UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG | WITS SCHOOL OF LAW

THE NEED FOR LEGAL REFORM TO EFFECTIVELY PROTECT THE RIGHTS OF QUEER-SEXUAL PUPILS IN SOUTH AFRICAN PUBLIC SCHOOLS.

by

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DECLARATION

I, _____ (1501645)_____,
declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

The South African community largely consist of marginalized and/or vulnerable groups, one of which is the queer-sexual community. This paper seeks to direct the attention of the social justice advocacy towards the children members of this groups. Within all the marginalized and vulnerable groups, children are the worst off. This study will focus on the children of the queer-sexual group, particularly, public school pupils. The 'queer-sexual' concept will be used to loosely mean children who are not heterosexual.

Through examples of legal reforms that have proven, to an important extent, effective in protecting queer-sexual adults; and comprehensive research on how basic education schooling environment fails to offer queer-sexual pupils' substantive equal opportunity to learn, this paper will prove the necessity of statutory intervention to achieve an effective protection of the right to equality for queer-sexual pupils in South African public schools.

While the Constitution of the Republic of South Africa (hereinafter referred to as the Constitution) guarantees equal rights for everyone, it is the statutory regulations that give effect to the constitutional broad provisions. To a certain and significant extent, the amended Intestate Succession Act and Civil Union Act have given effect to the protection of adult queer-sexual identities. However, the existing children-centred statutes do not make specific provision for the recognition and protection of queer-sexual children, the result of which is lack of a legal regime that protects queer-sexual identities of children.

While a society's voluntary recognition of the existence and subsequent acceptance or tolerance of queer-sexual children is ideal, this paper will only focus on the necessity of legal mechanisms to protect the rights of minorities.

Considering the efficacy of statutes such as the Employment Equity Act that fosters implementation of policies that vehemently prohibit discriminatory conduct and sexual harassment in the workplace, the obedience fostering character of the law makes the law integral to the protection of queer-sexual children.

TABLE OF CONTENTS

I. INTRODUCTION

The protection of sexual orientation from discrimination is codified in s9(3) of the Constitution.[1] The South African State is obligated to give effect to this provision, thus protecting sexual orientations of everyone within the SA jurisdiction.[2] Though the law has, over the years, evolved towards the protection and realization of sexual orientation diversity as envisaged by the Constitution, this evolution is devoid of the recognition and protection of queer-sexual children.[3]

For the purpose of this paper, the term queer-sexual means sexual identities that do not conform to heterosexuality binaries, such as the LGBTQI+ identities[4]

This paper will only focus on public schools which are dependent on the State, not private schools which can be accountable to churches and other private persons. Though it acknowledges the community's heteronormativity, it focuses on schools because piercing the family unit privacy is more complicated than controlling public schools that are already subject to full scrutiny by and directives from the State.

The application of the reform for which this paper advocates applies to all levels of basic education, preparatory school to matric, with the contents of the curriculum being suitably designed for different grades.

Finally, though an inspiration for voluntary society acceptance of queer-sexual learners would be a remarkable consequence, this paper prioritizes fostering a safe schooling environment for queer-sexual learners through the force of law.

With the clear parameters of the paper set out, it is further important to note that SA public schools are some of the spaces in which a significant number of queer-sexual children can be found and organized. These schools are predominantly located in townships and rural areas (hereinafter referred to as the community/communities) thus this essay will describe and explain schooling environment from the township and rural schools' point of view.[5] A detailed description and explanation of the communities is necessary to understand its essential relevance to the social justice problem this essay seeks to address.

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[1] The Constitution of the Republic, 1996.
[2] Ibid.
[3] Vasu Reddy 'Decriminalisation of homosexuality in post-apartheid South Africa: A brief legal case history review from sodomy to marriage' (2006) 20 *Agenda* 146-157.
[4] Whittington Karl 'QUEER' *Studies in Iconography* 33 (2012), 1.
[5] Department of Basic Education 'Education statistics in South African' 2018; Department of Basic Education Brief 'Rural schooling / multi-grade schools/ farms schools / non-viable schools; Inclusive Education implementation; Special Needs schools: Department briefing' 2015.

The communities are predominantly black, poor, illiterate and heteronormative (the presumption that being heterosexual is the only natural and right way in tandem with correlating behaviour thereof).[6] The dominant heteronormativity is a result of the longstanding heterosexual norms. These norms are often informed by rigid cultural and religious beliefs which create homophobic intolerance.[7] The heterosexual hegemony perpetuates the othering, ostracization and discrimination of the queer minority.

Communities are often conservative and rely on long standing customs as the yardstick of what ought to and what ought not to be, therefore it becomes the schools' responsibility to impart on its learners the knowledge that is not readily available to the rest of the community members.

The schools are supposed to ensure the learners' thought and cognitive abilities transcends the boxed community's perspectives.[8] Unfortunately, the teachers and school governing bodies predominantly consist of members of the same homophobic community thus the schools tend to reinforce the homophobic community's norms and/or those of Christian faith.[9]

At the core of heteronormativity is cisgenderism which infuses one's sexuality with one's gender.[10] It is important to make note of the cisgender element of heteronormativity because both learners and teachers fail to distinguish one from the other therefore discrimination against gender non-conforming pupils becomes intertwined with discrimination against sexuality.[11]

While this paper's main focus is the legal protection of sexual orientation, it would not sufficiently argue its case if it pretended that community schools could always tell gender and sexual orientation apart, hence I find it appropriate to use the term 'queer' to describe all the learners whose identities do not conform with heteronormativity.

Queer pupils who are not necessarily queer-sexual, such as queer-gender pupils, are almost always perceived to be queer-sexual thus ostracized based on the irrational conclusion

[6] Finn Reygan 'Sexual and gender diversity in schools: Belonging, in/exclusion and the African child' (2018) 36 *Perspectives in Education.*
[7] Thabo Msibi ''I'm used to it now': Experiences of homophobia among queer youth in South African township schools' (2012) 24 *Gender and Education* 526.
[8] Anthony Brown 'Queering teaching through intergroup dialogue' (2020) 9 *Educational Research for Social Change* at 19.
[9] Finn Reygan op cit note 5 at 97.
[10] Judith Butler *Gender Trouble: Feminism and the Subversion of Identity* (1999) 208.
[11] Thabo Msibi op cit note 6 at 523.

that their behaviour translates to queer-sexuality.[12] It is because of this general ill-informed conclusion in communities and schools that, for the purpose of this paper, queer-gender issues are a justified incidental factor in exposing and challenging the heterosexism hegemony in the community schools.

In communities where the schools are as heteronormative as the community, it is through the intervention of the law that queer-sexual children can find effective protection.

Unfortunately, the protection of queer-sexual children's rights has been one of the South African human rights discourse's blind spots. While there is evidence of progressive legal transformation with respect to sexual orientation, the current legal regime does not effectively protect the right of queer-sexual children.

