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Legal aspects of governance and control

Sub-theme: Applicable legislation

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Student/learner[1] allegations of teacher sexual misconduct: a teacher's right to privacy and due process

1. Background

Whether investigations of alleged teacher sexual misconduct are conducted by school officials, law enforcement or social services, the issues in the paper are (1) the extent to which members of the public are entitled to know the names of teachers against whom allegations of sexual misconduct have been made, (2) who should investigate sexual misconduct complaints, and (3) what privacy expectation teachers have during the investigation. The issue will be addressed from a comparative perspective between the United States and South Africa, with specific reference to the fact-finding process and School Governing Bodies' governance role in South African public education and school officials' role in the United States.

In the United States this issue is complicated by the fact that, in addition to investigations conducted by social service and law enforcement agencies, school boards or school administrators also generally conduct investigations and, while some allegations result in a finding of teacher misconduct, most either find the charges to be 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* (*Bellevue*)[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

[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).

privacy interest in his/her identity and the public's interest in schools that are free from sexual misconduct of publically paid teachers.

The stakes are high in the United States and South Africa regarding teacher sexual misconduct. Teachers found to have engaged in such misconduct are subject to criminal prosecution, revocation of their teaching credentials, and discharge from employment. Both countries require teachers and other school personnel to report suspected child abuse to social service or law enforcement agencies and failure to do so in the United States, can result in revocation of teaching or administrative licenses.

South Africa has recently adopted a Children's Act[4] 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", advancing their well-being"[5] and ensuring that their best interests are regarded as of paramount importance in all matters relevant.[6] Moreover, the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Criminal Law Act)[7] sets out to "provide adequate… effective protection to the victims of sexual offences" in order to minimize ensuing victimization and traumatisation.[8] While both these Acts are clearly timeous reaction to an increased incidence of sexual offences specifically against women and children, three pertinent questions that now need to be raised are (1) whether the legal system offers accused sexual offenders protection from false and/or unsubstantiated accusations[9]; (2) how the "weighting effect"[10] of balancing should apply to determining an appropriate balance between a teacher's right to privacy and the public's interest in schools

[4] 38 of 2005, assented to on 8 June 2006.
[5] *Id*. at s 2(b), 2(b)(iii) and 2(b)(i).
[6] *Id.* at s 2(b)(iv), 7(1) and 9. South African Constitution Act 108 of 1996 (SA Constitution), s 28(2).
[7] 32 of 2007.
[8] *Id.* at Preamble.
[9] See, for example, 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: both of them teachers who were eventually found innocent of the sexual charges learners brought against them.
[10] *S v Dodo* (*Dodo*) 2001 (1) SACR 594 (CC) dealt with the Constitutional Court addressing whether the Eastern Cape High Court was correct in declaring s 51(1) of the Criminal Law Act (*supra* note 7) "to be constitutionally invalid" (at 619), having convicted the appellant of murder and while considering whether a sentence other than life imprisonment could be imposed; at 595 the Court points out that "an independent court… was empowered to weigh and balance all factors relevant to crime, the accused and the interests of society before the imposition of sentence," leading to the Constitutional Court's declining to confirm the High Court's order that declared the section as unconstitutional, and referring the judgment back to be dealt with accordingly .

that are free from sexual offences; and (3) the role of the fact-finding process in determining the credibility of witness testimony.[11]

This presentation will address teacher misconduct and privacy by exploring the United States and South African approaches to the public's right to know whether those persons responsible for the education of their children have been charged with sexual misconduct, the extent to which investigations by schools or other pubic agencies should be appropriate vehicles for investigating allegations without the need for disclosing teacher names, and what privacy expectation teachers have during the investigation.

2. The United States experience

While at school, United States students are protected from employee abuse by a comprehensive network of state statutes and regulations that can result in criminal sanctions, civil damages,[12] and professional discipline[13] where an investigation has produced evidence of sexual abuse.

These sanctions, though, have not always been successful in preventing student sexual abuse and, among a comprehensive compilation by the United States Department of

[11] **Consider fn 60(FHETANI) or fn 177/179(VILAKAZI** *S v B* 2006 (1) SACR 311 (SCA), a case in which a youthful offender appealed against having been found guilty of murder at the age of 17 and having received a sentence of life imprisonment; the Supreme Court of Appeal not only declined the appeal, but also handed down a sentence of 18 years' imprisonment for murder and a concurrently running extra 15 years for robbery with aggravating circumstances; see *Id.* at 316, where the Supreme Court of Appeal sounds a warning not to treat a person too much "like the perpetrator he or she has not yet proven to be."

[12] The issue of civil damages presents two separate aspects in the US: the first aspect is whether a teacher can sue school officials or the school board where personally identifiable information has been released about the teacher without consent. See in this regard *William L. Prosser*, Privacy, 48 CAL. L.REV. 383, 398 (1960), describing a private facts tort as an extension of defamation, except that the private facts tort punishes the publication of truthful non-newsworthy matter that is damaging to a person's reputation. The second aspect of civil damages is whether the school district is liable in damages for teacher sexual misconduct with students. See 16B McQuillin Mun. Corp., Chapter 46, *Public education III. Officers, teachers and employees*, at § 46. 13.25 (2008), indicating that where there is no conspicuous, plain, and clear reason to exclude liability coverage for teachers' criminal acts of sexual misconduct with students, the teacher is covered by the district's policy to the extent that the teacher is considered to have committed a "wrongful act? Under the school board's liability policy.

[13] Beckham, J., 1996. Meeting legal challenges: 70-73; Thomas, S.B., Cambron-McCabe, N.H. and McCarthy, M.M. 2009. Public school law – teachers' and students' rights: 415-418, indicating that in as much as teachers are viewed as student role models, the threshold for determining when a teacher acts immorally is fairly low and acts of moral turpitude, criminal convictions, and sexual misconduct with students constitute the typical grounds for disciplinary action on the grounds of immorality). But see *Matter of Renewal of Teaching Certificate of Thompson*, 893 P.2d 301 [99 Ed. Law Rep. 1108] (Mont. 1995), where the board of education's order denying the renewal of a teaching certificate on the grounds of the moral unfitness of a teacher accused of and acquitted on criminal charges of sexual misconduct with students was clearly in violation of teacher's due process rights, and the trial court properly reversed the board's order, where decision of board was clearly erroneous and unsupported by substantial evidence).

Education of student sexual misconduct studies, [14] one such study reported that 9.6 percent of all children in grades 8-11 have been subjected to educator sexual misconduct.[15] From a broader perspective, "[m]ore that 4.5 million students are subject to sexual misconduct by an employee of a school sometime between kindergarten and 12th grade."[16]

As pointed out before, the issue of this paper concerns itself with the extent to which members of the public, including the media and parents, are entitled to know the names of teachers against whom allegations of sexual misconduct have been made. While some investigations do in fast result in a finding of teacher misconduct, most either find the charges as false or substantiated for lack of evidence.

The Supreme Court of Washington's recent decision in *Bellevue* addresses whether these school official investigations are adequate for finding and punishing abusive teachers or not. Moreover, the decision also point out that teachers' privacy interests in their identity and the public's interest in schools that are free from sexual misconduct of publically paid teachers need to be balanced when looking at whether the names of teachers against whom charges of sexual misconduct have been brought should be made public even before the investigations have been completed.

2.1 *Bellevue*: facts and court decisions

The majority and dissenting opinions[17] in *Bellevue* present dramatically different perspectives as to the appropriateness of teacher sexual misconduct investigations by school officials and

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[14] U.S. Department of Education, Office of the Under Secretary, Policy and Program Studies Service, *Educator Sexual Misconduct: A Synthesis of Existing Literature,* Washington, D.C., Doc # 2004-09 (2004) (hereafter referred to as, *Educator Sexual Misconduct*). Report is available at: www.ed.gov/rschstat/research/pubs/misconduct

[15] *See* Charol Shakeshaft, *Educator Sexual Abuse*, HOFSTRA HORIZONS, Spring, 2003, pp. 10-13 (published semiannually by Hofstra University, Hempstead, N.Y.), and an analysis of the Shakeshaft data by the American Association of University Women reported in *Educator Sexual Misconduct*, *supra* note 4 at 18, where students were asked to respond to the following kinds of teacher sexual abuse:

> Made sexual comments, jokes, gestures, or looks; Showed, gave or left you sexual pictures, photographs, illustrations, messages, or notes; Wrote sexual messages/graffiti about you on bathroom walls, in locker rooms, etc.; Spread sexual rumors about you; Said you were gay or a lesbian; Spied on you as you dressed or showered at school; Flashed or "mooned" you; Touched, grabbed, or pinched you in a sexual way; Intentionally brushed up against you in a sexual way; Pulled at your clothing in a sexual way; Pulled off or down your clothing; Blocked your way or cornered you in a sexual way; Forced you to kiss him/her; Forced you to do something sexual, other than kissing.

The result of this survey was that "9.6 percent of all students in grades 8 to 11 report[ed] contact and/or noncontact educator sexual misconduct that was *unwanted*." *Educator Sexual Misconduct*, *supra* note 4 at 17. (emphasis in original). Of this number, "6.7 percent reported physical sexual abuse." *Id.* at 18.

[16] *Educator Sexual Misconduct*, *supra* note 4 at 18.

[17] *Bellevue*

as to whether teachers should have any privacy interests regarding conduct that occurs during their employment responsibilities.

