SAME-SEX PARTNERSHIPS IN SOUTH AFRICA: THE IMPACT ON EDUCATION.

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1. Introduction

Since the advent of constitutionalism in South Africa in 1994 the overriding purpose of the Constitutional Court has been to advance transformation towards an egalitarian society based on the respect for fundamental rights. During the negotiations for a constitutional settlement and transition from the Apartheid State to a new democracy, proponents of the gay-rights movement such as Edwin Cameron and Simon Nkoli won the day by gaining the ANC’s support and sufficient consensus from other parties to secure protection. As a result, South Africa became the first country in the world expressly to recognize in its Constitution sexual orientation as a ground on which discrimination would automatically be unfair until proven otherwise. In a long line of judgments the Constitutional Court emphasized that same-sex rights should be interpreted as giving effect to the promise of equality while respecting and accommodating diversity in society.

It was inevitable that the Court eventually declared the lack of the legal recognition of same-sex relationships unconstitutional in the landmark decision of Minister of Home Affairs v Fourie. The Court gave Parliament a period of one year in which to adopt legislation that would allow same-sex partners to formalise their relationships. After a process of public participation and submissions by the conservatives as well as the gay-rights lobby groups, Parliament decided not to allow for same-sex “marriage,” but to place same-sex couples on an equal footing with

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1 The Constitution is the supreme law of South Africa and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. §2 SA Const.; Currie and De Waal The New Constitutional and Administrative Law 2001. Ch. 2, the Bill of Rights, uses the term “fundamental rights” instead of “human rights.”


3 §9 of the S.A. Constitution provides as follows: Equality

(1) 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.

(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 National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SALR (CC); National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SALR 1 (CC); Du Toit v Minister of Welfare and Population Development 2003 (2) SA 198 (CC); Satchwell v President of RSA No. CCT 45/01.

5 2006 1 SA 524 (CC).
heterosexual spouses by creating the category known as “civil partnership” for same-sex couples. South Africa thus became the fifth country to legalise same-sex unions when the Civil Unions Act was enacted by parliament in 2006. Yet, many in the same-sex community were outraged that they were not allowed to “marry” in the traditional sense of the word.

However, although the decisions of the Constitutional Court have by and large been endorsed by government, the headlong rush towards the emancipation of same-sex oriented rights does not necessarily meet with popular approval of the people of South Africa. In a society, such as South Africa, where approximately eighty per cent of South Africans profess to the Christian faith and most of parents and learners adhere to religious beliefs and moral opinions that accord with the conventional position on marriage, the normalization of same-sex unions and the concomitant interest to uphold same-sex lifestyles create a tension in the public domain. The extent to which same-sex rights and interests should be endorsed, tolerated or promoted in public schools is therefore a contentious issue.

In view of the aforementioned controversy, this paper will discuss the significance of the endorsement of same-sex partnerships to education in two parts. Firstly, the Constitutional background and relevant case law will be discussed, and secondly the effect of same-sex partnerships will be examined with regard to the purpose of education, the rights of parents and the best interest of children, the effect of legal positivism and a secular approach on societal mores and the impact of HIV/AIDS to South Africa.

2. Background to the South African Constitution.

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9 De Vos P. & Barnard, J. *South African Law Journal*, Vol 124( 4) at 808-809. Also, in his keynote address, Justice Froneman of the Constitutional Court, admitted that the people of South Africa are not in popular agreement with the overly progressive approach of this court and that it should take cognizance of public opinion on matters of moral import in order to retain credibility. Annual F.W. de Klerk-honorary lecture held at the Law Faculty, North-West University on 13 October 2010.
10 The 2007 census results indicate that 79,8% of South Africans adhere to the Christian faith, which includes mainstream Protestant, African Zionist, Independent, Latter Day Saints and Roman Catholic traditions. The percentages of the other main religions are: Judaism (0,2%), Islam (1,5%), Hindu (1,2%) other Eastern (0,9%). The remaining 16,5% of the population indicated that they have no religion. See http://www.statssa.gov.za/census01/html/RSAPrimary.pdf 24 (25-10-2007).
11 Duncan *Marriage Law Project*. 2001. The overwhelming consensus of adherents (99.9 percent) of the five major religions of the world, i.e. Christianity (Catholic, Protestant, Orthodox, Independent and Latter Day Saints traditions), Judaism, Islam, Hinduism and Buddhism affirm that marriage, by definition, requires a man and a woman. For a deviant view see Swidler 1993. *Homosexuality and World Religions.*
The Bill of Rights contains a number of provisions such as the right to human dignity, the right to freedom of expression, the right to privacy and the right to freedom of association that have an implicit bearing on the topic of this paper. Woolman et al. assert that the most important stipulation in the Bill of Rights is the limitation-provision. The gist of the limitation provision entails that fundamental rights are not absolute and that the proportional weight of conflicting rights should be balanced in a process by determining the reasonability and justifiability of limiting one right in respect of another. The essence of this proportionality assessment is to determine whether the “benefit to others” seem to outweigh the “cost to the right-holder.” Accordingly, in matters where the interests or rights of same-sex individuals or groups might conflict with the interests of others, the courts would apply the limitation provision to weigh the respective rights. The answer to such quandaries cannot be answered in the abstract, but depends on the particular facts of each case and must be considered casuistically.

2.1 The right to basic education

Section 29 of the South African Constitution provides that everyone has the right to basic education. This places an essential obligation on the state to provide public education. In addition, section 29(3) of Constitution provides that everyone has the right to establish and maintain, at their own expense, independent educational institutions. Independent schools in South Africa tend to be parochial institutions based on a particular faith, language of tuition or culture.