In proving the need for legal reform to effectively protect queer-sexual pupils in South Africa, this paper will provide a comprehensive contextual background on the legal reform regarding homosexuality; demonstrate the centrality of the law in achieving the protection sought; expose the law's deficient protection of queer-sexual learners; recommend a legal solution to the proven deficiency; discuss possible obstacles to the recommendation; use the law to reconcile the solution and the obstacles; and provide a brief reflection on international law.

[12] Dennis A. Francis 'Homophobia and sexuality diversity in South African schools: A review' (2017) 14 *Journal of LGBT Youth* 359-379.

(II) BACKGROUND AND CONTEXT

(a) A description of the schooling environment from which the rights of queer-sexual learners must be protected.

A typical community school is a boys and girls co-ed school.[13] From the uniform to the bathroom allocations. There is nothing in between or beyond the girls' and boys' groupings of learners. With cisgender-centric heteronormativity, one is expected to be a heterosexual boy or girl whose behaviour is aligned with what is expected of a boy or a girl child.[14] Such an environment isolates, suffocates and suppresses the identities of the queer learners.[15]

Research shows that the heterosexist victimization of queer learners is not only in the form of verbal abuse but in that of physical abuse as well, including rape.[16] This abuse is usually perpetrated by other learners, but Msibi's research shows that teachers are also the source and preservers of queer-sexuality victimization.[17] Teachers either turn a blind eye to the victimization or actively participate.[18]

The situation is so repugnant that instead of preventing and punishing bullying in schools, teachers are the bullies too. From laughing at homophobic jokes intended to hurt one learner by another to teachers making the hurtful homophobic comments about a learner.[19]

The queer-sexual learner is alone against the whole school community including teachers and the school governing body (hereinafter referred to as the SGB). They have no one to whom they can report the discrimination because everyone believes that it is they who need punishing and correcting.[20] Research shows that even teachers perpetuate the notion that queer-sexuality is contagious.[21] The irrational belief that one can be infected with queer-sexuality creates a strong fear that breeds an abhorrence of the very presence of queer-sexuality in the schools.[22]

A few teachers interviewed by Msibi attested to not wanting to engage with anything that had to do with queer learners. They would rather have students sort it out among

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[13] Thabo Msibi op cit note 6.
[14] George W. Smith & Dorothy E. Smith 'The Ideology of "Fag": The School Experience of Gay Students,' (1998) 39 *The Sociological Quarterly* 309-335.
[15] Ibid.
[16] Willem J Van Vollenhoven and Christo J Els 'The human rights paradox of lesbian, gay, bisexual and transgender students in South African education' (2013) 46 *De Jure Law Journal* at 277.
[17] Thabo Msibi op cit note at 518.
[18] Ibid.
[19] Ibid.
[20] Willem J Van Vollenhoven and Christo J Els op cit note 16 at 271.
[21] Ibid; Thabo Msibi op cit note 6 at 524
[22] Ibid.

themselves. Sharing the community's sentiments about queer-sexuality, some teachers find the behaviour shown and identities claimed by the queer learners to be immoral.[23]

The generally accepted hostility that is met by the learners who are deemed to behave queer-sexual not only discourages learners to openly embrace their identities,[24] but implicitly permeates the violence and other crimes committed by other members of the school community against the minority queer-sexual learners.[25] Moreover, it deters those who are still confused about their sexual orientation from exploring their sexualities and results in others dropping out of school.[26] The schools' heteronormative culture results in unequal access to education as it creates an intolerable environment for one group of learners while it remains welcoming to the other.

(b) The development of the law on the protection of sexual orientation

It would be an injustice to the strides that the law has made to protect the right to sexual orientation if this background did not include a brief history of how far the South African law has come in ensuring effective protection for the queer-sexual minority.

Notwithstanding its limited scope that only covers homosexuality to the exclusion of other queer-sexual identities, what it has achieved for homosexuality is a significant and remarkable start.[27] The following paragraphs highlight some of the landmark cases that contributed to the development of the law with respect to legal protection of homosexuality.

In *National Coalition for Gays and Lesbian Equality v Minister of Justice* (hereinafter referred to as the National Coalition), the court held that the prohibition of sex between men criminalized homosexual relationships therefore infringing on the gay men's right to equality and dignity. This case resulted in the de-linking of homosexuality from the crime of sodomy.[28]

Du Toit and another v Minister for Welfare and Population Development case was a progressive shift from the *Van Rooyen v Van Rooyen* case. In *Van Rooyen* the court maintained the view that homosexuality was a behaviour that children had to be protected from.[29] Though the court respected the lesbian mother's sexuality autonomy, it held that the lesbian mother should not have her partner around or sleep together in the same room

[23] Ibid at 525.
[24] Ibid
[25] Ibid.
[26] Joseph Daniels et al 'Rural school experiences of South African gay and transgender youth' (2019) 16 *Journal of LGBT Youth* 355-379.
[27] Deevia Bhana 'Parental views of morality and sexuality and the implications for South African moral education' (2013) 42 *Journal of Moral Education* 114-128.
[28] *National Coalition for Gays and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).
[29] *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W).

whenever the children spent a night at her place as this would be a danger to expose her children to homosexuality.[30]

In *Du Toit*, the court decided that same-sex life partners should be allowed to jointly adopt children where they are deemed fit parents.[31] This meant that the courts no longer found same-sex relationship detrimental to children thus putting an end to the *Van Rooyen* view. This was another important step towards effective protection of homosexual relationships.

In *Gory v Kolver* the Constitutional Court (hereinafter referred to as the CC) held that conferring intestate succession rights only on heterosexual spouses by the Intestate Succession Act (ISA) amounted to unjustified discrimination against permanent same-sex life partners.[32] The court found such discrimination an infringement of the permanent same-sex life partners' rights to equality and dignity in terms of s9 of the Constitution.[33] It further held that 'a partner in a permanent same-sex life partnership' must be read in after the word spouse when reading s 1(1) of ISA.[34]

The *Minister of Home Affairs and Another v Fourie* case challenged the constitutionality of the peremptory provisions of s 30 of the Marriages Act.[35] Section 30(1) of the Act contemplated marriages between a male and a female only. This was a clear exclusion of queer-sexual people. The court found the impugned provision unconstitutional and argued that the courts must avoid applying a piecemeal relief approach when dealing with the prejudice, discrimination, and other injustices from which the homosexual community suffer.[36] It was this CC's decision that ultimately resulted in the legislature responding with the enactment of the Civil Union Act to address the lack of effective protection of homosexual relationships.[37]

The above discussed case law remarkably contributed to transforming the legal and, to a certain and limited extent, social treatment of homosexuality. They resulted in the enactment and influenced the amendment of Acts to give effective protection of sexual orientation.[38] However, all these developments were reactions to infringements that had been complained of, publicly advocated against, and litigated in courts.

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[30] Ibid para 331E-I.
[31] *Du Toit and another v Minister for Welfare and Population Development* 2003 (2) SA 198 (CC).
[32] *Gory v Kolver* 2007 (4) SA 97 (CC) para 66.
[33] Juanita Jamneck et al (ed) *The Law of Succession in South Africa* 2ed (2013) 28.
[34] *Gory* Supra note 18.
[35] *Minister of Home Affairs and Another v Fourie* 2006 (1) SA 524 (CC).
[36] Ibid para 116.
[37] Ibid paras 115-124.
[38] Vesu Reddy op cite note 3.

