ See D Van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism* (1996) 180.

¹⁶² 'UN Committee on the Rights of the Child 'General Comment No. 12 (2009) : The right of the child to be heard', available at [http://www2.ohchr.org/english/bodies/crc/docs/ Advance Versions/CRC-C-GC-1](http://www2.ohchr.org/english/bodies/crc/docs/Advance%20Versions/CRC-C-GC-1) : accessed on 17 July 2017:10

28 (1) (a-c) of the CRC. The relevant provision also deals with the issue of primary, secondary and higher education. In many respects, the CRC provision is an elaboration of h Article 13(2) (a-c) of the ICESCR. Effectively these provisions call for primary education to be made compulsory and free to all and furthermore that secondary education be made available and accessible to every child. However, the drafters were careful with dealing with higher education as it “must be made accessible to all on the basis of capacity”.¹⁶³

The CRC is committed in the enforcement of the right to education for children, which is enacted in Article 29 of the Convention which sets out the aims and objectives of the right and also guarantees the liberty of individuals to establish independent educational institutions.¹⁶⁴ The CRC also supports the previous international instruments, such as the ICCPR and the ICESCR, by emphasising the needs of children (regarded as vulnerable group of society) and reminding states of their obligation to protect such persons. The CRC confirms that children should not be discriminated against in any way and that education is a right for all children. It also states that government must protect children’s rights in all forms – thus discrimination against GL children in schools is in violation of the provisions of the CRC. Since South Africa is one the most unequal countries in the world, with children experiencing inequality more intensely than adults, there is a duty incumbent upon the country to ensure the matter is dealt with.¹⁶⁵ Further, Article 6.2 of the Convention states that the State parties will provide, to the maximum extent possible, for the development and survival of a child and for the inherent right to life.¹⁶⁶ These rights suggest that the country is a mature democracy in which these and other rights are sacrosanct and greatly respected.¹⁶⁷ The General Comment of the Rights of the Child

¹⁶³ Article 28 (1) (a)-(c) of the CRC and article 13 (2) (a-c) of the ICESCR.

¹⁶⁴ Article 29 of the CRC.

¹⁶⁵ United Nations Committee on the Rights of the Child ‘Concluding Observations: Belgium’ (1995).

¹⁶⁶ Article 6(2) of the CRC. In the South African context, the right to life in the children’s rights is also enshrined in the Bill of Rights (Constitution of South Africa, Bill of Rights ss. 7-39).

¹⁶⁷ The Constitution of the Republic of South Africa of 1996, embodies many of these provisions.

further on, places a requirement on state parties to take legislative and policy measures to ensure the implementation of these rights.¹⁶⁸

2.2.6 Role of the United Nations International Children’s Emergency Fund (UNICEF)

UNICEF was adopted by the United Nations (UN) General Assembly in 1946.¹⁶⁹ UNICEF works on behalf of children on the basis of their needs without discrimination with regard to race, creed, nationality, status or religious belief¹⁷⁰. The body emphasizes that children have human rights just like adults because they are human beings and are entitled to the same rights as adults irrespective of their age, except for the right to vote which has an age restriction.¹⁷¹

The CRC built on the foundation of the ICCPR, ICESCR and the UDHR, and thus clarified that human rights are universal.¹⁷² As mentioned above, similarly, everyone is equal before the law and everyone has equal rights. As GL learners, or persons whom have different sexualities or gender identities, often experience discrimination, bullying, harassment and violence as discussed above, their protection should be at the forefront of UNICEF. Indeed, UNICEF is guided by the CRC and thus State parties should have measures in place to protect all children, and these measures should be enforced in a manner that truly is in the best interests of children

¹⁶⁸ ‘UN Committee on the Rights of the Child ‘General Comment No. 12: The right of the child to be heard’ (2009), available at [http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/](http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12) CRC-C-GC-12: accessed on 17 July 2017:92.

¹⁶⁹ ‘Protecting children’s rights: Convention on the Rights of a Child’ available at http://www.unicef.org/crc/index_protecting.html: accessed on 20 October 2017.

¹⁷⁰ ‘UNICEF’ available at https://www.unicef.org/about/history/files/UNICEFBeginners_web.pdf : accessed on 20 October 2017.

¹⁷¹ “Every child has the right to grow up in a safe and inclusive environment.” ‘*Protecting children’s rights: Convention on the Rights of a Child,*’ available at http://www.unicef.org/crc/index_protecting.html: accessed on 20 October 2017.

¹⁷² Declaration of the Rights of the Child, League of Nations *Records of the Fifth Assembly*, (1924) spec supp. 23 *League of Nation Official Journal*.

(Article 9). Further, GL learners should not be silenced or victimised to such an extent that they are forced to ‘hide’ their sexual identities and thus States should ensure that discussions involving these matters receive attention. The mandate of UNICEF is to promote the protection of the rights of all children, including homosexual children, since they are also human beings and they are born just like heterosexual children. Human rights apply to everyone equally regardless of one’s sexual orientation.¹⁷³

Interestingly, it appears that the call for these matters to be addressed is getting the necessary attention (at least on the international front) as there is a non-binding CRC Committee General Comment (GC15), whereby the committee identifies sexual orientation and gender identity on the basis of discrimination.¹⁷⁴ State parties of the CRC report on discrimination because of sexual orientation and gender identity, bullying in schools and educational establishments. According to UNICEF, the effect of discrimination on gay and lesbian children can extend from childhood into adulthood.¹⁷⁵

2.3 REGIONAL FRAMEWORK

2.3.1 The African Charter on the Rights and Welfare of the Child (ACRWC)

The international legal framework on the protection of the children has paved the way for the establishment of numerous regional institutions with a similar focus. The difference lies in that regional institutions would specifically focus on the civil, political, socio-economic and cultural needs of children within that region. Since, children have rights under international and national law; they should also have regional instruments to safeguard their rights. ACRWC falls under domestic law, which also forms part of children’s rights. The Organisation

¹⁷³ Secretary- General Ban Ki-Moon: human rights July 2013: Accessed on 1 November 2018.

¹⁷⁴ A/HRC/19/41. United Nations General Assembly ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’ (2011).

¹⁷⁵ UNICEF no. 9 November 2014.

of African Unity (OAU) adopted the ACRWC in 1990 and it entered into force in 1999.¹⁷⁶ Relevant to the discussion, in 2001, the OAU legally became the African Union (AU).¹⁷⁷ Similar to the CRC, the ACRWC reaffirms the obligations of African States in terms of international human rights norms. South Africa ratified this Charter in 2000.¹⁷⁸

The ACRWC defines a child as “every human being below the age of 18 years”.¹⁷⁹ The Preamble of the ACRWC recognizes that the best interests of the child shall be of primary consideration as alluded in Article 4 of the ACRWC.¹⁸⁰ The global treaty CRC is similar to some extent to the ACRWC regional treaty, but the main difference, according to Lloyd, is that ACRWC takes a more extensive approach on the concept of the protection of children, and the child’s best interests, as that is the focal point throughout the thesis.¹⁸¹

The drafting of the ACRWC was to address African countries concerns that on the underrepresentation of the continent during the drafting of the CRC and that the only African countries to participate in the drafting process were Algeria, Morocco, Senegal and Egypt.¹⁸² African states also argued that there should be a Charter, which would express their cultural values in terms of family and community. The preservation of one’s culture is an important part of the realisation of human rights, this the ongoing tension between these ideals need not be destructive. The African culture promotes the protection of the child and thus in this particular respect is on par with human rights position.

¹⁷⁶ BD Mezmur ‘The 9th Ordinary Session of the African Committee of experts on the Rights and Welfare of the Child: Looking back to look ahead’ *African Human Rights Law Journal* 7(2) 2007, 522-523.

¹⁷⁷ <https://au.int/> : accessed 26 February 2019.

¹⁷⁸ OAU *African Charter on the Rights and Welfare of the Child* (1990).

¹⁷⁹ Article 2 of ACRWC.

¹⁸⁰ Article 4(1) of the African Charter on the Rights and Welfare of the Child, 1990 and DM Chirwa ‘The merits and demerits of the African Charter on the Rights and the Welfare of the Child’ (2002) 10 *International Journal of Children’s Rights* 160. Example of other provisions: Article 9; Article 19; Article 20; Article 24 and Article 25 ACRWC.

¹⁸¹ A Lloyd ‘The African regional system for the protection of children’s rights’ in Nielsen J (ed) *Children’s Rights in Africa: a Legal Perspective* (2008) 37.

¹⁸² Preamble of the ACRWC.

As noted earlier, there was recognition that the situation of African children remained critical due to the “unique factors of their socio- economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, requiring that their care be specially safeguarded”.¹⁸³ Viljoen writes, “the reasons why the regional charter was adopted were the side-lining of Africans from the UN drafting process and the exclusion of Africa-specific issues from the CRC.”¹⁸⁴ According to Lloyd, another reason for the drafting of the ACRWC was for it to function as a “complimentary mechanism to the CRC” and for this uniquely African instrument “to enhance the enjoyment of the rights of the child in Africa”.¹⁸⁵ Furthermore, Lloyd explain that the ACRWC does not replace the existing standard of CRC – instead it adds to them.¹⁸⁶ As mentioned above, the ACRWC defines a child as “every human being below the age of 18 years with no exceptions”¹⁸⁷ and Article 4(1) provides that “in all actions concerning the child, undertaken by any person or authority, the best interests of the child shall be the primary consideration”.¹⁸⁸ This principle shows that in every matter concerning a child this principle must be take priority over matters. According to Article 3 of ACRWC:

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.¹⁸⁹

¹⁸³ http://www.ijhssnet.com/journals/Vol_5_No_7_1_July_2015/17.pdf : accessed on 14 July 2017.

¹⁸⁴ F Viljoen ‘Why South Africa should ratify the ACRWC’ (1991) 116 *South Africa Law Journal* 660-661.

¹⁸⁵ A Lloyd ‘Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet’ (2002) 10 *International Journal of Children’s Rights* 179 at 184.

¹⁸⁶ *Ibid.*

¹⁸⁷ Article 2 of ACRWC.

¹⁸⁸ Article 4(1) of the ACRWC.

¹⁸⁹ Article 3 of the ACRWC.

Furthermore, Article 11(3) (a) of ACRWC obliges State Parties to “provide free and compulsory basic education and to take special measures to ensure access to education” for “females, gifted and disadvantaged children”.¹⁹⁰ As such, Article 11(5) of the ACRWC requires State parties to “ensure that school or parental discipline is administered in a manner that is humane and consistent with child’s human dignity and in conformity with the Charter”.¹⁹¹ There are ample matters that reveal the effect of child abuse and child neglect which have resulted in many children’s childhood and their sense of security and well-being, destroyed. Article 16 provides for protection against child abuse and torture.¹⁹² Accordingly, GL learners can seek protection under these relevant provisions and to the relevant African Human Rights Bodies.

2.4 CONCLUSION

This chapter established that States have an obligation to implement international human rights treaties. The international and regional legal frameworks share a common theme, which is the protection of children. The study has shown that both the international and regional legislative framework play a significant role in the lives of children of any race, colour, gender, nationality, and culture equally without discrimination. Furthermore, they are interlinked as they strive to ensure the best interest of the child, their non-discrimination, children’s participation, and the survival and development of the child.

¹⁸⁸ Article 11(3) (a) of the ACRWC.

¹⁹¹ Article 11(5) of the ACRWC.

¹⁹² 1. State Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child. 2. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

All of these legal frameworks are linked, so that when the regional instrument is not adequate, the international legal framework can be relied on. In fact, the relevant provisions has revealed that children are right holders too and require the protection of States, international, regional bodies and adults. Thus, in terms of the international and regional legal framework, GL learners are entitled to the same protection and their individuality must be respected. However, some of the international frameworks, as highlighted, do not specifically address sexual orientation although reference is made to sex and other status, in the relevant instruments. The right to education is equally important to all children for development. The next chapter will evaluate the extent to which the South African Constitution and the current basic education policies and guidelines by the South African Department of Basic Education adequately protect the rights of GL learners.

CHAPTER 3

THE SOUTH AFRICAN CONSTITUTION AND THE DEPARTMENT OF BASIC EDUCATION'S POLICIES AND GUIDELINES

3.1 INTRODUCTION

Education in South Africa has played a pivotal role in sculpting the country's current leadership, the role that we play on the continent and in the international community. Leaders such as the late Nelson Mandela have been able to surpass the impediment of discriminatory laws and policies and to gain international recognition.¹⁹³ Two years after South Africa gained independency, that is in 1996, the final Constitution was accepted which provides for the rights and obligations of persons and explains the role and powers of the state and relevant government officials.¹⁹⁴ The Constitution of South Africa is the supreme law of the land, which guarantees the protection of all people in the country equally without discrimination, including specific mention of protection against discrimination on the grounds of sexual orientation.¹⁹⁵

¹⁹³ NR Mandela *Long Walk to Freedom* (1994). Nelson Mandela graduated with Bachelor of Law degree in 1943 at the University of Fort Hare. In 1943. He further studied diploma in law which allowed him to practice law after graduating. In 1952 he and Oliver Tambo established the first black law firm. In 1989 he obtained his LLB degree in UNISA whilst in Robben Island Prison in Cape Town and he graduated in absentia at a ceremony in Cape Town.

¹⁹⁴ The Constitution of Republic of South Africa of 1996.

¹⁹⁵ Sections 7, 8 and 9 of the Constitution.

Before South Africa's advent to democracy, the rights of people were determined by their race.¹⁹⁶ Further, the apartheid Government did not protect minority groups, such as gay and lesbian people.¹⁹⁷ Generally, gays and lesbians were punished in terms of criminal, civil and common law spheres as their conduct were regarded as immoral and against the morals or values of the then South African society.¹⁹⁸ Now the Constitution affirms the democratic values of human dignity, equality and freedom,¹⁹⁹ which guide the people of South Africa. In terms of Section 9 of the Constitution, which is a reflection of the democratic principles against the apartheid past, discrimination on the grounds of sexual orientation is unconstitutional.²⁰⁰ Furthermore, GL learners also have the right to dignity equally with heterosexual learners and, where this is contravened, it would amount to a contravention of section 10 of the Constitution.²⁰¹

As discussed in Chapter Two, there exists a broad international and regional legal framework in respect to education. The relevant national framework that underpins our basic education system includes education policies and guidelines that exist within the Department of Basic Education and which affect GL learners. In particular, education policy can be described, as part of the legal framework that governs human conduct and is recognised as binding or enforced by the state, but also has to operate within the human rights framework established by the Constitution. Further, education policy is part of the South African legal framework,

¹⁹⁶ U Jivan 'From individual protection to recognition of relationships': same sex couples of the South African experience of sexual orientation reform' (2007) 11 (2) *Law, Democracy and Development* 21.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ Section 7 (1) of the Constitution.

²⁰⁰ Section 9 (1) of the Constitution, everyone is equal before the law and has the right to equal protection and benefit of to the law.

²⁰¹ Section 10 of the Constitution. The right of equality and dignity was discussed in a case of *S v Makwanyane*. See *S v Makwanyane* 2003 (2) SA 198 (C).

which regulates relations between educators, learners, teachers, parents, managers, public in general, trade unions, and the interests of other stakeholders and interested parties.²⁰²

A particular legal instrument entrusted to assist with the implementation of Section 9 is the Promotion of Equality and Prevention of Unfair Discrimination Act (hereafter the Equality Act or PEDUDA), which prohibits unfair discrimination, hate speech, harassment and the publication of discriminatory material.²⁰³ The Equality Act has created a network of equality courts countrywide in order to provide a quick, informal and effective way of resolving cases involving unfair discrimination disputes. When GL learners experience unfair discrimination, the equality court should protect their interests.²⁰⁴

This chapter will discuss the extent to which the current basic education policies and guidelines, as established by the South African Department of Basic Education (hereafter ‘DBE’) and address the position of GL learners, in view of the relevant Constitutional provisions.²⁰⁵ In addition, the management structure, and the roles of management and other relevant departments, will be discussed to shed light on the focus of the chapter.

²⁰² SM Shaba, T Campher, T Du Preez, P Grobler and C Loock *Education Management Series Module 4: South African Law in Education* (2003) 2.

²⁰³ Section 7 to 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

²⁰⁴ *Ibid.*

²⁰⁵ The following cases is of relevance to the discussion: *S v Makwanyane* 2003 (2) SA 198 (C), *MEC for Education, KwaZulu- Natal and Others v Pillay* 2008 (1) SA 474 (CC), *Basic Education for all and Others v Minister of Education and Others* 2012 ZA GPPHC 114 and *Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) paras 36-38.