2.1.1 Facts and trial court decision

The *Seattle Times* newspaper applied under the state's Public Disclosure Act (PDA)[18] (recodified as the Public Records Act (PRA) and referred to as PRA hence forth) [19] for "seeking copies of all records [for three school districts] relating to allegations of teacher sexual misconduct in the last 10 years."[20] Washington's PRA defines a public record broadly as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[21] The PRA protects an employee's privacy to the extent that any disclosure of employee information "(1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public."[22] To the degree that making information public would represent "an unreasonable invasion of personal privacy… an agency *shall delete identifying details* in a manner consistent with this chapter when it makes available or publishes any public record."[23] However, the Washington Code accords a "good faith" exemption to any public agency or employee that releases information while attempting to comply with the provisions of this chapter.[24] The Washington Code goes so far as to require that, except for pending civil or criminal investigations or charges or a contrary request from the employee, "[a]ll information determined to be false and all such information in situations where the employee has been fully exonerated of wrongdoing, shall be promptly destroyed."[25]

Pursuant to the *Seattle Times*' request, the three school districts identified 55 current and former teachers who fitted the profile and, pursuant to the PRA, they notified the teachers of the request. Of the 55 teachers, 37 responded with a lawsuit alleging that "the release of records identifying them with accusations of sexual misconduct would be an invasion of

[18] Rev. Code of Wash., Ch. 42.17.
[19] Rev. Code of Wash., Ch. 42.56. A change in the name from PDA to PRA did not change the statutory content as affecting this case.
[20] *Bellevue*, 189 P.3d at 143.
[21] Rev. Code of Wash., Ch. 42.56.010(2).
[22] Rev. Code of Wash., Ch. 42.56.050.
[23] Rev. Code of Wash., Ch 42.56.070 (1) (emphasis added).
[24] Rev. Code of Wash., Ch. 42.56.060.
[25] Rev. Code of Wash., Ch. 41.06.450(1)(b), (2)(a) and (b).

privacy."[26] The school districts released to the newspaper the unredacted records of the 18 teachers who did not join the lawsuit,[27] in addition to having earlier released "numerous records [regarding the 37 teachers] documenting the nature of the allegation in each case [against the teachers], the grade level[s] [they taught], the type of investigation conducted [by the school district], and any disciplinary action taken [by the district]… [but without] disclosure of [the 37 teachers'] real names."[28]

Against a backdrop of PRA statutory policy that "free… open examination of public records is in… public interest, even [if] such examination may cause inconvenience or embarrassment to public officials"[29] and after considering documentary evidence introduced by the plaintiff teachers, the trial court ordered the disclosure of 22 of the 37 teachers' records where "alleged misconduct was substantiated, [where the misconduct had] resulted in some form of discipline, or [where] the school district's investigation [had been] inadequate."[30] Twelve of the 22 teachers sought review of the order for the disclosure of their names and the *Seattle Times* was permitted to intervene "seeking release of identifying information for the 15 [of the 37] prevailing John Does."[31]

2.1.2 Appeals court decision

The Washington appeals court held that the names of all but three teachers had to be disclosed to the *Seattle Times*, including those in the group of 15 who had been excluded from disclosure by the trial court, holding that non-disclosure did not apply to "unsubstantiated [allegations] or [those] determined not to warrant discipline"[32] or to teachers who had received "letters of direction."[33] In effect, the appeals court limited non-disclosure only to those fact situations where an investigation had occurred and "an allegation against a teacher [was] plainly false."[34] For the three cases where nondisclosure was not required under the PRA, the

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[26] Bellevue John Does 1-11 v. Bellevue Sch. Dist.#405, 120 P.3d 616, 620 [202 Ed. Law Rep. 346] (Wash. Ct. App. 2005).
[27] *Bellevue*, 189 P.3d at 143.
[28] Bellevue John Does 1-11 v. Bellevue Sch. Dist.#405, 120 P.3d at 621. The names of the 37 teachers had been changed to "John Does" which explains the plaintiffs in this case. *Id.*
[29] PDA, ch, 42.56.550 (3).
[30] *Bellevue*, 189 P.3d at 143.
[31] *Id.*
[32] Bellevue John Does 1-11 v. Bellevue Sch. Dist.#405, 120 P.3d at 620.
[33] *Id*. at 623-24. In Washington, "[a] counseling letter, or 'letter of direction', is a practice a district may use to respond when it views a teacher's conduct as inappropriate but not serious enough to warrant a reprimand or other discipline." *Id*. at 621.
[34] *Id.* at 627.

appeals court found those cases to involve reports that were "blatant fabrication"[35] or "patently false."[36]

2.1.3 Supreme court majority decision

The Supreme Court of Washington, in a complicated and divided 5-3 opinion, partly reversed the appeals court decision. In effect, this court had to establish whether "the identities of teachers who are the subjects of allegations" and information in letters of direction were "personal information" under the PRA "to the extent that disclosure would violate [the teachers'] right to privacy."[37] In its interpretation of the PRA, the majority decision firstly observed that "the public lacks… legitimate interest in… identities of teachers [subjected to] unsubstantiated allegations of sexual misconduct because [their] identities do not aid in effective government oversight by… public and… teachers' right to privacy [is independent of] the quality of… school districts' investigations."[38] Secondly, the majority opined that "the [PRA] mandates disclosure of letters of direction… [but] where a letter simply… guide[s] future conduct, does not mention substantiated misconduct, and a teacher is not disciplined or subject to any restriction, the name and identifying information of the teacher should be redacted."[39]

Moreover, the court held that "teachers' identities" and letters of direction "contain[ing] information regarding the school districts' criticisms and observations of the DoE employees that relate to their competence as education professionals," constituted "personal information"[40] under the statute, and were therefore subject to the statutory limitation on

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[35] A complaint involving a teacher "sitting out in the hallway with a middle school girl on his lap turned out to be a blatant fabrication by an unruly student whose credibility was completely undermined by an immediate investigation." *Id.* at 628.

[36] Two complaints involved rape, one an "accusation that the teacher was guilty of violent rape, kidnapping, and satanic torture[,] was completely implausible [because it lacked any] corroborat[ion] by physical evidence, [and] no one reading the file would reasonably believe that the allegations against [the teacher]were anything but fabrications," *Id*. at 627 and a second complaint concerning "an individual with a well documented history of psychiatric problems [that] was purportedly based on a memory suppressed for 15 years . . . [and during the investigation produced no] corroborative evidence . . . [but did reveal that] . . . [t]he accuser and her mother both admitted to the investigator that the police report had been filed with the thought of getting money from the teacher." *Id.* at 627-28.

[37] Rev. Code of Wash, chapter 42.56.230(2): "Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy."

[38] *Bellevue*, 189 P.3d at 152.

[39] *Id.* at 153.

[40] *Bellevue*, 189 P.3d at 145. The court found this definition similar to other states within the Ninth Circuit. *See, e.g.,* Alaska Stat. 40.25.350(2) (2006) ("information that can be used to identify a person and from which judgments can be made about a person's character, habits, avocations, finances, occupation, general reputation, credit, health, or other personal characteristics"); Cal. Civ. Code 1798.3(a) (West 2005): "any information that is maintained by an agency that identifies or describes an

invasion of privacy. The *Bellevue* Supreme Court was constrained by two of its earlier opinions reaching opposite results regarding disclosure, the first (*Brouillet v. Cowles publishing Co*.)[41] deciding that the public had a legitimate interest in information about the revocation of a teacher's certification involving "the extent of *known* sexual misconduct in schools,"[42]and the second (*Dawson v. Daly*)[43] that disclosure of a deputy prosecutor's performance evaluation was not required under the PRA because it would have violated the prosecutor's right to privacy.[44]

In both of these decisions, the Washington Supreme Court had relied on the definition of "invasion of privacy" in the Restatement of Torts: "'[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.'"[45] However, in *Brouillet*, the supreme court had never reached the question as to "whether teachers have a right of privacy in *unsubstantiated* allegations of sexual misconduct,"[46] and in *Dawson*, whether disclosure of a performance evaluation "would violate the prosecutor's right of privacy [where] it would be highly offensive and the public [did] not have a legitimate concern in such information."[47]

In *Bellevue*, the Supreme Court addressed the unanswered question from *Brouillet*, holding that "unsubstantiated or false accusation[s] of sexual misconduct [do not involve] action taken by an employee in the course of performing public duties [and thus]… are matters concerning the teachers' private lives."[48] In essence, the supreme court determined that where "the fact of the allegation, not the underlying conduct… lacks any evidence that misconduct ever occurred," the court refused to permit "the teacher's performance or activities as a public

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individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history."

[41] 791 P.2d 526, [60 Ed. Law Rep. 638] (Wash. 1990).

[42] *Id.* at 147 (emphasis added), citing *Brouillet v. Cowles publishing Co*., 791 P.2d 526, 532, 530 [60 Ed. Law Rep. 638] (Wash. 1990) (holding that disclosure of teacher records was permissible as "effective law enforcement" under state statute because revocation of a teacher's license involves the "imposition of sanctions for illegal conduct.")

[43] 845 P.2d 995 (Wash. 1993)

[44] *Dawson v. Daly*, 845 P.2d 995, 1005 (Wash. 1993): "if public employees were aware that their performance evaluations were freely available to their co-workers, their neighbors, the press, and anyone else who cares to make a request under the act, employee morale would be seriously undermined."

[45] RESTATEMENT (SECOND) OF TORTS § 652D (1977).

[46] *Bellevue*, 189 P.3d at 147 (emphasis added).

