

NOTES

GIRLS' EDUCATION UNDER ATTACK: THE DETRIMENTAL IMPACT OF SEXUAL ABUSE BY TEACHERS ON SCHOOL GIRLS' HUMAN RIGHTS IN KENYA A HUMAN RIGHTS REPORT AND PROPOSED LEGISLATION

THE INTERNATIONAL WOMEN'S HUMAN RIGHTS CLINIC GEORGETOWN
UNIVERSITY LAW CENTER*

ABSTRACT

Through its own Constitution and as a state party to numerous international and regional human rights treaties, Kenya guarantees its citizens key fundamental human rights, including the right to be free from discrimination, the right to education, the right to dignity and freedom from degrading treatment, the right to health, and the right to life. All of these rights are violated when a schoolteacher sexually abuses a learner. This paper looks at the pervasive problem of sexual abuse by teachers in Kenya and analyzes the specific violations of schoolgirls' human rights under the Kenyan Constitution and international law triggered by this abuse. It also identifies the steps that the Kenyan government has taken to address the problem of sexual abuse by

* This human rights report was authored by Sara Adhami, Nicole Chenelle, Meika Freeman, and Michelle Gulino, student advocates in the Spring 2017 International Women's Human Rights Clinic ("IWHRC") at Georgetown University Law Center. The report was supervised and edited by Kristie Bluett, Visiting Associate Professor at Georgetown University Law Center and the Acting Director of the IWHRC during the 2016-2017 academic year. The report results from collaboration with two women's rights, non-governmental organizations in Kenya: The Centre for Rights Education and Awareness ("CREAW"), directed by Wangechi Wachira Moegi, and the Federation of Women Lawyers ("FIDA-Kenya"), directed by Teresa Omondi Adeitan, who was pursuing her LL.M. at Georgetown University Law Center during the course of this project. The Clinic students received invaluable input and feedback on their project from Mike Wachira, the Deputy Director of CREAW and from Brian Tronic, the IWHRC Teaching Fellow and Supervising Attorney. The Clinic would also like to thank the local and U.S. supervising attorneys that accompanied the students on their interviews in Kenya: Teresa Omondi Adeitan, Mbeti Michuki (Legal Counsel/Program Officer at FIDA-Kenya), Collins Oluoch (Legal Intern at FIDA-Kenya), Beatrice Njeri (Head of Legal at CREAW), Nancy Stafford (Adjunct Professor at Georgetown University Law Center during the 2016-2017 academic year), and Laura Booth (an associate at Latham & Watkins LLP). Finally, the Clinic students wish to thank the IWHRC's Office Manager, Briana Hauser, for her efforts during the fact-finding trip and in the finalization of this report. © 2018, International Women's Human Rights Clinic, Georgetown University Law Center.

teachers and additional efforts the Kenyan government must undertake to better protect all learners from sexual abuse.

I.	EXECUTIVE SUMMARY	243
II.	METHODOLOGY	247
III.	THE PERVASIVE PROBLEM OF SEXUAL ABUSE BY TEACHERS IN KENYA	249
IV.	THE RELEVANT LEGAL FRAMEWORK	265
V.	SEXUAL ABUSE AT SCHOOL: A VIOLATION OF SCHOOLGIRLS' FUNDAMENTAL HUMAN RIGHTS	267
A.	<i>The Right to Education</i>	267
1.	Violations of the Right to Education: Disrupting the Learning Process, Causing Poor Academic Performance, and Impacting Girls' Attendance.	269
a.	<i>Disruption of the Schoolgirl's Learning Process</i>	269
b.	<i>Poor Academic Performance</i>	271
c.	<i>Negative Effects on Girls' Attendance and Promotion of Female Drop-outs</i>	273
2.	Disregard for Schoolgirls' Personal Development, A Primary Purpose of the Right to Education	275
3.	Long-Term Impacts on Kenyan Society	277
B.	<i>The Right to Freedom from Discrimination and Equality Before the Law</i>	279
1.	Teachers Target Schoolgirls on the Basis of Sex.	281
2.	Schoolgirls Are Disproportionately Impacted	284
C.	<i>The Right to Health</i>	285
1.	The Detrimental Impact of Sexual Abuse on Schoolgirls' Physical Health	287
2.	Mental Trauma Caused by Sexual Abuse	290
D.	<i>The Right to Life</i>	292
E.	<i>The Right to Dignity</i>	295
F.	<i>The Right to Freedom from Degrading Treatment.</i>	299
G.	<i>The Right to Freedom from Violence</i>	303
VI.	KENYA'S POSITIVE OBLIGATIONS TO RESPECT, PROTECT, AND FULFILL SCHOOLGIRLS' HUMAN RIGHTS	305
VII.	EFFECTIVE MEASURES THE GOVERNMENT MUST TAKE TO FULFILL ITS OBLIGATIONS AND BETTER PROTECT KENYAN SCHOOLGIRLS' RIGHTS	308