3.2 BASIC EDUCATION

After the ending of apartheid, South Africa adopted an equal rights approach, which provided many rights to previously marginalised groups, as the previous education dispensation was largely structured according to race. During the apartheid era the minority white elite was allocated funding for education which, according to Simbo, was ten times more than that received by the majority of South Africans.²⁰⁶ Since the end of apartheid, the Constitution as the supreme law of the country, aims to transform South Africa into an inclusive state that respects the dignity, equality and freedom of all its citizens.²⁰⁷

The ground-breaking 1990 “Jomtien Conference”²⁰⁸, introduced the term “basic education” and this influenced the subsequent international and domestic strategies and statistical categories adopted.²⁰⁹ At this conference, the Participants the adopted the Declaration on Education for All, which Section 29 (1) of the Constitution, mirrors largely. Of importance is that this Constitutional provision, establishes the basic tenets of basic education. Further, as identified in Chapter Two, unlike other socio-economic rights, the right to education is not subject to resource constraints.²¹⁰ Thus, the State is obliged to respect, protect and promote the right to education.²¹¹ Basic education, according to Justice Nkabinde, is an “unqualified human

²⁰⁶ C Simbo ‘Defining the term basic education in South African Constitution: and International law approach’ (2012) 16 *Law Democracy and Development* 162-182 at 168.

²⁰⁷ Section 7 of the Constitution of the Republic of South Africa of 1996.

²⁰⁸ The March 1990 Jomtien, Thailand Conference resulted in the World Declaration on Education For All which used the term “basic education” throughout the document : available at http://www.unesco.org/education/pdf/JOMTIE_E.PDF : accessed on 30 September 2017.

²⁰⁹ Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33 E/CN.4/1999/49 13 (January 1999) at para. 15, available at <http://www2.ohchr.org/english/issues/education/rapporteur/annual.htm> : accessed on 30 September 2017.

²¹⁰ Section 29 of the Constitution of the Republic of South Africa of 1996.

²¹¹ Sections 7(2), 29 (1) (a) and (b) of the Constitution.

right that everyone is entitled to”.²¹² This concept may vary from country to country, and the definition may even change or evolve depending on other factors such as changing requirements of a technologically advancing society.²¹³ In accordance with the international Conventions article 26(2) of the UDHR, the CRC and ICESCR, the core content of basic education comprises “literacy, numeracy, skills relating to one’s health, hygiene and personal care, and social skills which include oral expression”.²¹⁴ In 1999, the UN Special Rapporteur on the right to education noted the evolution in the terminology used by certain education specialist. Accordingly, the Rapporteur noted that:

The language of international educational strategies shifted from “primary” to “basic” education, differing from the continued use of “primary education” in human rights, and the term “basic education” was introduced by the “Jomtien Conference” in 1990.²¹⁵

Thus, in the South African context, “basic education” was first constitutionalized in 1994 having been virtually unheard of previously in South African education circles.²¹⁶ In respect of

²¹² Justice Nkabinde understanding the textual formulation of section 29(1) (a) stated that the right to basic education is an unqualified human right, which may be limited only ‘in terms of a law of general application which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’ See *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) paras 36 -38.

²¹³ G Baker ‘The right to education in The South African Constitution: An introduction’ in LV Mashava (ed) *Compilation of Essential Documents on the Right to Education Economic and Social Rights Series* (2000) 7.

²¹⁴ F Coomans ‘Exploring the normative content of the right to education as a human right’, available at <https://core.ac.uk/download/pdf/83566057.pdf> :accessed on 27 August 2017.

²¹⁵ Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33 E/CN.4/1999/49 13 (January 1999) at para. 15 ‘Education Rapporteur’, available at <http://www2.ohchr.org/english/issues/education/rapporteur/annual.htm> : accessed on 30 September 2017.

²¹⁶ C Simbo (2012) ‘Defining the term basic education in South African Constitution: and International law approach’ (2012) 16 *Law Democracy and Development* 162-182.

South Africa, Abdi further explained that the name “basic education” was adopted after the first South African democratic elections in 1994.²¹⁷ He states that:

Inequality was writ large in the education system; the malfunctions of the society were playing out in the education system and interfered with the implementation of pedagogic changes, with these taking time to be institutionalized.²¹⁸

According to Veriava *et al*, the basic aim of the right to basic education is to empower learners, teachers, principals and school governing bodies (SGBs).²¹⁹ Section 29 (1) (a) of the Constitution implies that claims of resource constraints would not be applicable when determining the content of the right to basic education, as the right is not subject to resource availability which means that it must be implemented.

The School Act does not provide a concrete definition of the term “Basic Education”. Simbo notes that the Schools Act provision states “education is compulsory from grade 1 to grade 9 and also between the ages of 7 and 15”.²²⁰ The basic education system before democracy had four different departments employed in accordance with racial groupings, but in 1994 after the advent of democracy, only one Department is tasked with safeguarding the right to basic education.²²¹

²¹⁷ AA Abdi (2003) ‘Integrated Education and Black Development in post-apartheid South Africa critical analysis’ (2003) 31 (2) *Compare* 25-27.

²¹⁸ AA Abdi (2003) ‘Integrated Education and Black Development in post-apartheid South Africa critical analysis’ (2003) 31 (2) *Compare* 25-27.

²¹⁹ F Veriava, A Thom and F Hodgson *Basic Education Rights Handbook* (2017), available at <http://section27.org.za/wp-content/uploads/2017/02/Preface.pdf> : accessed on 27 August 2017.

²²⁰ C Simbo ‘Defining the term basic education in South African Constitution: and International law approach’ (2007) 16 *Law Democracy and Development* 162-182 at 173.

²²¹ National Department of Education (hereafter NDE). In 2009 the department was split into two, the Department of Basic Education (hereafter DBE) and Department of Higher Education (hereafter “DHE”). Basic education

3.2.1 Purpose of basic education

According to the National Education Policy Act of 1996 (hereafter NEPA), researchers have shown that “basic education is a prerequisite for tackling poverty and promoting short- and long-term economic growth”.²²² According to Butler, the Department of Education (DOE) included an anti-discrimination clause in its policy.²²³ The transformation of basic education is guided by five internationally accepted principles namely: access, redress, equity, quality and efficiency.²²⁴

The five internationally accepted principles of basic education transformation in terms of NEPA access means that “every person should have access to basic education and access to educational institutions”.²²⁵ Redress, according to Simbo, means that the South African Government should “redress the ills caused by the colonial and apartheid systems of government in basic education”.²²⁶ Further, redress would entail, for example, putting in place measures to address the needs of those who were denied education previously.²²⁷ In the so-called ‘*Textbook Case*’ the Supreme Court of Appeal (SCA) stated that the DBE by law is required to ‘adopt clear national policy’ that ensures that each learner has access to a textbook

comprises of learners from grade “R” reception group to grade 12 and the DHE and training. On the other hand, the DBE specialises in learners from grade R to 12 and adult literacy programmes.

²²² National Education Policy 27 of 1996.

²²³ AH Butler, N Alpaslan, N Strumpher, and G Astbury ‘Gay and lesbian youth experiences of homophobia in South African secondary education’ (2003) 1 (2) *Gay & Lesbian Issues in Education* 3-28.

²²⁴ Department of Basic Education 2018/2019: Annual performance plan.

²²⁵ Section 4 (a) (ii) of National Education Policy Act 27 of 1996 (NEPA).

²²⁶ C Simbo ‘Defining the term basic education in South African Constitution: and International law approach’ (2007) 16 *Law Democracy and Development* 162-182 at 166.

²²⁷ C Simbo ‘Defining the term basic education in South African Constitution: and International law approach’ (2007) 16 *Law Democracy and Development* 162-182.

before the commencement of the academic year.²²⁸ The court further stated that, by failing to comply with their constitutional mandate and to provide textbooks to those students, the DBE in effect had infringed those affected learners' rights to basic education.²²⁹ Indeed, textbooks are important to enabling education. Since, many public schools in South Africa that are mainly dependent on government support, lack the infrastructure to enable technology advanced education methods, access to textbooks are key for learners to understand the relevant concepts.

Importantly, in terms of the internationally accepted principles, equity in terms of “the World Declaration on Education for All” means that basic education should allow people of all genders to have access to education and that all gender stereotyping should be eliminated.²³⁰ Further, according to the Declaration, “quality” means that rural and underserved children must all have access to quality education and should not be discriminated against.²³¹ Further, efficiency measures the extent to which in the South African context, the DBE wield resources to achieve its objectives in terms of basic education.²³²

Ultimately, the five principles of basic education enable all learners to get the optimal advantage that arise from such educational opportunities, which are primarily designed to enable the learners to the basic learning needs. Since, primary education is the forum where learners first receive education; most view is as being the most important component of basic

²²⁸ *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) (2 December 2015), pp 4 - 5.

²²⁹ *Ibid.*

²³⁰ Jomtien Conference, Thailand ‘World declaration on education for all and framework for action to meet basic learning needs 5-9 March 1990, available at: http://www.unesco.org/education/pdf/JOMTIE_E.PDF:accessed on 30 September 2017.

²³¹ *Ibid.*

²³² *Education Information Standards Dictionary of Education Concepts and Terms* (2010) 42, available at <https://www.education.gov.za/Portals/0/Documents/Publications/Dictionary%20of%20Education%20final.pdf?ver=2015-01-29-112633-100>: accessed on 25 October 2017.

education.²³³ International law defines the term “basic education” as satisfying basic learning needs as stated in the World Declaration:

Basic needs have essential learning tools, which include literacy, oral expression, numeracy, problem solving and a basic learning component.²³⁴

Thus, literacy according to the DBE is the ability to process and use information for a variety of purposes.²³⁵ The term “oral expression” concerns the ability of learners to be able to express their ideas, to be able to think critically, and to be able to express their opinion/thoughts through stories and so forth.²³⁶ Numeracy, according to Simbo, means “the mathematical skills used in the classroom.”²³⁷ The term “problem solving” refers to clarifying a description of a problem and explaining whether the problem was solved or not.²³⁸ As such, the Declaration on Education for All emphasizes that it is important for everyone to have basic learning.²³⁹ These international principles are relevant to the South African context, as it is probable that South

²³³ Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comments no. 13 The Right to Education (Article 13 of the Covenant) (1999) 9.

²³⁴ Jomtien Conference, Thailand ‘World declaration on education for all and framework for action to meet basic learning needs 5-9 March 1990, available at: http://www.unesco.org/education/pdf/JOMTIE_E.PDF:accessed on 30 September 2017.

²³⁵ Department of Basic Education ‘National Curriculum statement NCS: Curriculum and policy Statement – foundation phase: Grade R-3 ‘(2011b), available at <http://www.education.gov.za/LinkClick.aspx?filetickettabid=572&mi> Assessment: accessed on 1 December 2017.

²³⁶ C Simbo ‘Defining the term basic education in South African Constitution and international law approach’ (2012) 16 *Law Democracy and Development* 162-182 at 177.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

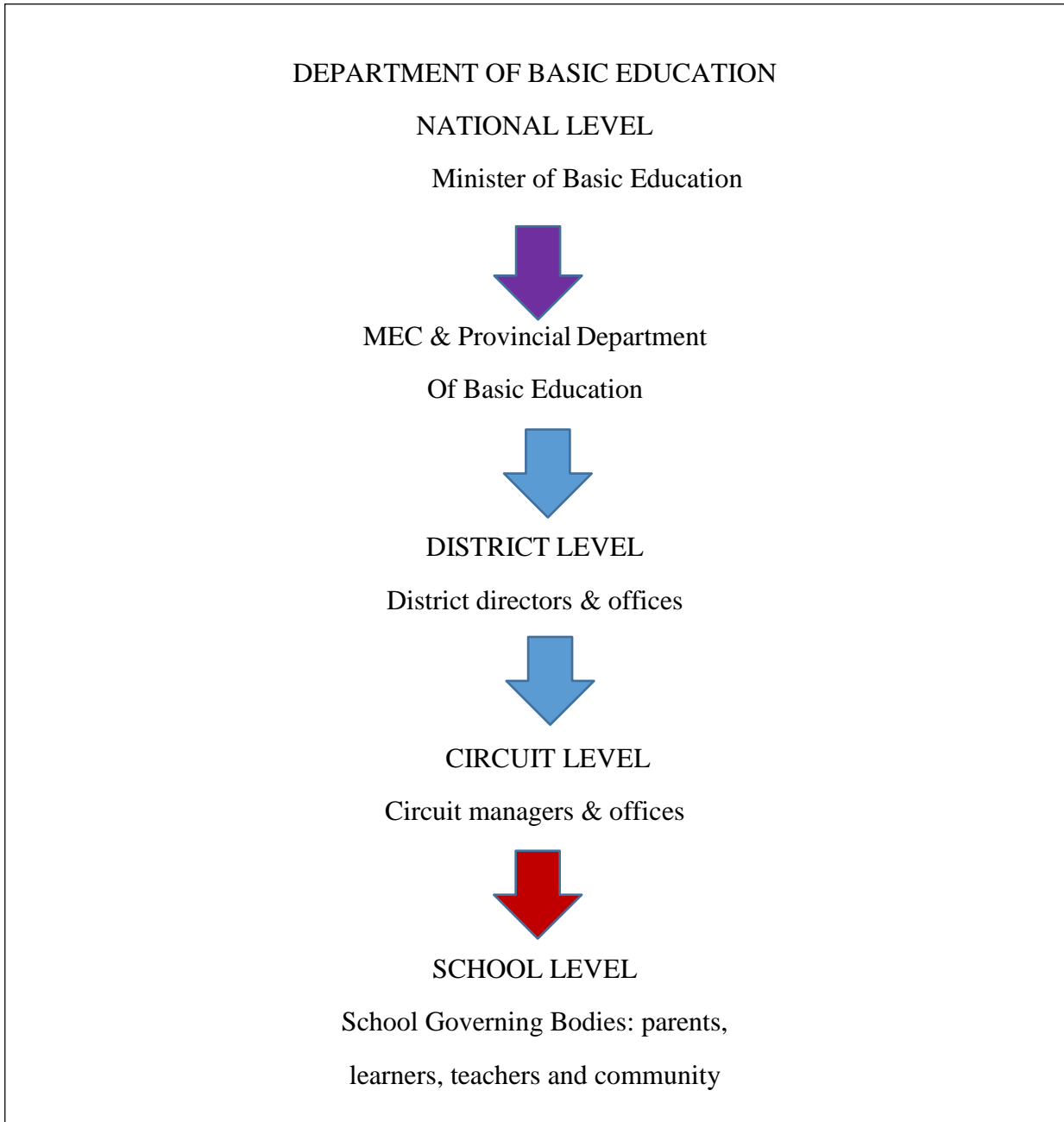
²³⁹ Jomtien Conference , Thailand ‘World declaration on education for all and framework for action to meet basic learning needs 5-9 March 1990, available at: http://www.unesco.org/education/pdf/JOMTIE_E.PDF:accessed on 30 September 2017.

African schools are not in compliance as their actions or omissions are not in line with these guiding principles.

3.2.2 The structure of the basic education system in South Africa

The National Education Policy²⁴⁰ authority was designed to “inscribe the policy, legislative and monitoring responsibilities of the Minister of Education, and to formalise the relations between national and provincial authorities”. Below is a diagram that depicts operational structures. Thereafter a discussion on the role of these stakeholders will follow to provide more clarity on the operation and decision making within the relevant department.

²⁴⁰ World Data on Education 2010/2011 7th Edition, 4. <http://www.ibe.unesco.org/en/document/> : accessed 27 February 2019.



*Figure 1: The Basic Education Structure according to School Governance of Basic Education*²⁴¹

²⁴¹ *Basic Education Rights Hand Book* (2017) 77, available at <http://section27.org.za/wp-content/uploads/2017/02/Chapter-3.pdf>: accessed on 30 October 2017.

3.2.2.1 The Role(s) of the Minister of Basic Education

The Minister is politically appointed by the President of the country and as the head of this government department, his/her role is to give leadership and direction to the Department and to govern schools at the National level.²⁴² As such, the national office is responsible for providing support and guidance to the numerous Department officials and for overseeing whether the Department is in compliance with the policies and legislation as set forth, and that such policies and legislation are adhered to, together with the Schools' Code of Conduct.²⁴³

As an official of the State, the Minister's duty is enshrined in Section (8) (1) of the Constitution.²⁴⁴ It is important the relevant national and provincial stakeholders protect, promote and enforce the national and provincial policies and laws as the State will have to answer to the extent to which such laws have been respect, protected and fulfilled. Since Section 29 of the Constitution stipulates that everyone has a right to education,²⁴⁵ the Minister is duty bound to protect the right to basic education in terms of the provision. The Minister has to realise the specific rights in the Bill of Rights.²⁴⁶ Furthermore, the Constitution grants the right of access to basic education and places the responsibility upon this government department to ensure that education is accessible and available to everyone.²⁴⁷ In this respect, it is thus arguable that where GL learners are denied access to these constitutional rights, they may have a right to litigate when their rights are violated.

²⁴² Department of Basic Education, available at: <https://www.education.gov.za/AboutUs/DBEStructure.aspx>: accessed on 30 October 2017.

²⁴³ Section 3 of National Education Policy Act, Act 27 of 1996.