2.2 The best interest of the child

Section 28(2) of the Constitution provides that “a child’s best interests are of paramount importance in every matter concerning the child.” The comprehensive and emphatic language of section 28 indicates that application of the law must always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and

12 Chapter 2, SA Constitution Act 106 of 1996.
(1) The rights in the Bill of Rights may be limited only in terms of law 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, including-
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children’s rights. However, the Constitutional Court has held that section 28 is not an overbearing and unrealistic trump of other rights and that the best interests injunction is capable of limitation.

In the matter of *M v State,* which dealt with the question whether it would be in the best interest of three young boys if their mother (as primary caregiver) was incarcerated for committing fraud, Justice Sachs explained the role of the law and obligations of the State with regard to the best interests of the child as follows:

No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives. Thus, even if the State cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can.

In *Government of the Republic of South Africa v Grootboom* Justice Yacoob pointed out that the State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated in section 28. Normally that obligation would be fulfilled by enacting legislation and implementing enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of harm suffered by children. Accordingly, the purport of section 28(2) establishes the principle that the State and organs of the State, such as public schools, should follow policies and conduct itself in a manner that safeguards family life and sustains parental care in the best interest of the child.

### 2.3 Religion in public schools

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15. Ibid. at para 28.
17. 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paras 77-8.
In contrast to the position of the United States\textsuperscript{18} which attempts to completely divorce the religious and secular spheres of society, South Africa follows the co-operative model towards religion and the State. In the co-operative model, both the principle of legal separation and the possibility of creative interaction between the law and religion are affirmed.\textsuperscript{19} In an open and democratic society contemplated by the Constitution, there must be mutual respect and co-existence between the secular and the sacred.\textsuperscript{20} In terms of section 15(2) of the Constitution religious observances may be conducted in public schools on condition that firstly, the observances should follow rules made by the school governing body; secondly, they are conducted on an equitable basis; and thirdly that attendance at them is free and voluntary.\textsuperscript{21} The national guidelines for religious policy at schools distinguishes between religious observances (such as prayer, singing hymns, reading from the Bible etc.); religious studies (which refers to the subject of studying religions of the world); and religious training (which involves specific doctrinal teaching and proselytizing that is usually performed by ordained religious leaders). Accordingly, the right to conduct religious observances in public schools does not entitle any teacher to teach specific religious doctrine to a captive audience of learners in a classroom as the involuntary nature of such teaching would infringe the section 15(2)(a) requirement.

In terms of section 9(3) of the Constitution the state may not unfairly discriminate directly or indirectly against anyone on grounds of religion. Obviously this implies that the judicial branch of the state (the courts) may not discriminate unfairly against a person or groups religion by differential treatment that impugns the dignity of those affected. According to De Vos and Barnard the most compelling factor favouring a conclusion that differential treatment imposed by the state constitutes unfair discrimination will be a showing that the affected group suffers from pre-existing disadvantage, vulnerability, stereotyping or prejudice.\textsuperscript{22} Yet, in a society in transition new patterns of discrimination by the state (or other persons) may develop. In this regard it has become clear that the judicial approach of favouring secularism has established a trend of differential treatment towards Christian religious groups.\textsuperscript{23}

\textsuperscript{18} The problematic approach of the US Supreme Court toward the state and religion and the untenable results associated with the separationist model have been well documented. See in general Russo "In the Eye of the Beholder: The Supreme Court, Judicial Activism, and Judicial Restraint" (2005) School Business Affairs 47-50.
\textsuperscript{19} Wittmann \textit{v} Deutscher Schulverein, Pretoria 1998 (4) SA 423 (T) per Van Dijkhorst J at p 446 G-H “It is clear therefore that the drafters of our Constitution steered our constitutional ship on a religious course diametrically opposed to that of the United States.”
\textsuperscript{20} Minister of Home Affairs \textit{v} Fourie. See note 5.
\textsuperscript{21} §15(2) SA Constitution.
\textsuperscript{22} See note 3 at 798.
Nevertheless, the co-operative model has the advantage that every school may have its own religious policy and that educators and learners alike are free to publicly live in accordance with their religious convictions. As a result, many public schools in South Africa have retained a religious character and culture that enables learners and educators to demonstrate their faith. The adverse side of the matter is that contentious issues such as same-sex relationships can create tensions in schools especially where such practices conflict with the precepts and ethos of a particular religion.

2.4 Equality and the legalization of same-sex rights

Over the past fifteen years almost all the provisions in the common law and statutory law that differentiated directly or indirectly between heterosexuals and homosexuals have now been set aside by parliament or declared invalid by the Constitutional Court. In particular the common law crime of sodomy has been abolished, immigration benefits have been afforded to same-sex life partners of citizens, adoption right have been granted to same-sex couples, spousal benefits such as pensions and medical aid compensation have been accorded to same-sex life partners, and same-sex unions have been legalised.

The legalisation of same-sex rights has fortified the secularisation of societal norms because there is, to a large extent, a complacent acceptance of the normalisation of same-sex relationships in South Africa.

3. Same-sex partnerships in the public domain

Proponents of same-sex rights argue that family, family life and conventional spousal relations are not threatened by same-sex relationships. In the immigration case Justice Ackerman stated

It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form and non-traditional family forms may equally advance true family values.