THE HUMAN RIGHTS OF KENYAN SCHOOL GIRLS

A.	<i>Issuance of Comprehensive Learner Protection Guidelines and Standard Operating Procedures on Reporting.</i>	311
B.	<i>Updated Definitions Related to Sexual Abuse</i>	312
1.	Expansion of the Definition of Sexual Abuse	312
2.	Addition of a Definition of Sexual Grooming.	315
3.	Expansion and Harmonization of the Definition of Sexual Harassment	317
C.	<i>Necessary Updates to the TSC’s Mandatory Reporting Requirement</i>	319
1.	Mandatory Reporting of All Instances of Sexual Abuse and Sexual Grooming to the Relevant TSC Office.	320
2.	Mandatory Reporting of Certain Instances of Sexual Abuse to the Police	323
3.	Expanded Reporting Window—From 24 to 72 Hours	326
4.	Confidentiality in the Reporting Process	327
5.	Inclusion of a Non-Retaliation Clause.	329
D.	<i>Mandatory Dismissal of Teachers Who Sexually Abuse Students.</i>	331
E.	<i>Mandatory Teacher Training.</i>	335
VIII.	CONCLUSION	337
APPENDIX A.	. . . . .	339
APPENDIX B.	. . . . .	350
APPENDIX C.	. . . . .	362
APPENDIX D	. . . . .	367
APPENDIX E.	. . . . .	396
APPENDIX F.	. . . . .	403

I. EXECUTIVE SUMMARY

“I don’t think as a nation we are committed enough to protect the plight of the girl—either generally, le[t] alone specifically, in the classroom.”¹

– Jedidah Wakonyo Waruhiu, Kenya National Commission on Human Rights

1. Interview with Jedidah Wakonyo Waruhiu, Commissioner, Kenya National Commission on Human Rights, in Nairobi, Kenya (Mar. 17, 2017).

When schoolgirls² in Kenya experience sexual abuse by their teachers, it not only compromises their education and results in increased drop-out rates, but also attacks a number of other crucial aspects of a girl's life. It degrades girls as human beings, threatens their health, and in the most extreme circumstances, can even endanger their lives. Stakeholders interviewed during the International Women's Human Rights Clinic Fact-Finding Trip in March 2017 ("IWHRC Fact-Finding Trip") expressed widespread concern regarding the on-going and pervasive problem of learners in Kenya being sexually abused by their teachers, particularly female students by male teachers. Because the Kenyan government has not taken sufficient measures to protect its learners from sexual abuse, schoolgirls' rights continue to be violated, and Kenya continues to be in violation of its obligations under its own Constitution and the international and regional human rights treaties to which it is a party.

Kenya has a progressive Constitution that guarantees gender equality among other rights and has ratified numerous international and regional treaties that protect schoolgirls' fundamental human rights. These treaties include the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights (African Charter), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), and the African Charter on the Rights and Welfare of the Child (African Children's Charter). Moreover, the Kenyan Government has taken a number of specific steps targeted at tackling the widespread problem of gender-based violence in Kenya, including sexual abuse of schoolgirls by teachers. In 2010, the Teachers Service Commission (TSC), which is licenser of all teachers in Kenya and employer of public school teachers, issued Circular No. 3/2010 on the Protection of Pupils/Students from Sexual Abuse (TSC Circular No. 3). TSC Circular No. 3 expressly recognizes sexual abuse of learners as a violation of their human rights. It also sets forth specific prohibited behaviour by teachers and a mandate that teachers must report instances of

2. "Schoolgirls" includes all female students attending Kenyan public or private schools, regardless of whether they are age 18 or above. While "schoolboys" are also subject to sexual abuse by teachers in Kenya, this report focuses particularly on the rights of schoolgirls due to the much greater proportion of sexual abuse by teachers that is committed against schoolgirls. However, the proposals set forth herein apply to all learners equally and are aimed at protecting all learners from sexual abuse in the school context.

sexual abuse. Parliament then passed the Teachers Service Commission Act in 2012, which provides for disciplinary action to be taken against teachers who have engaged in certain conduct with students. And the TSC issued regulations in 2015 that were intended to facilitate the disciplining of teachers who engage in conduct prohibited in TSC Circular No. 3.