²⁴⁴ In terms of the relevant provision: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State".

²⁴⁵ Section 29(1) (a) of the Constitution.

²⁴⁶ Section (8) (1) of the Constitution.

²⁴⁷ Section 29 of the Constitution.

There are a number of cases where the court has explained the role or duty of the Minister in question. One case (referred to earlier), the *Basic Education for all and Others v Minister of Education and Others*, where text books had not been delivered to almost 39 schools in the Province of Limpopo,²⁴⁸ the DBE was given a direction to provide textbooks to the affected schools on or before the 15th of June 2012. The court emphasized that the right to basic education and right to equality were violated in terms of the Constitution.²⁴⁹ It is submitted that as some schools did not receive their school books, such learners' dignity in terms of Section 10 was impaired as those learners would have had to borrow text books from other school learners who were issued with text books.²⁵⁰ As such, the decision of the court could also be applied to GL learners. The Minister is duty-bound to fulfil the right to basic education also for GL learners, equally and without discrimination in terms of their sexual orientation, since such learners are protected under Section 9 of the Constitution.²⁵¹ Furthermore, the Equality Act prohibits any form of discrimination by the state.²⁵² Additionally, the Act also prohibits hate speech.²⁵³ Any words, which cause hurt, harm or which propagate hatred towards gay and lesbian learners is prohibited in terms of the Act. Thus, the Minister must ensure that education is accessible to everyone without discrimination – including GL learners.

3.2.2.2 *The provincial structure of basic education with particular focus on KwaZulu-Natal*²⁵⁴

²⁴⁸ *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) (2 December 2015).

²⁴⁹ *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) (2 December 2015).

²⁵⁰ Section 29 (1) (a), 9 and 10 of the Constitution.

²⁵¹ Section 9 of the Constitution.

²⁵² Section 8 (a) South Africa Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

²⁵³ Section 10(1) South Africa Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

²⁵⁴ KwaZulu-Natal Department of Basic Education, available at http://www.kzneducation.gov.za/Portals/0/Circuiars/General/2012/Approved_Organogram_forKZN_DoE.pdf: accessed on 30 October 2017.

The Provincial structure of DBE comprises four pillars. These are illustrated in the diagram below.²⁵⁵

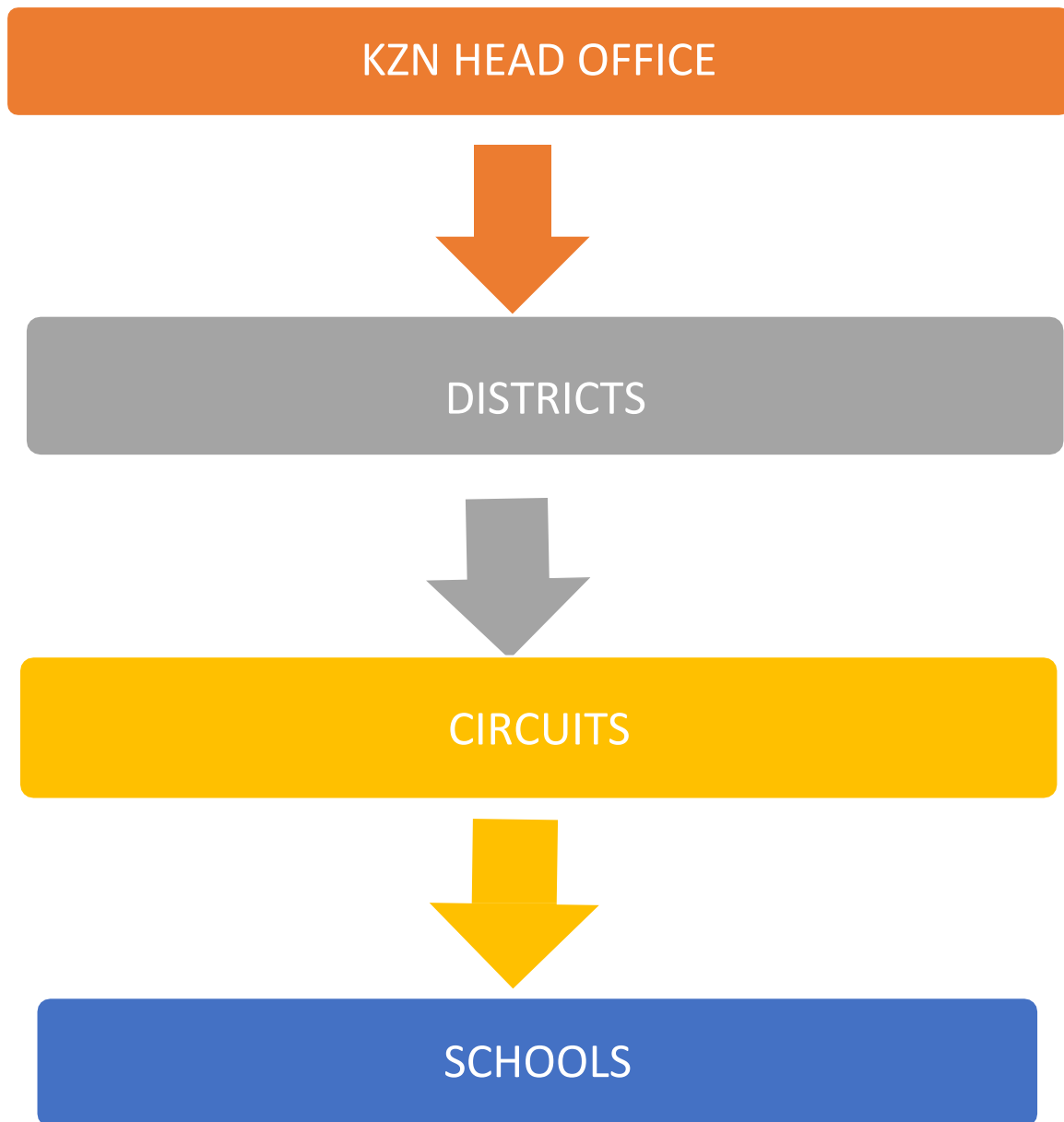


Figure 2: The Provincial Offices Four Pillars of Basic Education

²⁵⁵ Kwazulu-Natal Department of Basic Education available at http://www.kzneducation.gov.za/Portals/0/Circuiars/General/2012/Approved_Organogram_for_KZNDoe.pdf; accessed on 30 October 2017.

According to the Schools Act, the Education Department is “the department established by section 7(2) of the Public Service Act of 1994, which is responsible for education in a province”.²⁵⁶ The purpose of a Provincial Education Department is to “provide all people, for example in the KwaZulu-Natal Province, with access to equal education and training in order to improve their position in life and to contribute to the advancement of a democratic culture in the province”.²⁵⁷

The roles of the provincial head office in KwaZulu-Natal Province include providing:²⁵⁸

curriculum management and delivery services, institutional development support services, financial services, co-corporative management services, counselling and guidance for gay and lesbian learners, psychosocial services to learners, care and support to all learners, and social cohesion.

The provincial office should see to it that policies and legislation are in compliance with the Constitution and are implemented.²⁵⁹ The implementation of policies and legislation, together with the School Code of Conduct can protect GL learners from discrimination, but failure to implement policies and legislation will result in a violation of a School’s Code of Conduct and other policies. The MEC is responsible for the appointment of the Head of Department (HoD) and for the provision of political leadership and direction to the Department and for accountability by the Department.²⁶⁰ The provincial office should also ensure that the Districts and Circuits run smoothly, and furthermore the office has to oversee whether there is

²⁵⁶ Section 1 of the South African Schools Act 84 of 1996.

²⁵⁷ KwaZulu-Natal Department of Basic Education, available at <https://provincialgovernment.co.za/units/view/48/KwaZulu-Natal/Education>: accessed on 30 November 2017.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ http://www.kzneducation.gov.za/Portals/0/Circuiars/General/2012/ApprovedOrganogram_for_KZN_DoE.pdf : accessed on 30 October 2017.

compliance and implementation of the education policies of the National Department.²⁶¹ Policies and school codes of conduct must also be in compliance with the Constitution, and the focus is on policy, strategic interventions, monitoring and evaluation.²⁶²

3.2.2.3 *District offices*²⁶³

According to the DBE district offices are hubs, which are found in local areas of Provincial Education Departments (PEDs) which provide communication between the Provincial Head Office and education institutions.²⁶⁴ Districts are responsible for the smooth implementation of “policies in education as they work in collaboration with principals and teachers”.²⁶⁵ Their main function is for the Province to achieve excellence in learning and teaching.²⁶⁶ The role of the District, as envisaged by the Department of Education (2010), is:

To encourage all schools to become inclusive and reward excellence in this area; to train and provide support to schools in dealing with challenges regarding inclusion; and to ensure that all managers and service providers work with inclusion officials in the district to manage, train and support schools to become inclusive and to monitor district offices.²⁶⁷

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ Department of Basic Education, available at <https://www.education.gov.za/Informationfor/EducationDistricts.aspx>: accessed on 30 October 2017.

²⁶⁴ *Ibid.*

²⁶⁵ Department of Basic Education, available at <https://www.education.gov.za/Informationfor/EducationDistricts.aspx>: accessed on 30 October 2017.

²⁶⁶ Department of Basic Education, available at <https://www.education.gov.za/Informationfor/EducationDistricts.aspx>: accessed on 30 October 2017.

²⁶⁷ Department of Education: available at <https://provincialgovernment.co.za/units/view/48/KwaZulu-Natal/Education>: accessed on 30 November 2017.

The four roles of District Offices are:

To conduct school visits, to evaluate classrooms, to provide support with curriculum and institutional development, and to provide support in terms of subject advising.

The main intention of District Offices is to improve the quality of teaching and learning.²⁶⁸ District Offices manage the quality of work by conducting inspections for compliance in schools and also assist schools in terms of planning and improvement or development plans.²⁶⁹ District Offices are responsible for oversight and accountability of principals for their schools' performance. They are also accountable for District officials in terms of whether they are in compliance with relevant policies.²⁷⁰ Additionally they communicate with members of the community to discuss the challenges experienced, listen to their needs in an open and transparent manner, and hold awareness campaigns.²⁷¹ District Offices play an important role for GL learners since they have the right to report directly to these offices whenever they are suffering discrimination. GL learners who are victims of discrimination in schools can be assisted during the monitoring process.

3.2.2.4 *Circuit management*²⁷²

The "Basic education" Gazette defines a Circuit Manager as a Head of a Circuit Office who executes and prescribes functions, which have been allocated by District Directors or by the

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² Department of Basic Education 'Guidelines on the Organisation, Roles and Responsibilities of Education' (2011); BM Mafuwane and J Pitsoe 'Circuit managers as agents of school development and support: A conceptual analysis' (2014) 5 *Mediterranean Journal of Social Sciences* 9.

Head of the Provincial Education Department.²⁷³ The Circuits are the group of schools that fall within the jurisdiction of an education district.²⁷⁴ Schools, which are grouped into circuits, cannot total more than 30 but should be between 20 and 30. The Circuit is therefore made up of a small group of schools, which includes principals and educators. The Circuit manages service delivery in schools and co-ordinates communication between Head Office, District Office and the education institutions. These people's roles in the school community is important for development and support and they play a pivotal role in forming a culture in schools that encourages change.²⁷⁵ Circuit managers provide management support to schools which experience problems with school principals. They have an instructional leadership role to play since they also engage in the development of the schools by assisting school principals and teachers to improve the quality of teaching and learning.²⁷⁶ Circuit managers are thus responsible for providing curriculum guidance, support and advisory service to all teachers to improve teaching and learning.²⁷⁷ They can therefore provide programmes, which sensitize learners about human rights and the Schools Code of Conduct, and policies which provide for education for all learners equally, and which prevent GL learners from dropping out and even committing suicide. Circuit managers can also establish victim support programmes, or forums whereby teachers, learners, parents and community members take part, and they are able to organize a separate parental guidance programme.

²⁷³ Department of Basic Education, Gazette No. 36324(3) 2013.

²⁷⁴ Department of Basic Education 'Guidelines on the Organisation, Roles and Responsibilities of Education' (2011); Mafuwane and Pitsoe 'Circuit managers as agents of school development and support: A conceptual analysis' (2014) 5 *Mediterranean Journal of Social Sciences* 9.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

3.2.2.5 School Governing Bodies (SGBs)

The SGB is the government of the school, which is established in terms of the South African Schools Act.²⁷⁸ Principals (automatically members of the SGBs, due to their position), certain learners and non-educators, as well as members of the community, make up a school community. The school community elects SGB members who represent the school community.²⁷⁹

The role of the SGB is to assist the school with various kinds of knowledge and support or skills, since some of the members have professional skills.²⁸⁰ In terms of the Act:

Section 5(1) provides that, a public school must admit learners and serve their educational requirements without unfairly discriminating in any way and, in terms of Section 20(1) (a) of the Schools Act, the SGB has a duty to promote the best interests of the children and to ensure the provision of quality education for all learners at the school.²⁸¹

As such, SGBs are responsible for the protection of the rights of all learners in schools by administering fair school rules.²⁸² These schools rules include: ‘determining the admission policy, the school’s code of conduct, language policy, pregnancy policy, religious policy and

²⁷⁸ ‘School governing bodies rights and responsibilities,’ available at http://www.populareducation.co.za/sites/default/files/governance%20booklet_WEB.pdf : accessed on 30 October 2017.

²⁷⁹ Department of Basic Education, available at <https://section27.org.za/category/right-to-basic-education/>: accessed on 30 October 2017.

²⁸⁰ Sebastian Mansfield-Barry and Lithalthemba Stwayi : *Basic Education rights handbook Chapter 3 School Governance* available at <http://section27.org.za/wp-content/uploads/2017/02/Chapter-3.pdf> :accessed on 30 October 2017.

²⁸¹ Section 5(1) and 20 (1) (a) of the South African Schools Act 1996. Department of Basic Education.

²⁸² Section 5(5) of the South African Schools Act 1996. Department of Basic Education, <https://section27.org.za/category/right-to-basic-education/>: accessed on 30 October 2017.

school fees'.²⁸³ If the SGB fails to develop an admissions policy that is non-discriminatory, then the Provincial Department of Education is entitled to intervene if empowered to do so by the Provincial law.²⁸⁴ The case of *MEC for Education, KwaZulu-Natal and Others v Pillay*²⁸⁵ is relevant to the roles of the SGB for admission policies. The South African Schools Act under admission policy states:

Admission to public schools 5; (1) A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.²⁸⁶

Additionally, subsection 2 of the South African Schools Act states that “the governing body of a public school, or any other person, may not administer any test related to the admission of a learner to a public school or any other person”.²⁸⁷ Furthermore, Section 8 of the SASA authorizes SGBs, in consultation with learners, their parents and other relevant persons, to develop codes of conduct. As noted above, in the case of *Pillay* the decision was that the MEC for Education unfairly discriminated against the rights of a learner, violating the learner’s religious rights and cultural rights.²⁸⁸ Of particular relevance was that the court found that when dealing with the constitutional rights in question, schools and relevant bodies must reasonably

²⁸³ Section 5(5) of the South African Schools Act 1996. Department of Basic Education, available at <http://section27.org.za/wp-content/uploads/2017/02/Chapter-3.pdf>: accessed on 30 October 2018.

²⁸⁴ “Gender identity and sexual Orientation: Legal review: The rights of learners in South African Schools” available at <https://eelawcentre.org.za/wp-content/uploads/2016/05/LGBTI-Final.pdf>: accessed on 20 January 2019.

²⁸⁵ 2008 (1) SA 474 (CC), 288 (2) BCLR 99 (CC), 2007 ZACC 21. This case dealt with the right to equality in section 9 of the Constitution. Ms Pillay claimed that she unfairly discriminated against based on her religion and cultural rights. The Equality Court found that the school had not discriminated against Ms Pillay but the High Court overturned the decision and in fact found that there was unfair discrimination. An important part of the case was that Chief Justice Langa stated “there was no burden place on the school and that the schools interference amounted to discrimination. An order was made to amend the schools code of conduct to accommodate religious and cultural practices of learners.

²⁸⁶ Section 5(1) of South African Schools Act, 1996.

²⁸⁷ Section 5(2) of South African Schools Act, 1996.

²⁸⁸ *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (3) SA 232 (CC) 2007 ZACC 21.

accommodate the needs of the learner. Other relevant cases, which dealt with similar issues, include the *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*.²⁸⁹ Khan explains the extent to which pregnant learners rights were violated.²⁹⁰ The authors explains that:

In addition, a PL's right to human dignity is infringed when they are marginalized, ignored or devalued. This marginalization and discrimination was evidenced in the above case. The preservation of a pregnant learner's physical and psychological integrity solidifies her right to human dignity.²⁹¹

Unlike the Pillay case, GL learners are merely asking for treatment that they have a right to and are exercised by heterosexual learners. Similar to the pregnant learner situation, the continued marginalisation and discrimination of GL learners amount to a violation of their right to equality and dignity. Furthermore, The *Pillay and Welkom cases*, also highlighted the roles of the different school and department bodies. As mentioned above, one of the duties of the SGB is to set a code of conduct for the school.²⁹² The SGB's mandate is to set rules and policies, which will govern the school, and to monitor the implementation of those rules and policies.²⁹³ The Minister publishes, "the regulations relating to minimum uniform norms and standards for public school infrastructure", which must be adhered to by all Provincial Governments.²⁹⁴

²⁸⁹ *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* (CCT/03/12) [2013] ZACC 25; 2013 (9) BCLR 989 (CC) (10 July 2013).

