

## Submission

to the

### The Department of Basic Education

on the

Draft National Policy on the Prevention and Management  
of Learner Pregnancy in Schools

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## 1. Introduction

1.1. The Centre for Applied Legal Studies ('CALs') is a civil society organisation based at the School of Law at the University of the Witwatersrand. CALs is also a law clinic, registered with the Law Society of the Northern Provinces. As such, CALs connects the worlds of both academia and social justice. CALs' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALs operates across a range of programme areas, namely: basic services, business and human rights, environmental justice, gender and the rule of law.

1.2. The Gender Programme at CALs focuses on ensuring the rights of all individuals from different self-identified genders and/or sexual designations and/or sexual orientations are realised and protected as set out in the Constitution of South Africa.

1.3. Historically, CALs has engaged in various gender-related issues through numerous submissions to Parliament. These include submissions to the Department of Women on the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW)<sup>1</sup>, the Speaker of the National Assembly on the Choice on Termination of Pregnancy Draft Amendment Bill<sup>2</sup>, the Director-General of Justice and Constitutional Development on the Draft Regulations to the Criminal Law (Sexual Offences and Related Matters) Amendment Act in 2015<sup>3</sup>, to the Director-General of Justice Constitutional

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<sup>1</sup> <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/CALS%20submission%20CEDAW%20Final-Oct%202015.pdf>.

<sup>2</sup> <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20Submissions%20on%20the%20Termination%20of%20Pregnancy%20Amendment%20Bill%20.pdf>.

<sup>3</sup> <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Sexual%20Offences%20Court%20November%202015.pdf>.

Development on the Draft Regulations Relating to Sexual Offences Courts: Criminal Law (Sexual Offences and Related Matters) Amendment Act in 2018,<sup>4</sup> and to the Joint Multi-Party Women's Caucus on the Response to the South African Law Reform Commission's Report on 'Sexual Offences: Adult Prostitution' in 2018.<sup>5</sup>

1.4. CALS also has a history of working specifically on sexual violence in schools using the tools of both research and advocacy. In 2014, we produced a research report entitled, 'Sexual violence by educators in South African schools: Gaps in accountability' based on a year-long investigation. This was also complemented by a handbook called, 'Managing sexual abuse in schools: A guide for children, families and community members' developed in partnership with Lawyers against Abuse and Section27. We have subsequently used these handbooks for workshops in multiple locations in Gauteng, KwaZulu-Natal, the Eastern Cape and the North West provinces.<sup>6</sup>

1.5. In addition to points 1.4 and 1.5 above, CALS asserts that it has sufficient expertise and institutional knowledge to comment on the DBE Draft National Policy on the Prevention and Management of Learner Pregnancy in Schools ('the draft policy').

1.6. We commend the Department of Basic Education for recognising the importance of learner sexual and reproductive health and welcome the

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<sup>4</sup> <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Centre%20for%20Applied%20Legal%20Studies%20-%20Submissions%20on%20the%20Draft%20Regulations%20Relating%20to%20Sexual%20Offences%20Courts.pdf>.

<sup>5</sup> <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20-%20Response%20to%20the%20SALRC%20Report%20on%20Adult%20Prostitution%20.pdf>

<sup>6</sup> <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Sexual%20Violence%20by%20Educators%20Size%20180270%20NEW.pdf>.

<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20Managing%20sexual%20abuse%20in%20schools.pdf>.

opportunity to comment on the draft policy. We would like to draw attention to a number of aspects of the current draft, which we believe could benefit from our reflections which we set out in detail below.

## 2. Reflections on the draft policy

### 2.1. Purpose of policy

#### The need for clear guidelines

The 'Preamble and Purpose' section sets out that the draft policy states focuses on "goals, guiding principles and policy themes" in order to "stabilize and reduce incidences [of unplanned pregnancy] and its adverse effect on the education system". It further states that the draft policy "has been developed to guide officials, principals, school management teams and educators".<sup>7</sup> The first statement which sets out what the focus of the draft policy is cannot achieve what is set out in the second statement. By using only goals, principles and themes, a principal, school management team or educator is not *guided* on how to assist pregnant learners, and is instead left to formulate their own substantive policies on what to do in each situation they are faced with.