The Constitutional Court held that a person’s sexual orientation is of no legal consequence and that the state does not have a legitimate interest in protecting society and its

24 National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SALR (CC).
25 National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SALR 1 (CC).
26 Du Toit v Minister of Welfare and Population Development 2003 (2) SA 198 (CC).
27 Satchwell v President of RSA No. CCT 45/01.
28 Du Toit v Minister of Welfare and Population Development CCT 40/0.
29 National Coalition for Gay and Lesbian Equality v Minister of Justice1999 (1) SALR (CC) at para. 34.
institutions by excluding gay men and lesbians from society or its institutions. In Fourie the Court rejected many of the stereotypical assumptions made about gay men and lesbians and their intimate relationships. The Court affirmed the principles with regard to treating gays and lesbians fairly which includes that gays and lesbians have a constitutionally entrenched right to dignity and equality; the criminalisation of private and consensual sexual expression between gays has been struck down as unconstitutional; gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms including affection, friendship, eros and charity; and that gays and lesbians are as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships. In particular the Constitutional Court thus concluded that the family life of gay men and lesbians is in all significant respects indistinguishable from those of heterosexual spouses and in human terms as important. The Constitutional Court warned that societal prejudice can never justify discrimination and an institution’s (such as a church or a school) wish to accommodate the prejudices of the majority of the people of the country can never make otherwise unfair discrimination fair.

As far as same-sex relationships relate primarily to private matters in the realm of family law, these statements by the Court are decidedly correct. Thus, in terms of the Civil Union Act same-sex couples have the ex lege duty to support one another according to their respective means and needs, will be prohibited from disposing of joint property without written consent, and will be entitled to occupy the family home irrespective of which partner owns or rents it. Same-sex partners also automatically qualify as a "spouse" for the purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, and as a "dependant" in terms of the Compensation for Occupational Injuries and Diseases Act.

However, the exercise of these private rights, arrangements and concerns of same-sex couples are and should be restricted to the private sphere. Supposed same-sex entitlements or claims in the public domain are in not analogous to same-sex rights in the private domain. In other words, it is important to distinguish between the rights of same-sex oriented persons in private and the ostensible entitlements of same-sex persons in public. The extent to which the exercise of same-sex rights should be permitted in the public realm is a matter that requires close scrutiny. Within the realm of public education the endorsement of same-sex rights or supposed entitlements may have adverse legal, educational and moral consequences that impact on the

30 Ibid.
31 2006 1 SA 524 (CC) para 92.
purpose of education, the rights of parents, the appointment of educators and the best interests of children. These matters will be considered sequentially.

4. The purpose of education

Schools are microcosms of society. Learners experience many of the everyday challenges and conflicts in the classrooms and school environment that will one day become part of their adult life in the society they live in. Education has two main aims namely a qualification function and a socialisation (or civilising) purpose. The socialising purpose of education is least effective if children are placed in cultural-, linguistic- or religious settings foreign to their own upbringing, but is optimised by placing a child in the safe setting of a known language, culture and religion.

Education is the primary instrument to ensure the safeguarding, protection and transference of a society’s constitutional values and a community’s culture. Developing a culture of human rights is enhanced when educators model behaviour in accordance with the Constitution. So doing educators overtly and explicitly display the desirable codes and values of behaviour to learners, parents and others in the school community.

Obviously, the opposite also applies. If homosexual or lesbian educators overtly and explicitly promote or practice same-sex lifestyles, such behaviour will inadvertently model the values and mores according to which such educators live. The overriding socialising purpose of education to develop learners into skilled, competent, socially responsible adults and civic minded citizens could be undermined if learners are actively recruited or purposefully exposed to promiscuous sexual behaviour that are foreign to their own upbringing. However, this does not imply that all same-sex oriented persons are promiscuous as they are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships.

Even so, in the public education context the overt practice of promiscuous same-sex lifestyles in schools could undermine the ultimate aim of education because socialisation will not be optimised and the learners will be taught values foreign to their own upbringing and the

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34 Ibid.
37 Minister of Home Affairs v Fourie
boni mores of society. Section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can. Therefore, the State must avoid circumstances in public schools that might have a harmful effect on children insofar as non-conventional sexual behavior is contrary to the child’s upbringing.

5. Parent rights and curriculum content

In terms of the South African common law parents have the right to direct the education, religion and general upbringing of their children. In addition, section 2 of the Convention against Discrimination in Education, which was ratified by South Africa on 9 June 1996, confirms in that parents or legal guardians may determine the content and nature of the education of their children. Article 4 of the African Charter on the Rights and Welfare of the Child, which was ratified by South Africa on 7 January 2000, also provides that treaty states must respect the rights of parents to choose schools and determine the education of their children. Therefore, the South African common law and international law places a duty on the State to uphold the rights of parents to determine the moral, religious and cultural education of their children to the extent that it does not conflict with the Constitution.

Part and parcel of parent rights is the right to contest exposure of the child to potentially harmful or contentious content in the curriculum. Parents should be given reasonable opportunity to contest contentious issues such as age-inappropriate and explicit content in sex education, ideological indoctrination and exposure to potentially harmful values. However, it is not advocated that all contentious content should be banned because, after all, schools are places where learners should be taught to think critically and to take issue with contentious matters and educators, as professionals, should be entitled to determine the content of their classes. A better recourse would be for educators and school officials to consider reasonable parental request and then to accommodate such concerns by developing appropriate programs. School officials must balance the interests of those who advocate same-sex marriage as a right and those who disagree, including parents who do not wish their young children to be subject to teaching about this

38 S v M See note 10 at para 28.
39 Ibid.
40 Spiro, E. 1985. The Law of Parent and Child; Van Heerden, B. 1999. Boberg’s law of persons and the family. The South African common law is the Roman-Dutch Law of the seventeenth century. Elements of English Law such as the precedent system, the Law of Evidence and aspects of Commercial law have been recepted to create a unique system of South African Law.
aspect of human sexuality at the hands of educators or school officials.\footnote{Russo, C. 2010. *Respect for Me But Not for Thee: Reflections on the Impact of Same Sex Marriage on Education*. Paper presented at the Symposium on Same-sex marriage: Impact on education held at Brigham Young University, October 2010.} It is suggested that sensitive and contentious content should not be taught unless parents have been given fair and adequate warning in writing and have had the opportunity to determine the content. At this stage this is not standard practice in South African schools, although educators and schools do at times obtain consent from parents in writing to teach or discuss contentious content.