²⁹⁰ F Khan "A critical analysis of the laws and policies regulating the management of learner pregnancy in South Africa using the lived experiences of various stakeholders at selected public secondary schools in KwaZulu-Natal and the Hospital School Pretoria" PhD Thesis University of KwaZulu-Natal (2016),

²⁹¹ *Ibid* 48.

²⁹² Section 5(5) of the South African Schools Act 1996. Department of Basic Education.

²⁹³ *Ibid*.

²⁹⁴ Department of Basic Education, available at <https://section27.org.za/category/right-to-basic-education/>: accessed on 30 October 2017.

Further, the SGB's role is to draft school policies in terms of security and safety in order to protect the dignity and the rights of learners including GL learners. The SGB must ensure adherence to the school's code of conduct and policies. Hence, necessary actions must be taken for misconduct. SGBs could engage with the South African Police Service (hereafter SAPS) and the South African Human Rights Commission (SAHRC) to educate learners about hate speech in schools.²⁹⁵ These bodies could join forces to create awareness programme campaigns in order to curb discrimination against GL learners.

3.3 OTHER POLICIES AND FRAMEWORKS

In addition to the above legislation and institutional mechanism the following laws also emphasise the importance of addressing the needs of GL learners in public schools. Section 1 of the Constitution provides that "South Africa is a sovereign constitutional state founded on a number of values which include: the achievement of equality, the advancement of human rights values and freedoms, and non-racialism and non-sexism".²⁹⁶ Section 28 (1) (d) of the Constitution states that "every child is deemed to be protected from maltreatment, neglect, abuse or degradation". As discussed earlier, the Constitution refers to the principle of equality in section 9²⁹⁷ and prohibits unfair discrimination of any kind. Likewise, the Children's Act (38 of 2009) "protects children from discrimination, exploitation and any other physical, emotional or moral harm or hazards".²⁹⁸

²⁹⁵ The role of SAHRC is enshrined in Section 184 of the South African Constitution, Act 108 of 1996, it is stipulated that the SAHRC must promote respect for human rights. The SAHRC's role is to assist human beings when their rights have been violated. The South African Human Rights Commission (SAHRC) was inaugurated on 2 October 1995, under the Human Rights Commission Act 54 of 1994 (repealed by the South African Human Rights Commission Act 40 of 2013).

²⁹⁶ The Constitution of the Republic of South Africa.

²⁹⁷ Section 9 of the Constitution.

²⁹⁸ Section 2(f) of the Children's Act 38 of 2005.

Further, Section 12 of the Constitution embodies the right to freedom and security of the person.²⁹⁹ As mentioned previously, indeed section 9 and 10 of the Constitution, indeed establishes the crux of the argument for fair and humane treatment of GL learners. The position of Constitutional court in respect of the importance of these values was emphasised in *S v Makwanyane*, where it was stated that:³⁰⁰

Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected.³⁰¹

Throughout the schooling system there are many key stakeholders that play a direct role in the marginalisation of GL learners. Deacon, Morrell and Prinsloo (in Bhana)³⁰² argued that “teachers views about democracy and transformation are in conflict with the progressive policy in the country, with teachers holding onto familiar patriarchal constructions of gender and sexuality in/through which homophobia is constructed”.³⁰³ Teachers are also playing a role in discrimination against GL learners, as discussed in Chapter 1, whereby teachers themselves are often homophobic and do not create a safe environment for GL learners. Despite the various legislation on education and the clear demarcation of the roles of the various stakeholders, it is clear that other parties must be involved to assist with safeguarding, protecting and educating on these issues.

²⁹⁹ Section 12 of the Constitution.

³⁰⁰ See *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (4) BCLR 665 (CC) 9.

³⁰¹ Section 9 of the Constitution.

³⁰² D Bhana ‘Understanding and addressing homophobia in schools a view from teachers’ (2012) 32 *South African Journal of Education* 307-318 at 309.

³⁰³ *Ibid.*

3.4 ROLE OF OTHER INSTITUTIONS OR NGOS

According to Butler *et al*³⁰⁴ NGOs will assist teachers with training as to how to deal with homophobia in schools. According to Butler, Alpaslan, Strumpher and Astbury:

NGOs work toward achieving full legal and social equality for lesbian, gay, bisexual, transgender, and intersex South Africans. Their endeavours are achieved through advocacy, public policy, education and legal reform, strategic/impact litigation and the provision of access to justice.³⁰⁵

Awareness campaigns led by NGOs should be conducted thus encouraging the community to also play an important role in tackling the issue of homophobia in schools. The United Nations Children's Fund (UNICEF), as discussed in Chapter two, has a responsibility to protect the rights of vulnerable people including women and children.³⁰⁶ This study argues that GL learners fall within the ambit and thus are protected by UNICEF to help meet their basic needs including the right to basic education and to gender equality.³⁰⁷ As discussed in Chapter Two, UNICEF is indeed guided by the provisions of the CRC.³⁰⁸ To this end, Article 29 of the CRC is of relevance as it states that:

³⁰⁴ A H Butler, N Alpaslan, N Strumpher and G Astbury 'Gay and lesbian youth experiences of homophobia in South African secondary education' (2003) 1 (2) *Gay & Lesbian Issues in Education* 3-28.

³⁰⁵ *Ibid.*

³⁰⁶ 'Role of UNICEF in the protection of child rights', available at http://shodhganga.inflibnet.ac.in/bitstream/10603/57295/11/11_chapter4.pdf: accessed on 1 October 2018.

³⁰⁷ 'Role of UNICEF in the protection of child rights', available at http://shodhganga.inflibnet.ac.in/bitstream/10603/57295/11/11_chapter4.pdf: accessed on 1 October 2018.

³⁰⁸ *Ibid.*

the education of a child shall be directed to their development with respect to human rights for the development of the child's cultural identity and that children can be kept away from the problem of discrimination in terms of gender and education.³⁰⁹

Indeed, UNICEF aims to ensure “that every child has access to the quality learning that lays the foundation for growth, transformation, innovation, opportunity and equality”.³¹⁰ This organisation, is dedicated to realising the quality education of all children.

In addition to UNICEF, Childline is a well-known South African NGO that protects children from all forms of violence and creates a culture of children's rights in South Africa³¹¹ Schools, relevant Departments cannot address the issue of homophobia in isolation, and Childline has established a national toll-free number to assist in protecting children against any form of violence.³¹² The schools should therefore make use of NGOs like Childline since they can provide schools with awareness programmes to sensitise the school community to issues of their human rights and responsibilities.³¹³

OUT-LGBT (Lesbian Gay Bisexual and Transgender Wellness) ‘is another NGO that advocates the promotion of LGBT peoples’ sexual and mental health and their related rights’.³¹⁴

³⁰⁹ *Ibid.*

³¹⁰ ‘Role of UNICEF in the protection of child rights’, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/57295/11/11_chapter4.pdf : accessed on 1 October 2018.

³¹¹ Childline is a well-known South African NGO that protects children from all forms of violence and creates a culture of children's rights in South Africa. www.childlinesa.org.za/ : accessed 27 February 2019.

³¹² UNICEF *Violence against children in South Africa* (2012) available at http://www.cjcp.org.za/uploads/2/7/8/4/27845461/vac_final_summary_low_res.pdf accessed on 30 August 2018.

³¹³ *Ibid.*

³¹⁴ OUT-LGBT (Lesbian Gay Bisexual and Transgender Wellness) ‘is another NGO that advocates the promotion of LGBT peoples’ sexual and mental health and their related rights’. It is also involved in school projects like policy development and training programmes for teachers and learners in order to protect GL learners from

The researchers of OUT report that discrimination against GL learners has caused a large number of dropouts which violates the right to education and which has increased the incidence of suicide, thus even violating the right to life. The assistance or recommendations of organisations such as Educational Action Challenging Homophobia (EachAction) could be sought. The organisation focuses on implementing policy, training and consultancy with relevant stakeholders.

3.5 CONCLUSION

The study has shown that the Constitution protects all people equally and that all people are equal before the law and all have the right to equal protection and benefits of the law. Everyone also has a right to live in a safe environment so that where schools are regarded as unsafe for GL learners that is a violation of the Constitution. The state may not discriminate against anyone because of their sexual orientation as this would be deemed unfair. Thus, the discrimination of GL learners is in violation with the relevant Constitutional provisions. As discussed in Chapter Two, the PEPUDA prohibits any form of unfair discrimination in public schools, including harassment and hate speech which fall under name-calling. The study reviewed a common theme between the Constitution, the DBE, the PEPUDA, the SASSA and the NEPA, which is the promotion of equality for all learners and the enjoyment of such rights along with the prohibition of unfair discrimination on the grounds of sexual orientation. The Minister of Basic Education determines the drafting of codes of conduct and education policies, and the Department of Education structures, and all DBE policies, must be aligned with the Constitution. Basic education has a code of conduct, which must be enforced by all teachers. The next chapter will discuss some specific problems and experiences faced by GL learners in the South African public schools' environment.

discrimination in school by other learners, teachers and other staff members 'Report of the public hearing on school based violence', available at [https://www.sahrc.org.za/home/21/files/ Reports/SBV%20ReportIntro.pdf](https://www.sahrc.org.za/home/21/files/Reports/SBV%20ReportIntro.pdf) : accessed on 25 October 2018. See also www.out.org.za/: accessed 27 February 2019.

³¹⁵ OUT-LGBT Well-being-LGBTQ available at <https://www.out.org.za/.../566-lgbtq-youth-in-sa-facing-high-rates-of-bullying-and-di>: accessed on 18 January 2019. <http://www.each.education/>: accessed 08 August 2109.

CHAPTER 4

PARTICULAR PROBLEMS FACED BY GAY AND LESBIAN LEARNERS IN SOUTH AFRICAN PUBLIC SCHOOLS

4.1 INTRODUCTION

In the previous chapter the research discussed the extent to which the DBE protects GL learners in public schools. Particular attention was focused on basic education policies, legal frameworks, guidelines used by the DBE, and management structure roles, as well as other institutional roles. Having established the legal framework that underpins the study, this chapter will discuss the experiences and problems faced by GL learners on a daily basis within the South African public school environment. The research may also briefly refer to experiences from outside South Africa. The research aims to identify the different experiences to reveal the reality of the position of this vulnerable group.

Since the South African Constitution provides for everyone to be afforded human rights, it forms the underlying basis for the discussion. The values and ethos of the Constitution also require the state to respect and fulfil the rights enshrined in the Bill of Rights, which include equality,³¹⁶ freedom of expression,³¹⁷ freedom of religion,³¹⁸ human dignity³¹⁹ and life,³²⁰ not

³¹⁶ Section 9 of the Constitution.

³¹⁷ Section 16 of the Constitution.

³¹⁸ Section 15 of the Constitution.

³¹⁹ Section 10 of the Constitution.

³²⁰ Section 11 of the Constitution.

to be treated in a cruel, inhumane or degrading way, and to be protected from maltreatment.³²¹ As stated in the earlier chapters, Section 9 (3) of the Constitution prohibits discrimination on the grounds of sexual orientation. In addition, to the Constitutional protection, other legislation such as the Schools Act also afford protection to all learners and provides that all learners should be safe in the school environment.³²² Learners should be regarded as future leaders and they must be treated with care while the state has a duty and responsibility to promote and achieve equality.³²³ According to Bhana, “despite learners’ strong identification with the country’s rights-based legal framework, homophobic attitudes remain strong at schools.”³²⁴ This is concerning as in South Africa’s education policy emphasis is placed on the importance of creating a safe school environment that encourages respect for human rights.³²⁵

4.2 PARTICULAR PROBLEMS

Generally, most learners experience difficult times at school. Name-calling and bullying are quite common. However, GL learners’ situation is different as they are not only struggling to find their place in society, but must in addition also deal with community-constructed views on gender and sexuality. Since they do not ‘neatly’ fit into these socially constructed categories, they have to face these added problems. Indeed, they face the general struggles of teenage years while also trying to find their identity. According to an article in the *Mail and Guardian*, GL learners feel isolated and depressed because of the way in which sexual orientation is handled in schools.³²⁶ Van Vollenhoven and Els also found that GL learners will face harsher

³²¹ Section 12 of the Constitution.

³²² Section 5, 8 and 10 of the South African Schools Act 84 of 1996.

³²³ Section 24(1) Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

³²⁴ Bhana *Under Pressure. The Regulation of Sexualities in South African Secondary Schools* (2014) 42.

³²⁵ ‘Centre for Justice and Crime Prevention and the Department of Basic Education’, available at www.education.gov.za : accessed on 30 December 2017.

³²⁶ V John ‘A lesson in sexual tolerance’ *Mail and Guardian* (8 December 2011) 37.

punishments than their heterosexual peers – for instance, when GL learners engage in misconduct emanating from these problems they will be punished rather than receive support or therapy or given service performance tasks.³²⁷

4.2.1 Name-calling / Labelling

Name-calling causes psychological abuse and is an immense violation of GL learners. One particular right that is infringed is the right to freedom and security of the person, which states that people should be free from all forms of discrimination.³²⁸ Name-calling / labelling falls under an umbrella of “bullying”. Bullying in school context is singling out and deliberately hurting or harming a child physically or psychologically which results in pain and distress to the victim.³²⁹ “Bullying” has also been defined as “a repeated, persistent and aggressive behaviour intended to cause fear, distress, or harm to another person’s body, emotions and self-esteem”.³³⁰ Again, according to Laas and to Boezert, bullying is a repeated negative and aggressive behaviour of psychological, verbal or physical acts that can be detrimental to the victim’s happiness and development.³³¹ Additionally, Laas and Boezert defines bullying as a psychologically motivated act which infringes the rights of learners and which can even lead to the death of the victim.³³² Labelling / name-calling is an indirect form of bullying, where no physical violence occurs but it involves verbal and non-verbal communication behaviour,

³²⁷ Van Vollenhoven and Els ‘The human rights paradox of lesbian, gay, bisexual and transgender students in South African education’(2003) 46 *De Jure* 277. The authors, referring to 2008 SAHRC Report on School-Based Violence, notes how ‘corrective rape’ was a growing phenomenon in South Africa.

³²⁸ Section 12 (1) (c) of the Constitution.

³²⁹ DBE ‘Addressing bullying in schools’, available at http://www.cjcp.org.za/uploads/2/7/8/4/27845461/addressing_bullying_in_schools_workbook.pdf : accessed on 30 December 2017.

³³⁰ Duhaime’s law dictionary available at <http://www.duhaime.org/LegalDictionary/B/Bullying.aspx>: accessed on 31 August 2017.

³³¹ L Laas and T Boezaart ‘The legislative framework regarding bullying in South African schools’ (2014) 17 (6) *PER* 2668; T. Boezaart *Child Law, the Child and South African Private Law* (2009) 3-37.

³³² *Ibid* 2670.

blackmailing, making threats, excluding others, and spreading rumours about other people.³³³ Bullying behaviour is sometimes correlated with hate crimes since it targets people who are different from society's norms.³³⁴

As discussed in previous chapters, Butler and Astbury noted that learners labelled as "queer"³³⁵ in South Africa "experience unfair discrimination, rejection, isolation, non-tolerance, marginalization and harassment from peers, teachers and other school staff members".³³⁶ According to Matthew Bettar "queer" refers to "all those identities that fall into a spectrum of sexual variance from the heterosexual norm".³³⁷ Furthermore Perko et al explained "queer" as a swear word which has been used for a long time in the United States of America (USA) and it deliberate intends to harm or marginalise homosexual people.³³⁸ "Queer", according to Giffney, has been used for decades to express homophobic sentiments.³³⁹ What emerges is that it symbolises torture, cruelty, inhuman and degrading treatment of members of the gay and lesbian community. Victims of labelling / name-calling experience humiliation, loneliness,

³³³ Available at <https://www.bing.com/images/search?q=12+types+of+bullying&id=eee145c3aa632937df0f6d0127b343156837123d&form=iqfrba> and <https://www.merriam-webster.com/dictionary/name-calling>: accessed on 31 August 2017.

³³⁴ E Englander (2007) 'Is bullying a junior hate crime?' (2007) 51 (2) *American Behavioural Scientist* 205-212.

³³⁵ T Msibi 'I'm used to it now': experiences of homophobia among queer youth in South African township Schools' (2012) 24 (5) *Gender and Education* 524, 533.