Unfortunately, these efforts have fallen short of the TSC's goal to protect learners in Kenya from sexual abuse by their teachers. The Kenyan Government, therefore, has extensive work to do in order to combat effectively the phenomenon of schoolgirls being sexually abused by their teachers. Media outlets in Kenya continue to report all too frequently on new instances of teachers sexually abusing schoolgirls across the country. And it remains regrettably common to hear of stories of the grooming process that teachers continue to employ, particularly with female students. This "sexual grooming" begins with a seemingly innocuous act, such as asking a schoolgirl to carry water or books to the teacher's house, or to stay after class for tutoring. In many cases, the teacher will give a schoolgirl special attention and compliments. The intention is to build trust and rapport with the student, only to later exploit the authoritative role held by teachers in Kenyan society to sexually abuse those girls. Alarming, because of this grooming, by the time the teacher engages in sexual activity with the schoolgirl, she may not even realize that it is abuse. During the IWHRC Fact-Finding Trip, interviewee after interviewee spoke of how embedded this grooming process is in Kenya's schools. And while TSC Circular No. 3 mandates that teachers report any "reasonable suspicion" that sexual abuse has occurred, interviewees during the IWHRC Fact-Finding Trip stressed that this is not happening. Teachers, including head teachers and principals, continue to disregard the TSC's reporting requirements, either due to a culture of "brotherhood" among teachers or to protect the school's reputation.

The failure, or refusal, to comply with the TSC's mandates on sexual abuse is likely due—at least in part—to gaps and inconsistencies in the current legal framework. The current framework fails to articulate comprehensive, consistent definitions of sexual abuse and sexual grooming and to provide sufficient enforcement mechanisms. Notably, the TSC Code of Regulations issued in 2015 was intended to provide for the enforcement of TSC Circular No. 3, yet it was not tailored sufficiently to the prohibitions and mandates in the Circular. For example, while the TSC Circular speaks in terms of "sexual abuse," the TSC Act and Code of Regulations refer to "immoral behaviour." Moreover, the TSC Circular states that any violation of the provisions therein will result in disciplinary action. However, it does not specify what type of disciplinary

action a violation will trigger, and the TSC Act and Code of Regulations provide merely for discretionary disciplinary action. The regulations also contain only a permissive provision for the de-registration (i.e., dismissal) of teachers even in cases of sexual intercourse and/or where the teacher has been convicted for a sexual offense against a student. Meanwhile, the Act and the Regulations are silent on the issue of disciplining teachers for failing to report sexual abuse. And neither the TSC Circular nor the Act or Code of Regulations mandates the reporting of conduct that constitutes sexual grooming.

Schoolgirls in Kenya therefore continue to be denied their fundamental human rights as guaranteed to them by the Constitution and international human rights law. Specifically, sexual abuse by a teacher violates schoolgirls' rights to education, equality, health, life, dignity, freedom from degrading treatment, and freedom from violence. It also contributes to a cycle in which schoolgirls will continue to be denied these rights. For example, when schoolgirls are sexually abused, and thereby denied the right to an education, it undermines their ability to understand and assert their rights to protect themselves against further sexual abuse and exploitation. Sexual abuse against schoolgirls therefore endures and escalates where there is no enforceable or harmonized law to combat the problem.

The Kenyan Government must ensure that it fulfills its positive obligations under its own Constitution and international human rights treaties to respect and protect schoolgirls' fundamental human rights. To this end, the TSC should issue a set of robust Learner Protection Guidelines, which will serve as an update to its Circular No. 3 of 2010, and issue a comprehensive and user-friendly Standard Operating Procedures on Reporting to clearly instruct teachers and other TSC agents on the how, what, when, and where to report instances of sexual abuse of a learner. In addition, the TSC must amend its Code of Regulations and propose amendments to the TSC Act to provide the requisite enforcement mechanisms for the prohibitions and mandates contained in the Learner Protection Guidelines and Standard Operating Procedures. It is only by revamping its current laws to ensure that there are enforcement mechanisms in place that Kenya can satisfy its obligations to schoolgirls and effectively combat sexual abuse and its undulating effects.