[47] *Id.*

[48] *Id*. at 147-148.

servant… [to be] held up to hatred and ridicule in the community."[49] This court found the appeals court's distinction between reportable "unsubstantiated" claims and unreportable "patently false" claims to be a "vague and impractical" one that placed "unworkable [and] time consuming… [burdens] on agencies and courts… likely to lead to radically different methods and conclusions."[50]

In holding that "[w]hen an allegation is unsubstantiated, the teacher's identity is not a matter of legitimate public concern," the Supreme Court of Washington rejected the *Seattle Times* argument that "the public has a legitimate concern in monitoring the school districts' investigations of sexual misconduct and the identity of the accused is imperative to the effectiveness of such monitoring."[51] The court refused to make "the quality of a school district's investigation" a relevant factor in determining teacher privacy because "the accused [teacher] has no control over the adequacy of the investigation."[52]

The *Bellevue* majority opined that even in the case where school districts were conducting "less than acceptable investigations and permit teachers (whose reputations have not been cleared by thorough investigations) to avoid public scrutiny of their alleged misconduct, . . the public can [still] access documents related to the allegations and investigations (*subject to redactions*), thus maintaining the citizens' ability to inform themselves about school district operations."[53]

Similarly, the public is entitled only to redacted letters of direction in teacher personnel files where the letter "does not identify unsubstantiated misconduct and the teacher is not disciplined or subjected to any restriction."[54] Even with redactions of teacher identities, the public's interest is still protected "in overseeing school districts' responses to allegations…[by] giv[ing] citizens a complete picture of a school district's investigations and accompanying procedures."[55]

2.2 Analysis and implications of *Bellevue*

Bellevue specifically addresses the difficult policy question of how much information about sexual misconduct complaints involving teachers should be disclosed. The policy reasons against disclosure are arguably more persuasive where allegations of sexual misconduct have been found to be false, but one has to assume that even in such cases the investigation of

[49] *Id.*
[50] *Id*. at 149.
[51] *Id.* at 150
[52] *Id.* at 150-151.
[53] *Id.* at 151 (emphasis added).
[54] *Id.* at 152.
[55] *Id.* at 153.

those allegations was adequate. Thus, for purposes of this paper, all allegations in the United States - those found to be false, substantiated, and unsubstantiated - will be included together since, whatever differing privacy interests may be asserted by teachers, those privacy interests depend arguably on the adequacy of the investigations.

Although issues concerning teacher privacy and disclosure of information are state specific,[56] the overarching issue regardless of current state law, is whether teachers *should have a protectable privacy interest at all* in complaints about their performance as a public employee. Whether information requested for disclosure should be denied as an invasion of privacy is the threshold issue in all jurisdictions, although courts do not reach the same conclusions.[57] Generally, courts have held that information regarding teacher sexual misconduct can be revealed as long as the teacher's name is redacted.[58] However, as suggested by the dissent opinion in *Bellevue*, redacting information about teacher identities whenever a student claim cannot be substantiated may only serve to send the message to the public that when "predatory teachers … go undetected, … children will continue to suffer at their hands."[59]

Bellevue also, among others, highlights two policy questions related to allegations of teacher sexual misconduct: (1) whether school officials or board members are the appropriate persons to investigate allegations of teacher sexual misconduct and to make decisions regarding the substantiated or unsubstantiated results of such investigations; and (2) whether sexual misconduct charges related to teacher performance of their public educational duties are (or should be) protected by privacy.

2.2.1 The investigatory role of school officials or school boards

An appellate brief filed on behalf of thirty of the teachers in this case began with a plea that pointed out that it was vital that the Supreme Court of Washington shielded the identity of teachers "against whom false allegations are made," but then the brief subtly expanded its

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[56] See *Stern v. Wheaton-Warrenville Community Unit School Dist*. 200, 894 N.E.2d 818 [237 Ed. Law Rep. 509](Ill. App. Ct. 2008), in holding that the details of a superintendent's employment contract were not exempt public records under state law, the court observed that "*the disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy*" (emphasis in original); *Anonymous v. Board of Educ. for Mexico Cent. School Dist*., 616 N.Y.S.2d 867 [94 Ed. Law Rep. 883] (N.Y. Sup. Ct. 1994), holding that a settlement agreement disposing of charges of misconduct against a teacher was subject to disclosure under the Freedom of Information Law.

[57] For a comprehensive discussion of cases discussing the balance between disclosure and invasion of privacy, see Andrea G. Nadel, *What Constitutes Personal Matters Exempt From Disclosure By Invasion Of Privacy Exemption Under State Freedom of Information Act[s]*, 26 A.L.R.4th 666 (2008).

[58] See for example, *Booth Newspapers, Inc. v. Kalamazoo School Dist.*, 450 N.W.2d 286 [58 Ed. Law Rep. 295] (Mich. Ct. App. 1989), awarding partial attorney fees to a newspaper that prevailed in securing disclosure of information about allegations of sexual misconduct even though the teacher's name could be redacted.

[59] *Bellevue*, 189 P.3d at 154 (Madsen, J., dissenting).

claim to read that no legal public interest existed in knowing the identity of teachers in cases of "no finding of misconduct and allegations remain unsubstantiated or false after an adequate investigation of those allegations."[60] Indeed, one of the core issues in this discussion is how the categorization following an investigation should affect disclosure of teacher identities.

In the three school districts involved in this case, a person in each was designated as personally responsible for scrutinizing any charges of teacher misconduct and "imposing appropriate discipline where allegations… [were] substantiated and issuing letter[s] of direction when allegations [were] not."[61] The advantage of such a letter, for both the school district and the employee, was that it did not amount to a finding of misconduct or that the employee had transgressed a District policy. Therefore its significance as "[an] evaluative tool [was]… [that] the employee… avoid[ed] [the] time-consuming grievance process"[62] that is normally associated with employee discipline.

Yet the school districts' position in *Bellevue* was that:

> [r]eleasing letters of direction would harm the public interest in efficient government administration by interfering with the employer's ability to give candid advice and direction to its employees and would . . . chill employer-employee communications . . . if all written communications between the employer and employee were subject to disclosure.[63]

The teachers' position in *Bellevue* was that there was no public interest in knowing the identity of teachers where "*an adequate or extensive investigation…* revealed no finding of misconduct [or] imposed [no] discipline."[64] However, the adequacy of an investigation and the recommendations of the investigator are two quite different matters and, to follow the reasoning of the teachers in *Bellevue*, the latter can be emphasized at the expense of the former. Thus, if school officials conducting an investigation choose to frame their evaluative comments as "*concerns* about [an employee's] handling of specific incidents at the schools… [or] shortcomings and performance criticisms [without] . . . discussion of specific instances of

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[60] Appellate Brief of Amicus Curiae Washington Education Association (Feb. 4, 2005), 2005 WL 5288867 at *1 (hereafter referred to as, *WEA Appellate Brief*).
[61] *Id.* at *3.
[62] *Id.*
[63] *Id.* at *4.
[64] *Id*. at *5 (emphasis added).

misconduct,"[65] the public, even though no consideration has been given to the adequacy of the investigation, should have no right to disclosure.[66]

The trial court in *Bellevue* had refused to defer to the school district's investigation and after "an *in camera* review of the records… the trial court [had] order[ed] disclosure o[f] the identity of [those] teacher[s]… [where] there [had] not [been] an adequate investigation,"[67] a position affirmed by the appeals court.[68] On appeal, the Supreme Court of Washington in *Bellevue* reversed and refused to make inadequate investigations the basis for unredacted disclosure of teacher identities,[69] reasoning that school districts could be sued under separate lawsuits for negligent retention or supervision[70] or breach of its supervisory duty to investigate allegations of sexual abuse,[71] or school districts could be subject to "significant penalties and attorney fees… if the [school district] fail[ed] to comply with the [PRA]." [72]

The dissent opinion in *Bellevue* had little confidence in allowing school officials to "control the scope and depth of its investigation,"[73] adopting what in essence was a "foxes guarding the henhouse" position that such self-investigation would serve to erode public trust and leave the public with the perception that "the school board is not responsive to the taxpayers, and the

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[65] *Brown v. Seattle Public Schools*, 860 P.2d 1059, 1063 [86 Ed. Law Rep. 475] (Wash. Ct. App. 1993) (emphasis in original), dealing with a request for evaluation records of a school principal under the prior PDA, not involving sexual misconduct but still involving the same public interest issue.

[66] *Bellevue*, 189 .3d at 158 (Madsen, J. dissenting): "the majority leaves school districts free to control whether an accused teacher's identity must be released by controlling the scope and depth of its investigation."

[67] *WEA Appellate Brief* at *15, 16 (emphasis in original). The trial court in *Bellevue* conducted an *in camera* review of all the records sought by *the Seattle Times* and on the basis of that review decided to disclose teachers' records where either there had been substantiated evidence of misconduct or an inadequate investigation. *Bellevue*, 189 P.3d at 143, n. 5.

[68] *Bellevue*, 189 P.3d at 143.

[69] *Id.* at 151: "the identities of teachers who are subjects of unsubstantiated complaints should not be disclosed, regardless of the quality of the investigation."

[70] See for example *Peck v. Siau*, 827 P.2d 1108 [73 Ed. Law Rep. 859] (Wash. Ct. App. 1992), holding that a school district could not be held liable to a high school student with whom the school librarian had sexual contact, on the theory of negligent supervision of the librarian, absent showing that the district knew, or in exercise of reasonable care should have known, that the librarian constituted aq risk of danger to the students. See generally, Robin Cheryl Miller, *Liability, Under State Law Claims, of Public and Private Schools and Institutions of Higher Learning for Teacher's, Other Employee's, or Student's Sexual Relationship with, or Sexual Harassment or Abuse of, Student*, 86 A.L.R.5th 1 (2001).