³³⁶ *Ibid* 515, 520.

³³⁷ M Bettar 'Questions of visibility and identity': analysis of representations of the Mr Gay South Africa pageant' (2012) 80 *Transformation* 44-68, available at <https://muse.jhu.edu/article/495685>: accessed on 18 December 2017.

³³⁸ M Reuter & M KLEIN "about the concept of queerness in the African context at <https://wikis.fu-berlin.de/display/queer/About+the+concept+of+queerness+in+the+African+context>: accessed on 30 December 2017. Also see Perko, Gudrun (2006): „Queer-Theorien als Denken der Pluralität. Kritiken, Hintergründe, Alternativen, Bedeutungen“, in: *QUER - denken, lesen, schreiben*, Volume 12, pp.4-12. Msibi, Thabo (2001): "The Lies We Have Been Told. On (Homo) Sexuality in Africa", in: *Africa Today*, Volume 58, pp.55-76.

³³⁹ N Giffney 'Introduction: the 'q' word' in N Giffney and M Rourke (eds) *The Ashgate Research Companion to Queer Theory* (2009) 2.

fear, helplessness, hatred, low self-esteem, frustration and feelings of rejection.³⁴⁰ These experiences are not only limited to the USA.

In research conducted by Frosh *et al*, who are also American scholars, and in Bhana, a South African scholar, being called “gay” in boys is experienced as a most hurtful word and constitutes unfair discrimination.³⁴¹ The research conducted by Bhana also recognised the word “poofter” as an extremely offensive word used to refer to a male homosexual, and the word “faggot” as another word that is used to refer to gay learners.³⁴² Further Bhana found that the word “isitabane” is also used to humiliate GL learners in class and reveal their sexual identity.³⁴³ According to Hunter in Bhana, ‘Isitabane’ is a Nguni word for “man who is in a same-sex relationship or who is seen as effeminate”.³⁴⁴ Further Bhana finds that heterosexual learners also call GL learners ‘Lesbos’ which is a contemptuous term for lesbian.³⁴⁵ Some learners call them ‘Emo’ meaning people who always wear black clothes and very heavy black makeup.³⁴⁶ Zulu speaking people will call GL learners ‘Ongqingili’ and ‘Inkonkoni’ meaning lesbian or gay in the isiZulu language³⁴⁷ and some learners will call GL learners ‘nerdy’ which means a person who is unattractive and unstylish.³⁴⁸ In view of the above name-calling, Butler (in Bhana) characterises South African Schools as homophobic.³⁴⁹ In this respect, the work of

³⁴⁰ ‘Schools unsafe for gay pupils’ *IOL* (3 June 2014), available at <https://www.iol.co.za/pretoria-news/opinion/schools-unsafe-for-gay-pupils-1698084>: accessed on 31 August 2017.

³⁴¹ D Bhana *Under Pressure. The Regulation of Sexualities in South African Secondary Schools* (2014) 42.

³⁴² *Ibid.*

³⁴³ *Ibid* 43.

³⁴⁴ *Ibid.*

³⁴⁵ “Lesbos” available at www.dictionary.com/browse/lesbos : accessed on 20 December 2017.

³⁴⁶ D Bhana *Under Pressure. The Regulation of Sexualities in South African Secondary Schools* (2014) 96.

³⁴⁷ *Ibid* 97.

³⁴⁸ Available at <https://www.meriam-webster.com/dictionary/nerd>: accessed on 20 December 2017.

³⁴⁹ D Bhana ‘Understanding and addressing homophobia in schools a view from teachers’ (2012) 32 *South African Journal of Education* 307.

Epstein *et al* (quoted previously) is instructive. These authors give various examples of name calling/labelling in school where one of the learners, whilst talking to his friend, shouted out concerning a GL learner that ‘He’s a fucking gay, which embarrassed the GL learner.³⁵⁰ This highlights the infringement of the right to human dignity inherent in such name-calling.

Bhana’s research also found that homosexuals can be referred to as “he-she” or “e-mail”. “He-she” means that, they are either he or she, they are not “straight”.³⁵¹ The example again shows unfair discrimination, marginalisation and cruelty against GL learners in terms of sexual orientation.³⁵² According to Delius and Glaser, some learners also associate homosexuality with AIDS.³⁵³ They believe that homosexual people are the carriers of HIV.³⁵⁴ According to these authors the first cases of AIDS found in the USA were detected in 1981 in many white gay men.³⁵⁵ For many years, AIDS was therefore associated with gay and lesbian people until it was proven that the disease does not only infect homosexual people but also can infect anyone, regardless of their sexual orientation, race, age, or religion. Further, the South African Human Rights Commission (SAHRC)³⁵⁶ took a Limpopo school to the Seshego Equality Court over a transgender issue of a pupil’s abuse.

³⁵⁰ A H Butler, N Alpaslan, N Strumpher, G Astbury ‘Gay and lesbian youth experiences of homophobia in South African secondary education’ (2003) 1:2 *Journal of Gay and Lesbian Issues in Education* : 3-28.

³⁵¹ D. Bhana: *Under pressure. The regulations of sexualities in South African secondary schools* edition (2014):42.

³⁵² Section (9) (3) of Constitution.

³⁵³ P Delius and C Glaser ‘Sex, disease and stigma in South Africa: Historical perspectives’ (2005) 4 (1) *African Journal of AIDS Research* 29-36. AIDS is a Human Immunodeficiency Virus which affects the body’s ability to fight diseases thereby cause AIDS. It can be passed on in different ways by having sexual intercourse either by heterosexual or homosexual without using a condom. During oral sex without a condom, from a positive mother to her baby during pregnancy, child birth or breast feeding. Blood transfusion of an infected person, and many other ways as reflected. See <http://www.kznhealth.gov.za/hivandaids.html>: accessed on 25 August 2017.

³⁵⁴ Delius and Glaser ‘Sex, disease and stigma in South Africa: Historical perspectives’ (2005) 5 (1) *African Journal of AIDS Research* 29-36.

³⁵⁵ MS Gottlieb ‘AIDS—past and future’ (2001) 344 (23) *New England Journal of Medicine* 1788–1791.

³⁵⁶ South African Human Right Commission referred to in Section 184 of the Constitution of the Republic of South Africa Act 108 of 1996.

The learner allegedly faced unfair discrimination and violation of his rights to basic education, and asked for a school removal to a school in Gauteng Province. Furthermore, the report also revealed that 56% of pupils experience discrimination in school due to sexual orientation.³⁵⁷ According to Stein, GL learners experience a high prevalence of name-calling, verbal abuse, discrimination, mockery and shaming.³⁵⁸ Barnes reported that in a survey conducted in 2005 that “20% of gay and bisexual men and 19% of lesbian and bisexual women reported having been raped or sexually assaulted when they were at school”.³⁵⁹ Further the author noted that: “one in three was physically assaulted in school because of their sexual orientation in KwaZulu-Natal in Pietermaritzburg and it was found that one in five GL learners in Pietermaritzburg and Durban alone are raped or sexually abused on school premises”.³⁶⁰

Thus, themes which emerge from a range of different authors, as mentioned above (for example, Epstein, Deacon, Bhana and Msibi) all provide insights into different homophobic experiences in terms of name-calling experienced by sexual minority groups in schools. These authors therefore established that GL learners are faced with grave discrimination in schools. According to Di Silvio (cited in Bhana) learners have confirmed that people are against homosexuality, particularly in low income, socially marginalized, areas where many incidents of harassment, violence and abuse are experienced.³⁶¹ Moreover, the research conducted by Themba (cited in Bhana) highlighted that people are generally opposed to homosexual individuals and this is shown by the way in which public discourse is used to stigmatise GL people.³⁶² Although the research on GL learners is not as extensive as compared to the USA, from the little that has been conducted it has emerged that such attitudes are also prevalent in

³⁵⁷ ‘Mamba online’: available at www.sahrc.org.za on 16 November 2016: accessed on 26 December 2017.

³⁵⁸ A Stein ‘Make room for daddy: Anxious masculinity and emergent homophobias in nonpatriarchal politics’ (2005) 19(5) *Gender and Society* 601-620.

³⁵⁹ L Barnes ‘Gay teens ordeal’ *News 24* (17 April 2006).

³⁶⁰ L Barnes ‘Gay teens ordeal’ *News 24* (17 April 2006).

³⁶¹ D Bhana *Under Pressure: The Regulation of Sexualities in South African Secondary Schools* (2014) 37.

³⁶² *Ibid.*

South African public schools, which see homosexuals as abnormal, dangerous and/or contagious. Homosexual learners are nearly always judged and persecuted in terms of name-calling, exclusion, humiliated, embarrassed, ridiculed, and some heterosexual learners even make statements indicating that. In addition, there were findings which show attitudes that see being gay as all wrong and that “gay people are disgusting”.³⁶³ GL learners are then forced to seek help from psychologists or theologians in order to “heal or change their sexual orientation”.³⁶⁴ Additionally being called “gay” is regarded as an offensive statement, which is also part of labelling homosexuals: “labelling a male learner gay or “moffie” can thus be read as calling into question his position in the patriarchal social hierarchy.”³⁶⁵

4.2.2 Teachers’ lack of response

In some instances, teachers themselves mock GL learners or join in the bullying. Teachers are found to pass derogatory remarks about GL learners in their classrooms in front of other learners.³⁶⁶ King Siphon in a *Mail & Guardian* newspaper article reported that there was a teacher who told one of the gay learners to undress themselves so that he can see “what is down there”.³⁶⁷ According to Bhana’s article this is what arose from some of the teachers’ discussions, as a teacher stated: “I don’t need to know it, I don’t need to see it”.³⁶⁸ The article gives an example on how teachers make sarcastic derogatory remarks in the classroom. It was reported by Nolwandle Zondi in the *Mail and Guardian* that an Indian homosexual in an Afrikaans high school was being called a “fag” by one boy all the time, and the teachers would

³⁶³ D Bhana *Under Pressure: The Regulation of Sexualities in South African Secondary Schools* (2014) 46.

³⁶⁴ Van Vollenhoven and Els ‘The human rights paradox of lesbian, gay, bisexual and transgender students in South African education’ (2003) 46 *De Jure* 263-284.

³⁶⁵ D Bhana *Under Pressure: The Regulation of Sexualities in South African Secondary Schools* (2014) 46.

³⁶⁶ D Bhana ‘Understanding and addressing homophobia in schools: a view from teachers’ (2012) 32 *South African Journal of Education* available at http://www.scielo.org.za/scielo.php?pid=S0256-01002012000300007&script=sci_arttext&tlng=pt/ : accessed on 2 July 2017.

³⁶⁷ King ‘Sharp rise in classroom homophobia’ *Mail & Guardian* (14 March 2014).

³⁶⁸ D Bhana *Under Pressure: The Regulation of Sexualities in South African Secondary Schools* (2014) 98.

let him get away with it.³⁶⁹ This shows that teachers are not only in denial but are neglecting their responsibility when they turn a blind eye to the problem. They do not want to be part of the solution or to take responsibility.

Victimisation of 68% are reported to be gay learners with 42% being lesbian learners,³⁷⁰ and additionally some teachers reported that GL learners should be allowed in schools but should not be permitted to practice homosexuality³⁷¹ in so doing GL learners are being discriminated against in terms of their sexual orientation.³⁷² Further, research by Francis and Reygan confirms that teachers ignore issues, which are related to sexual diversity. They found that teachers were uncomfortable discussing the topic of sexuality and gender diversity and the researchers felt they were sowing emotions of discomfort and disapproval and that teachers were expressing feelings of fear.³⁷³ Van Vollenhoven and Els, further confirm that the homosexuality as a sex education topic is often ignored as it is something that is stigmatised.³⁷⁴ However, arguably, when teachers fail to teach the topic of homosexuality they are in violation of Section 16(1) (b) of the Constitution which states that everyone has the right to freedom of expression which includes freedom to receive information or ideas.³⁷⁵ Harber and Serf found that student teachers in South Africa and in England had never experienced homosexuality or homophobia education.³⁷⁶

³⁶⁹ N Zondi 'Why are our schools unsafe for LGBTQI children' *Mail and Guardian* (22 March 2017).

³⁷⁰ L Barnes 'Gay teens ordeal' *News 24* (17 April 2006).

³⁷¹ D Bhana *Under Pressure : The Regulation of Sexualities in South African Secondary Schools* (2014) 223..

³⁷² Section 9 (3) of the Constitution.

³⁷³ D Francis and F Reygen 'Emotions and pedagogies of discomfort: Teachers responses to sexual and gender diversity in the Free State, South Africa (2015) 19 (1) *Education as Change* 101-119.

³⁷⁴ Van Vollenhoven and Els 'The human rights paradox of lesbian, gay, bisexual and transgender students in South African education' (2003) 46 *De Jure* 263-284.

³⁷⁵ Section 16(1) (b) of the Constitution. By denying such persons position in the community and their overall existence, these persons are in fact violating such persons right to freedom of expression and freedom of association (Section 18). And if such behaviour actions are only directed towards GL learners, it amounts to a violation of the equality provision in the Constitution.

³⁷⁶ Harber and Serf 'Teacher education for a democratic society in England and South Africa' (2008) 22 (8) *Teacher and Teacher Education* 966-997.

The examples given indicate that the DBE does not have a policy in place pertaining to GL learners. On the contrary there is evidence of teachers silencing learners who are homosexuals, not wanting them to express their thoughts. Bhana's research also gave example of a teacher who called a gay learner who was problematic, a 'moffie' and somebody who was uncontrollable.³⁷⁷ She also included an example of a situation where a GL learner was protected by girl learners but was given no support whatsoever from teachers or staff members, when ridiculed by other learners.³⁷⁸ She eventually left school and still no follow-up was made as to why she dropped out.³⁷⁹ Interestingly, the Department of Basic Education, South Africa, requires teachers to pledge under the Teachers' Code of Conduct that:³⁸⁰

As a TEACHER, in line with the SACE (South African Code of Council for Educators) Code of Professional Ethics, I promise to:

- teach, to advance the education and the development of learners as individuals;
- respect the dignity and rights of all persons without prejudice;
- develop loyalty to, and respect for, the profession;
- be punctual, enthusiastic, well prepared for lessons and of sober mind and body;
- improve my own knowledge and skills base to be more effective;
- maintain good communication between teachers and learners; among teachers themselves; and between teachers and parents;
- provide information to parents on their children's progress on a regular basis;
- eliminate unprofessional behaviour, such as teacher-pupil relationships, drunkenness, the use of drugs, assault, sexual harassment and other infringements; and

³⁷⁷ D Bhana *Under Pressure: The Regulation of Sexualities in South African Secondary Schools* (2014) 98.

³⁷⁸ D Bhana *Under Pressure: The Regulation of Sexualities in South African Secondary Schools* (2014) 98.

³⁷⁹ D Bhana *Under Pressure The Regulation of Sexualities in South African Secondary Schools* (2014) 98.

³⁸⁰ Department of Basic Education Republic of South Africa 'The Quality Learning and Teaching Campaign', available at https://www.sace.org.za/assets/documents/uploads/sace_34340-2016-08-31-Code%20for%20Quality%20Education.pdf :accessed on 30 December 2017.

- make myself available for extra-mural activities.

Despite this pledge, as has been highlighted on a number of occasions in this study, that teachers are also the cause of homophobia in schools, which contravenes their code of conduct. As discussed above, to prevent learners from having freedom of sexual orientation is in contravention with Section 9 (3) of the Constitution. The research reveals that South African schoolteachers has a direct role in the continuation of homophobia in schools. Sears (in Bhana)³⁸¹ and SASA, indicates that ‘educators are professional people and as such they are duty bound to protect and promote the human and civil rights of all learners within the classroom and the school grounds, regardless of the educators’ own culture or religion. Examples highlighted above show that teachers, as well as the school management, are at times fully aware of unfair discrimination in schools in terms of sexual orientation but they fail to take the necessary steps to address the problem and thus fail to provide GL learners with a safe place to learn. According to the *Mail and Guardian*, Lindiwe Dhlamini, founder of Injabulo Anti-Bullying Project, which supports children who are LGBT, reported that “queer” learners are often the target of bullies in schools.³⁸² Also Nolwandle Zondi found that learners who are homosexuals receive more social pressure than heterosexual learners because their gender identity is not accepted. It was reported that the Principal of Ulwazi High School in East London forced lesbian learners to reveal their sexuality to their parents and thirty-eight learners were assembled in front of the whole school and were ridiculed.³⁸³ Again, these incidents are concerning and contrary to the values. Further, aside from the violations of the identified Constitutional provisions, these incidents also violated the GL learners’ right to privacy.³⁸⁴

³⁸¹ A H Butler, N Alpaslan, N Strumpher, G Astbury ‘Gay and lesbian youth experiences of homophobia in South African secondary education’ (2003) 1:2 *Journal of Gay and Lesbian Issues in Education* : 3-28.