What is needed in a policy is clear steps to be taken in each instance and not vague references to themes and principles which are not grounded in legally correct and constitutionally aligned guidelines. This, unfortunately, is where the draft policy fails. It appears that the draft policy should be read in conjunction with the Department's Prevention and Management of Learner Pregnancy Implementation Plan ('plan'). This plan has not, however, been made accessible.

For individuals who are not legal scholars, the process of deducing guidelines on action that are legally valid from a set of abstract themes and principles is not an easy task. Furthermore, when one leaves this process to each principal, management team or

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<sup>7</sup> Draft Policy, p 6.

educator to decide, what can occur is the movement away from universalised guidelines (which are both lawful and constitutionally aligned) to guidelines that may be based on personal morals, ethics or philosophies which could have unintended effect of leading to unlawful conduct or discriminatory practices. A study conducted in the Western Cape around pregnancy and policy found that “many schools continue to lack clarity regarding day-to-day support and management of pregnant learners” despite the fact that there was a policy in place. It further found that “[i]nconsistencies in policy implementation have not only been associated with misunderstanding of the policy but related also to individual schools negative responses to or rejection of the policy and its intentions altogether”.<sup>8</sup> This tells us that, where individuals are forced to decide on how implementation of policy should take place, their internal biases may override the intentions of the policy and become a ‘weapon’ against female learners instead of a document aimed at care and support. In light of this, the policy must be both mandatory and specific to avoid individualised interpretations thereof.

The draft policy goes on to state that “[t]his Policy is grounded in the interests, advancement and protection of pregnant learners guaranteed by the Constitution of South Africa and related policies and strategies in the DBE and the wider social sector. For this reason, the Policy is promulgated to guide the strategies required to realise its Goals and addresses *what* is required rather than *how* this will be achieved”.<sup>9</sup> This statement is nonsensical, the grounding of the draft policy on sources such as the Constitution, current DBE policies and the wider social sector (which in itself is a vague source) is in no way a valid reason for not setting out *how* the Goals will be achieved. Instead the policy must consider all law (both international and national) and current policies and fashion formal processes/steps that aim to achieve the goals that are in line with law and other policies.

### The status of the Implementation Plan

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<sup>8</sup> S, Ngabaza & T, Shefer ‘Policy commitments vs. lied realities of young women and mothers in school, ‘Western Cape, South Africa’ (2013) *Reproductive Health Matters* 106 – 113, 107.

<sup>9</sup> Draft Policy, 7.

The draft policy states that “[d]etails of this Policy protocol are addressed in the Implementation Plan”<sup>10</sup>. Where to find said Implementation plan is not stated and a search of the Department’s website did not bring up said plan. This is problematic. If the plan has been drafted, then it should be easily accessible and perhaps a footnote should be used with the URL for the policy. If the plan has not yet been drafted, a detailed plan and timeline for its publication should be provided.

### Reference to all relevant international law and instruments

The draft policy refers to international law instruments which guide the formation of the policy yet only refers to the African Charter on the Rights and Welfare of the Child.<sup>11</sup> Any policy should be exhaustive on referring to those international instruments which are applicable to the rights of the pregnant learner. Both the Convention on the Rights of the Child and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) set out obligations in terms of female learners, pregnancy and equal access to education.<sup>12</sup> The need to give exhaustive lists of international instruments of law (both African and global international law) is based upon the fact that South African legislation, upon which the draft policy is based (such as Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (or PEPUDA)) and Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) specifically reference that they are a codification of these international instruments.<sup>13</sup>

### **Recommendations**

We suggest that the draft policy be reformulated to include:

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<sup>10</sup> Draft Policy, 7.

<sup>11</sup> Draft Policy, 8.