[71] See for example, *Christensen v. Royal Sch. Dist. No. 160*, 124 P.3d 283, 287 [204 Ed. Law Rep. 385] (Wash. 2005), rejecting a school's claim that a contributory defense should be permitted to an eighth grade student who had sexual contact with a teacher, reasoning that "children do not have a duty to protect themselves from sexual abuse by their teachers" and if the student's lies frustrated the school's investigation, that would relate to the breach of a school's duty to supervise its students).

[72] *Bellevue*, 189 P.3d at 151.

[73] *Id*. at 158 (Madsen, J., dissenting).

school board is hiding something."[74] In its appellate brief, the *Seattle Times* cited an unreferenced six-week nationwide study that found "at a minimum, hundreds of cases involving sexual abuse of students are unfolding publicly." The study concluded that school officials "have fallen short in their duty to keep students safe," resulting in multimillion-dollar jury verdicts for victims or in costly out-of-court settlements.[75]

Some courts have called into question the adequacy of internal investigations of teacher sexual misconduct, particularly where those investigations substitute for reporting the alleged misconduct to social services.[76] However, even if school districts forgo investigation of sexual misconduct complaints by referring all complaints to social welfare agencies as required under state child abuse statutes,[77] such referrals do not necessarily require disclosure of the teacher's identity (including teacher name, certificate/license number, and schools taught at)[78] if the investigation does not substantiate that sexual misconduct occurred, or if the result generates a "letter of direction" that allegedly is not based on a finding of sexual misconduct. In other words, if a social service agency investigation does not produce a substantiated finding of child abuse,[79] the public is likely to discover the names of teachers against whom

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[74] See Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don't*, 76 U. CIN. L. REV. 1281, 1331 (2008), applying the foxes and henhouse argument to school boards after *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The latter allows boards to retaliate and, thus, control teacher speech where that speech is part of a teacher's job).

[75] Appellate Brief of Seattle Times, 2004 WL 5252059 at *3-4 (Wash.) (*Seattle Times Appellate Brief*).

[76] See *Yates v. Mansfield Bd. of Educ*., 808 N.E.2d 861 (Ohio 2004), where a school principal conducted the internal investigation of a student's complaint of coach sexual harassment, determining that the student was lying, but the case was remanded in subsequent damages lawsuit for negligent supervision and retention as to whether the principal had a duty under the state's child abuse reporting statute to report the alleged harassment to social services under a "knew or reasonably suspected" standard).

[77] See http:// childwelfare.gov/systemwide/laws_policies/search/, the United States Department of Health and Human Services National Clearinghouse on Child Abuse and Neglect Information listings of each state's mandatory reporting statutes, what professions are required to report, and which states recognize an exception to mandatory reporting due to privileged communications; Danny R. Veilleux, *Validity, Construction, and Application of State Statute Requiring Doctor or Other Person To Report Child Abuse*, 73 A.L.R.4th 782 (2005).

[78] See *Seattle Times Appellate Brief* at *14.

[79] See, for example, West's Ann. Cal. Penal Code § 11165.12 defining the following results of a social services investigation:

(a) "Unfounded report" means a report that is determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect…

(b) "Substantiated report" means a report that is determined by the investigator who conducted the investigation to constitute child abuse or neglect, . . . based upon evidence that makes it more likely than not that child abuse or neglect, as defined, occurred.

(c) "Inconclusive report" means a report that is determined by the investigator who conducted the investigation not to be unfounded, but the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect . . . has occurred.

complaints of sexual misconduct have been made only if a student is willing to pursue a lengthy, costly, and cumbersome lawsuit for negligent hiring, supervision or retention.

More troublesome, though, is that even if parents can pursue these negligent claims, actions against state officials for inadequate investigations may be blocked by state immunity statutes.[80]

2.2.2 *Privacy rights of teachers*

From the teachers' perspective, the core issue is the extent to which teachers charged with sexual misconduct are government actors subject to public scrutiny or citizens entitled to have their identities shielded from such scrutiny as long as those allegations are not substantiated.[81] The teachers in *Bellevue* argued that the purpose of the State of Washington's PRA was "to monitor government, …not to scrutinize individual…, [and the effort to gain access to teacher records] relating to [other than] actual misconduct… constitute[d] scrutiny of individuals, not of government.[82]

For the plaintiff teachers in *Bellevue* the conflict focused on the extent to which teachers in public schools retain the privacy rights of a citizen while they perform their contracted responsibilities in classrooms and other school venues. While the answer to this question is framed to a large extent in a localized context by a state's statutory and common law, it also invokes in the larger context a public policy consideration of the quality of education, a topic discussed in the next section.

The Supreme Court of Washington majority rested its *Bellevue* decision on the privacy rights of teachers' "personal information" under the state's public records act.[83] Appellate briefs on behalf of the teachers claimed broadly that public disclosure of an accusation of sexual misconduct, especially if unsubstantiated or false, would be highly offensive under state law because such release would taint a professional teacher's career and shed doubts on the character of the accused teacher.[84] The argument contrary to the *Bellevue* majority is that complaints of teacher sexual misconduct have to be disclosed because "a teacher's conduct

[80] See for example, *B.T. v. Santa Fe Pub. Schs*., 506 F.Supp.2d 718 [225 Ed. Law Rep. 300] (D.N.M. 2007)

[81] See the Reply Brief of Appellant Bellevue John Doe #11 (May 28, 2004) at * 3 (hereafter referred to as, *Reply Brief of John Doe #11*).

[82] *Reply Brief of John Doe #11*at * 11.

[83] *Bellevue*, 189 P.3d at 145.

[84] See *WEA Appellate Brief* at *9; *Reply Brief of John Doe #11*at * 4.

with his or her students… on the job is not a private matter… [nor does it] relate to 'the intimate details of one's personal and private life."[85]

Courts have taken three approaches to disclosing education-related information regarding sexual misconduct: (1) some courts have rationalized disclosure of personal identities where such disclosure would not only "encourage… the public [to] evaluate the expenditure of public funds and the efficient and proper functioning of its institutions, but also to foster confidence in government through openness to the public;"[86] (2) however, even when ordering disclosure, other courts have taken the *Bellevue* majority approach that complaint or grievance records are discoverable only after individual identity material has been redacted;[87] and, (3) yet other courts have adopted the *Bellevue* trial court approach that information can be disclosed after an *in camera* hearing to determine if disclosure would constitute an invasion of privacy.[88]

Privacy in its broadest meaning is the protection of an individual's interest in making decisions free of government interference.[89] The United States Supreme Court has recognized that the Liberty Clause of the Fourteenth Amendment[90] protects "a right of personal privacy"[91] that includes "the interest in independence in making certain kinds of important decisions."[92] However, the right to make decisions without government interference is not without limits. For public school teachers, their expectation of privacy, one can argue, is diminished by the reality

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[85] Supplemental Brief of Respondent *Seattle Times* Company (Feb. 2, 2007) at * 2 (hereafter referred to as *Supp. Seattle Times Brief*). See *Spokane Police Guild v. Washington State Liquor Control Bd*., 769 P.2d 283 (Wash. 1989), holding that an investigative report regarding the investigation of liquor law violations on policy guild property had to be disclosed, because under state law it would not be highly offensive to a reasonable person and was not of legitimate concern to the public).

[86] See *Athens Observer, Inc. v Anderson*, 263 S.E.2d 128, 130 (Ga. 1980): upholding the disclosure of a consultant's evaluative report of the mathematics department with comments on the faculty, because the public policy was not only to encourage public access to such information in order that the public could evaluate the expenditure of public funds in the efficient and proper functioning of its institutions, but also to foster confidence in government through openness to the public).

[87] See *United Federation of Teachers v New York City Health & Hospitals Corp.* 428 N.Y.S.2d 823 (N.Y. Sup. Ct. 1980), upholding under the state Freedom of Information Act, the disclosure of grievances and decisions rendered on grievances filed by registered nurses represented by competing union, but only after all personal identifying details were redacted and deleted from the records.

[88] See *News & Observer Pub. Co. v. State ex rel. Starling,* 309 S.E.2d 731, 732 (N.C. Ct. App. 1983), upholding the trial courts disclosure of an investigative report of a school superintendent after balancing the interests of disclosure and confidentiality, reasoning that the public's interest prevailed "as to how the official is functioning who is entrusted with responsibility for the day-to-day operations of the Wake County Public Schools".

[89] See for example, *Littlejohn v. Rose*, 768 F.2d 765 [26 Ed. Law Rep. 955] (6th Cir. 1985), cert. denied, 475 U.S. 1045 (1985), where a non-tenured teacher's privacy right might have been violated if the school board's non-renewal decision was based on her divorce.

[90] U.S. Const. amend. XIV, § 1 ("[No] State shall... deprive any person of life, liberty, or property, without due process of law.").

[91] *Roe v. Wade*, 410 U.S. 113, 152 (1973).

[92] *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

that they have been employed to instruct students, most of whom are minors required under state compulsory attendance laws to attend school.

3. A perspective on the law in South Africa

There is a world-wide concern and growing awareness of the particular vulnerability of children and of the fact that child abuse, including sexual exploitation of children, is a serious and ever-escalating problem. In South Africa, unfortunately, the extent of this problem is truly appalling.