³⁸² Zondi ‘Why are our schools unsafe for LGBTQI children’ *Mail and Guardian* (22 March 2017).

³⁸³ *Ibid.*

³⁸⁴ Section 14 of the Constitution.

4.2.3 Curriculum related challenges

Generally, other matters inflate the responses and attitudes towards GL learners. The current South African curriculum does not have an inclusive approach to GL learners. Further, where the current curriculum does address such issues it is limited and not properly implemented by teachers. According to Wackerfuss, many schools in the USA apply a zero tolerance policy for bullying but only a few actually address homophobic bullying.³⁸⁵ Similar, to the USA but influenced by culture and other factors in South Africa; research also indicates that principals and teachers lack knowledge about the rights of GL learners. According to Zondi, support may come from the Equal Education Law Clinic (EELC), which provides with all kinds of legal support to learners, who has suffered a violation of their rights.³⁸⁶ However, change can only occur if teachers, parents and school staff work collectively and take action to implement these policies. In terms of the equality clause,³⁸⁷ homosexual and heterosexual learners should be treated equally since no one is better than the other, and all are equal before the law.

The Department of Education has a duty and responsibility to promote and to achieve equality, and also teachers, staff members, parents and SGBs all have a responsibility to promote equality in schools. As discussed previously, Section 28(2) of the Constitution states “a child’s best interest is of paramount importance in every matter concerning the child”.³⁸⁸ Moreover, training and support as to how to deal with GL learners must be provided to all teachers, parents and learners. The South African Schools Act of 1996 is still going through radical transformation. Research conducted by different authors found that teachers to some extent lack knowledge on knowledge on to how address the issue of GL learners in schools,

³⁸⁵ Wackerfuss ‘Homophobic bullying and same-sex desire in Anglo-American schools: An historical perspective (2007) 19 (3-4) *Journal of Gay & Lesbian Social Services* 139-155.

³⁸⁶ Zondi ‘Why are our schools unsafe for LGBTQI children’ *Mail and Guardian* (22 March 2017). <https://eelawcentre.org.za/> : accessed 27 February 2019.

³⁸⁷ Section 9 of the Constitution.

³⁸⁸ Section 28(2) of the Constitution.

aggregated by the limited to no useful programs / policies have yet been implemented in this regard. Teachers are thus often unable to support GL learners facing problems of bullying whether from their peers or from other teachers.

The DBE introduced Life Orientation (LO) in South African Schools which is a subject which that includes sexuality education. The introduction of LO falls under the National Curriculum Statement (NCS) for grades R-12. The NCS was introduced to overcome the curricular divisions of the past (revised NCS Grades R-9, Government Gazette No. 23406 of 31 May 2002 and NCS Grades 10-12, Government Gazette No. 27594 of 17 May 2005).³⁸⁹ However, Prinsloo explicates that the proper implementation of the LO curriculum requires “knowledgeable teachers with quality skills, informed by a subject-specific philosophy”.³⁹⁰ Essentially, LO can be described as “a learning area within the educational context that promotes the holistic development of a child”. Furthermore, “educational context” refers to “all the processes, at school level, entailed in training children’s minds and abilities so that they can acquire knowledge and develop the skills needed to succeed in life”.³⁹¹

As such, LO incorporates ‘subjects such as life skills, career guidance, health education, physical education, human rights studies and religious education’.³⁹² However, it is a concern that the subject is often taught by teachers or persons who have not received little training in

³⁸⁹ National Curriculum, available at <https://www.education.gov.za/> accessed on 30 December 2017.

³⁹⁰ E Prinsloo ‘Implementation of Life Orientation programmes in the new curriculum in South African schools: The perceptions of principals and life orientation teachers’ (2007) 27 (1) *South African Journal of Education* 155-170.

³⁹¹ B Gama ‘An exploration of life orientation education educators knowledge and the teaching of study skills in further education and training phase high schools in Ekudibeng Cluster , Gauteng East’ (MEd thesis, UNISA), available at <http://uir.unisa.ac.za/handle/10500/20192> : accessed on 30 December 2017.

³⁹² J Pillay ‘Keystone Life Orientation (LO) teachers: implications for educational, social, and cultural contexts’ (2012) 32 (2) *South African Journal of Education* 167-177.

the learning area.³⁹³ Furthermore, some teachers who teach LO lack sufficient support, are not sufficiently qualified, and find themselves often frustrated by the limited time allocated for this learning area.³⁹⁴ According to De Palma and Francis, the LO curriculum needs to teach learners about sexual orientation and also other types of relationships and human behaviour like bullying, rebellious behaviour and forms of diversity.³⁹⁵ Researchers have discovered that teachers are faced with challenges in teaching sexuality education. Thus, according to the research, quality preparation or training on such matters such teaching sexual and gender diversity education is non-existent. Teachers therefore lack these skills and experience, and are put in a situation where they have to deal with these sensitive issues. Teachers thus find themselves required to perform different roles, including the roles of a social worker and counsellor, and they do not know how to maintain a balance between their roles. They lack confidence on teaching sexual and gender diversity education openly in classrooms and some parents, as indicated above, do not want their children to learn about sexual and gender diversity.³⁹⁶ According to Wilmot and Naidoo, “LGBT sexualities are largely invisible in schools’ LO curricula”.³⁹⁷ This is concerning, as LO is an important subject because its aim is to prepare a South African child to be able to participate as a citizen of South Africa which is a democratic country.³⁹⁸ Failure to include GL education in the LO curriculum can result in

³⁹³ J Pillay ‘Keystone Life Orientation (LO) teachers: implications for educational, social, and cultural contexts’ (2012) 32 (2) *South African Journal of Education* 173-174.

³⁹⁴ DJ Christiaans *Empowering Teachers to Implement the LO Learning Area in the Senior Phase of the G.E.T Band* (2008).

³⁹⁵ R DePalma & D Francis ‘South African Life Orientation Teachers: (Not) teaching about sexuality diversity’, (2014) 61(12) *Journal of Homosexuality* 1687-1711 at 1707. <http://dx.doi.org/10.1080/00918369.2014.951256> .

³⁹⁶ J Glover ‘Why sexuality education in schools needs a major overhaul’ (2016), available on <https://theconversation.com/why-sexuality-seduction-in-schools-needs-a-major-overhaul-58176> : accessed on 30 December 2017.

³⁹⁷ M Wilmot & D Naidoo (2014) ‘Keeping things straight’: the representation of sexualities in life orientation textbooks’ (2104) 14 (3) *Sex Education* 323-337.

³⁹⁸ *Ibid.*

issues of misunderstanding of LGBT identities, and will create further prejudice and violence towards the LGBT community.³⁹⁹

Again, according to the research conducted by Francis, teachers disregarded sexual diversity issues.⁴⁰⁰ The schools responsibilities are to ensure that all learners who are bullied (which includes name-calling or labelling) receive protection, support and assistance.⁴⁰¹ However, according to Richardson, most learners attend heterosexist schools that support homophobic harassment.⁴⁰² In the case of *MEC for Education: KZN and Others v Pillay and Others*, the court found as follows: “teaching the constitutional values of equality and diversity forms an important part of education”.⁴⁰³ Hence, GL learners cannot be discriminated against by educators just because of their culture or religion as such is prohibited. Since the Constitution and the Schools Act guide educators, decisions made by them in their professional capacities must comply with the Constitution and the Schools Act. Not everyone exercises the same belief, opinion, thoughts and so forth, and teachers cannot deny their responsibility to educate learners just because of their own cultural, religious differences. It is important for them to respect other cultures and also the Teachers’ Pledge. Further the Constitutional mandate in terms of Section 28 of the Constitution is of paramount importance and educators should comply with it since it states that all children have a right to be protected from all forms of maltreatment, neglect, abuse and degradation.⁴⁰⁴

³⁹⁹ *Ibid.*

⁴⁰⁰ DA Francis ‘Teacher positioning on the teaching of sexual diversity in South African schools’ (2012) 14 *International Journal for Research , Intervention and care, Culture , Health and Sexuality*, 597-611.

⁴⁰¹ Department of Basic Education ‘Addressing bullying in schools’, available at http://www.cjcp.org.za/uploads/2/7/8/4/27845461/addressing_bullying_in_schools_workbook.pdf : accessed on 30 December 2017.

⁴⁰² Richardson (2006) ‘Researching LGBT Youth in post-apartheid South Africa’ (2006) 3 (2) *Journal of Gay and Lesbian Issues in Education*, 135-140.

⁴⁰³ *MEC for Education: KZN and others v Pillay and Others* [2007] ZACC 21 at 104.

⁴⁰⁴ Section 28(1) (d) of the Constitution.

It should be noted that there are educators who support GL learners and believe it is their duty as teachers to protect all learners equally regardless of their sexual orientation. To counter this Archbishop Desmond Tutu spoke in 2007 comparing homophobia to racism.⁴⁰⁵ Educators are thus duty bound by their profession to treat all learners equally and with respect regardless of their sexual orientation and religion, and regardless of their own cultural preferences.

4.2.4 Culture

South Africa is a country with diverse cultures, traditions and religions. It is a multi-cultural society. These differences are realised in Section 15 of the Constitution, which protects the right to freedom of religion, belief and opinion.⁴⁰⁶ Further, Section 31 of the Constitution is read with Section 15, and Section 31 states that the rights of cultural communities are also protected.⁴⁰⁷ Section 9 of the Constitution further reinforces the place of religion and culture in our Constitution, by prohibiting discrimination on these grounds.⁴⁰⁸

The Constitution protects and reinforces the concept that all people have cultures and should be used as a guide for the implementation, realisation and protection of human rights. Ntombikayise Mthiya (quoted in Van Vollenhoven and Els) echoes this in saying that “culture is a wonderful thing that is there to nurture and protect people, not abuse and humiliate”.⁴⁰⁹ Further social anthropologists have identified that homosexuality existed in distant times as it

⁴⁰⁵ Davis ‘Why Tutu’s support for gay rights matters’ *Daily Maverick* (29 July 2013), available at <https://www.dailymaverick.co.za/article/2013-07-29> : accessed on 30 July 2017.

⁴⁰⁶ Constitution of the Republic of South Africa 1996.

⁴⁰⁷ Section 31 of Constitution.

⁴⁰⁸ Section 9 of Constitution.

⁴⁰⁹ Van Vollenhoven and Els ‘The human rights paradox of lesbian, gay, bisexual and transgender students in South African education’(2003) 46 *De Jure* 263-284.

does today.⁴¹⁰ In South Africa discrimination against homosexuals is partly caused by a “misconception that homosexuality is an unwanted legacy of colonialism, white culture and post –modernism”.⁴¹¹

Education is a systematic effort whereby culture is cultivated, reproduced, and even maintained. Society, through schools and other institutions, deliberately conveys its cultural heritage by the process. It is the accumulated body of knowledge, values and skills passed on from one generation to another and it is an instrument of cultural change.⁴¹² Furthermore, it is recognised that within the African context, culture plays a significant role in a child’s life as every child is born into a certain culture and it is that particular cultural beliefs and values that mould their behaviour and values. Human rights are globally and regionally however, the cultural relativism of human rights in Africa is debated matter. To an extent it could be argued that a person’s conduct is determined by his / her culture.⁴¹³ Culture is the “food we eat, the clothes we wear, the music we play and listen to, and the way we dance”.⁴¹⁴

This study acknowledges that every community is different. For example if a learner comes from a community where GL people perceived as abnormal or contagious, there is a strong possibility that such a learner will have a similar opinion and may takes this further by

⁴¹⁰ Whitam and Zent ‘A cross-cultural assessment of early cross-gender behaviour and familial factors in male homosexuality’ (1984) *Archives of sexual behaviour* 427-439, Whitam, Daskolos, Sobelowski and Padila ‘The emergence of lesbian sexuality and identity cross-culturally: Brazil, Peru, Philipines, and the USA’ (1998) *Archives of Sexual Behaviour* 187-206.

⁴¹¹ Van Vollenhoven and Els ‘The human rights paradox of lesbian, gay, bisexual and transgender students in South African education’ (2003) 46 *De Jure* 263-284.

⁴¹² Culture and Education: available at <https://sol.du.ac.in/mod/book/view.php?id> : Lesson 3 culture and education: accessed on 30 December 2017.

⁴¹³ *Ibid.*

⁴¹⁴ F Veriava, A Thom and F Hodgson *Basic Education Rights Handbook* (2017), available at <http://section27.org.za/wp-content/uploads/2017/02/Preface.pdf> : accessed on 27 August 2017. TF Hodgson Chapter 10: Religion and culture in public education in South Africa TF Hodgson “Religion and Culture in Public Education South Africa”, Chapter 10, 186.

discriminating against that particular group of people. Similarly, if another person is coming from a community where everyone is treated the same, regardless of their sexual orientation, the chances may be that such person is likely to not discriminate. Research conducted by Bhana found that a Christian teacher reported that GL learners should be supported in every way but homosexuality should not be encouraged or accepted as a norm.⁴¹⁵ Another report by a teacher explains that there are those teachers who are willing to support GL learners but they find it difficult to support them as they will be seen to be challenging their own culture and religion.⁴¹⁶

These statements from teachers highlight the fact that teachers' find themselves in a complex position as they are also unsure whether to accept homosexuality in schools or not. As mentioned above, in a school environment you get different children coming from different communities, but a school as a whole is also regarded as a community where there are certain values and behaviours which must be obeyed by the community members including principals, teachers and learners, as well as all other staff members. Research conducted by Altman *et al*, Sigamoney and Epprecht, quoted in Bhana, finds that in the Eastern Cape, learners perceive culture and homosexuality as incompatible and "un-African".⁴¹⁷ However, as the social environment changes so does culture. Education and culture are interdependent and are complimentary to each other.⁴¹⁸ Epprecht quoted in Bhana argues that their research found that homosexuality is viewed as something which was imported from the western countries.⁴¹⁹ Nonetheless, Bhana finds that in terms of culture learners in schools regard homosexuality as

⁴¹⁵ D Bhana *Under pressure. The Regulation of Sexualities in South African Secondary Schools* (2014) 224.

⁴¹⁶ T Msibi 'I'm used to it now': experiences of homophobia among queer youth in South African Township Schools (2012) 24 (5) *Gender and Education* 515 at 527.

⁴¹⁷ D Bhana (2015) 'Isitabane, South African teenagers and the regulation of sexuality, gender and culture. In: Reynolds, Ringrose and Egan (eds) *Children, Sexuality and Sexualization* (2015) 193.

⁴¹⁸ 'Lesson 3 culture and education', available at <https://sol.du.ac.in/mod/book/view.php?id> :accessed on 30 December 2017.

⁴¹⁹ D Bhana 'Isitabane', South African teenagers and the regulations of sexuality, gender and culture. In Reynolds, Ringrose and Egan (eds) *Children, Sexuality and Sexualization* (2015) 193.

abnormal and something which is unnatural and unacceptable.⁴²⁰ Additionally, (in Bhana) Roehr agrees with Altman *et al* and Sigamoney and Epprecht on these views and found that while it may be good for other cultures it is not so in Africa since it is of foreign origin.⁴²¹ As mentioned earlier, education comes into the issue of culture in order to improve the social conditions of people. South Africa is now a democratic country which is still going through radical changes and thus it imperative for schools to link in with community programmes which deal with issues they want to implement, while such programmes must also be aligned with the community's needs and be in compliance with the Constitution and the South African School's Act. Indeed, the curriculum is prepared according to the Constitution and the Constitution insures that everyone is equal before the law and has the right to equal protection and benefit of the law.⁴²²

Methods of teaching are connected with culture.⁴²³ Cultural values can sometimes influence the discipline of a person. De Gruchy (in Bhana) indicates that there is a conflict of interest between the African tradition and Christian principles, and that, additionally, the Muslim and Hindu population considers homosexual practices as ungodly and sinful.⁴²⁴ However, the must be emphasized that when dealing with conflict between religion, culture, beliefs particularly, we need to consider the matter subjectively and consider how it affects the particular person concerned.

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*

⁴²² Section 9 of the Constitution.

⁴²³ 'Lesson 3 culture and education', available at <https://sol.du.ac.in/mod/book/view.php?id> : accessed on 30 December 2017.

⁴²⁴ D Bhana *Under Pressure: The Regulation of Sexualities in South African Secondary Schools* (2014) 9.

4.3 CONCLUSION

The study has shown that GL learners are faced with bullying in the form of name-calling in public schools. It has also shown that some learners, as well as teachers, are at times perpetuating this homophobia. There are different names which are given to GL learners by heterosexual learners and also by teachers, which cause humiliation. Other peer learners often associate homosexuality with AIDS. Various scholars confirm that GL learners are faced with discrimination in public schools because of their sexual orientation, despite the LO curriculum dealing with the study of Constitutional rights.⁴²⁵ According to De Palma and Francis, teachers have spoken about GL learners in terms of their teaching and it was emerged that most teachers “suggested that they must be provided with ongoing training, workshops, materials, and specific lesson plans as a way to facilitate the teaching of a subject area for which very few have been specifically trained.”⁴²⁶ It is however the case that teachers generally lack skills and knowledge regarding sexual diversity teaching, which prevents them from teaching these topics as required by the Constitution. Thus, the Department of Basic Education must assist teachers to understand more about homosexuality and the legal framework.