Notwithstanding these strides, these cases were not concerned with queer-sexual children. The State's and the judiciary's tendency to be reactive rather than proactive, where sexual orientation issues are concerned, has left the queer-sexual children out of the development of the human rights discourse.

In accordance with s 9(2) of the Constitution, the protection of queer-sexuality needs legislation for effective enforcement. However, the current relevant laws are adult orientated. For example, the Civil Union Act 17 of 2006 that legalises same-sex unions and ensures recognition of and respect for homosexual adult relationships.[39] The Act is most empowering to and protects adult homosexuals who are or want to be spouses.

The Employment equity Act prohibits the use of sexual orientation and gender as a determining factor in deciding whether an employment applicant is fit and qualified for a job.[40] However, this progressive act is relevant to and often associated with adult employees and/or job seekers but not queer-sexual children in basic education. While the law seems to be progressively moving forward the children seem to be left behind.

Against this background, the following sections will prove the need for legal reform in order to effectively protect the queer-sexual public-school learners' right to equality, especially in relation to education, and advance arguments for schools as the starting point to guarantee effective protection of queer-sexual children.

(III) THE CENTRALITY OF LAW IN ACHIEVING THE SOUGHT PROTECTION

This section will demonstrate the centrality of law in creating a safe and non-discriminatory environment for queer-sexual learners through discussing (a) s9 of the Constitution; (b) and the relationship between the law and societal obedience.

(a) S9 of the Constitution

In s9(1), the Constitution states that 'Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

[39] Act 17 of 2006.
[40] Employment Equity Act 55 of 1998.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

The constitutional right to equality is accompanied by a clear prohibition of discrimination against several grounds including sexual orientation. What is of more interest for the purpose of this paper is the provisions of s9(4) of the equality clause which uses peremptory language in its requirement for national legislation to be enacted to prevent the occurrence of the discrimination prohibited by s9 (3).

The Constitution places a responsibility on the State to realize the right to equality and provide effective protection for the persons belonging to the categories listed in s9(3) through statute. The Constitution does not provide the scope of the right or how the right is to be enforced. The subsidiary constitutional statute (hereinafter referred to as a statute or legislation) is, *inter alia*, a crucial source of law through which a constitutional provision is given effect and enforcement.[41]

Legislation defines, limits the scope, and provides enforcement measures of the right therefore giving the right its meaningful recognition, respect, and effective protection.[42] Moreover, a statute has the flexibility to extend the scope of the constitutional protection to which it is intended to give effect so long as the extension does not result in constitutional inconsistencies. [43]

Everyone is not readily accepted by the society, everyone is not the same, and everyone does not belong in all the discrimination grounds categories as listed in s 9(3) of the Constitution and some minorities exist within other minority groups.[44] Legislations that give customized effect for the different groups is essential to ensure that a category of persons that is not readily accepted by the society is effectively protected from those who fall outside that category. A statute is an indispensable source of law in the fulfilment of the Constitution's

[41] L du Plessis 'The status and role of legislation in South Africa as a constitutional democracy: Some exploratory observation' (2011) 4 *PER/PELJ* 96.
[42] Ibid.
[43] Ibid at 97.
[44] Sumit Bisarya 'Protecting ethnic minorities within minorities' 2020, *International Institute for Democratic Electoral Assistance* 2.

objectives such as 'the achievement of equality and advancement of the human rights and freedoms.'[45]

It is the objective of this section that queer-sexual learners, as a minority group within other minority and/or marginalized groups, need effective and customized legal provisions to unequivocally ensure their legal protection.

(b) Relationship between the law and societal obedience

The law determines actions people ought and ought not to perform.[46] Though there are many reasons why people obey the law, it is predominantly the general acceptance of the legitimacy of the legal system that fosters obedience.[47] People tend to act against their self-interests and obey the law against their moral values because not doing so would be against the legitimate law.[48] Research shows that people believe that they should obey the law not because they subjectively believe it to be right but because it is the legitimate law.[49]

Consequences of disobedience can also compel obedience.[50] Formal crime control policing that punishes imposes punitive measures for criminal conduct may be a strong motivation for compliance.[51] Formal sanctions have proven effective deterrents of negative behaviour in achieving social control.[52]

People may simply commit to being law abiding citizens for social coherence or another reason.[53] The point is, when it is clear and known, law is likely to compel its subject to obey whether the subjects like the law or not. The laws that have punitive consequences are likely to foster obedience from the majority of its subjects as it will be adhered to for legitimacy; as a result of commitment to abide by the law; or because disobedience is not worth the punishment.

Fortunately, the South African Constitution is generally accepted as the legitimate supreme source of law and its CC as its legitimate apex agent therefore constitutional subsidiary legislation is likely to be obeyed regardless of the subjective morals and thoughts of its subjects. Otherwise, punitive sanctions will motivate the obedience.

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[45] L du Plessis op cit note 28 at 92-99.
[46] Michael Sevel 'Obeying the law' (2018) 24 *Legal Theory* 1911-215.
[47] Tom R. Tyler 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 *Annual Review of Psychology* 375-400.
[48] Ibid at 376-377.
[49] Jonathan Jackson et al 'Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions (2012) 52 *British Journal of Criminology* 1051-1071.
[50] Ibid at 1051.
[51] Ibid.
[52] Ibid.
[53] Ibid at 1052.

This relationship between the law and obedience makes the law essential for the protection of the queer-sexual children minority. The protection of a group of children that is easily vulnerable to all kinds of oppressions should not be left to broad constitutional provisions that do not provide recourse and consequences for failure of recognition. It also cannot be left to the heteronormative citizens to find and legitimize the inferred inclusion of queer-sexual children in s9 of the Constitution nor can it be left to the same oppressive group to commit to abiding by that inference.

This paper argues for the kind of laws that will foster development and implementation of policies that will enforce the recognition of; respect for; and protection of queer-sexual pupils' equality right by means of legally forced tolerance if needs be. The first step to achieving this objective is to outline the failures of the current laws in the following section.

(IV) FAILURE TO ADVANCE THE PROTECTION OF QUEER-SEXUAL LEARNERS.

Queer-sexual children have been the country's human rights discourse blind spot with respect to gender and sexual orientation identities. The progress the country has seen has been through adult victims challenging the constitutionality of legal heteronormativity that criminalized and/or did not recognize their queer-sexual relationships. They invoked their right to equality in relation to sexual orientation to foster the construction and amendments of mechanisms that would give effect to the right.

Unfortunately, the current legislative mechanisms the queer-sexual adults have achieved for the queer minority is not always relevant to the children's needs in the schooling environment. Queer-sexual pupils need protection from oppression that may be caused and perpetuated by, *inter alia*, their teachers, school management; fellow pupils; and the curriculum.[54]

They need a curriculum that does not alienate them, one that helps them understand the developments of their sexual interests, how to safely navigate their sexual orientation identities and one that encourages acceptance and inclusion of queer-sexuality in the school's culture and traditions.[55]

[54] Dennis A. Francis (2017) Op cit note 12.
[55] Finn Reygan Op cit note 5.