<sup>12</sup> For example the Convention on the Rights of the Child under article 28 states that all States must take steps to encourage regular attendance at schools and the reduction of drop-out rates and in CEDAW article 10 states that States Parties must take appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women.

<sup>13</sup> For example, PEPUDA states that ‘South Africa also has international obligations under binding and customary international law in the field of human rights... [a]mong these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination Against Women’ (PEPUDA, Preamble).

- Clear steps setting out what must be done in different scenarios involving the female learner which is guided by the Constitution and other applicable laws.
- If there is an Implementation Plan setting out how the draft policy will be implemented, this document must be made easily available.
- All law (including international and national) which is relevant to and ought to guide the development of policy must be set out.

## 2.2. Absence of evidence

The draft policy states that its overall goal is to “reduce the incidence of learner pregnancy”<sup>14</sup> which it describes as a “major social, systemic and fiscal challenge”<sup>15</sup> for the country in general and for the basic education system in particular. The draft goes on to suggest that the rate of learner pregnancy may be reduced by “delayed sexual debut, abstinence and/or access to condoms and their appropriate and effective usage.”<sup>16</sup>

These assertions are not, however, necessarily supported by evidence. The draft policy is narrowly focused on the rate of learner pregnancy which it describes as “high”<sup>17</sup> – but it does not offer any concrete data to substantiate this claim. It does not, in fact, indicate how many learner pregnancies occur or what proportion of these pregnancies are “unintended and unwanted”.<sup>18</sup> It appears to assume they all are, but does not provide any support for this.

In addition, the draft policy does not explain in any detail why learner pregnancy itself is identified as the primary challenge it seeks to address. Characterising learner pregnancy

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<sup>14</sup> Draft Policy, 9.

<sup>15</sup> Draft Policy, 6.

<sup>16</sup> Draft Policy, 7.

<sup>17</sup> Draft Policy, 6.

<sup>18</sup> Draft Policy, 6.



as a “challenge”<sup>19</sup> may, in fact, undermine one of the draft policy’s other related goals around the “limitation of associated stigma and discrimination”.<sup>20</sup>

This narrow emphasis on learner pregnancy might also have a number of other unintended consequences. For example, it may influence how proposed “sexuality education” is developed by focusing on preventing pregnancy at the expense of providing a working understanding of all aspects of sexual and reproductive health to allow learners to make informed choices (in instances where they have a choice). It is possible, for example, to reduce the rate of pregnancy by concentrating on providing hormonal contraception or encouraging learners to engage in unprotected sexual acts that would not lead to pregnancy. Such a focus might therefore inadvertently lead to an increase the rate of sexually transmitted infections amongst learners.

In focusing on “delayed sexual debut, abstinence and/or access to condoms and their appropriate and effective usage”, the draft policy does a disservice to young people. It is limiting and does not refer to any research indicating that encouraging “abstinence” or “delayed sexual debut” have been proven to reduce rates of learner pregnancy. In fact, much research exists which shows that advocating for abstinence has the opposite of its intended effect. In the United States, for example, emphasis on abstinence in education is connected with an *increase* in teenage pregnancy and birth rates.<sup>21</sup> This should definitely not, therefore, be referred to as a “default option” for the Department’s stance or education focusing on sexual and reproductive health.<sup>22</sup>

In reality, even unintended learner pregnancies are not, in themselves, the problem that needs to be addressed. They are instead just one result of a number of established underlying social issues the draft policy itself identifies. These include lack of access to comprehensive, quality and inclusive sexual and reproductive health education; lack of

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<sup>19</sup> Draft Policy, 6.

<sup>20</sup> Draft Policy, 9.

<sup>21</sup> K, F Stanger-Hall and D, W Hall ‘Abstinence- only education and teen pregnancy rates: why we need comprehensive sex education in the U.S.’ (2011) *Public Library of Science*. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3194801/>.