The findings in this chapter demonstrate that GL learners face discrimination, rejection and isolation, which lowers their self-esteem, causes them to drop out of school, and even to commit suicide. It causes psychological and emotional problems, including depression and poor social skills. Based on the statements given by teachers, as well as other learners, it is evident that South African schools generally condemn homosexuality. Furthermore, GL learners feel unsafe in the school environment since their sexuality and dignity are infringed. Schools should be a safe place for learners to learn and a place where teachers protect their

⁴²⁵ De Palma & Francis ‘*South African Life Orientation Teachers: (Not) teaching about sexuality diversity*’ (2014) 61 (12) *Journal of Homosexuality* 1687-1711 at 1701, available at <http://dx.doi.org/10.1080/00918369.2014.951256> : accessed on 16 July 2018.

⁴²⁶ *Ibid.*

rights – not a place where their peers, other staff members and teachers threaten their rights. It is concerning that not much has been done in schools to prevent GL learners from discrimination, thus preventing schools from being safe places for all children to learn as interpreted in the World Declaration on Education. The reality is that GL learners are still oppressed and that they experience dislike, hatred, and are at times avoided due to the stigma attached to such persons. The next chapter will provide recommendations to assist with the matter.

CHAPTER 5

FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 INTRODUCTION

The South African Constitution envisages a country based on non-sexism and non-racism, a country where one has the freedom, dignity and equal opportunity to be oneself. This is the right of adults and children alike. However, as has been demonstrated, GL learners in South African public schools are bullied, verbally abused, victimised, harassed, isolated and humiliated not only by other learners, but also by their teachers. These actions and omissions, is reflecting a gap in the South African education system and clearly there is a need to educate persons about homophobia and unfair prejudicing against persons or learners from this community.

The focus of the study was directed by three critical questions, firstly to determine the extent to which the international and regional legal framework offers protection for GL learners in South African Schools; secondly the extent to which the Constitution and the current policies and guidelines of the South African Department of Basic Education addresses the position of GL learners; and thirdly what are the daily struggles faced by GL learners at public schools and the extent to which this amounts to a violation of their entrenched rights.

One aim of the study was to recommend guidelines that could be implemented to address and possibly improve the situation of GL learners. This concluding chapter will first identify the key findings of each chapter and thereafter will suggest and provide motivations for a list of recommendations to enable the relevant parties to address the situation.

5.2 KEY FINDINGS

As noted above, Chapter Two examined the international human rights legal framework with a particular focus on the rights of GL learners in South African public schools. It was found that these legal frameworks offer protection for GL learners through international instruments such as the UDHR, ICCPR, CRC and ICESCR. The study also discussed relevant regional legal instruments and those provisions of relevance to the study. The regional legal framework includes the African Charter on Human, People's Rights, and the African Charter on the Rights and Welfare of the Child. All have a common theme, which is the protection of human rights. As such, South Africa, being a signatory to the various international treaties, which fights against discrimination, has an obligation to ensure the realisation of these rights within its territory. However, the study found that there are some limitations in Article 2 of the UDHR and Article 26 of ICCPR, as sexual orientation does not fall under the listed grounds but falls under "other status". The grounds of discrimination, which fall under "other status", are those which are unlisted but are analogous to the listed grounds like sexual orientation, marital status and family status. The chapter also reiterated that the relevant policies and legislation purposes are to protect human rights equally without discrimination, including non-discrimination based on sexual orientation. While the human rights treaties are the same for all persons, the CRC takes note of children's vulnerability and requires that children below the age of 18 be given special treatment in terms of protection. Finally, it is apparent that there are ample international and regional instruments that GL learners can invoke to ensure protection and realisation of their rights.

Having identified the international and regional legal frameworks, the aim of Chapter Three was to discuss the relevant DBE policies and guidelines that affect (either directly or indirectly) GL learners in South African schools. Furthermore, the chapter also set out the roles of the relevant officials within the DBE to provide sufficient context to the problem. Ultimately, the

chapter sought to identify whether GL learners are protected and the extent to which they are protected by the applicable DBE policies and guidelines in the public school environment. The chapter found that basic education is important to everyone for the development of knowledge and skills and for better future life opportunities. Although the term ‘basic education’ has not yet been defined by the Department of Education, it has been defined in other literature. The South African Constitution through numerous provisions protects the rights of learners to a safe learning environment.⁴²⁷ These includes the NEPA,⁴²⁸ the Equality Court, which prohibit unfair discrimination⁴²⁹ and UNESCO.⁴³⁰ The Constitution provides for the right to basic education for everyone equally without discrimination on the basis of sexual orientation or other basis.⁴³¹ What emerges from the chapter is that legislation and policies such as the Schools Act⁴³² and the National Education Policy,⁴³³ and the Children’s Act (a special act which protects children against discrimination, as discussed in Chapter Two⁴³⁴, also endorses the Constitution’s endeavours to protect all citizens of South Africa irrespective of their sexual orientation.

The study noted that the application of the above by the DBE has not ensured that the rights provided for in the international and regional legislation and particularly our Constitution, are adhered to or implemented. South African public schools have not yet translated the basic education rights, and children’s rights, into tangible reality. Public schools are still found to have a culture of tolerance for heterosexual learners only. The study illustrated this by giving

⁴²⁷ Sections 7, 8, 9 and 10, of the Constitution

⁴²⁸ National Education Policy Act, Act No. 27 of 1996 (NEPA).

⁴²⁹ Equality Act 4 of 2000.

⁴³⁰ UNESCO, (1994) The Salamanca statement, Paris: UNESCO.

⁴³¹ Section 29 (1) (a) of the Constitution.

⁴³² Section 5(1) of the Schools Act, 1996.

⁴³³ National Education Policy Act, Act No. 27 of 1996 (NEPA).

⁴³⁴ The Children’s Act 38 of 2005.

a shocking example.⁴³⁵ According to the Education Act, teachers have a duty to maintain and to protect the safety of all learners equally without discrimination on any basis, including their sexual orientation. The management staff of a school, which includes the principal and the SGBs, are responsible for the proper management of the school, including the implementation of disciplinary matters pertaining to learners and the implementation of policies and legislation. Disciplinary measures imposed upon learners should be consistent with the Constitution, the Children's Act, and the CRC. However, there is a major problem in the implementation of these policies at school level. The discussion found that the Minister of Basic Education is indeed responsible to oversee whether DBE policies and legislation are adhered to and implemented in all public schools.

Further Chapter Four examined the experiences which are faced by GL learners in public schools. One of the objectives of the study was to determine whether GL learners experience discrimination through verbal bullying, or name-calling in public schools. The review of literature found that GL learners do experience discrimination on the basis of their sexual orientation in the school environment. The scholars referred to in this chapter all find that GL learners experience homophobia in South African public Schools.⁴³⁶ They also find that discrimination emanates not only from heterosexual learners, but also from teachers, principals and staff members – that is cultured and respected people of the community. It appears therefore that homophobia in the South African public schools' environment is rife. GL learners experience verbal abuse in the form of name-calling on a daily basis.⁴³⁷

⁴³⁵ Butler and Astbury 'South African LGBT youth' In JT Sears (Ed.) *Youth, Education, and Sexualities: An International Encyclopaedia* (2005): 814 – 817. Based solely on his sexual orientation aptly reflects this discrimination in the educational system. This gay youth was expelled because he “dressed in drag,” entered, and then won his high school's Miss Beauty competition. This was the first publicized demonstration of the gap between the 1996 Constitution and the reality of homophobia, which still exists in South African high schools.

⁴³⁶ D Bhana 'Understanding and addressing homophobia in schools: a view from teachers' (2012) 32 *South African Journal of Education* available at http://www.scielo.org.za/scielo.php?pid=S0256-01002012000300007&script=sci_arttext&tlng=pt/ accessed on 2 July 2017.

⁴³⁷ Laas and Boezaart 'The legislative framework regarding bullying in South African schools' (2014) (17) 6 *PER* available at <http://dx.doi.org/10.4314/pej.v17i.12> , <http://www.apa.org/topics/bullying> :accessed on 31 August 2017; bullying by teachers definition :available at <https://www.bing.com/>

The principle of “the best interests of the child” is therefore not adhered to as required by the Constitution⁴³⁸ and the Children’s Act⁴³⁹ by persons within the school community. The realisation of children’s rights in public schools has therefore not yet translated into tangible reality. The apparent best interests of the school are promoted by SGBs, but not the best interests of the child which is of paramount importance.

Furthermore, GL learners do not have the enjoyment of the right to basic education since they cannot speak out and claim their rights, and they experience discrimination in school where they are being bullied when they are involved in school sports, or when talking to other (heterosexual) learners and when using school toilets.

5.3 RECOMMENDATIONS

Throughout the study, relevant stakeholders have been identified as playing a key role in addressing the needs of GL learners in South African public schools. The study will thus make recommendations to that extent.

5.3.1 The Department of Basic Education

The National Department needs to act in collaboration with other relevant Provincial Government Departments and NGOs in order to alleviate the conditions of discrimination against GL learners in public schools. There must be adequate monitoring, for instance intra-

[search?q=definition+of+bullying+by+a+teacher&qs=ri&pq=bullying+definition+by+&sk=as1ri4&sc=6-23&cvid=8b1017ecabea419ea8144c431f87d29d&form=qbre&sp=6](https://www.google.com/search?q=definition+of+bullying+by+a+teacher&qs=ri&pq=bullying+definition+by+&sk=as1ri4&sc=6-23&cvid=8b1017ecabea419ea8144c431f87d29d&form=qbre&sp=6) : accessed on 31 August 2017.

⁴³⁸ Section 28(2) of the Constitution.

⁴³⁹ Section 9 of the Children’s Act.

departmental initiatives in schools by District Inspectors, in order to monitor reported cases and to evaluate challenges encountered by the schools under their areas of jurisdiction. In order to ensure that schools are a safe environment, the DBE must conduct pilot studies and research should be undertaken to explore effective ways to ensure the affected GL learners have access to quality education, which is equal to that provided for heterosexual learners. It is the responsibility of the DBE to ensure that all teachers re trained in sexual diversity and human rights to ensure that the education system is adaptable and appropriate to all learners.

The study recommends that the DBE with discussions with relevant stakeholders, amend the curriculum for basic education as the LO in its current is inadequate with dealing GL learners and ensuring the realisation of the Constitutional values. Further, that the DBE must ensure that all Districts must have a centre aimed at supporting GL learners who do not have support from the school community. Such centres should employ professional people including qualified social workers. The National Schools Act should be amended to include a Code of Conduct for school counsellors and that relevant policies and regulations on homophobic bullying and human rights must be included in the schools' curriculum. The DBE should have a stern approach towards teachers who discriminate against GL learners and that such persons should be dealt with according to the disciplinary Code of Conduct for Teachers. Furthermore, teachers who are reluctant to, or who fail to comply with, the Teachers' Code of Conduct should face disciplinary actions or the matters must be submitted to the SAHRC.⁴⁴⁰ The SAHRC has been instrumental in assessing, educating and promoting awareness of rights, but the DBE can involve the body even more. Effective behavioural management strategies for beginning teachers must be introduced as part of their educational curriculum. In the curriculum, the Department should include programmes, which would enlighten other learners, and the community, about the practice of homosexuality and the transmission of HIV/AIDS.

⁴⁴⁰ SAHRC, available at <https://www.sahistory.org.za/article/south-african-human-rights-commission>: accessed on 17 July 2017.

The role of the DBE is important as all around the world, education systems regard teachers as the chief implementers of curricula and without their proper implementation, the intended goals of education cannot be attained.⁴⁴¹ The DBE should encourage teachers to address sexual diversity throughout the curriculum. The policy is aimed at preventing homophobic tendencies or instances in schools. The anti-discriminatory policies can then be included in every school's rules and regulations.

5.3.2 Schools

It is noted that schools are reliant on directives from the relevant DBE thus some recommendations will involve such departments. Teachers with the necessary skills can be appointed within schools on a temporary basis as councillors as a short-term measure. Then school counsellors with more advanced skills can be appointed permanently per District. A learner who needs support can then be offered consultations with such a counsellor. In order to obtain their trust it is imperative for school counsellors not to be judgmental during consultation with GL learners. School must assist with the establishment of support groups whereby social workers, psychologists, teachers with relevant skills, and NGOs can also form part of a wider group in supporting GL learners. School must ensure that parents and teachers also be educated about how to support and teach homosexuality, by means of workshops. The Department of Social Development (DSD) and NGOs should work with schools to assist with counselling and with the training of teachers and learners. Schools with the assistance of the SAHRC should instil an environment that condemns discrimination, homophobic statements and so forth.

Respect for one another must form part of school values, encouraging teachers, staff members and heterosexual learners to respect GL learners and to accept their sexual orientation. Additionally, as part of school values, Departmental steps according to the Schools Act must

⁴⁴¹ <https://www.education.gov.za/> : accessed 27 February 2019.

be taken against teachers, staff members and learners who unfairly discriminate against GL learners and schools have a duty to report such persons to the relevant authorities. However, disciplinary steps against learners and staff must be consistent with the Constitution, the Children's Act and the CRC as discussed in this chapter. Teachers can be trained to create a conducive learning environment where sexual orientation is not perceived as a challenge.

Awareness campaigns should also be integrated into the school environment. Posters and signs prohibiting homosexual discrimination need to be placed in every classroom and in school passages. A free hotline or a drop off letterbox should be set up for all cases of discrimination against GL and other learners, to be reported. Such a box may be placed in school lavatories or outside the counsellor's office – such a means of communication allowing victims to remain anonymous. Much information can be gathered in this way since, if a perpetrator becomes known because more than one learner reports the same bully, it will become possible to identify which learners are in need of assistance and parents should be informed about bullying taking place in schools.

5.3.3 Community

The media, including newspapers, television and radio can also be used as a medium of education. Some people cannot read or write and therefore the use of radio programmes will be an effective way of spreading information throughout communities. Indunas, chiefs and traditional leaders can also be a means of spreading information to people who are from rural areas as some of the people lack education and live in remote areas with no television or radio. Such people highly respect the voice of indunas, chiefs and traditional leaders.

5.4 CONCLUSION

South Africa is a democratic country it is been many years since the implementation of the South African Constitution which prohibits discrimination on the basis of sexual orientation. South Africa has a highly respected Constitution, which protects all human beings equally. Therefore, after over 20 years of democracy it is shocking to reveal that GL learners' needs have not yet been addressed in public schools. GL learners are not included or visible in LO from evidence of schools' curricula. Schools policies and curricula revealed that they are still institutionally "heteronormative" and "heterosexual". As a result, this hegemonic norm, viewing everyone as heterosexual, remains part of the school culture. The study findings show that in public schools gender patriarchy forces learners into the binary roles of either male or female, and they are assumed to be heterosexual. The communities and teachers have always been the main locus of school systems around the world, being important components of the education system, and there is strong evidence that they are often the perpetrators of discriminatory practices. This shows that GL learners' rights and their plight are still not receiving the attention by the relevant authorities that they deserve. Schools and teachers remain silent and ignorant about sexual and gender diversity. Therefore, the research study concludes that, despite ample legal frameworks, the protection GL learners human rights within South African public school system has not yet been realised and that the current framework is not adequate to protect such learners.

BIBLIOGRAPHY

INTERNATIONAL CONVENTIONS

African Charter on Human and Peoples Rights 1986

African Charter on the Rights and Welfare of the Child 1990

Convention on the Rights of the Child 1989

International Covenant on Civil and Political Rights 1966

International Covenant on Economic Social and Cultural Rights 1976

General Comment 13 (Twenty-first Session) Committee on Economic, Social and Cultural Rights Twenty-first session 15 November-3 December 1999 E/C.12/1999/10 8 December 1999

United Nations Committee on the Rights of the Child 1995

United Nations Convention on the Rights of the Child 1989

United Nations Discriminatory Laws and Practices 2011

Universal Declaration of Human Rights 1948

SOUTH AFRICAN LEGISLATION

Children's Act 38 of 2005

Constitution of the Republic of South Africa of 1996

Department of Education White Paper on training 1995 Notice 196 of 1995 (Parliament of the Republic of South Africa Cape Town, 15 March 1995)

National Education Policy Act 27 of 1996

Promotion of Equality and Prevention of Unfair Discrimination

Act 4 of 2000

South African Schools Act 84 of 1996

FOREIGN LAW

Nigeria Child Rights Act 2003.

JOURNAL ARTICLES

A.A Abdi ‘Integrated education and black development in post-apartheid South Africa: A critical analysis’ (2003) 33 *University of Alberta ,Canada. and Black development* 25-27.