Statistics show a prevalent culture of homophobic bullying that goes unpunished in schools. In 2016 the United Nations Educational, Scientific and Cultural Organization (UNESCO) reported that 61.2% of the homophobic discrimination and bullying experienced by queer-sexual learners, globally, occurs in schools. South Africa is one of the States that were a part of this 2016 study.[56]

Though the study noted the difficulty in finding statistics reports on homophobia in African schools, it did reference a South African study conducted in the province of KwaZulu Natal in 2011.[57] The 2011 study showed that queer-sexual learners' experienced high levels of all kinds of violence that occur in schools. According to this study 63% of female and 76% of male queer-sexual learners reported being victims of homophobic verbal; physical and sexual abuse.[58] Though they report the violence to be predominantly perpetrated by other learners, they also reported teachers and principals to have been perpetrators too.[59]

This section aims to demonstrate that the law has (a) neglected to expressly include the right to sexual orientation in the two most relevant statutes for the protection of school pupils, (b) and has permeated heteronormative curriculum.

(a) Lack of express protection for queer-sexual pupils in relevant statutes

This subsection provides (i) an overview of PEPUDA in relation to the focus of this paper; an analysis of (ii) the Children's Act and (iii) the South African School's Act failure to effectively protect queer-sexual children. The main focus will be on the two latter statutes as they are specifically relevant to children and learners.

(i) PEPUDA

The State did enact the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter referred to as PEPUDA). PEPUDA gives effect to the right to equality by promoting equality and eliminating unfair discrimination. Though s1 of PEPUDA mentions 'sexual orientation, it mentions it in relation to harassment and does not give substantive prohibition of unfair discrimination or promotion of equality in relation to sexual orientation as a stand-alone important concern.[60] It also provides generic protections which overlooks the need for explicit expression of the protection of specific minority or marginalized groups such as queer-sexual children. It's generic provisions, as far as this paper is concerned, makes PEPUDA simply a part of the current

[56] UNESCO 'Out in the open: Education sector response to violence based on sexual orientation and gender expression/identity' 2016 *UNESCO* 35.
[57] Ibid at 39.
[58] Ibid.
[59] Ibid.
[60] Act 4 of 2000

legal regime provisions which neglects the needs of minorities within minorities and does not offer queer-sexual learners any effective protections.

(ii) The Children's Act 38 of 2005

The Children's Act 38 of 2005 (hereinafter referred to as the Act) is the primary legislation that gives effect to s28 of the Constitution. It is meant to meaningfully protect and enforce children's rights and remedy violations thereof.[61] However, children are not only entitled to the s28 of the Constitution rights but to all the other rights that the Constitution provides to everyone subject to the limitation clause.[62] The legislature, in its construction of the legislation had the discretion to extend the scope of the Act to give effect to more rights concerning the children that are not listed in s28.[63]

The Act is relevant to this paper as the subjects of the research are children to which the full protection of the Act applies and is a statute with which the South African Schools Act 84 of 1996 (hereinafter referred to as SASA) should be consistent. This legislation is silent about queer children. It ignores the intentional and necessary classifications as enumerated in s 9(3) of the Constitution and treats children as though they have the same struggles, vulnerabilities and needs.

Section 6(2) (d) of the Act lists the general grounds under which children may not be discriminated. It expressly lists only health status and disability though the rest of the language in the clause suggests the list is not exhaustive.[64] S11 of the legislation further details the scope of the protection of children with disabilities and chronic illnesses.[65] In s11 (1), of the Act states: "In any matter concerning a child with a disability due consideration must be given to-

(b) Making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have;

(c) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and

(d) providing the child and the child's care-giver with the necessary support and services."

[61] L du Plessis Op cit note 29.
[62] JA Robinson 'Children's rights in the South African Constitution' (2003) 6 *PER/PELJ* 21-79.
[63] Op cit note 29.
[64] Act 38 of 2005.
[65] Ibid.

Section 11 (2) consists of the same provisions as S11(1) but in relation to "any matter concerning a child with chronic illness."

These sections will be the guideline to the proposed reform in the fourth section of this paper titled 'the proposed reform'.

The absence of an expressed recognition of the protection of children's sexual orientation in the legislation is the Act's to effectively recognise; protect; and meaningfully remedy the violations of the queer-sexual child's right to equal sexuality autonomy, thus the legislation fails to give adequate effect to s9 of the Constitution.

Though s13 provides for the right to access to healthcare information related to, *inter alia,* sexuality and reproduction, the general language of the legislation does not give the impression that the word 'sexuality' includes queer-sexuality.[66]

In its preamble, the Act uses the pronouns 'his and her' which are generally heteronormative identities associated with cisgenderism. Without any mention of queer-sexuality in the contents of the statute the queer-sexual children's identities disappear in the generic ignorant assumption that all children are cisgender heterosexual human beings.

The protection of sexual orientation is neither expressly listed as every child's right nor is it expressly listed as ground on which discriminatory conduct is prohibited. For the purpose of the focus minority group of this paper, I submit that the generalization of children in the Act is an injustice against the existence of queer-sexual children and the Act must be amended accordingly.

The following section will deal with children in the school environment. Dealing with the Act that concerns children in general before zooming into the statute that specifically deals with public school pupils is essential as it is the foundation of how children should be treated and protected wherever they are. The SASA provisions, because they regulate an environment that is children-centred, must be in line with the provisions of the Children's Act.

(iii) SASA

SASA is the primary statute to give effect to the right to basic education. All policies adopted by schools must be in line with SASA. It should be the first point of binding reference on the appropriate organisation, governance, and protection of learners' rights.

[66] Ibid.

Schools often consists of community members with different religious; cultural; and conscience beliefs and backgrounds that inform their notions of what is and is not an acceptable way of life. It is because of this diversity of the members of the school's backgrounds, norms, and values that the schools have to be intentional and proactive in creating an environment that equally accommodates all the differences for a quality and equal education.

The learners already come from heteronormative communities therefore need not be told or taught that they have rights to be cisgender heterosexual beings. It is the queer-sexual learners whose sexual orientation, acceptance and equal treatment have to be taught and enforced.

It is in the interest of the queer-sexual minority that often finds itself subsumed in heteronormativity that the SASA must impose an expressed positive duty on the schools to protect the diversity of the learners' sexuality identities without any room for teachers or the governing body to exercise discretion whether or not to proactively and expressly protect queer-sexual learners.[67] The rest of this section will (a) outline the general gaps in the content of SASA and (b) address the dominance of heteronormative curriculum.

(a) General gaps in the content of SASA

Similar to the Children's Act, the SASA does not expressly protect the learner's sexual orientation. SASA does not even attempt to progressively transform the education system to appreciate the diversity of sexuality identities in order to ensure protection of queer-sexual learners.