<sup>22</sup> Draft Policy, 15.

access to effective, quality sexual and reproductive healthcare services including contraception and prophylactics; and, very importantly, widespread sexual violence.

Focusing on “delayed sexual debut, abstinence and/or access to condoms and their appropriate and effective usage”<sup>23</sup> assumes that learners have a choice around when and if to engage in sexual activity. Precise rates of rape and sexual violence are difficult to determine since incidents frequently go unreported for a number of reasons related to trauma, mistrust of the criminal justice system and fear of stigma and retribution.<sup>24</sup> Estimates indicate, however, that up to 39% of adult women in South Africa have reported “forced sexual initiation, unwanted touching or rape as a child”.<sup>25</sup> More specifically, statistics from SAPS indicates that 41% of all rapes that were reported over the last three years were committed against children, predominantly young women.<sup>26</sup> Pregnancy reportedly results from rape in approximately 5% of cases for women aged 12 – 45,<sup>27</sup> though some studies report that the incidence may be as high as 18%.<sup>28</sup> It is therefore likely that a significant proportion of learner pregnancies are the result of rape or statutory rape and not the choice to engage in sex.

## Recommendations

We cannot expect our national policies to be effective unless they are based in evidence. Without this support, we cannot be sure that our policies correctly identify the social issues that need to be addressed, and we similarly cannot be certain that the proposals

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<sup>23</sup> Draft Policy, 7.

<sup>24</sup> M, Machisa et al. ‘Rape Justice in South Africa’ (2017), 17. Available at: <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/RAPSSA%20REPORT%20FIN1%2018072017.pdf>

<sup>25</sup> M, Machisa et al. ‘Rape Justice in South Africa’ (2017), 22. Available at: <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/RAPSSA%20REPORT%20FIN1%2018072017.pdf>.

<sup>26</sup> M, Charles ‘41% of rapes committed in South Africa are against children’ (2018) *Cape Argus*. Available at <https://www.iol.co.za/capeargus/news/41-of-rapes-committed-in-south-africa-are-against-children-15037185>.

<sup>27</sup> M, Holmes et al ‘Rape-related pregnancy: Estimates and descriptive characteristics from a national sample of women’ (1996) *American Journal of Obstetrics and Gynecology*, 320 – 5.

<sup>28</sup> E, G Krug ‘World report on violence and health’ (2002) *World Health Organization*.

for addressing these issues will be successful. In light of this and our arguments outlined above, we recommend that this and all national policies consider available research.

In particular, we would like to propose:

- The policy should take a more holistic and inclusive view of sexual and reproductive health. Instead of having a narrow focus on learner pregnancy, the draft policy could be redrafted to include all aspects of sexual and reproductive health. The overall goal of the policy should, in our view, be changed to:

*“Provide quality, comprehensive sexual and reproductive health services including education and access to effective contraceptives and prophylactics to empower learners to make informed choices – while understanding that it is often not their choice to engage in sexual activity”* and;

*“Eliminate sexual violence within the basic education sector”*.

- If learner pregnancy remains the focus of the policy, the reasons for this focus should be logically set out and based in recognised research. The measures taken to lower the incidence of pregnancy amongst learners should likewise be based in evidence and should at all times be developed with social issues related to sexual violence and sexually transmitted infections in mind.

### 2.3. Language use

There are a number of specific instances where we believe the draft policy could benefit from either more precise or more inclusive language. Language matters: how we phrase our communications has an impact in reality, whether contributing to a shared understanding of the world and reasserting a stigmatising and commonly-held belief. How we phrase our policies similarly has an impact on how they are understood and implemented.

## Precise terminology

Where the draft policy does acknowledge that learners may not always have a choice around when and if they engage in sexual activity, it suggests that “some learner pregnancies may have resulted from non-consensual sex which is legally defined as rape”.<sup>29</sup> The use of the term ‘non-consensual sex’ is both unnecessary and unacceptable. Literature exists describing the problematic nature of this phrase and the negative effects it may have for victims and survivors of sexual violence.