In accordance with this, according to the objectives of the Criminal Law Act,[93] all complainants of sexual offences are afforded the maximum and least traumatizing protection the law can provide which, among other things, include guarding against the possible secondary victimization of these complainants and their families.[94] While this would then serve as legislation aimed at safeguarding the constitutional rights of especially young complainants by considering their best interests to be of paramount importance,[95] the question arises as to how, for example, a teacher's right to privacy[96] is balanced against the public's interest in having schools free from, among other things, the sexual misconduct of publically paid teachers.[97]

Reciprocating the protection granted complainants of sexual offences, one would thus expect to see the persons accused of such transgressions afforded protection from false or unsubstantiated accusations, while at the same time taking note of the fact-finding process after a leaner has filed a complaint of sexual misconduct against a teacher.

3.1 The panoply of constitutional rights in South Africa

The fundamental rights are prefaced at the beginning of both the Constitution itself[98] and its Bill of Rights[99] with the three nucleus values of human dignity, equality and freedom. The former of these three, human dignity, which is expounded as everyone's "inherent dignity and

[93] Criminal Law Act, *supra* note 7, Chapter 1, s 2.
[94] *Id.* at s 2(d).
[95] SA Constitution, *supra* note 6, s 28(2).
[96] *Id.* at s 14; see also s 9 (right to equal protection and benefit of the law), s 10 (right to inherent dignity), s 12 (right to freedom and security) and s 33 (right to just administrative action).
[97] Employment of Educators Act 27, s 17(1)(b) & (c) which point out certain dismissal of educators who have been found guilty of acts of sexual assault on and/or sexual relationships with learners.
[98] SA Constitution, *supra* note 6, s 1(a): "The Republic of South Africa is [a] democratic state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms."
[99] *Id.* at s 7(1) which also describes the Bill of Rights as "a cornerstone of democracy."

the right to have [it] respected and protected,"[100] appears to be central[101] to a society founded on democracy.[102] At the same time, it is the only one of the three nucleus values which does not have a counterpart in the United States Constitution. While the wide-ranging exact grants of fundamental rights in the SA Constitution would seem to invite numerous legal challenges,[103] the number of cases which address concerns in education law to date has been fairly limited and the number of cases dealing with teachers' privacy rights even more so.

3.1.1 *A teacher's right to human dignity*[104]

In a disconcerting case, it took a female teacher of the public Orkney High School four years, six months and 15 days to be able to hold her head high after having been accused of the indecent assault of a 15-year-old schoolboy. The learner accused his teacher,[105] Van Niekerk, in 2003 of having fondled him, having played with his genitals and having had sex with him on a desk in the classroom. She was accordingly found guilty on two accounts of indecent assault.[106]

During the appeal case, the High Court[107] pointed out (1) that it was confronted with two mutually exclusive versions of the events[108] and that it had to adjudicate the reliability of the complainant and the appellant separately,[109] (2) that a Court had to acquit accused persons if any reasonable possibility existed that their testimony could be true,[110] and (3) that the

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[100] *Id*. at s 10.

[101] See *S v Makwanyane and Another* 1995 6 BCLR 665 (CC) at 722-723 where a case which challenged the administration of capital punishment and which ended in the court ruling it to be unconstitutional, the Constitutional Court remarked that "[t]he rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3 [of the Interim Constitution]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."

[102] SA Constitution, *supra* note 6, Preamble.

[103] See Mawdsley, R.D. and De Waal, Elda. 2008. Symbolism in education: a comparative legal analysis of symbolism, language and culture in the United States and South Africa. *De Jure*, 41(3): 561-579.

[104] SA Constitution, *supra* note 6, s 10: "Everyone has inherent dignity and… the right to have their dignity respected and protected."

[105] Hester van Niekerk, former Afrikaans teacher at Orkney High School.

[106] Sentence was handed down by the Magistrate of the Klerksdorp Regional Court in 2003.

[107] *Van Niekerk v Staat (Van Niekerk)* Case No. A215/2007, High Court, Transvaal, *supra* note 9.

[108] *Id*. at § 3 where the young complainant's testimony describes graphically how the teacher undressed herself and started playing with his genitals and her own before having sex with him. *See* also at § 6 where the appellant and one of her colleagues testify to the fact that the accused teacher was part of a transport club and that they left almost immediately after school that day.

[109] *Id*. at § 7. *See* also at § 15 where the High Court refers to the skin disease white markings on the appellant's body: the complainant's sketches of where these markings were on her body differed completely from those prepared by the appellant's medical doctor and gynecologist.

[110] *Id*. where the High Court points out the duty of the State to find accused persons not guilty if their versions cannot be proven to be false beyond a reasonable doubt, even if the State's evidence is not rejected.

complainant was a single witness[111] of a young age and that the case revolved around accusations of sexual misconduct.[112] The latter three factors traditionally call on a court to evaluate the factual position of such a case extremely carefully.[113]

Contrary to the original court proceedings that found the complainant to be a trustworthy and reliable witness based solely on the fact that the Magistrate thought that he fitted the psychic profile of a molested child,[114] the High Court stated that the available evidence of parental violence and threats[115] against him sounded a warning to be wary of his testimony.[116] At the same time, the Court referred to the possibility that the complainant never intended to accuse the teacher of sexual relations, but merely originally mentioned her touching him inappropriately to stay out of trouble.[117]

In reflecting on the fact-finding process of the Regional Court,[118] the High Court opined that the Magistrate's criticism of the appellant's trustworthiness simply because she had appointed a private investigator to help her with her defense and was not fully forthcoming in this regard, was unjustified.[119] Moreover, the High Court remarked that the Regional Court's critique on the appellant's testimony was mostly unjustified and thus did not reflect negatively on her trustworthiness,[120] indicating that the Court could not reject her version as not reasonably possibly true.[121] Finally the High Court found that there were a number of improbabilities in the

[111] *Id*. at § 8. *See* also *infra* note 144, where the Magistrate refers to approaching the testimony of a single witness with extreme caution so as to guard against an incorrect judgment of guilt.
[112] *Id*. at § 8. *See* also § 4 that contains the evidence of the complainant's lying to his parents about attending school and getting out of the car and running away when his mother tried to return him to school four days after the date of the alleged sexual misconduct. After a police search, he was found hiding in a trailer at his parent's house.
[113] *Id*.
[114] *Id*. at § 16.
[115] *Id*. at § 9 and 23 where the High Court refers to the mother' evidence concerning her own fights with the complainant and her husband's physical violence against him, as well as both parents' threats to send him to a school of safe-keeping. This evidence involuntarily led the High Court to believe that the parents were excessively aggressive and threatening towards the complainant over an extended period of time.
[116] *Id*. at § 24-25 that remind us of the possibility that victims of violence and threats would fabricate a story simply to protect themselves. *See* also § 22 where the High Court agrees with the appellant's defense as it questions the young boy's reliability and trustworthiness as a witness.
[117] *Id*. at § 25 and *see supra* note 107, § 4. *See* also § 11 that contains the evidence to the effect that he once the police had found him, he told his parents that his teacher had touched him and that he was scared.
[118] *See supra* note 105.
[119] *Van Niekerk*, *supra* note 9, at § 18 and 34.
[120] *Id*. at § 34-36.
[121] *Id*. at § 36.

complainant's testimony,[122] and that Van Niekerk's testimony deserved the benefit of the doubt.[123]

Van Niekerk's appeal against the guilty conviction[124] was granted, she was found not guilty and the sentence handed down by the court a quo was set aside.[125] Moreover, although Van Niekerk has since left education apparently due to medical reasons,[126] she refers openly to the humiliation and trauma which she suffered[127] before winning her appeal on two charges of indecent assault.

This High Court judgment is reminiscent of the fact that teachers at public schools are also entitled to having their innate dignity revered and looked after,[128] and that the investigation into the credibility of witness testimony needs a careful fact-finding process after a complaint of sexual misconduct has been filed, in order to offer protection from false or unsubstantiated accusations to the accused teacher.

3.1.2 *A teacher's right to equal protection and benefit of the law*[129]

In *State v Marais* (*Marais*)[130] a male teacher was accused of two accounts of indecent assault on a 19-year-old female learner. On the first charge of the teacher's approaching her and rubbing his genitals against her arm while she was writing a test,[131] the complainant's original statement in court was inconclusive as to which part of the teacher's body was involved in the alleged assault, since she reported not being able to remember clearly.[132] However, contrary

[122] *Id*. specifically at § 21 where the State relies on testimony that the complainant stayed away from school for two days due to the alleged incident before his parents forced him to tell them the truth, yet the mother's testimony indicates the period as being two weeks; at § 22, where the dates of the alleged indecent assault are mixed up by the complainant and his mother; at § 30, where it becomes clear that the appellant only had a few minutes to spare to commit the alleged crime; at § 32, where the High Court pointed out that several aspects brought by the State raised fundamental questions and others were seen to be highly improbable.
[123] *Id*. at § 37.
[124] In *Dodo* (*supra* note 10) at 404, the Constitutional Court pointed out that an offence "[consisted] of all [the] factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender."
[125] *Van Niekerk*, *supra* note 9, at § 1 and 37(2), setting aside the Klerksdorp Regional Court's sentence of three years' correctional supervision. The High Court handed down its verdict on 5 December 2008.
[126] Van der Walt, 2008, *I was stripped naked in court*, Beeld:4, Feb. 7.
[127] *Id*. The female educator, Van Niekerk, described the four years as an ordeal and of being literally stripped naked in court; see also SA Constitution, s 10 9fn.22), which recognizes human dignity both as a human attribute and a fundamental right.
[128] *Supra* note 100.
[129] *Id.* at s 9(1), part of the equality clause.
[130] Regional conducted at Kimberley, Case No. ASOC 122/2204.
[131] *Id*. at 2.
[132] *Id*. at 6.