In its preamble, the legislation commits to the combat of unfair discrimination and intolerance.[68] It is only through this commitment of the preamble that a protection for queer-sexual pupils may be inferred while other systematic injustices such as sexism and racism are expressly listed as those that SASA aims to eradicate alongside the mentioned advancement of diverse culture and languages.

Section 6B of the statute clearly prohibits unfair discrimination with respect to the languages taught in a school. In s7, the statute provides for the learner's freedom of conscience and religion in public school. These two sections of the legislation are

[67] Clive Baldwin, Chris chapman and Zoe Gray 'Minority rights: Key to conflict prevention' 2007 *Minority Rights Group International Report*.
[68] Act 84 of 1996.

the only expressed codification of the protection of the learner's rights to identity. The rest of the provisions pertain to SGB powers and general management of schools including appropriate discipline of pupils.

The development of the learners' individual identities is a very important part of the learner's learning experience.[69] Schools are the system, in tandem with the family unit, that moulds and informs identity development of learners.[70] It is very disheartening that the very statute that aims to redress past injustices of past educational provision through a progressively high-quality education; building a strong foundation for the development thereof; and uphold the rights of all learners[71] only expresses its commitments to the development and protection of the individual learner within just ten lines of approximately fifty-six pages of legislative content.[72]

Section 7 makes no expressed imperative protection of sexual orientation though it does for religion. It expressly provides for the protection of the right that is often relied upon to justify the marginalization; ostracization; discrimination and violation of queer-sexuality.[73]

It is therefore my view that if the legislation giving effect to the right to education demonstrates a special interest in the protection of religion, it should equally demonstrate a special interest in the right that is often infringed upon by irrationally placing a higher value on religion to justify unfair discrimination against queer-sexual identities.

It is an injustice that the SASA leaves it up to heteronormative schools to infer the inclusion of queer-sexuality in the combat of 'all other forms of unfair discrimination' instead of being the primary instrument that fosters such inclusion.

(b) Heteronormative curriculum

The school subject that is most relevant to sexuality diversity and accessible to all schools is Life Orientation.[74] This is the subject that ought to primarily advance the development of individual self of learners and encourage self-determination.[75] It is the subject through which schools can effectively dismantle heteronormative

[69]Dennis A. Fancis op cit note 12 at 359-360.
[70] Hanoch Flum and Avi Kaplan 'Identity formation in educational settings: A contextualized view of theory and research in practice' (2012) 37 *Contemporary Educational Psychology* 240-245.
[71] The Preamble of Act 84 of 1996.
[72] S6B and 7 of Act 84 of 1996 as Amended by Act 15 of 2011.
[73] Deevia Bhana (2013) op cit note 30 at 119-120.
[74] Marl Wilmot and Devika Naidoo 'Keeping things straight": the representation of sexualities in life orientation textbooks' (2014) 14 *Sex Education* at 325.
[75] Ibid.

indoctrination and foster healthy tolerance; meaningful inclusion and protection of queer-sexual learners.[76]

Research shows that the life orientation syllabus is in and of itself heteronormative.[77] The textbooks contents preserve the invisibility of queer-sexual learners.[78] Life Orientation lessons often lack information about queer-sexual youth puberty; sexual activities; sexual health; and contraceptives.[79]

The taught content and classroom discussions are heteronormative and even when a learner asks about queer-sexuality, teachers give answers based on their personal heteronormative views or just avoid such questions.[80] Teachers already assume that all learners are heterosexual thus queer-sexual content is not of any importance, in fact, it would just confuse the learners.[81]

Another important reason teachers' reluctancy to engage in queer-sexuality education is that they are not well informed about the subject.[82] They have had no education or training on it.[83] They are not well equipped to deal with discussions and questions on the subject, so they just avoid it altogether.[84]

According to research, a few teachers who are not against progressively queer-sexual inclusive education curriculum have expressed their worry of going off the set assessment standards for Life Orientation curriculum.[85] The Department of Basic Education's (hereinafter referred to as the Department) policies do not provide for or require lesson plans and discussions focused on queer-sexual identities.[86] There is also fear of backlash from the parents especially because they form a significant part of the SGBs.[87]

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[76] Reygan (2018); Msibi (2012); Francis (2017) and Bhana (2013).
[77] Ibid.
[78] Marl Wilmot and Devika Naidoo op cit note 49, 323–337.
[79] Emmanuel Mayeza and Louise Vincent 'Learners' perspectives on Life Orientation sexuality education in South Africa' (2019) 19 *Sex Education* 472-485.
[80] Dennis A. Francis 'Teacher positioning on the teaching of sexual diversity in South African schools. Culture, Health & Sexuality' (2012) 14 *International Journal for Research, Intervention and Care* at 598.
[81] Dennis A. Francis (2017) op cite note 12 at 371.
[82] J Lees 'Sexual diversity and the role of educators: Reflections on a South African teacher education module' (2017) 31 *South African Journal of Higher Education* 249-266.
[83] Finn Reygan 'LGBTI-affirming educational practice: developing anti-homophobic bullying materials' (2013) 12 *Journal of Educational Studies* at 231.
[84] Ibid.
[85] Dennis A. Francis (2017) op cite note 12 at 369.
[86]Deevia Bhana 'Understanding and addressing homophobia in schools: a view from teachers' (2012) 32 *South African Journal of Education* at 310.
[87] Ibid at 315.

In a study conducted in Gauteng, principals proved to be ignorant on queer-sexual learners' issues. One claimed that there were no queer-sexual learners in their school because none of the learners looked or behaved gay or lesbian.[88] The general view was that schools were not ready to openly deal with queer-sexuality. [89]

The principal represents the head of the Department in their SGB.[90] The principal's views and directives as the member of the SGB are by representation the views and directives of the head of department of education.

With representatives of the head of the Department sharing a view that the schools are not ready for queer-sexual learners, there is little hope that the SGBs can easily decide to champion or accept the transformation of the schools into inclusive non-heteronormative environments.

I therefore submit that the current contents of constitutional statutes that have been enacted to protect the queer-sexual learner who is also a child are inadequate and requires rigorous legal provisions that will ensure the recognition of the existence of queer-sexual children who are in the worst-off position than the legally recognized queer-sexual adults.

(V) PROPOSED REFORM

Protection of minority groups should not be inferred or reasonably deduced from indirect contents. Their recognition often depends on expressed advocacy and demand for their recognition and protection.[91] The easy assumption, inference and reasonable deduction is that the omnipresent majority group is always protected by any legally binding human rights provision.

This was evident in the *Gory v Kolver* case where the codified protection of a spouse was readily applicable to heterosexual spouses and was only recognized to apply to homosexual permanent life partners too after a homosexual partner challenged the scope of the protection in court.[92]

There should be no space for an exercise of discretion by teachers and/or the governing body on whether to include and enforce protection of queer-sexuality.