In essence, the phrase ‘non-consensual sex’ is a contradiction in terms. The word ‘sex’ implies there is consent. Without consent, an experience can no longer be considered sex, but rather violence.<sup>30</sup> Using the phrase ‘non-consensual sex’ instead of only the accurate legal term ‘rape’ means using the language of perpetrators and obscuring the violent, criminal nature of their actions. It is therefore not only a confusing and inaccurate term, but one that privileges perpetrators of sexual violence at the expense of victims and survivors. This may reinforce problematic beliefs and rape myths around victims being responsible for crimes committed against them.

Furthermore, the draft policy describes how even “consensual sex may amount to a sexual offence depending on the age of the learner and the age difference between the parties which in some instances is defined as statutory rape”.<sup>31</sup> By its very definition, there can be no consent in an instance of statutory rape. Statutory rape is a crime committed against a child who is under the age of consent and by law cannot give their consent to have sex with an adult. It is vital that this is recognised and treated with the same seriousness as the crime of rape given the vulnerability of children and potential for them to be harmed.

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<sup>29</sup> Draft Policy, 7.

<sup>30</sup> K, Oliver ‘There is no such thing as “Nonconsensual Sex.” It’s Violence’ (2016) *New York Times*. Available at <https://www.nytimes.com/2017/10/27/opinion/nonconsensual-sex.html>.

<sup>31</sup> Draft Policy, 8.

Once again, even in instances where learners are over the age of consent and do give their agreement to sexual activity, it is confusing and unnecessary to refer to ‘consensual sex’. The term ‘sex’ implies consent and the use of the word ‘consensual’ is therefore redundant. As outlined above, there is no such thing as ‘non-consensual sex’ from which to distinguish it.

In addition, the draft policy indicates that it “provides important detail regarding what steps are to be taken when it is alleged that a pregnancy has occurred as a result of sexual intercourse between a learner and an educator”.<sup>32</sup> Using the phrase ‘sexual intercourse’ as a coverall here may again be misleading. The policy does not address the fact that these pregnancies are likely to be the result of rape or statutory rape or that sexual relationships between educators and learners are, in fact, prohibited by a number of laws and codes of ethics governing basic education.

The Employment of Educators Act defines such a relationship as “serious misconduct” and states that an educator “must be dismissed if he or she is found guilty of... having a sexual relationship with a learner of the school where he or she is employed”.<sup>33</sup> In addition, the South African Council of Educators (SACE) Code of Professional Ethics – which is not mentioned anywhere in the draft policy – takes this one step further and stipulates that a registered or provisionally registered educator “refrains from any form of sexual relationship with learners from any school”.<sup>34</sup> Finally, the Sexual Offences and Related Matters Act emphasises that, in an instance where a person may be inhibited from indicating their unwillingness to participate in a sexual act “where there is an abuse of power or authority”, then this constitutes a sexual violation.<sup>35</sup>

There is always a significant disparity of power between any educator and any learner, and the abuse of this power by an educator should be recognised not only as serious misconduct and a dismissible offence, but acknowledged as a crime. The draft policy

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<sup>32</sup> Draft Policy, 8.

<sup>33</sup> Employment of Educators Act 76 of 1997, section 17(c).

<sup>34</sup> Code of Professional Ethics, section 1.10.

<sup>35</sup> SORMA, section 17(3)(b).

does not deal with this sufficiently or indeed refer to educators raping learners and how this should be dealt with, even under the section entitled “Measures to Deal with Sexual Offences, Child Abuse and Neglect”.<sup>36</sup>

## **Recommendations**

We recommend that precise terms which are victim-centred and acknowledge sexual offences as serious crimes should be used throughout the policy. In particular, we propose:

- The term ‘consensual sex’ should be removed from the policy.
- The term ‘non-consensual sex’ should be removed from the policy and the terms ‘rape’ or ‘statutory rape’ or ‘rape and/or statutory rape’ are used where applicable. For example, “some learner pregnancies may have resulted from rape or statutory rape”.
- The phrase ‘give their agreement’ or similar should be used instead of the term ‘consent’ when discussing incidents of statutory rape.
- The SACE Code of Professional Ethics should be considered and included in the “Policy Alignment” section.
- SACE should be included in the list of persons and organisations in the “Scope of Application” section.