to this testimony, during cross-examination led by her legal representative, she firmly recollected that the teacher had rubbed his genitals against her arm.[133]

When her female friend who sat in front of her in the class during the test gave evidence, new facts were mentioned concerning the first charge[134] and the court found her testimony not to be the truth.[135] However, the Court found the complainant's boyfriend to be the most credible witness of the three, based on the fact that (1) he suggested that the complainant speak to his mother, a teacher, about the incident,[136] and (2) he admitted to the court that he would not have handled the incidents as the complainant did.[137]

On the second charge of the teacher having touched her genitals,[138] the complainant's original statement in court contained testimony to the fact that he had touched her breasts over her jacket and proceeded to touch her genitals over her jeans.[139] Yet during cross-examination led by her legal representative, she indicated this as having occurred when he placed his hands inside her jacket.[140]

Turning to the matter at hand, the Regional Court first of all referred to the duty that the State has to prove the case beyond a *reasonable* doubt and not beyond *every inkling* of doubt.[141] In the second case, the Court stated that accused persons do not have the responsibility to prove their innocence themselves,[142] and in the last instance, the Court pointed out that clear verdicts of criminal cases relied on considering all probabilities and improbabilities.[143]

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[133] *Id*. at 6-7.
[134] *Id*. at 7, 10 and 11: the friend testified that when she turned around the first time, the teacher was rubbing his cheek against the complainant's cheek, and the second time she turned around, he was rubbing his leg against the complainant's leg.
[135] *Id*. at 10-11 and 15 where the Regional Court points out that the complainant would have testified to these facts if they had occurred and that the friend's testimony was held to be false.
[136] *Id*. at 8-9: the boyfriend's mother then contacted the investigating officer and informed the complainant's aunt about the matter.
[137] *Id*. at 14-15 where the boyfriend testified that he would not have expected the complainant to go to the classroom of a teacher who had molested her previously, since he would not have done so (*see infra* note 67).
[138] *Id*. at 2.
[139] *Id*. at 7-8.
[140] *Id*. at 8.
[141] *Id*. at 3 where the Regional Court refers to *Staat v Alex Carriers* 1998 (*Alex*) (3) SA 79 (T) 88 I – 89 A: the Provincial Court pointed out that the power the State had to exert was that of convincing the court beyond a reasonable doubt before it could let the wall of guilt tumble in on the accused person/s. the Regional Court also refers to *Staat v Tsele* 1998 (2) SASV 178 (A) 182 E where the Appeal Court reminded everyone of the duty the State has to prove guilt beyond a reasonable doubt and not beyond any inkling of doubt.
[142] *Id*., *Alex*, where the Provincial Court stated that it was not necessary for the accused person/s to push the wall of guilt over the side of the State.
[143] *Id*. at 4.

As was the case with *Van Niekerk* above,[144] the Regional Court pointed out the care that had to be taken with the complainant's testimony in this matter, since she was a single witness.[145] While the Court reminded everyone that it can pronounce a judgment of guilt based on the evidence of an only witness,[146] it also commented on having to search for guarantees of reliability when considering accepting the evidence of a single witness[147] and being confronted with two sets of facts in this case.[148]

Due to the many inconsistencies and improbabilities in the statements of the two state witnesses and the learner,[149] as well as questionable honesty on the side of the complaining learner,[150] the court decided that since it could not be proven beyond a reasonable doubt that the accused was guilty, he was found to be innocent.[151]

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[144] *Van Niekerk*, *supra* note 110.
[145] *Id*. at § 8 where the High Court remarked on taking caution with the testimony provided by an only witness.
[146] Criminal Procedure Act 51 of 1977, sec 208, heading: "Conviction may follow on evidence of single witness cases."
[147] *Id*. at § 2: "An accused may be convicted of any offence on the single witness of any competent witness." *See* also *supra* note 48 at 4.
[148] *Id*. at 4-5.
[149] *Id*. at 10 where (1) the Court refers to the complainant's being 19 years old and in Grade 12 as being inconsistent with her reaction of not knowing how to handle the incident and not wanting to report the matter at all, and (2) where the complainant gave two versions of which part of the teacher's body was involved in the alleged indecent assault (*supra* note 132 and 133); at 11 where the female friend testified to the teacher's rubbing the complainant's cheek and leg, while the complainant testified to his rubbing his genitals against her right arm; at 12 where the complaint's original statement that the teacher locked the classroom door proves to be inconsistent with her testimony in court where she testified under oath that the door was not locked; at 13-14 where the Court (1) points out the improbability of a 19-year old female learner returning to the same classroom where the teacher had molested her and being alone with him by choice, and (2) finds it strange that the complainant did not want her boyfriend to help her report the matter; at 14-15 where the Court refers to (1) the boyfriend's testimony as being more probable than the complaint's (*supra* note 137), and (2) the many improbabilities and inconsistencies in the complainant and the female friend's testimony proving their testimony not to contain the full truth.
[150] *Id*. at 9 where the Court questions that fact that the 19-year-old complainant (1) did not trust any of the other teachers to report the incidence, and (2) did not even tell her aunt whom she was living with; at 10 where the Court questions the complainant's honesty concerning her testimony concerning which part of the teacher's body rubbed against her; at 11 where the Court questions the honesty of the complainant concerning the width of the school desk and her slender build, making it impossible for the teacher to rub against her without her moving closer to the side of the desk; at 12 where the Court questions why the complainant did not move away from him when he approached her the second time during the test; at 12-13 where the Court questions her honesty since the incident allegedly occurred on 7 June 2004 and the court case took place on 5 July 2004, indicating that the Court did not expect such contradictions in her testimony; at 14-16 where the Court questions the complainant's honesty concerning (1) returning to the same classroom after the first incident to be alone with the same teacher, since her boyfriend testified that he would not have expected her to do this either, (2) the possibility that the complainant was looking for sympathy, and (3) in relation to her testimony in general.
[151] Ibid, at 15-17 of judgment.

This court judgment therefore serves as a reminder that also teachers are entitled to be presumed innocent until proven guilty,[152] and that the fact-finding process can be managed carefully even at Regional Court level.

3.1.3 *A teacher's right to freedom and security*[153]

In 2002 two schoolgirls charged the principal of Brooklyn Heights Primary School in Crossmoor, Chatsworth, with rape and indecent assault and he was thus immediately suspended from his position. Four years later, the suspended principal was acquitted of all charges.[154] He prepared documentation to enable the Department of Education to reinstate him towards the end of 2006 and started the process of suing the parents of the two girls who accused him for R5million [$625K].

The non-education case of *Fhetani*[155] concerned itself with looking at whether the Venda High Court had facts before it to "establish that the appellant was guilty of rape."[156] The appellant was 23 years old at the time of the original trial, completing Grade 12 at school,[157] and he was only 15 years old when the offence was committed.[158] He was arraigned in the Venda High Court on a charge of rape, or alternatively unlawful sexual intercourse with a girl younger than 16 years, and he pleaded guilty to the alternative charge.[159]

On appeal, the Supreme Court questioned the fact-finding process of the trial court,[160] pointing out that the latter had been "under the impression that there were facts" that proved that the appellant was guilty of rape and therefore "sentenced him accordingly".[161] However, the trial

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[152] SA Constitution, *supra* note 6, at s 35(3)(h) which states: "Every accused person has a right to a fair trial, which includes the right… to be presumed innocent;" *Dodo* (*supra* note 124) at 386 & 403 where the Constitutional Court pointed out the right to a fair trial; *Fhetani v The State* (*Fhetani*) [2007] SCA 113 (RSA) at § 6, in a case where the Supreme Court of Appeal upheld a man's appeal against the 15 years' imprisonment sentence which the Venda High Court handed down in 2002 (*infra* note 160).
[153] SA Constitution, *supra* note 6, s 12.
[154] Judges Hurt and Ndlovu, sitting in the Pietermaritzburg High Court in October 2006, found the story against the suspended principal to have been fabricated.
[155] *Fhetani*, *supra* note 152.
[156] *Id*. at § 3
[157] *Id*. at § 9.
[158] *Id*.
[159] *Id*. at § 2.
[160] Venda High Court, with Hetisani J presiding; the court convicted the appellant of rape and sentenced the appellant to 15 years' imprisonment in 2002.
[161] *Fhetani*, *supra* note 152, at § 3, where the Supreme Court of Appeal quotes the trial court in handing down judgment: "The court has to pass sentence which must be deterrent to others who may be thinking of meeting girls in the evening, producing a knife and pulling them to empty houses and rape them." *Id*. where the Supreme Court of Appeal quotes the trial court in passing judgment on the application for bail: ""Today's communities are very much up against people who have been convicted of offences like rape, and more particularly the rape against minor children. One cannot imagine the

court had erred since "no evidence was led at the trial"[162] and it had "impermissibly relied" solely on the synopsis of important facts to reach its findings.[163] Such a synopsis does not represent evidence or admitted facts, but merely serves the purpose of bringing the accused person up to date with the substantial facts on which the prosecution relies.[164]

In this case, the trial court's "misdirections"[165] and its incorrect approach in assessing the punishment,[166] led to it handing down "an excessively disproportionate sentence."[167]

At the time of the appeal, the appellant had in actual fact already served five years in prison, because although bail was granted, it was set at "an exorbitant amount of R10 000 [$1250]."[168] The reasons offered to the court for the delay in conducting the appeal, were seen to be "unsatisfactory" and "unacceptable."[169] Moreover, since the chief reason offered was linked to the availability and service provided by attorneys of the Legal Board[170], the Supreme Court of Appeal reminded everyone that making legal representation available to those who cannot pay for it themselves, was "discharging one of the most important constitutional obligations imposed on the state."[171]

In the final instance, this court pointed out that lawyers who were appointed by the Legal Board and who delivered sub-standard service, gave rise to violating accused persons' rights and not fulfilling their obligation to the person appropriately.[172] With reference to this case, the outcome of the questionable fact-finding process and the delays was that the appellant had

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horror with which the people out there will see you now walking around and enjoying Christmas when they know that you have perhaps spoiled the future of that poor child."