In CC judgement in the *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* case, Khampepe J

[88] Dennis A. Francis (2017) op cite note 12 at 371.
[89] Ibid.
[90] S16A of Act 84 of 1996.
[91] Clive Baldwin, Chris chapman and Zoe Gray Op cit note 55.
[92] Supra note 19.

remarkably stated: "Indeed, this court has recognized that children merit special protection through legislation that safe guards and enforces their rights and liberties."[93] Honorable Khampepe J's remarks necessitate the existence of legislation that is indubitably in place to safe guard and enforce the rights and freedoms of queer-sexual children.

This section discusses some of the measures that need to be taken in rectifying the law's ignorance towards the need for effective protection of queer-sexual learners. Amendments to the (a) Children's Act; and (b)SASA to expressly include effective protection of the queer-sexual minority learners can be the first legal steps towards the ultimately desired transformation of the legal system and the conservative society.

(a) Amendments to the Children's Act.

The school communities understand learners' rights from the children's rights point of view.[94] It is only proper that the primary legislation giving effect to constitutional children's rights be transformed to advance the bottom line for which this paper advocates, and for the SASA provisions to draw from the Children's Act.

The Act must be amended explicitly include the protection of children's sexual orientation. Explicit and decisive legal consequences for a conduct or omission thereof by a natural and/or juristic person that undermines this protection must be effectively deterrent of such conduct or omission thereof.[95]

Among other possible amendments to effect this protection, the definition of 'care' in s1 of the Act should have the following edition:

> (c) protecting the child from…, discrimination [on grounds as set out in s9(3) of the Constitution including sexual orientation], …
>
> (e) guiding, directing and securing the child's education and upbringing, including religious, cultural [and sexuality]…;

Section 6 (2) should be amended as follows:

> (d) protect the child from unfair discrimination on any ground, including … [sexual orientation] of the child...;

[93] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC), para 1.
[94] Lucia Munongi and Jace Pillay 'The inclusion of children's rights and responsibilities in the South African school curriculum' (2018*)* 2 *Improving Schools* 48-62.
[95] Clive Baldwin, Chris chapman and Zoe Gray Op cit note 66 at 25.

Add an eighth paragraph [(g) recognize the child's sexual orientation and gender and create a safe environment that enables the child to safely embrace their sexual orientation identities.]

Section 7 (1) should be amended as follows: 'Whenever a provision of this Act requires the best interest of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

(g) (iii) [sexual orientation;]

(iv) background; and…

The title of s11 should read 'Children with disability or chronic illness or [queer-sexual children]' and include a third subsection that gives the same provisions and as subsections 1 and 2, but in relation to 'any matter that concerns a queer-sexual child'.

S13 should be amended to read as follows: (1) 'Every child has a right to-

(a) have access to information on…, [in relation to all sexual orientations];…

and s13(2) to read as follows: 'Information provided to children in terms of this subsection should…giving due consideration to the needs of disabled children [and queer-sexual children]'.

The explicit codification and clear mechanism to enforce the right eliminates doubt and deniability of the legitimacy of queer-sexual children's existence. It forces the communities to deal with queer-sexual children's issues because the law requires that natural and juristic persons recognise; respect; and protect the rights of queer-sexual children as they do for heterosexual children.

(b) SASA amendment

SASA should explicitly codify the protection of leaners' sexual orientation. It must unequivocally demand adherence to the protection from all members of the school community by imposing legal consequences for the schools and all levels of the Department of Education's failure to ensure this protection.

It must place a legal obligation on the national Department to ensure a curriculum that is accordingly transformed. The Department must frequently monitor their schools' strict adherence to a curriculum that is inclusive of quality queer-sexual education.

Additionally, the transformation of curriculum is essential to enabling the queer-sexual learners to hold their abusers accountable. The curriculum needs to inform the leaners about the existence of such laws, the procedures and channels through which

learners can hold perpetrators accountable for unjust anti queer-sexuality conducts committed against them.

The statute must impose clear and effective deterrent legal consequences for failure of reasonable fulfilment of these obligations. This way, everyone is forced to at least tolerate queer-sexual learners without expressed reservations or actions on their internalized reservations.[96]

Schools are meant to develop and transform the communities through the knowledge they impart on the learners.[97] They ought to help enlighten the communities about social issues that the communities are not readily open to recognise and discuss[98] therefore discussions about sexuality and the rights of queer-sexual people should be a compulsory part of the basic education curriculum.

Teachers are the primary instruments with which substantive knowledge is imparted to learners. They are presumed, by the pupils, to know better, their views are highly valued and often held as truth by learners. If they were to be subjected to compulsory education and training on appropriate approaches to sexual orientation discussion in the classroom; demystification of sexuality and effective measures to take in dealing with homophobia and other injustices committed against the queer-sexual pupils, the school communities would experience a significant dose of transformation.

Lacking power in the political and social life, queer-sexual learners need strong laws that are explicit about the objectives to ensure protection of queer-sexual learners and strong judicial and educational systems to enforce these laws on their behalf.[99]

Perpetual injustices necessitate clear laws that prohibit such practices. They require a justice system that effectively identifies such practices, punishes them, and provides meaningful remedies to the victims of the unjust practices.[100]

I therefore submit that transformation of the education system through the two and/or even other statute that will give effect to the constitutional protection of sexual orientation and guide mandatory school policies in addressing the protection of queer-sexual learners. SASA must be amended to *(a)* explicitly prohibit practices that result in direct or indirect discrimination of queer students, *(b)* make sexuality and gender studies mandatory in all levels of basic education with content and method of teaching suitable for each grade, *(c)*

[96] Jonathan Jackson et al op cit note 37 at 1051.
[97] Linda Darling-Hammond et al 'Implications for educational practice of the science of learning and development' (2020) 24 *Applied Development Science* 97-140.
[98] Ibid.
[99] Clive Baldwin, Chris chapman and Zoe Gray Op cit note 66 at 25.
[100] Ibid.

make it mandatory that all teachers take a course on how to create and maintain a sexuality-discrimination free learning environment.

(VI) FORESEEABLE CHALLENGES TO THE PROPOSED REFORM

This section explores some of the opposition to a non-heteronormative school environment that this paper argues for. This opposition is likely to be based on (a) parental rights; (b) and teachers' right to freedom of association, religion, belief, and opinion.

(a) Parental rights and responsibilities

Parents have a right and responsibility to care for their children. s1 of the Children's Act defines care to extend 'to guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development.'[101] This means that the parents have power to challenge the schools' curriculum when they deem it contrary to their cultural and religious guidance and directives.

SASA confirms the legitimacy of parental involvement in the learners' education. According to SASA, a public school must consult parents before adopting a code of conduct and a learner must have a parent or guardian present during disciplinary proceedings. Section 23 provides for more direct and official parental involvement in leaners' education by requiring parental representation in the governance of schools.[102] They have a right to be involved in decision making about the best form of educational environment for learners.

Parents have a strong influence in the decisions made by the SGBs. Section 23(9) states that the number of parent members of the SGB must be one more than the combined number of the rest of voting members. This demonstrates the sway parents have in the decisions of the governing body and the likelihood that parents pose a significant threat to a sexuality transformed curriculum and learning environment.