### Stigmatising vs inclusive language

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<sup>36</sup> Draft Policy, 16.

The draft policy focuses almost entirely on learners who may “become pregnant”.<sup>37</sup> There are, presumably, many reasons for this. Amongst other things, they are the ones that may need to attend doctors’ appointments and miss school; they are the ones most likely to face stigma; they are the ones who will have to be responsible for childcare. However, the draft policy does not do much to problematise this state of affairs. It seems, instead, to accept that pregnant learners are the ones who will have to bear these burdens, but does not emphasise the unfairness of the situation. It does not make provision for the person who made them pregnant to, for example, support them at doctors’ appointments, or likewise take time off from school around the time of the child’s birth if they are also learners.

Even the phrase ‘become pregnant’ is somewhat questionable. It appears to take agency away from the other person involved in the sexual activity if not rape or statutory rape of the pregnant learner. This is similar to terms like ‘fall pregnant’ which historically have been used to place the emphasis on women – at least partly to ensure that ‘blame’ for the pregnancy and the unfair burdens of childcare on women remain unquestioned.

The draft policy is also inconsistent in its use of language to refer to those learners who “become pregnant”. This varies from “young people”<sup>38</sup> to “young women”<sup>39</sup> to “girls”<sup>40</sup> to “children”<sup>41</sup>. Each of these terms has a particular connotation. “Children” might emphasise that these learners are young and may not have agency, but may be inaccurate if the learners are over the age of 18. Similarly, “girls” has the connotation of being young, even infantile, and obviously exclusively female. Perhaps the most inclusive, accurate term would be “young people”.

Similarly, there is inconsistency with the pronouns used to refer to them. Sometimes these pronouns even change within a sentence such as, “there should be no exclusion

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<sup>37</sup> Draft Policy, 14.

<sup>38</sup> Draft Policy, 6.

<sup>39</sup> Draft Policy, 6.

<sup>40</sup> Draft Policy, at 9.

<sup>41</sup> Draft Policy, 17.

of pregnant learners who must be allowed to remain in school during *their* pregnancies and return as soon after giving birth as is appropriate for both the learner and *her* child”.<sup>42</sup> Once again, the most inclusive set of pronouns would be ‘they’ / ‘them’ / ‘their’.

Finally, the manner in which the policy refers to learner pregnancy generally serves to undermine the goal of “limitation of associated stigma and discrimination”.<sup>43</sup> Learner pregnancy is variously referred to as a “challenge”<sup>44</sup> that must be “prevented”<sup>45</sup> and from which learners must be “protected”.<sup>46</sup> All these references have negative connotations and contribute to stigmatising learner pregnancy. It is worth noting that even in protocols on sexual violence, the Department of Basic Education does not refer to ‘prevention’ in the title of the policy.<sup>47</sup>

## **Recommendations**

- In order to be not only accurate, but also inclusive and consistent, we would recommend using ‘young people’ and the pronouns ‘they’ / ‘them’ / ‘their’ to refer to all learners affected by this policy.
- While it is possible that using more neutral terms might obscure the fact that women are disproportionately impacted by sexual and reproductive health issues including pregnancy, this can be explicitly acknowledged by the policy.
- The draft policy should refrain from characterising learner pregnancy as a ‘challenge’ and focusing on ‘preventing’ and ‘protecting’ learners from it which may further stigmatise pregnant learners.

### **2.4. Need for inclusiveness**

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<sup>42</sup> Draft Policy, 7, emphasis added.

<sup>43</sup> Draft Policy, 9.

<sup>44</sup> Draft Policy, 6.