The South African National Curriculum Statement is centralised and determined by the National Department of Education. The national policy with regards to the topics of same-sex rights and sexual orientation is that every provincial department has the competence to decide on the inclusion or exclusion of these topics. The learning area of Life Orientation, which is compulsory for grades 1 to 12, addresses topics such as life skills, health education, vocational guidance, civics and so forth. To date the national education department and the provincial departments in South Africa have decided to omit the topic of same-sex or unconventional sexual relations from the Life Orientation curriculum. This prudent approach is supported by the author in view thereof that parents are the primary educators who have the ultimate responsibility educate their own children with regard to contentious content in accordance with their moral and religious outlook.

6. Appointment of educators with same-sex orientation

In the matter of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*\footnote{[2008] JOL 22361 (T)} a music teacher claimed damages for wrongful termination of his employment contract by a church on the ground of his homosexual orientation. Strydom based his claim on the Promotion of Equality and Prevention of Unfair Discrimination Act.\footnote{Act 4 of 2000.} It was common cause that the plaintiff’s contract with the church was terminated on the basis that he was involved in a homosexual relationship and that the church unfairly discriminated against him on the basis of his sexual orientation. The onus then rested on the church to prove in terms of the limitation provision of the Constitution that the discrimination was fair. The right to equality of Strydom had to be balanced against the freedom of religion of the church.

The plaintiff argued that the churches opposition to homosexuality on religious grounds was simply as an expression of bigotry. The clear evidence presented was that the stated belief of the church that marriage can only validly exist between one man and one woman, and that persons of homosexual orientation are therefore required to remain celibate and cannot be
involved in a homosexual relationship. In view of the church's teachings based upon the Bible same-sex relations would, in fact, amount to a cardinal sin.

The church argued that the plaintiff could not by way of his example of living in a homosexual relationship deliver his services as a spiritual leader and a lecturer in music at the church's music academy. The court found that the job description of Strydom did not entail leadership or substantial religious responsibilities and that the impact on religious freedom did not justify the unfair discrimination. Therefore, the court found that the church could not show that it was part of his job description that he was to become a role model for Christianity. The onus to justify the discrimination was not discharged, and the Court ordered the church to pay the plaintiff an amount of R75 000 for the impairment of his dignity and emotional and psychological suffering, and R 1 970 for loss of earnings.

However, the secular reasoning of the court in Strydom is at variance with the co-operative model of accommodating religious freedom. In terms of the Constitution it would be automatically be unfair to discriminate on grounds of religion until proven otherwise. The court in Strydom favoured a secular approach that treats religion and the religious rights of Christians differently. As a result the pattern is developing wherewith the affected group (Christians) are caused to suffer from prejudice endorsed by the courts.

Woolman suggests that if a Christian school could show that leading an 'exemplary Christian life' was an important part of every teacher's job description, of course, being interpreted by the church in accordance with its own tenets – then it is conceivable that the church would be given some latitude to flout the legal prohibition on employment discrimination. Most schools in South Africa have to date not included such requirements in their job descriptions. It is probable that any job description that includes a condition that discriminates unfairly against a person's sexual orientation would also be unconstitutional. Based on this analysis, it is clear that most public schools would find it very difficult to justify the termination of educators by virtue of their sexual orientation.

In another matter concerning employer-employee relations, the Constitutional Court held in the landmark judgment Hoffmann v South African Airways that it was unconstitutional of the Airways to refuse to employ an applicant who was HIV-positive because it infringed on his constitutional right not to be subjected to unfair discrimination. This decision has far-reaching implications for the employment of persons, whose status is HIV-positive, and in regard to an employee's right to equality of treatment generally. The Hoffman-case confirms that educators

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44 section 9(3).
45 See note 13 supra at 41- 48.
46 (2000) (5) LLD 635 (CC)
who are HIV-positive must remain in the employ of the Education Department or the particular school as long as they are physically able to perform their duties. The employer may not terminate the services of HIV-positive employees simply because they are HIV-positive.

These cases have significant implications for all schools, both public and independent. *Strydom* suggests that the termination based on the sexual orientation of an educator would only be justifiable if the job description specifically requires of the educator to be a role model whose behaviour and conduct will accord with the values, religious policy and ethical norms of the school. Although there are no reported cases of the unfair dismissal of educators by public schools based on their sexual orientation, the case of *Strydom* would clearly apply to similar circumstances in schools. *Strydom* confirms the principle that religious beliefs about sexual orientation, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to the grounds of sexual orientation. *Hoffman* confirms that HIV-positive applicants for positions at schools, may not be refused appointment because of their HIV status *per se*, but may only be refused appointment if their HIV/AIDS condition is so advanced as to render them entirely unfit for duty. Although, same-sex HIV-positive educators are not stereotypically promiscuous and do not generally pose a contagious health risk to learners or colleagues at schools, it is conceivable that educators may pose a health risks in certain circumstances because of sexually promiscuous behaviour.

### 7. Impact of same-sex relationships in education.

#### 7.1 Constitutionalism and the secular approach

Surprisingly, in this era of constitutionalism the legal positivistic approach to constitutional adjudication has remained the preferred methodology of the courts. Davis attributes the juridical practice of applying legal positivism as method to the pre-1994 tradition of formalistic interpretation in accordance with the Westminster constitutional model. Legal positivism is a philosophical approach that formalistically separates morality from the positive law. Application of the legal positivistic method ostensibly avoids decisions or interpretations based on moral values, religious beliefs, or emotional considerations to influence the process of reasoning, because such apparently irrational phenomena cannot be posited as true “facts” or valid reasons. The core features of positivist epistemology is that only empirical facts (i.e. facts observed and measured by the senses) that have been rationally (i.e. by induction) abstracted to a higher system of knowledge can be “posited” as true and valid.