[162] *Id*. at § 4.

[163] *Id*.

[164] *Id*., referring to *S v Van Vuuren* 1983 (1) SA 12 (A) 21E in this regard.

[165] *Id*. at § 9.

[166] *Id*. at § 5, 8 and 11.

[167] *Id*. at § 5.

[168] *Id*. at § 10-12, where the Judge of Appeal pointed out that the fixing of bail at an amount that a poor person, in this case a student, could not pay, was "tantamount to a refusal" of granting someone bail at all. This resulted in his having served two additional years "without just cause and in violation of his right to freedom."

[169] *Id*. at § 14.

[170] This board provides legal practitioners to those who cannot afford it and the state takes care of the cost.

[171] *Fhetani*, *supra* note 152, at § 15; see also SA Constitution, *supra* note 6, at s 35(3)(g): "Every accused person has... the right… to have a legal practitioner assigned… by the state and at state expense."

[172] *Id*., *Fhetani*, at § 15.

served "unjustifiably excessive time in prison,"[173] depriving him of his right to freedom and security.[174]

These two matters point to the role of the fact-finding process in determining the credibility of witness testimony, so that teachers are protected from false or unsubstantiated accusations. and underline the guaranteed right of also teachers "not to be treated… in a… degrading way."[175]

3.1.4 *A teacher's right to just administrative action*[176]

In *Vilakazi v The State* (*Vilakazi*),[177] the Supreme Court of Appeal referred to the fact-finding process in prosecuting rape as presenting unusual intricacies that called for "the greatest care to be taken,"[178] especially where the complainant was young. According to the Court prosecutors needed to execute "thoughtful preparation, patient and sensitive presentation of… available evidence, and [pay] meticulous attention to detail.[179] At the same time, the judicial officers who tried these cases had to have a precise understanding and do a cautious analysis of all the evidence.[180]

the Supreme Court of Appeal expressed four specific concerns that are relevant to taking cognizance of accused persons' privacy rights: firstly, the complainant's evidence was presented with little care for comprehensiveness and truth,[181] resulting in the evidence being subjected to only slight analysis and the sentencing itself being handed down automatically.[182]

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[173] *Id*.
[174] *Id* .at § 1 and 16: the sentence of 15 years' imprisonment was set aside, a three years' term was handed down and so he was released from prison immediately, since he had already served five years there.
[175] SA Constitution, *supra* note 6, at s 12(1)(e); see also *Fhetani*, *supra* note 151, at § 6, where the Supreme Court of Appeal warned against "not only [violating] the accused person's right to a fair trial but also [the] right not to be punished in a cruel, inhuman or degrading manner."
[176] SA Constitution, *supra* note 6, at s 33(1), which points out that all citizens are entitled to administrative action which is "lawful, reasonable and procedurally fair." .
[177] (2008) SCA 87 (RSA), a case brought on appeal against the maximum sentence of 15 years' imprisonment that was handed down on a charge of rape.
[178] *Id*. at § 21.
[179] *Id*.
[180] *Id*.
[181] *Id*. at § 22 & 50.
[182] *Id*. at § 22, where Judge Nugent used the phrase: "[the] process of sentencing was perfunctory", indicating that sentencing occurred without paying due attention to all the relevant factors an evidence, merely as a matter of custom.

Secondly, simply discarding the evidence which accused persons present to prove them free from guilt, does not end the enquiry into a criminal case.[183]

Thirdly, the Supreme Court of Appeal referred to what it termed "ordinary logic of reasoning,"[184] indicating that a court would be vindicated for accepting uncontested evidence. However, when no evidence is presented, the burden which rests on the State accumulates to the advantage of the accused[185] since "the gap in the evidence could not be filled by an inference drawn against the accused. That is… a consequence of… inferential reasoning."[186]

Finally, the Supreme Court of Appeal voiced its concern at the fact that the appellant in this case had been imprisoned on the day of the alleged crime and had remained imprisoned ever since then, that he had not been brought to trial swiftly, and that this was "most unjust."[187]

In a different case,[188] the Supreme Court of Appeal pointed out that the 11-year-old complainant's version concerning the rape which she accused a 39-year-old teacher of committing was "entirely uncorroborated,"[189] that the court had no reason to reject the evidence given by the appellant and the defence witness, and that guilt had not been proven.[190]

The trail court had "committed a number of misdirections": while the Magistrate mentioned the variation between the complainant and appellant's testimony on whether sexual intercourse occurred and whether the incident had taken place on a school day or a Sunday, the Magistrate erred in failing to notice (1) the various versions concerning the sequence of events of the day in question;[191] (2) whether the witness for the defence had been at the appellant's

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[183] *Id*. at § 47: "Before convicting a court must... be satisfied not merely that the exculpatory evidence of the accused is not true, but also that every element of the offence has been established by evidence that is truthful and reliable beyond reasonable doubt."

[184] *Id*. at § 48, where this court referred to *R v Blom* 1939 AD 188 AT 202-3 for having termed this phrase.

[185] See also *R v M* 1946 AD 1023 at 1027; *S v Khubeka* 1982 (1) SA 534 (W) at 537E; *S v Ipeleng* 1993 (2) SACR 185 (T) at 189b-i, where the court pointed out that accused persons had a right to be found not guilty if their versions were not proved to be "false beyond reasonable doubt."

[186] *Vilakazi*, *supra* note 177, at § 48.

[187] *Id*. at § 60: he was taken into custody on 17 September 1999 and sentenced on 8 October 2001.

[188] *Nonyane v The State* (*Nonyane*) [2006] SCA 23 (RSA).

[189] *Id*. at § 6(2) where the Supreme Court of Appeal pointed out that the trial court had erred in finding credible evidence that made the complainant's version of alleged rape more likely than the appellant's version that denied it. Moreover, the Supreme Court referred to the absence of "medical evidence to show that was no longer a virgin."

[190] *Id*. at § 7 and 8.

[191] *Id*. at § 3 and 6(1) where the complainant's testimony relates passing the appellant's house on her way home from school, being first sent to buy him a cold drink and later sent to buy him four cigarettes, returning to the appellant's house to watch a video and being raped by him in the bedroom forcefully, without ever seeing the witness for the defence at all that day; at § 4 and 6(1) where the appellant's

house at all on that day;[192] and (3) that no responsibility rests on the appellant to advance reasons why State witnesses would falsely implicate them.[193]

In the last instance, the trial court declared the appellant as not making "a good impression"[194] as a witness, based on his being evasive in cross-examination and answering what had not been asked, yet "[n]either of the criticisms leveled by the magistrate at the appellant's evidence appear from the record, as the State's counsel on appeal was constrained to concede."[195] Further, the trial court ignored the evidence of the witness for the defence completely since he and the appellant were friends and the court found it strange that the witness remembered what the complainant was eating when he arrived at the house.[196] The Supreme Court of Appeal pointed out that the Magistrate "was not entitled to disregard" his testimony.

By the time the appeal was granted and the conviction and sentence were set aside, this appellant had already been in custody for four and a half years.[197]

These two Supreme Court of Appeal judgments serve as cues to everyone, including the courts, that teachers too have the fundamental right to procedurally just administrative action. At the same time the judgments reflect on accused persons' protection from false or unsubstantiated accusations through a precise fact-finding process.

3.1.4.1 *The importance of weighing the evidence*

The case of *S v Gentle*[198] refers to weighing evidence and reminds everyone in the first place that substantiating the facts "on the issues in dispute" would imply that other evidence

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version of the events is that it was a Sunday when he asked her to buy him a cold drink, that she came back and started watching a video at his place, that the witness for the defence arrived at his house and asked her to buy him the four cigarettes, after which she returned and finished watching the video. She left his house before he and the witness for the defence were picked up by someone else and he denied having sexual intercourse with her.

[192] *Id*. at § 6(1): the Supreme Court of Appeal questioned the complainant's honesty on being sent by the appellant twice to buy him items; the Court found it "probable" (1) that the witness for the defence was at the appellant's house on the day in question, and (2) that he had asked the complainant to buy him four cigarettes.

[193] *Id*. at § 6(5) where the trail court is reported to have found no reason why the complainant would have lied and to have seen this finding as supported by the appellant who could not suggest any such reason either. See *S v Ipeleng*, *supra* note 184, at 189b-i: "It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate them. The accused has no *onus* to provide any such explanation."

[194] *Nonyane*, *supra* note 188, at § 6 (3).

[195] *Id*. at § 6(3)(a) and (b).

[196] *Id*. at § 6(4).