<sup>45</sup> Draft Policy, 6.

<sup>46</sup> Draft Policy, 10.

<sup>47</sup> Protocol on the Management and Reporting of Sexual Violence in Schools.



We welcome the draft policy's commitment to providing access to "Comprehensive Sexuality Education (CSE)".<sup>48</sup> In its guiding principles, the draft policy includes access to Comprehensive Sexuality Education in the following terms:

Every learner in the basic education system from the end of its primary phase has the right to quality CSE appropriate to their **age, gender, culture, faith, language and context**, in order to make informed choices about their sexual health and safety.<sup>49</sup>

However, this guiding principle seems to exclude learners that identify as part of Sexual Orientation, Gender Identity and Expression (SOGIE) community. This oversight is sustained throughout the draft policy, with much of the policy assuming that learners are identify as cisgender and are only engaged in heterosexual sexual behaviour. This is despite learners that are members of the SOGIE community also engage in sexual behaviour and also have the potential to become or make someone pregnant.

The exclusion is a significant one as evidence has demonstrated how SOGIE issues remain on the periphery of basic education generally and within the Life Orientation curriculum and pedagogy particularly.<sup>50</sup> In one 2014 study, teachers cited the lack of SOGIE inclusive policy as a reason for their inability to teach comprehensive sexual education within the classroom.<sup>51</sup> When asked whether or not they taught about SOGIE identities as part of the LO curriculum, only:

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<sup>48</sup> Draft Policy, 10.

<sup>49</sup> Draft Policy, 10.

<sup>50</sup> See, for instance, R, DePalma 'South African life orientation teachers: (not)teaching about sexuality diversity' (2014) *Journal of Homosexuality* 1687 – 1711; M, Wilmot 'The construction of sexualities and sexual identities in life orientation textbooks' (2011) Research Report, University of the Witwatersrand; and C, Potgieter & F, Reygan 'Perspectives in education – lesbian, gay and bisexual citizenship: a case study as represented in a sample of South African life orientation textbooks' (2012) *Perspectives in Education* 39 – 51.

<sup>51</sup> Wilmot, 1692 – 1693.

Nine [of the 25 interviewed] teachers responded that they did not. One of these teachers qualified this absence by noting that the issue of homosexuality might come up in discussions of discrimination...and a few mentioned that although they did not teach it, children might bring up the issue – for example, in lessons about STD prevention.<sup>52</sup>

In the absence of a strong policy directive to teach SOGIE-affirming sexual education, Life Orientation educators are often left to rely on their own subjectivities, which are often based on religious, cultural or social moral rather than the dictates of the Constitution.<sup>53</sup>

The draft policy continuing the exclusion of SOGIE learners Comprehensive Sexuality Education thus not only verges on indirect discrimination but could also negatively affect the draft policy's effectiveness.

## **Recommendations**

- The draft policy provides for the training of educators and other designated school personnel to provide CSE.<sup>54</sup> We recommend that the training of educators not only be in relation to the content of CSE but include a component that rigorously sensitises them to their own prejudices when teaching.
- Given the stated importance of sexuality as part of human development, we recommend that the draft policy expressly commits to creating CSE quality assurance mechanism. This ought to include an express commitment to review the life orientation curriculum as it relates to sexuality education generally and SOGIE sexuality particularly.

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<sup>52</sup> Wilmot, 1693.

<sup>53</sup> Wilmot, 1700.

<sup>54</sup> Draft Policy, 14.

- We recommend that the draft policy create clear accountability measures for educators that fail their responsibility to teach learners quality CSE.
- In order to be inclusive of the diversity that exist amongst learners, we recommend that the draft policy does away with gendered terminology and opts rather for more gender-neutral and inclusive language, as outlined in the section above.

## 2.5. Indirect discrimination

As Rebecca Davis points out in relation to a recent attempt to amend the Termination of Pregnancy Act 92 of 1996, '[w]hen you can't ban something outright, it's possible to make the process of obtaining it so onerous as to be a kind of punishment'.<sup>55</sup> This statement potentially applies in relation to parts of the draft policy.