There is reasonable foreseeability of the parents from heteronormative communities rejecting an education that goes against the heterosexual foundation of their values and norms. They would invoke their right to choose the current curriculum as it is and preserve the current heterosexist cultures and Christian religion as the basis of the morals of their children.

[101] Act 38 of 2005.
[102] Act 84 of 1996.

(b) Teachers and learners' religion, belief, and opinion.

The Constitution guarantees everyone the freedoms as listed in the subtitle of this section.[103] Both teachers and learners may find queer-sexual education and a queer-sexual inclusive schooling environment at odds with their cultural and religious beliefs.[104]

Teachers are likely to find the proposed transformation challenging as they would have to punish the condemning of queer-sexuality; defend queer-sexuality from discriminatory comments and actions; and foster tolerance thereof even if it goes against their personal opinions, beliefs, and religious commitments.[105]

Moreover, it would contradict the culture and religion with which the SGB has chosen the school's traditions and education to be in line. Not only will the proposed reform disrupt the schools' long-standing norms but will threaten the communities' long standing cultural norms and values. The communities will want to protect their schools from the imposition of queer-sexual 'immoralities'.

(VII) RECONCILING THE REFORM AND THE CHALLENGES

The conflict between the proposed reform and anticipated challenges is resolved through the application of, *inter alia*, (a) the paramountcy of the child's best interest; (b) s36 of the Constitution; (c) and the use of a national policy on religion and education in support of queer-sexuality education.

***(a)* The best interest of a child**.

The law is clear about the paramountcy of the best interest of a child (hereinafter referred to as BIC) in matters that concern a child through its application is on a case-by-case basis.[106] Furthermore, BIC "is not only a guiding principle in all matters that concern a child but is also a standard against which provisions and/ or conduct concerning children are tested".[107]

The BIC test is essentially an exercise of balancing competing interest.[108] For the purpose of this section, we have on the one hand the interest of queer-sexual learners and on the other the interest of parents.

[103] Supra note 1 s15.
[104] Anthony Brown (2020) op cit note 7 at 16-31.
[105] Dennis A. Francis (2012) op cit note 87 at 597-611.
[106] Ann Skelton 'Too much of a good thing? Best interests of the child in South African jurisprudence' (2019) 52 *De Jure Law Journal* 564.
[107] Supra note 100, para 69.
[108] Ibid, para 65.

(i) *Child's interest vs parental rights*

The parents want to retain their parental rights and responsibility to care for their children in the way they deem best, including guiding and directing their education.

The proposed reform seeks to protect and realize queer-sexual child's interest to access and receive quality and equal education about their sexuality, sexuality identities, and related health and reproduction information. Moreover, it prevents homophobic abuse of queer-sexual learners by the school community including teachers and management of the schools. Ultimately, the reform seeks to ensure enjoyment of the right to equality including equal access to education for all learners in the public schooling environment.

The Teddy Bear Clinic judgement described children as "individual rights-bearers rather than mere extension of their parents."[109] This means that children must enjoy their human rights as individuals and in terms of their parents' directives. One of the important rights, for the purpose of this paper, is the right to privacy.

In the CC judgement of the *National Coalition* case, the court explained the centrality of the right to privacy in how people choose to give expression to their sexuality.[110] This right protects one's sexuality autonomy and if one expresses their sexuality without harming another, any uninvited interference of such an autonomy amounts to a breach of privacy. Children have equal right to privacy and unless its exercise is causing harm to the child or another person, parents have no right to interfere with it.

If prioritizing parental interest means maintaining the status quo of the basic schooling environments to the detriment of queer-sexual learners, whereas the implementation of the proposed reform ensures protection of queer-sexual learners without harming or infringing everyone else's rights, the protection of the queer-sexual learners must trump parental rights and responsibilities. The BIC scale, in this case, should tip in favour of the queer-sexual learners' interest.

Section 28(2) of the Constitution obliges the SASA to take a children-centred approach in its provision for equal and quality education. Parental rights and authority should be exercised to advance the best interest of the child not of the parent. The school has a responsibility to equally serve the educational interest of all its learner

[109] Supra note 100, para 40.
[110] Supra note 29, para 32

children including queer-sexual learners.[111] The pupil's right to equality in terms of s9 of the Constitution cannot be trumped by the parental rights and responsibilities as represented by SGB parent members.

The protection of sexual orientation does not discriminate against heterosexual learners, it is just more important for the misunderstood queer-sexual minority whose existence is rejected or denied. It provides equal protection for all sexual orientation identities and is in sync with SASA's objective to ensure high-quality and equitable education for all learners.[112]

This is line with the spirit; purport; and objects of the Constitution which include building a non-discriminatory and equal society in which diversity is embraced, positive steps to eradicate unfair discrimination and redress its effects are taken, and effective protections for groups that belong in the s9 of the Constitution listed discrimination grounds is implemented.[113] Lastly, as Kondile J simply put it in *Pillay v KwaZulu-Natal MEC of Education*: "There is no need to suppress individuality to achieve harmony".[114]

(b) Does the reform limit the relevant teachers' freedoms?

According to s36 of the Constitution, 'the rights in the Bill of Rights may be limited only in terms of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.'[115]

The CC has often applied a two-stage approach when grappling with the limitation of rights.[116] The first stage is to determine whether the impugned provision does in fact infringe on the protected right.[117] After the infringement has been determined, the second stage follows and questions whether the infringement is justifiable.[118] If in the first stage it is found that an infringement does not exists, the two-staged inquiry ends there.

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[111] S9 of the Constitution and the preamble of Act 84 of 1996.
[112] Act 84 of 1996, the preamble.
[113] *Pillay v KwaZulu-Natal MEC of Education* 2006 (10) BCLR 1237 (N), para 22 (hereinafter referred to as *Pillay*).
[114] Ibid, para 36.
[115] Pierre De Vos et al (eds) *South African Constitutional Law in Context* 2 ed (2014).
[116] *Minister of Justice and Constitutional Development and Others v Prince* 2018 (6) SA 393 (CC) paras 58-59.
[117] Op cit note 125 at 354
[118] Ibid

The first stage covers s36(1) (a) and (b) of the Constitution as it requires an examination of the scope and content of the protected right and tests its endurance against the meaning and effect of the impugned provision.

Religious freedom contains the right to express one's religious belief with the philosophy on which it is based.[119] It entitles one to freely partake in religious activities individually or jointly.[120] It further entitles one to both private and public exercises of their religion.[121]

Including queer-sexuality education in the curriculum and ensuring protection of queer-sexual learners' does not prevent teachers or learners from expressing their religious beliefs and from freely partaking in practices of their religions. It just eliminates religious and cultural dogmas from a democratic society that is based on equality and freedoms and one that prides itself of its diversity.

Teachers are not meant to teach their opinions or beliefs but what is required of them to teach. It is their responsibility to teach the curriculum as best as they can for the equal benefit if all learners.