[197] *Id*. at § 1.

reinforces the evidence offered by the complainant, causing the evidence presented by the accused to be regarded as less credible, less plausible. In the second place, if a complainant's evidence disagrees considerably from that of the State witnesses, for example, the Court needs to scrutinize the differences seriously[199] to establish whether the complainant's evidence is trustworthy or not.[200]

The Supreme Court of Appeal opined that the trial court had "committed a number of misdirections,"[201] yet chose to focus only on the following two specific ones:"[202] the Magistrate was at fault for having relied on the co-accused's evidence to discredit the appellant's version, since the former's testimony "was patently unsatisfactory;"[203] and although the Magistrate found the complainant's testimony reliable, the medical evidence proved the contrary.[204] The outcome of the first misdirection was that "inadmissible material"[205] was considered, leading to the trial court's wrongful discrediting the appellant's version of the events. The outcome of the second misdirection was that the trail court made an incorrect finding concerning the reliability of the complainant.[206]

Furthermore, the fact that the complainant's evidence agrees with that of other State witnesses "on issues not in dispute" does not provide substantiation. What is necessary is plausible, trustworthy proof which then renders the complainant's version more probable than that of the accused person.[207]

The Supreme Court of Appeal reached the conclusion that the "onus of proof"[208] of the appellant's guilt had not been satisfied, since the complainant's account of the issue in dispute was found to be incongruous and untrustworthy,[209] and her evidence was found to be "patently unsatisfactory, and… uncorroborated."[210]

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[198] 2005 (1) SACR 420 (SCA) at 422; a case brought on appeal against being convicted of rape and sentenced to 15 years' imprisonment.
[199] *Id*. at 430
[200] *Id*. at 421-422 and 431.
[201] *Id*. at 427.
[202] *Id*.
[203] *Id*.
[204] *Id*. where the medical practitioner is quoted as reporting that the complainant was inebriated and could not answer his questions, mixing up facts as he spoke to her.
[205] *Id.* at 428.
[206] *Id*.
[207] *Id*. at 422.
[208] *Id.* at 423, 428 and 434: whether the guilt of the appellant was proved beyond a reasonable doubt.
[209] *Id.* at 421-423 and 428-429; specifically at 423 and 430 where the Supreme Court of Appeal points out that witnesses had testified seeing the complainant "in [the] extremely compromising situation" of being inebriated, which would have led her family to ask for an explanation, with rape then being "an

In this regard the Supreme Court of Appeal set aside both the conviction and the sentence.

This case is reminiscent of the weighting effect which was pointed out above[211], and which occurs when balancing, for example, a teacher's right to privacy against other parties' interest in maintaining schools that are free from sexual offences. It also emphasizes the role of the fact-finding process in determining the credibility of witness testimony.

3.1.4.2 *The importance of being aware of inherent probabilities*

In *Monageng v The State* (*Monageng*)[212] a 37-year-old man lost his appeal against both his conviction of the rape of his 15-year-old cousin, and the sentence of 18 years' imprisonment. His version was not seen to be reasonably possibly true and therefore the court rejected it. Furthermore, the sentencing court did not hand down a "shocking, startling or disturbingly inappropriate" sentence.[213] At the same time, the Supreme Court of Appeal found the single child witness "satisfactory", her version "credible" and she had "no reason to falsely implicate the appellant."[214]

This court made it clear that examining available evidence asked for (1) balancing all the aspects which indicated the accused persons' guilt against all the aspects which pointed towards their innocence, while (2) accurately considering "inherent strengths and weaknesses, probabilities and improbabilities on both sides,"[215] and then (3) deciding if the scales were tipped so profoundly that any reasonable doubt concerning the accused person's guilt was eliminated.

Finally, the Supreme Court of Appeal pointed out that while it was acceptable for courts to test an accused person's evidence against the possibilities of it happening just like that, it was unacceptable for courts to establish blame "on a balance of probabilities."[216]

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obvious answer." The Court went on: "Those facts alone provided an evidentiary basis for the suggestion that the version of the complainant that she had been raped could be unreliable and such evidence accordingly had to be approached with caution."

[210] *Id*. at 422 and 434.

[211] *Supra* note10.

[212] (590/06) [2008] ZASCA 129.

[213] *Id.* at § 3.

[214] *Id*. at § 10.

[215] *Id*. at § 13; see also *S v Chabalala* 2003 (1) SACR 134 (SCA) at § 15.

[216] *Monageng* at § 14: What is needed is "[evidence] with such… high degree of probability that… the ordinary reasonable man, after mature consideration, comes to… the conclusion that… no reasonable doubt [exists] that…accused has committed the crime." See *R v Mambo* 1957 (4) SA 727 (A) at 738A & *S v Phallo* 1999 (2) SACR 558 (SCA) at § 10 & 11, where both courts pointed out that an accused person's evidence can only be rejected on the basis of probabilities if such evidence is found to be so improbable that "it cannot reasonably possibly be true."

With this judgment, everyone is reminded of the fact that single child witnesses can be trustworthy and that their reliable evidence can eliminate any reasonable doubt concerning an accused person's guilt.

3.1.4.3 *School Governing Body's involvement questioned*

With reference to the *Van Niekerk* case,[217] the learner's mother testified that she and her husband had been worried not only about their son's weak academic progress, but also the fact that he had been skipping school. Both of them went to see the principal on several occasions to voice their concern.[218]

However, the principal assured them that their son was participating in sports and that he was satisfied with the circumstances at school,[219] without consulting with any of the teachers or pulling any of his school records.

Based on the facts of the case not enough was done to investigate these parental concerns, since from the evidence presented in court, the principal who is an official member of the School Governing Body,[220] did not take up these two matters at all and did not report back to the parents. It is thus concluded that the School Governing Body did not investigate or react to the learner's skipping school for two weeks[221] or his regularly skipping school[222] which the mother testified to.

Everyone is reminded of the fact that the governance of schools is vested in their School Governing Bodies,[223] that they assume a position of dependence towards the school they serve[224] which clearly involves the execution of a function in which the public has a very material and direct interest, and that the principals report to them on matters regarding the professional management of the school.[225] It is therefore clear that School Governing Bodies would rely on the fact that principals run their schools effectively, including showing concern for the well-being of, among other people, their learners and educators.

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[217] *Van Niekerk*, *supra* note 107.
[218] *Id*. at § 9.
[219] *Id*. at § 10.
[220] South African Schools Act 84 of 1996 (SA Schools Act), at s 23(1)(b) and 24(1)(j).
[221] *Van Niekerk*, *supra* note 107, at § 21.
[222] *Id*. at § 23.
[223] SA Schools Act, *supra* note 220, at s 16(1).
[224] *Id*. at s 16(2), which clearly involves the execution of a function in which the public has a very material and direct interest.
[225] *Id*. at s 16A(2)(c).

While principals are charged with the professional management of their school,[226] they represent the Head of the Provincial Department as non-elected members of their School Governing Body[227] and also support the School Governing Body in managing learner disciplinary issues.[228]

This serves as an example of the vital role that school principals and their School Governing Bodies play in following up concerns voiced by parents and other interested parties. The principal as a representative of the employer, may be compelled to investigate alleged learner misconduct and initiate School Governing Body action. It remains an open question whether, if immediate attention had been paid to the parents' repeated visits on behalf of their son, this court case[229] could perhaps have been prevented.

4. The way forward: recommendations for South Africa

The South African and United States case law referred to in this paper reflected on several issues related to (1) the disclosure of teacher identities once learners and students have lodged complaints of sexual misconduct, (2) who should investigate sexual misconduct complaints, (3) and what privacy expectations teachers have during such investigations. Unquestionably, teachers have a great deal at stake when they are alleged to have been involved in sexual misconduct, especially considering that complainants can bring such charges anonymously and maliciously.

Offering a quick solution to the complicated balancing act between teachers' privacy rights and the public's interest in schools that are free from sexual offences is easier said than done. However, to protect South African teachers from the damage that unsubstantiated allegations of sexual misconduct could cause to their reputations, decisive steps must be taken and lessons need to be gleaned from foreign jurisprudence such as the United States.

In the United States, the first obvious solution would be to merely eliminate the statutory privacy protection that exists in most states. However, as is reflected in this paper, public policy has favoured protecting teachers from the damage that unsubstantiated allegations of sexual misconduct could cause to their reputations, even at the risk of inadequate school officials' investigations.

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[226] *Id*. at s 16(3).
[227] *Id*. at s 16A(1)(a).
[228] *Id*. at s 16A(2)(d).
[229] *Van Niekerk*, *supra* note 107.

Another possible resolution of the United States dilemma concerning the adequacy of school officials' investigation of sexual misconduct allegations might be to remove this function completely from the local level and to transfer it to the state department of education. All investigations would then become matters of professional responsibility and while parents would not necessarily have access to the names of all teachers charged with sexual misconduct, the identities of sanctioned teachers, including those who receive "letters of admonishment" or who enter into consent agreements would be public knowledge. At the very least, it would remove the wall of silence that *Bellevue* sanctions under its state privacy Act for all but the relatively few allegations of sexual misconduct where a finding of abuse has been made.

To remedy the South Africa situation, the following strong recommendations are made:

1. The fact-finding process after a complaint of sexual misconduct has been filed must be managed smartly.
2. The lower court judges must undergo some form of in-service training to make them aware of the basic fact-finding errors they frequently commit at this level.
3. Respecting and protecting the human dignity of all people, including teachers, must take up the central role that the SA Constitution affords it.
4. Accused teachers must remain innocent until reliable evidence proves their guilt beyond a reasonable doubt.
5. A teacher's right to privacy must be weighed with careful consideration against the public's interest in maintaining schools free from sexual offences.

Only when these vital issues have been addressed will South African teachers experience the advancement of their human rights and freedoms within the democratic state that was born 15 years ago.