Section 6.4.2 of the draft policy called "Retention in Schools" outlines the process for a pregnant learner to continue attending school after 6 months into their pregnancy. The process is based on the production of a medical certificate stating the point of gestation the learner is at as well as an estimate of delivery date.<sup>56</sup> This is to be accompanied by "reports" to an appointed educator or principal which certifies that she is safe to continue with her attendance if she wished to remain in school during the 8<sup>th</sup> month of gestation. If the learner does not provide such medical certificate and fails to give a reason they "may" be requested to stay away from school until the proof is provided.<sup>57</sup>

This type of proof denies the autonomy of the individual and adopts a form of medical paternalism whereby doctors are expected to speak for the individual rather than listening to what the individual feels and considering their opinion around decisions

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<sup>55</sup> R, Davis 'Analysis: Proposed changes to SA's abortion law would be (more) bad news for women' (2017) *Daily Maverick*. Available at <https://www.dailymaverick.co.za/article/2017-08-17-analysis-how-proposed-changes-to-sas-abortion-law-would-be-more-bad-news-for-women/#.WZa3PncjHeQ>

<sup>56</sup> Draft Policy, 17.

<sup>57</sup> Draft Policy, 17.

which affect their own body. Furthermore, as stated by Ngabaza and Shefer, when you leave the interpretation of policy around individuals being able to continue attending school to principals and educators they may “be misinterpreted, resulting in exclusionary practices” which has been shown to be the case application of policy in the United States and Namibia.<sup>58</sup>

There was a similar issue which arose in a study of policy in the Western Cape where it was found that although provisions in the policy were aimed to indemnify the school against any pregnancy related accidents these provisions could in fact create feelings of exclusion by pregnant learners.<sup>59</sup> A problem which potentially arises from this is that “[n]ot wanting to be responsible for pregnant adolescents may also lead school heads and teachers to believe it is in the school’s best interest to encourage them to stay at home”.<sup>60</sup>

The problematic and onerous approach to the pregnant individual’s retention and then return to school is once again echoed when it is stated under section 6.4.2 that “[t]he basis on which the pregnant learner may be reintegrated into the basic education system after delivery will depend on medical advice and the point in the calendar year when she left school for delivery”.<sup>61</sup> This echoes the problem of medical paternalism and ignores the voice of the individual in her choice to return to school and may be seen as discriminatory practice.

With regard to the issue of the time of the year the learner leaves school and the learner’s return, a true reflection of letting the rights and values in the Constitution shape policy would require flexibility around the timing on leaving and returning to school as well as a degree of creativity in adequately facilitating the soonest return of the learner and support during the period the individual is absent, this should all be done by listening to what the individual learner wants and needs as not each individual is the same.

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<sup>58</sup> S, Ngabaza & T, Shefer ‘Policy commitments vs. lived realities of young women and mothers in school, ‘Western Cape, South Africa’ (2013) *Reproductive Health Matters* 106 – 113, 106 – 107. (‘Ngabaza’).

<sup>59</sup> Ngabaza, 109.

<sup>60</sup> Ngabaza, 109.

<sup>61</sup> Draft Policy, 17.

When considered in this context the overarching heading of section 6.4 of the draft policy which is called “Impact Mitigation” could be charged with focusing the mitigation of the impact on the effects it may have on the school rather than on the individual. The onerous nature of the steps set out above may inadvertently be a punishment of learners rather than a protective measure.

## **Recommendations**

We suggest that the draft policy be reformulated to include:

- Adopting a gender-lens when drafting policy and ensuring that policy decisions which may seem to benefit an individual are not influenced by internal bias.
- Referring to studies and shaping this policy based on studies conducted both here and abroad on policy around pregnancy in schools.
- Listening to the pregnant learner in each instance and understanding what they want and need with regard to leaving and returning to school. This is an act of respecting their autonomy.