D Bhana ‘Understanding and addressing homophobia in schools: A view from teachers’ (2012) 32 *South African Journal of Education* 307-318.

A Butler, A Alpaslan, J Strümpfer and G Astbury ‘Gay and lesbian youth experiences of homophobia in South African secondary education’ (2003) 2 *Journal of Gay and Lesbian Issues in Education* 14-20.

P Delius and C Glaser ‘Sex, disease and stigma in South Africa: Historical perspectives’ (2005) 4(1) *African Journal of AIDS Research* 29-36.

E Englander ‘Is bullying a junior hate crime?’ (2007) 51(2) *American Behavioural Scientist* 205-212.

M.S Gottlieb ‘AIDS—past and future’ (2001) 344(23) *New England Journal of Medicine* 1788–1791.

C.R Harber and J Serf ‘Teacher education for a democratic society in England and South Africa’ (2008) 22(8) *Teacher and Teacher Education* 966-997.

G.M Herek Beyond “Homophobia”: Thinking About Sexual Prejudice and Stigma in the Twenty-First Century *Sexuality Research & Social Policy* April 2004 Vol. 1, No. 2, 06-24.

A Laas and T Boezaart ‘The legislative framework regarding bullying in South African schools’ (2014) 17(6):1-37.

A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 *International Journal of Children's Rights* 179-184.

A Lopatka 'An introduction to the United Nations Convention on the Rights of the Child' (1996) 6 *Transnational Law and Contemporary Problems* 251- 268.

B M Mafuwane and J Pitsoe 'Circuit managers as agents of school development and support: A conceptual analysis' (2014) 5(9) *Mediterranean Journal of Social Sciences* 439-444.

BD Mezmur 'The 9th Ordinary Session of the African Committee of Exprts on the Rights and Welfare of the Child: Looking back to look ahead' *African Human Rights Law Journal* 7(2) 2007, 522-523.

T Msibi 'I'm used to it now: Experiences of homophobia among queer youth in South African township schools' (2012) 24(5) *Gender and Education* 515-524.

J Pillay 'Keystone Life Orientation (LO) teachers: implications for educational, social, and cultural contexts' (2012) 32(2) *South African Journal of Education* 167-177.

E Richardson 'A ripple in the Pond: Challenging homophobia in a teacher education course' (2004) 8 *Education as Change* 146-163.

E.M Richardson 'Researching LGBT youth in post-apartheid South Africa' (2006) 3(2) *Journal of Gay and Lesbian Issues in Education* 135-140.

C Simbo 'Defining the term basic education in the South African Constitution: and international law approach' (2012) 16 *Law Democracy and Development* 162-182.

G.W Smith 'The ideology of fag the school experience of gay students' (1998) 39(2) *The Sociology Quarterly* 309-335.

A Stein 'Make room for daddy: Anxious masculinity and emergent homophobias in neo patriarchal politics' (2005) 19(5) *Gender and Society* 601-620.

C Stevens and N Ntlama 'An overview of South Africa's institutional framework in promoting women's right to development' (2016) 20 *Law Democracy and Development* 46-68.

K Tomasevski 'Has the right to education a future within the United Nations? A behind-the-scenes account by the Special Rapporteur on the Right to Education' (1998-2004) *Human Rights Law Review* 205- 224.

W.J Van Vollenhoven and C.J Els 'The human rights paradox of lesbian, gay, bisexual and transgender students in South African education' (2003) 46 *De Jure* 263-284.

F Viljoen 'Why South Africa should ratify the ACRWC' (1991) 16 *South African Law Journal* 660-661.

J Von Bernstorff 'The changing fortunes of the Universal Declaration of Human Rights: Genesis and symbolic dimensions of the turn to rights in international law' (2008) 19(5) *European Journal of International Law* 903-924.

Wackerfuss 'Homophobic bullying and same-sex desire in Anglo-American schools' (2007) 19(3-4) *Journal of Gay & Lesbian Social Services* 139-155.

REPORTS

Department of Basic Education *Guidelines on the Organisation, Roles and Responsibilities of Education* (2011): DBE Pretoria, South Africa.

Nelson Mandela Foundation *Emerging Voices: a Report on Education in South African Rural Communities* (2005): HSRC Press Cape Town, South Africa.

BOOKS AND THESES

A.H Alpaslan 'Only study guide for SCK410/1/2011-2013 Social work research' (2010) Pretoria: University of Pretoria.

P Ankut '*The African child: Linking principle with practice, open society initiative of West Africa*' (2006) to be published by the open society initiative of West Africa (OSIWA).

G Baker 'The right to education in The South African Constitution' In Mashava, LV *Compilation of essential documents on the right to education economic and social rights* (2000). South Africa Basic education rights handbook.

D Bhana 'Isitabane, South African teenagers and the regulations of sexuality, gender and culture'. In *Reynolds, Ringrose and Egan (eds) Children, sexuality and sexualization* (2015): Palgrave Macmillan, London 193.

D Bhana '*Under pressure. The regulation of sexualities in South African secondary schools*' (2014) Braamfontein : MaThoks Books 9

A De Baets '*History and theory*' Cambridge (2009) Wesleyan University.

A Detrick '*A Contemporary on the United Nations Convention on the Rights of the Child* (1999): *Implementation Handbook for the Convention on the Rights of the Child, (UNISEF)*, 569-584.

J Dugard '*International Law, a South African Perspective*' 4ed. (2011) Cape Town: Juta.

J Fortin '*Children's rights and the developing law*' (1989) London Butterworth: Jordan Publishing Ltd.

N Giffney and M Rourke (eds) '*The Ashgate Research Companion To Queer Theory*' (2009). Burlington: Ashgate.

A Govindjee, D Holness and PHG Vrancken '*Introduction to human rights law*' (2009) Durban: LexisNexis.

F Khan "A critical analysis of the laws and policies regulating the management of learner pregnancy in South Africa using the lived experiences of various stakeholders at selected

public secondary schools in KwaZulu-Natal and the Hospital School Pretoria” PhD Thesis
University of KwaZulu-Natal (2016).

P.G Lauren ‘*The evolution of international human rights visions seen*’ 3 ed. (2011) New York
City : University of Pennsylvania Press.

A McBeth, J Nolan and S Rice ‘*The international law of human rights*’ (2013) Oxford:
Oxford University Press.

A MacDonald ‘*The rights of the child: Law and practice*’ (2011) Bristol UK: Jordan
Publishing Ltd.

V Mncube and C Harber ‘*The dynamics of violence in South African Schools*’ (2011)
Pretoria: University of South Africa.

J S Nielson ‘*Children’s rights in Africa A legal perspective*’ (2008) Aldershot, England,
Burlington, VT: Ashgate 37.

OJ Spec ‘Declaration of the Rights of the Child League of Nations Records of the Fifth
Assembly’ (1924) 23 *League of Nations Official Journal* 43-138.

M Santos Pais ‘The Convention on the Rights of the Child In United Nations’ *Manual on
human rights reporting* New York: United Nations (1997) 393-504.

R.K.A Smith ‘*Textbook on international human rights*’ 5th ed. (2012) Oxford: Oxford
University Press.

Waller, J ‘*The sociology of teaching*’ (1932) New York: London Chapman and Hall.

E Bonthuys & C Albertyn ‘*Gender, Law and Justice* (2007) Juta and company (Pty) Ltd.

CASES

Fourie v Minister of Home Affairs 2005 (3) SA 429 (SCA).

Minister of Basic Education v Basic Education for All 2016 (4) SA 63 (SCA).

Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) ZACC 19 (2006) 3

Minister of Home Affairs v Fourie 2006 (1) SA 542 (CC).

Nicholas Toonen v Australia, Human Rights Committee, 50th Session, Case no. 488/1992.

S v Makwanyane 1995 (3) SA 391 (CC).

S v Rudman 1989 (3) SA 368.

INTERNET SOURCES and WEB ARTICLES

- *Basic education rights hand book* available at <http://section27.org.za/wp-content/uploads/2017/02/Chapter-3.pdf>: accessed on 30 October 2017.
- Bullying UK part of family lives ‘*What to do if the school doesn’t resolve the bullying*’ available at <https://books.google.co.za/books?idschool+bullying>: accessed on 30 October 2017.
- DJ Christiaans ‘Empowering teachers to implement the LO learning area in the senior phase of the G.E.T band. Stellenbosch’ (2006) Stellenbosch University Press, available at <https://scholar.sun.ac.za/bitstream/handle/10019.1/2979/christiaans-empowering-2006>. accessed on 17 October 2018.
- ‘Centre for Justice and Crime Prevention and the Department of Basic Education’ available at www.education.gov.za: accessed on 30 December 2017.
- ‘CESCR’ available at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> : accessed on 25 August 2017. www.childlinesa.org.za/ : accessed 27 February 2019.
- ‘Combating discrimination based on sexual orientation and gender identity’ available at <https://www.ohchr.org/en/issues/discrimination/pages/lgbt.aspx> : accessed on 27 July 2017.
- Culture and Education ‘Lesson 3 culture and education’ available at <https://sol.du.ac.in/mod/book/view.php?id> :accessed on 30 December 2017.

- H Calamari (1958) '*The foundation of International Human Rights Law*'. available at : <http://www.allisterbutler.com/Documants/Navigating%20institutional%20paper%202004> : accessed on 2 June 2017.
- R Davis 'Why Tutu's support for gay rights matters.' (2013), available at https://www.dailymaverick.co.za/article_2013-07-29, accessed on 30 July 2017.
- L De Barros. 'Shocking Scale of LGBT discrimination in South Africa' (2016), *Mamba online*, available at <http://mambaonline.com/./shocking> accessed on 16 July 2017.
- R De Palma and D Francis '*South African Life Orientation Teachers: (Not) teaching about sexuality diversity*', (2006) 61:12, 1687-1711:1707, available at <http://dx.doi.org/10.1080/00918369.2014.951256>, accessed on 16 July 2017.
- Department of Basic Education : '*Education Districts*' : available at <https://www.education.gov.za/Informationfor/EducationDistricts.aspx>: accessed on 30 October 2017.
- Department of Basic Education '*Curriculum Assessment Policy Statements National Curriculum (CAPS)*' (2018) available at <https://www.education.gov.za/> : accessed on 30 December 2018.
- B Gama '*An exploration of life orientation education educators knowledge and the teaching of study skills in further education and training phase high schools in Ekudibeng Cluster , Gauteng East*' (2015), available at <http://uir.unisa.ac.za/handle/10500/20192>, accessed on 30 December 2017.
- Gender identity and sexual orientation legal review '*The rights of learners in South African Schools*' (2016) available at www.eelawcentre.org.za : accessed on 25 October 2018.
- 'Human rights' available at <http://www.un.org/en/sections/issues-depth/human-rights/>: accessed on 28 March 2017.

- ‘International human rights law’ available at <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> : accessed on 14 July 2017.
- International Justice Resource Centre ‘*Committee on economic social and cultural rights*’: available at www.ijrcenter.org/un-treaty-bodies/committee-on-economic-social-and-cultural-rights : accessed on 25 August 2017.
- KZN Department of Education (2011) ‘*Approved organisational structure*’ available at http://www.kzneducation.gov.za/Portals/0/Circuiars/General/2012/Approved_Organogram_for_KZN_DoE.pdf : accessed on 30 October 2017.
- LGBTI Statistics ‘*I am gay*’ available at <http://www.iamgay.co.za/explaining-gay/lesbian-and-gay-statistics/>: accessed on 16 July 2017.
- ‘LGBTI Statistics I am Gay’ available at <http://www.iamgay.co.za/explaining-gay/lesbian> : accessed on 16 July 2017.
- P Macklem ‘*Human rights in international law: three generations or one?*’ (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2573153, accessed on 27 August 2017.
- ‘Role of UNICEF in the protection of child rights’ available at http://shodhganga.inflibnet.ac.in/bitstream/10603/57295/11/11_chapter4 accessed on 27 August 2017.
- ‘SA Report’ available at <https://www.hrw.org/legacy/reports98/sareport/App1a.htm> : accessed on 27 August 2017.
- ‘South Africa: LGBT Rights in name only?’ (2011) *Human Rights Watch* available at <https://www.hrw.org/news/2011/12/05/south-africa-lgbt-rights-name-only> : accessed on 2 July 2017.
- ‘The Government of South Africa ratifies the ICESCR’ available at <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr> accessed on .16 July 2018.

- ‘The optional protocol on a communications procedure’ available at www.childrightsconnect.org/connect-with-the-un-2/op3-crc/: accessed on 31 December 2017.
- ‘The Salamanca statement and framework for action, on special needs education adopted by the World Conference on special needs education: access and quality’. Salamanca, Spain, 7-10 June 1994 available at <http://unesdoc.unesco.org/pdf> : accessed on 16 July 2018.
- ‘UDHR’ available at <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> : accessed on 14 July 2017.
- R Igual ‘SAHR takes school to court over transgender Limpopo pupil’s abuse’ Mamba online (2016) available at <https://www.mambaonline.com/2016/11/16/sahrc-takes-school-court-transgender-limpopo-pupils-abuse/> accessed on 26 December 2017.
- B Matthew ‘*Questions of visibility and identity: analysis of representations of the Mr Gay South Africa pageant*’ (2012), available at <https://muse.jhu.edu/article/495685>.; accessed on 18 December 2017.
- ‘Role of UNICEF in the protection of child rights’, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/57295/11/11_chapter4: accessed on 1 October 2018.
- SBV Report ‘*Report of the public hearing on school based violence*’ (2006) available at <https://www.sahrc.org.za/home/21/files/Reports/SBV%20Report> :accessed on 25 October 2018.
- ‘South African Human Rights Commission (SAHRC)’ : available at <https://www.sahistory.org.za/article/south-african-human-rights-commission>: accessed on 17 July 2017.
- ‘Summary of ICCPR and ICESCR’ (2013) available at <http://www.eycb.coe.int/compass/> : accessed on 25 October 2017.

- ‘UN Committee on the Rights of the Child General Comment No. 12’ (2009): The right of the child to be heard available at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/>: accessed on 17 July 2017.
- United Nations Human Rights ‘Office of the high Commissioner’ (1977-2014) available at http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership_: accessed on 12 October 2017.

NEWSPAPER ARTICLES

- L Barnes ‘Gay teens ordeal’: *News 24* 17 April 2006. available at <https://www.news24.com/SouthAfrica/News/Gay-teens-ordeal-> : accessed on 30 October 2017.
- R Davis *Homosexuality-in-South-African-schools-still-largely-a-silent-taboo* : 17 February 2015 available at <https://www.dailymaverick.co.za/article/2015-02-17-homosexuality-in-south-african-schools-still-largely-a-silent-taboo/> : accessed on 30 October 2017.
- V John ‘A lesson in sexual tolerance’ *Mail and Guardian* 2-8 December 2011 available at <https://mg.co.za/article/2011-12-02-a-lesson-in-sexual-tolerance>: accessed on 6 February 2019.
- S King ‘Sharp rise in classroom homophobia’ *Mail & Guardian* 29 August 2014 available at <https://mg.co.za/article/2014-08-29-sharp-rise-in-classroom-homophobia>: accessed on 6 February 2019.
- N Zondi ‘Why are our schools unsafe for LGBTQI children’ *Mail and Guardian* 22 March 2017 available at <https://mg.co.za/article/2017-03-22-why-are-our-schools-unsafe-for-lgbtqi-children> : accessed on 15 July 2017.

GENERAL COMMENT

- UN Committee on the Rights of the Child *General Comment No. 12 (2009): The right of the child to be heard.*

29 May 2019

Mrs Zanele Pretty Nkabinde (216074721)
School of Law
Howard College Campus

Dear Mrs Nkabinde,

Protocol reference number: HSS/0192/018M

New project title: The rights of gay/lesbian children in South African public schools: An overview of the relevant legal and institutional framework

This letter serves to notify you that your application and request for an amendment received on 09 April 2019 has now been approved as follows:

Approval Notification – Amendment Application

- Change in Title

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for period of 3 years from the date of original issue. Thereafter Recertification must be applied for on an annual basis.

Best wishes for the successful completion of your research protocol.

Yours faithfully

.....
Dr Rosemary Sibanda (Chair)

/ms

cc Supervisor: Mrs CE Stevens
cc. Academic Leader Research: Dr Donrich Thaldard
cc. School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

Dr Rosemary Sibanda (Chair)

Westville Campus, Govan Mbeki Building

Postal Address: Private Bag X54001, Durban 4000

Telephone: +27 (0) 31 260 3587/8350/4557 Facsimile: +27 (0) 31 260 4609 Email: ximbap@ukzn.ac.za / snymanm@ukzn.ac.za / mohunp@ukzn.ac.za

Website: www.ukzn.ac.za



1910 - 2010
100 YEARS OF ACADEMIC EXCELLENCE

Founding Campuses:  Edgewood  Howard College  Medical School  Pietermaritzburg  Westville