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In contrast, the natural law approach (legal moralism) to issues involving value judgments and moral questions is that the law is based on moral norms extraneous to the positive law itself.\textsuperscript{49} The extraneous source of moral norms is usually regarded to be of transcendental origin in accordance with religious beliefs.

South African case law is replete with examples of legal positivism as the dominant approach followed by the courts\textsuperscript{50} and is indubitably confirmed by this excerpt from \textit{S v Makwanyane}:

Whether or not a particular punishment is inconsistent with these rights depends upon an interpretation of the relevant provisions of the Constitution, and not upon a moral judgment that a murderer should not be allowed to claim them.”\textsuperscript{51}

There can be no doubt that, from a legal point of view, the South African civil marriage is regarded as a secular institution. Justice Farlam in his minority judgment in the Supreme Court of Appeal hearing of \textit{Fourie v Minister of Home Affairs}\textsuperscript{52} explained the secular and positivistic approach of the Courts as follows:

I have dealt in some detail with the history of the law of marriage because it throws light on a point of cardinal importance in the present case: namely, that the law is concerned only with marriage as a secular institution. It is true that it is seen by many as having a religious dimension also, but that is something with which the law is not concerned.

The notion of a separation or co-existence between the secular and the sacred is philosophical in purport, as the first dualistic life-view was contemplated by Plato.\textsuperscript{53} This confirms Moore’s the contention that irreligious (secular) convictions and presuppositions are philosophical points of departure that play a role in legal positivism as applied by the judiciary.\textsuperscript{54}

Thus, as shown by post-modernists, the meta-theoretical spheres of religion (or irreligion) and morality are so intertwined with “secular” life that it cannot be conveniently compartmentalised into a separate categories.

\textsuperscript{49} Hosten, Edwards, Bosman and Church. 1995. \textit{Introduction to South African Law and Legal Theory}.
\textsuperscript{50} Christian Lawyers Association of SA and Others v Minister of Health and Others 1998 (4) SA 1113 (T) at p.1118 par D: "Nor is it the function of this Court to decide the issue on religious or philosophical grounds. The issue is a legal one to be decided on the proper legal interpretation to be given to section 11."
\textsuperscript{51} para 137.
\textsuperscript{52} 2005 3 SA 429 (SCA) para 80.
\textsuperscript{54} Moore L. 1982. \textit{The Unmasking of Modern Science} 70.
Craffert demonstrated that religious or irreligious convictions and presuppositions, worldviews and life-views, convictions and philosophical points of departure all play a role in science, including the legal science. Worldviews are the pre-scientific foundational points of orientation from which individuals interpret their normative, belief and reality perspectives. Religion or morality forms the core of every person’s worldview. According to Rens values are based on a person’s worldview and are formed by a variety of factors including religion, culture, gender, cognitive, emotional and physical development, as well as parental upbringing and the socio-economic environment. Hosten et al remind that legal theory includes a concern with moral values as well as political values (such as the democratic tenets of equality, freedom and human dignity), legal values (such as justice, fairness, righteousness, reasonableness, equity and impartiality) and administrative values. Although the moral, democratic and legal values correspond to a large extent, conflicts arise at the periphery of these categories where the applications become intertwined. In South Africa the Bill of Rights makes the validity of the law contingent upon moral tests. Value judgments are part and parcel of the judicial process, and all judgments, including positivistic decisions, shape public opinion and values. The secular and positivist approach to law is founded on philosophical presuppositions and premises based on each judge’s particular worldview. It would be disingenuous to state that judges do not make value judgments from time to time and of course, the law plays a powerful part in determining the values of society by virtue of its coercive nature and the ability to enforce compliance by legal sanction.

Philosophers of science like Kuhn, Lakatos and Feyerabend questioned the positivist assumption that science was autonomous, self-reliant and self-sufficient. They demonstrate convincingly that philosophers, researchers, theoreticians and practitioners could not be impartial, objective and neutral in the processes of science. Similarly, it would be disingenuous for the judiciary to deny that presuppositional subjective influences and worldviews determine their judgments to an extent. Yet, the positivist approach maintains the ostensible reliance by the courts on rational and empirical evidence based on positive sources of law (such as common law texts, statutory provisions or codified law, case law, evidentiary proof, and rational argument).

58 Constitution of South Africa 1996 s 7(1) enshrines the democratic values of freedom, equality and human dignity.
59 Hosten et al. See note 57 at 237.
61 S v Makwanyane 1995 3 SA 391 (CC) par 207: “After all, concepts like ‘good faith’, ‘unconscionable’ or ‘reasonable’ import value judgments into the daily grind of courts of law.
62 See note 47 at 11.
64 Van der Walt Scholarship in a Changing Intellectual Climate (2002) 27
but spuriously denies the subliminal influence of meta-theoretical foundations of knowledge and subjective worldviews. Wilmot asserts that the positivistic method is erratic because the empirical requirements for proof and atomistic approach to communal structures cannot adequately accommodate the notion of irreducible causal relationships. 65

As a result, values expounded by the judiciary often conflict with other court decisions and with societal or individual mores. For instance, to name a few examples: the value of life is emphasised by the prohibition of capital punishment, 66 but is downgraded by the determination that foetuses do not have a right to life; 67 the value of human dignity is emphasised by disallowing the legalisation of prostitution, 68 but is also degraded by allowing pornography; 69 equality and individual autonomy is protected to reinforce same-sex emancipation, but equal deference is not accorded to traditional religious and moral views of marriage between a man and a woman. 70 As a result, the positivistic approach of the judiciary inadvertently influences morality when value judgments on issues purportedly within the secular sphere, exert a moral influence on society. This is evident in view of the wide-spread complacent acceptance of the normalisation of same-sex rights in South African society.

