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Legal aspects of school governance and control

Sub-theme: Applicable legislation

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Student/learner¹ allegations of teacher sexual misconduct and a teacher's right to privacy

Whether investigations of alleged teacher sexual misconduct are conducted by school officials, law enforcement or social services, the issue discussed in this paper is the extent to which members of the public, including media and parents are entitled to know the names of teachers whom allegations of sexual misconduct have been made. The issue will be addressed from a comparative perspective between the United States and South Africa.

In the United States this issue is complicated by the fact that most investigations are conducted by school personnel and, while some allegations result in a finding of teacher sexual misconduct, most either find the charges false or unsubstantiated for lack of evidence. The Supreme Court of Washington's recent decision in *Bellevue John Does v. Bellevue School District No.405*² addresses whether these investigations by school personnel are adequate for finding and punishing abusive teachers, and if not, what options need to be considered to assure that [school] children... will not continue to suffer at [the] hands [of predatory teachers.]³ Whether the names of all United States teachers against whom charges of sexual misconduct have been made, regardless of the outcome of investigations, should be revealed presents a difficult balancing question between a teacher's privacy interest in his or her identity and the public's interest in schools that are free from sexual misconduct of publically paid teachers.

In the southern hemisphere, South Africa has recently adopted a Children's Act⁴ which aims at, among other things, "to give effect to... constitutional rights of children..." such as keeping them safe from "maltreatment, neglect, abuse or degradation" and advancing their well-being⁵. Moreover, the Criminal Law (Sexual Offences and Related Matters) Amendment Act⁶ sets out to "provide adequate and

¹ The United States refers to school-going young persons as "students".

² 189 P.3d 139, 155 [1234 Ed. Law. Rep. 1007] (Wash. 2008).

³ *Bellevue John Does v. Bellevue Sch. Dist. #405*, 189 P.3d 139,155 [234 Ed. Law Rep. 1007] (Wash. 2008) (Madsen, J. dissenting).

⁴ 38 of 2005, assented to on 8 June 2006.

⁵ Children's Act, section 2(b), 2(b)(iii) and 2(b)(i).

⁶ 32 of 2007.

effective protection to the victims of sexual offences” in order to minimize possible victimization and traumatising⁷. While both these Acts are clearly timeous reaction to an increased incidence of sexual offences specifically against women and children, two pertinent questions that now need to be raised are (1) whether the legal system offers accused sexual offenders reciprocating maximum and least traumatising protection from false and/or unsubstantiated accusations⁸; and (2) what happens to the “weighting effect”⁹ of balancing, for example, a teacher’s right to privacy and other parties’ interest in schools that are free from sexual offences?

While South Africa does not have the significant case law of the United States, this issue of common interest will be addressed by discussing relevant and pertinent United States court cases and by turning to a speculative discussion of the law in South Africa, given a couple of critical incidents.

⁷ Ibid, Preamble.

⁸ The unreported case of *HK van Niekerk v The State* Case No. A215/2007 High Court, Transvaal and the District Court, Kimberley case of *S v Du Plessis* Case No. ASOC 122/2004 refer: both of them teachers who were eventually found innocent.

⁹ *S v B* 2006 (1) SACR 311 (SCA) at § 11.