Finally, Sachs J in *Minister of Home Affairs and Another v Fourie* said:

> 'It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies.'[122]

The Justice's remarks sums-up the reconciliation of the reasons the schools and members thereof for preserving heteronormativity and the proposed remedy to the legal problem. The constitutional provisions and protections cannot be viewed from a single point of view, nor should they be applied in a piecemeal approach.[123]

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[119] Mestry Raj 'The constitutional right to freedom of religion in South African primary schools' (2007) 12 *Australia & New Zealand Journal of Law & Education* 57–68.
[120] Ibid at 58-59.
[121] Ibid.
[122] Supra note 22 para 92.
[123] Ibid footnote 124.

Therefore, to the extent that it does not disturb the scope of the anticipated challenging rights, an effective reform of the law to meaningfully protect queer-sexual children and/or pupils must be in order.

(c) The National Policy on Religion and Education as an example.

The National Policy on Religion and Education (hereinafter referred to as the policy) recognises the importance of religious studies in schools not religion dogma where one form of religion is advanced above the others.[124] The policy recognises 'religious instruction' as another aspect of study in religion education.[125] In terms of Regulation 54, religious instructions instruct in accordance with a certain faith or belief with the intention to instil and direct adherence to that faith or belief.

The policy further explains in reg 55 that this form of religion education is the responsibility of the home; the family; and the religious community and is often expected to be provided by clergy or other persons accredited by the faith communities. Although schools are encouraged to allow the use of their facilities for religious instruction programmes, this type of religion education cannot be part of the formal school programme.[126]

In the *Pillay* case, the High Court decided in favour of one learner who wanted to wear a nose ring as part of her religion and against a standing school code of uniform. In this decision, the court held that it is the duty of the school to instil in its learners the Constitutional values and objectives of the SASA of cultural and religious tolerance.[127] In paragraph 26 of the judgement, the court emphasised equality to mean the regard and respect across and acceptance of differences.

The proposed reform seeks to achieve the same appreciation and tolerance of differences argued for by the court in *Pillay* by enforcing a curriculum that adequately represent all forms of sexuality identities. Schools should not be places of narrow indoctrination but places of options and wider understanding of different aspects of identities.

Just like the kind of religion education required by the policy for public schools, sexuality and gender education will not promote one sexuality and/or gender identity but ought to pursue a balanced approach to teaching and learning about the entire

[124] The National Policy on Religion and Education in GN 1307 GG 25459 of 12 September 2003.
[125] Ibid.
[126] Ibid
[127] Supra note 123, para 36.

spectrum of sexual orientation. The kind of approach that facilitates opportunities for both a deeper sense of self-realisation and a civil tolerance of others.

The same arguments so advanced in the policy can be advanced for sexuality education so to afford queer-sexual learners an equal opportunity, that is already available for heterosexual learners, to understand themselves better

Similarly, to the objectives of the policy, the proposed reform finds no space for one sided sexuality education and cultural norms in a schooling environment. In my view, the fact that this progressive policy exists but community schools are still promoting the domination of Christianity ethos is one of the reasons why it is necessary to have legally binding mechanisms that punish failure of adherence in order to achieve effective protection for minorities.

(VIII) THE INTERNATIONAL LAW ON EFFECTIVE PROTECTION OF QUEER-SEXUAL LEARNERS

Considering international law when grappling with the interpretation of the Bill of Rights is essential in the South African legal discourse as it provides an opportunity to see how other jurisdictions have dealt with similarly complex legal issues.[128] Moreover, wisdom and guidance in evaluating and understanding the Bill of Rights can be drawn from existing international agreements and international customary law frameworks.[129]

In relation to the issues with which this paper grapples, the majority treaties on international human rights do not mention the right to sexual orientation.[130] Adults have often accessed the protection of their sexual orientation through courts and the protection would be drawn from vague treaty provisions.[131] A remarkable explicit inclusion of sexual orientation in found in article 13 of EC Treaty.[132] Thus, it can reasonably be concluded that the International Human Rights Law regime is lacking with regards to the progression of queer-sexual minority interests.

International research shows that the current progressive legal instruments and recommendations on the protection of queer-sexual people are drawn from adults'

[128] Juha Tuovinen 'What to Do with International Law? Three Flaws in Glenister' (2013) 5 *CCR*, 438.
[129] Ibid at 439.
[130] Kerstin Braun 'Do ask, do tell: Where is the protection against sexual discrimination in International Human Rights Law?' (2014) 29 *American University International Law Review* 877- 880.
[131] Ibid at 880-883.
[132] Treaty on European Union (Consolidated Version), Treaty of Amsterdam, 1 May 1999.

perspectives and fail to account and represent the perspective of children on queer-sexuality rights.[133]

Some of the international human rights treaty bodies that have explicitly recognised the children's sexual orientation rights and have increasingly stressed the need for effective international protection of queer-sexual children in their schools and homes.[134]

The Convention on the Rights of the Child (hereinafter referred to as the Convention) does not mention sexual orientation at all. The Committee on the right of the Child (hereinafter referred to as the committee) often has to draw or infer the protection of the child's sexual orientation from other listed protected rights or grounds on which discrimination is prohibited.[135]

The article 2 non-discrimination clause of the Convention makes no mention of sexual orientation but is open ended as it states 'or other status' in the end.[136] It is this open end that allows the committee to draw the protection of the child's sexual orientation. One of the notable instances where the committee has made such an inference is in its General Comment no.4 (2003) on adolescent health and development where it states that the non-discrimination grounds include adolescents' sexual orientation and health.[137]

International law on human rights lacks a binding mechanism that effectively protects the sexual orientation of the child. Similar to South African legal discourse, the protection of the queer-sexual children is implied here and drawn from there without any explicit provision in any legally binding legislation with effective enforcement. However, the few instruments that infer and expressly recognise the right of queer-sexual children show a willingness of the international legal discourse to acknowledge and appreciate the need for legal protection of queer-sexual children, therefore the proposed reform would not contradict international law.

There is no need to wait on the international law to reform. South Africa was the first State to entrench in its Constitution the protection of sexual orientation[138] and it can lead the world once again in rectifying the international human rights' neglect of queer-sexual children by reforming its legal system accordingly.

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[133] Kirsten Sandberg 'The Rights of LGBTI children under the Convention on Rights of the child' (2015) 33 *Nordic Journal of Human Rights* 337- 352.
[134] Ibid at 337- 338.
[135] Ibid 43-45.
[136] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990).
[137] General Comment No 4 (2003) Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4 para 6.
[138] Willem J Van Vollenhoven and Christo J Els Op cit note 16 at 263-284.

(IX) CONCLUSION

I believe the paper has shown the lack of, and need thereof, effective legal protection of queer-sexual children in the communities and the schools. It has shown that s9 of the Constitution does not adequately protect children's sexual orientation without a subsidiary statute that expressly codifies the protection and provide for consequences of failure to obey the protection.

Furthermore, this paper has proposed a clear start to remedying this legal deficiency. It implores the State to proactively amend the existing relevant legislation on its accord instead of waiting for a directive from the courts while queer-sexual learners continue to be subjected to homophobia and unequal access to education.

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