7.2 Minister of Home Affairs v Fourie and religious freedom

The matter of Minister of Home Affairs v Fourie is illustrative of the conflict between religious (moral) and secular values that our society is experiencing. 71 As previously mentioned, in Fourie the Constitutional Court declared the exclusion of same-sex couples from the common-law definition of marriage and the prescribed marriage formula in section 30(1) of the Marriage Act unconstitutional because it constituted unfair discrimination against same-sex couples. 72

Once again, the court applied a positivistic approach, as is evident from the following extract, per Justice Sachs:

66 see S v Maksanyane (n 8) above.
67 see Christian Lawyers Association of SA and Others v Minister of Health and Others (n 6) above.
68 S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 6 SA 642 (CC).
69 Case and Another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others 1996 5 BCLR 609 (CC) par 91: “What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody’s business but mine.”
71 Minister of Home Affairs v Fourie (n 6) above.
“Yet for the purpose of legal analysis, such appreciation would not imply accepting that those sources may appropriately be relied upon by a court. Whether or not the Biblical texts support his beliefs would certainly not be a question, which this Court could entertain. From a constitutional point of view, what matters is for the Court to ensure that he be protected in his right to regard his marriage as sacramental, to belong to a religious community that celebrates its marriages according to its own doctrinal tenets, and to be free to express his views in an appropriate manner both in public and in Court. Further than that the Court could not be expected to go.”

The Court justifies this approach by stating that 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. This is however a fallacious argument, a non sequitur, because considering or hearing religious or moral arguments against an immoral notion or legal rule does not necessarily call for judicial construction of religious texts, but for consideration of the persuasive value of moral reasons. The religious texts were not in contention, in casu, and there is no unadulterated religious schism on the issue at hand. In fact, all Christian denominations are in agreement of the meaning of marriage. In other words, it is fallacious to purport that the use of religious texts calls for judicial construction of the texts. The court exaggerates the so-called differences in order to justify the disregard of religious doctrine.

In a predictable pattern that accords with a humanist worldview, Justice Sachs acknowledges the place of religious beliefs in a pluralistic society, for purely utilitarian reasons, but then downplays the pragmatic effect that same-sex marriages will have on freedom of religion.

The Court first considered the argument that the constitutive and definitional characteristic of marriage is its procreative potential and can therefore never include same-sex couples. However, it found this argument to be deeply demeaning to couples (married or not) who, for whatever reason, either choose not to procreate or are incapable of procreating when they start a relationship or become so at any time thereafter. It is also demeaning for couples who start a relationship at a stage when they no longer have the capacity to conceive, and for adoptive parents.  

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73 at par 93.  
74 per Sachs J at par 92.  
75 see note 11 above.  
76 per Sachs J at par 92: ‘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.’
Conservative submissions before the court in *Fourie* argued that marriage is by its very nature, and in terms of its historical evolution, is concerned with heterosexual relationships and suggested that the remedy does not lie in radically altering the law of marriage, but that an alternative form of recognition for same-sex family relationships would be the appropriate remedy. The Court rejected the assertion that marriage is by its very nature a religious institution and that to change its definition would violate religious freedom in a most fundamental way. Although the Court recognized that religious bodies play a large and important part in public life and are part of the fabric of our society, and that in an open and democratic society contemplated by the Constitution, there must be mutual respect and co-existence between the secular and the sacred, the Court held that:

The acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide, they co-exist in a *constitutional realm* based on accommodation of diversity.

The court thus held that in an open and democratic society there should be a capacity to accommodate and manage difference, and recognition should not be given to the view of the (religious) majority on marginalized minorities in ways that would reinforce unfair discrimination against a minority. In this regards Justice Sachs reasoned:

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other.\(^77\)

This is obviously a judgment based on a secular approach to matters of moral import. This line of reasoning is positivistically blind to the far-reaching consequences, which conflicting worldviews and underlying values have on the everyday lives of people. The containment of freedom of religion as a negative liberty strictly to be exercised within a private domain also has the likely potential for unfair discrimination against public religious practice. A strict positivistic approach becomes untenable when the court ostensibly applies one set of rules (confining the parties to the text), but then insidiously applies extraneous considerations (such as subjective presumptions and meta-theoretical approaches) in making value judgments or reaching conclusions of moral import.

\(^{77}\) at par 94.
The *Strydom* case is another example that illustrates the legal positivistic adjudication of same-sex rights is based on a secular worldview, which is value-laden and is influenced by prejudicial assumptions. The decision in *Strydom* was that the freedom of religion of the church and its members does not justify the discrimination against the plaintiff’s sexual orientation and implied that religious convictions and freedom is not a legitimate State interest that should receive protection. As a result of the judgment the church and all its members are placed the unconscionable position of having to choose between their religious beliefs and the Court’s interpretation of homosexual rights based on secular values.

Adjudication based on a secular (humanist) worldview that ostensibly promotes tolerance between various antagonists may seem to be a neutral solution, but in effect, it invariably takes a stand against religious equality and tolerance of religious beliefs in the public realm. The headlong rush of the judiciary to advance amoral values reflects the will of an ideological minority to impose irreligious worldviews on society in the name of the Constitution. Under the mask of “neutrality”, legal positivism hides a prejudice that is decidedly intolerant of religion. The injudicious application of legal positivism on moral issues without due deference to religious and moral values of society inevitably, unjustly promotes intolerance of religion, and is out of touch with the boni mores of society. Interestingly, the South African Constitution acknowledges the importance of religion and God’s providence and therefore indicates a set of values that should accord with religious worldviews.

The courts should remain responsive to societal values and norms, which also accord with constitutional values if viewed from a religious worldview perspective. Failing to do so usually amounts to prejudicial intolerance and overreaching by the courts.

### 7.3 The impact of HIV/AIDS on education.

In the South African context court decisions that have been based on secular approaches have had dire consequences for the well-being and moral outlook of society. The inability of the Constitutional Court to perceive the probable increase in the crime rate in South Africa after the abolition of the death penalty, confirms this shortcoming. It should be borne in mind that the

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80 Ironically, the former Chief Justice Chaskalson axiomatically stated in his keynote address at the Symposium on democracy and the Constitution that the crime wave experienced in South Africa cannot
secular approach to hard cases ignores the role of morality in society and is blind to the negative consequences that result from morally questionable values, as Wilmot asserted. \(^{81}\) Positivistic epistemology restricts and delimits otherwise valid knowledge systems (such as legal morality, public opinion, interpretivism, common religious beliefs, intuitive and experiential evidence of causal relationships) to such an extent that the resultant effects of such court decisions lead to distortions in society. \(^{82}\) The reason for this myopic logic of secularism is that positivistic epistemology, by its very nature and definition, erroneously excludes and delimits otherwise valid knowledge systems. The consequences and ill effects of a deterioration in morality is particularly significant and evident in South Africa which suffers from the highest murder rate per capita and the highest rate of HIV/AIDS infection in the world.

Statistics indicate that crime levels, measured from one year to the next, are increasing at a faster rate than any other time since 1994. \(^{83}\) Although murder decreased in 2009 by approximately 2%, attempted murder, rape and aggravated robbery increased unabatedly. Various factors contribute to the crime rate such as the removal of capital punishment, a decrease in the number of policemen between 1998 and 2000, a proliferation of illegal weapons, and an annual average population increase of 1% occurred during this period. However, despite reducing factors such as heightened security consciousness, mandatory minimum punishments, a burgeoning security industry, the incidence (i.e. new perpetration) of crime increased on average by 7% per year since the abolition of capital punishment. Although positivists would deny the connection, the crime wave that is being experienced in South Africa is to a large extent attributable and a consequence of the prohibition of capital punishment. However, the deterrent effect of capital punishment is difficult to prove by empirical methods, because potential criminals would not readily admit to contemplating the commitment of capital offenses. However, the negative \textit{de facto} effects of the change in societal values and morality do become apparent in view of the increase in offenses such as murder, rape and attempted murder in South Africa. \(^{84}\) This confirms the effect of secularisation of legal norms by the judiciary.

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\(^{81}\) See note 65.


\(^{84}\) Statistics indicate that crime levels, measured from one year to the next, are increasing at a faster rate than any other time since 1994. Between 1995 and 1996 crime increased by 0.3%. Since then, the year-on-year increase has been 1.1% (1997-1998), reaching a high of 7% (1998-1999). See also \textit{SA Crime Quarterly} (2007) 19. Although murder decreased annually by approximately 2%, attempted murder, rape, aggravated robbery increased unabatedly. Various factors contribute to the crime rate such as a decrease in the number of policemen between 1998 and 2000, a proliferation of illegal weapons, and an annual average population increase of 1% occurred during this period. However, despite reducing factors such as heightened security consciousness, mandatory minimum punishments, a burgeoning security industry, the incidence (i.e new perpetration) of crime increased on average by 7% per year.
Similarly, South Africa is currently experiencing the most severe HIV/AIDS (Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome) epidemic and has the highest number of HIV-positive people in the world, between 6.29 and 7 million.\footnote{UNAIDS. 2008. \textit{AIDS Epidemic Update}. [Web] Available at: http://www.unaids.org. Accessed: 17 July, 2010.} About half of South Africa's population of 49 million are children. By 2015, when the epidemic peaks, ten percent of South Africa's population about 3.6 to 4.8 million children will be orphans. Despite the strategic planning of the Department of Health, and increased resources for fighting the pandemic, South Africa is losing the battle against HIV/AIDS as the prevalence has risen from 0.7% in 1990 to over 22% in 2000.\footnote{Coome C. 2002. \textit{Keeping the Education System Healthy. Managing the impact of HIV/AIDS on Education in South Africa}.}

Eaton and Alan\footnote{Eaton L. & Alan J. 2002. Unsafe sexual behavior in South African youth. \textit{Elsevier Science}.} found that in South Africa at least 50% of young people are sexually active by the age of 16 years and that the sexual behaviour of young people is unsafe. In this regard it was found that between 1% and 5% of females and 10 to 25% of males reported having more than four partners per year. Between 50% and 60% of sexually active youth report never using condoms. Approximately 12% of the educator workforce is reported to be HIV-positive.\footnote{Khangale, N. 2005. Eleven teachers a day die of AIDS. \textit{The Star}. 01/04/05:1} One of the effects of HIV/AIDS on schools is that approximately 100,000 learners do not have teachers to teach in their classrooms. Although the HIV/AIDS pandemic is ravaging both the heterosexual and homosexual groups of the population alike, persons with homosexual orientation fall in the high-risk group of people who are particularly vulnerable to infection.\footnote{De Wet, A. and Van Huyssteen, A. 2003. Elements of an unsafe school environment. In: Oosthuizen, I.J. (ed). \textit{Safe Schools}. Centre for Education Law and Policy. University of Pretoria. at 45}

As the majority of same-sex HIV-positive educators do not in general pose a contagious health risk to learners or colleagues at schools, it is incorrect to stereotypically demonize gays and lesbians as being promiscuous. Nevertheless, promiscuous educators of same-sex or heterosexual orientation, pose a health risk to colleagues and learners at schools. One of the possible manners of contracting HIV/AIDS in schools is through involuntary sexual conduct. It has been estimated that in a third of all child-abuse cases in South Africa, teachers are the perpetrators.\footnote{SAPA-AFP. 2002. ‘Teachers commit a third of child rapes.’ \textit{Pretoria News}. 23/1/02:3; Human Rights Watch. 2001. Scared at school: sexual violence against girls in South African schools. Available at: http://www.hrw.org/reports/2001/safrica. Accessed on: 31 August 2010.} There are approximately 6 million learners between the ages of 13 to 18 in South African schools. Female learners do not only face abuse by educators, but are also often abused by male learners at school.\footnote{Fineran, S. Bennet, L. & Sacco, T. 2001. Peer sexual harassment and peer violence: South African children at risk. \textit{Social work}. 37(3).} Many of these abused learners become HIV infected by their
abusers, some fall pregnant and a large percentage drop out of school (Terreblanche, 2002:2). The HIV infection rate among girls is five times higher than among boys. Consequently, as a result of the increased prevalence of HIV/AIDS infection, it stands to reason that learners who are involved in sexual relationships with their peers or with educators, or are raped or sexually assaulted, are particularly at risk of contracting this killer disease.

In such instances, the constitutional right to life of learners and potentially affected persons and the right to a safe and healthy working place or learning environments should outweigh the employment rights and rights of equality of promiscuous HIV-positive educators. The changes in morality in the South African society as a result of secular court decisions may contribute to the increased prevalence of HIV/AIDS in South Africa. In view thereof that homosexually oriented men fall within the high risk category of contracting and spreading HIV/AIDS, it is reasonable and justifiable that the right to life and physical safety of learners and potentially affected persons should outweigh the right to equality and non-discrimination of same-sex persons in schools.

7.4 The tolerance threshold and civil disobedience

There will always be a tendency to apply a positivistic approach in litigation, especially in matters requiring factual proof. Nevertheless, in the interest of maintaining a sustainable democracy, the unjust court decision that inappropriately apply strict positivistic methods to matters concerning issues of morality, religion and cultural differences, will have to be tolerated. If society is to be open and democratic in the fullest sense, it needs to be tolerant and accepting of cultural pluralism and irreligious worldviews. The probability of conflicting interests, values, worldviews and cultural traditions are certainties in pluralist societies.

The question that arises is to what extent conflicting values should be tolerated and are there any limits to toleration. The democratic value of tolerance contains the paradox that the liberal values, goals or manners may themselves contradict the value of tolerance. For instance, if a majority insists on their liberal right to pursue their interests but in turn oppress the freedom of minority groups through intolerance, then this problem does not admit to easy solution. According to Kymlicka, liberal democracies should not tolerate restrictions on individual

94 MEC for Education: KwaZulu-Natal v Pillay (CC) Case no. 51/06 per Langa CJ par 92: “As already noted, our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation.”
autonomy within groups, and should likewise not tolerate unequal treatment between groups. Liberal tolerance protects the right of individuals to dissent from a group, as well as the collective right of groups not to be persecuted by the state.

However, tolerance of injustice and unconscionable law or conduct also has its limits. This notion found apt expression in the famous formula of Radbruch, a proponent of natural law, when he stated that the positive law, secured by legislation and power, takes precedence even when its content is unjust and inexpedient, unless the conflict between law and justice reaches such an intolerable degree that the statute or judicial law, as “lawless law,” must yield to justice.

Therefore, the tolerance of immoral or unjust law is a matter of degree; it will be tolerated until the threshold has been overstepped, whereafter the people’s critical mass will react by restoring justice or by disregarding and disrespecting the unconscionable law. Kymlicka suggests that “comprehensive” values favouring individual autonomy should guide public policies, but typically by persuasion and education, not legal imposition. In order to instil the value of tolerance and the ability to distinguish between immoral and unjust laws inappropriately determined by positivistic court rulings, education and an alternative forum (such as parliament) to deliberate issues morality, religion or culture are possible solutions.

8. Conclusion and recommendations

Insofar as conflicting interests, values, worldviews and religious or cultural traditions are certainties in pluralist societies and liberal democracies, such conflicting ideas and non-conformist practices should be tolerated to the extent that the legal consequences are negligible. However, unconscionable law should not be tolerated if interests are infringed, rights are violated and the resultant harm surpasses an acceptable threshold. In this regard it is suggested that the judiciary has a responsibility to exercise restraint by avoiding strict positivistic formalism when dealing with religious arguments to influence adjudication in hard cases of moral import.

The effect of the legalisation of same-sex partnerships on education was examined by demonstrating that legal positivistic approach of the judiciary that has tended to disregard religious concerns and arguments in matters of moral import. Secularisation of the law has

98 see note 97 at 158.
changed morality in society. The cases of Strydom and Hoffman confirm that schools may not unfairly discriminate against same-sex oriented or HIV positive educators during appointment or termination of employees by virtue of their sexual orientation. This discussion has highlighted analysed the constitutional provisions and relevant case law on the best interest of the child, parental rights and the changing attitudes towards same-sex couples in South Africa. The general moral decline and concomitant promiscuous behaviour has contributed to the prevalence of HIV/AIDS in South Africa. In view of the HIV/AIDS pandemic, any modeling or advocacy of promiscuous behaviour by either same-sex or heterosexually oriented educators would harm the best interests of children. It is recommended that schools should require and enforce strict adherence to a code of conduct requiring a caste (i.e. non-promiscuous) sexual behaviour.

This is particularly apt in the realm of public education where formalistic application of positivism based on the text of the Constitution may not be in the best interest of the child, harm to parental rights and the long term interests of society. Social institutions as such perform an important social function of perpetuating culture and rearing responsible, civilised and civic-minded young people. It is contended that the State has a responsibility to advance the purpose of education by supporting public schools and school communities in circumstances when same-sex interests might unjustifiably harm or conflict with the legitimate interests of parents and learners at school.