Key aspects of the reforms proposed within this report include:

- Mandating reporting of sexual abuse and sexual grooming to the local county TSC office or TSC headquarters and, in certain instances, reporting of sexual abuse to the police;

THE HUMAN RIGHTS OF KENYAN SCHOOL GIRLS

- Mandating the dismissal and de-registration of teachers found to have sexually abused a learner;
- Issuing comprehensive Learner Protection Guidelines and Standard Operating Procedures Mechanism on Reporting;
- Increasing the mandated reporting window from 24 hours to 72 hours;
- Instituting principles of confidentiality and non-retaliation within the reporting structure to encourage individuals to report instances of sexual abuse and to deter offenders from committing any retaliatory acts against those who report;
- Expanding the TSC's definition of "sexual abuse" to include additional inappropriate sexual conduct between a teacher and a learner;
- Adopting a new definition of "sexual grooming" to address the conduct that typically precedes sexual abuse in the teacher-learner context;
- Harmonizing and expanding the definition of "sexual harassment" across TSC documents; and
- Requiring teacher training on the key TSC documents aimed at protecting learners from sexual abuse, including the prohibitions, mandates, and reporting procedures.

By safeguarding schoolgirls' fundamental human rights, Kenya can begin to break through the ingrained patterns of conduct that fuel sexual abuse by teachers and create a safer learning environment for all.

II. METHODOLOGY

The International Women's Human Rights Clinic (IWHRC) at Georgetown University Law Center, in cooperation with The Federation of Women Lawyers (FIDA)-Kenya and the Centre for Rights, Education and Awareness (CREAW), prepared this report aimed at identifying the issue of sexual abuse against schoolgirls in Kenyan private and public schools. In an effort to propose solutions, the students also included annotated draft legislation. To gain insight into Kenya's existing legal framework, the IWHRC conducted extensive research on the substantive rights guaranteed by the Kenyan Constitution; rules specifically governing teachers, including the Teachers Service Commission (TSC) Act; the TSC Code of Regulations; and other relevant legislation, including the Basic Education Act and the Sexual Offences Act. The IWHRC also used international and regional human rights treaties and comparative regional law to inform the legislative recommendations included in this project. Through regular partner teleconferences with CREAW, the

IWHRC faculty and law students participated in discussions about the application of existing laws and policies, as well as the gaps where legislation fails to protect schoolgirls from abuse.

In March 2017, the IWHRC faculty and students travelled to Kenya to conduct an intensive week-long fact-finding investigation to further bolster the desk research.³ To gain a comprehensive understanding of sexual abuse within Kenyan schools, IWHRC student advocates, accompanied by FIDA-Kenya and CREAM attorneys and IWHRC faculty, conducted interviews in and around Nairobi, including the neighbouring counties of Machakos and Kiambu. In total, IWHRC faculty and students interviewed over 60 individuals, including affected persons and various stakeholders such as lawyers, non-governmental organizations (NGOs), international organizations, judges, religious leaders, government officials, academics, journalists, health professionals, teachers, and students.⁴

Upon returning from Kenya, IWHRC students transcribed the interviews and used the findings to inform this report. The report analyzes the ways that sexual abuse by teachers violates schoolgirls' fundamental human rights and how Kenya's failure to protect schoolgirls results in non-compliance with their domestic and international legal obligations. Within the current legal framework, the report proposes legislative reforms that the TSC should implement to better protect schoolgirls in the future. Ultimately, the final report and draft legislation draw on relevant domestic law (including the Constitution, legislation, and court cases), international and regional human rights law

3. The researchers designed this mission in accordance with the Lund-London standards for research involving human subjects and the research protocol was approved by Georgetown University's Institutional Review Board (IRB). See generally Raoul Wallenberg Institute, *The Lund-London Guidelines* (2009), <http://www.factfindingguidelines.org/guidelines.html>. To protect interviewees, researchers implemented an extensive consent process. Interviewees were informed that no direct benefit would arise from their participation in the interview and no harm would come to them if they chose not to participate. Additionally, all interviews were conducted in private locations. Interview notes and audio recordings were stored on secure devices, separate from any identifying information of the interviewee. References to interviewees in this report comply with the precise descriptor approved by the interviewee, including some instances where the interviewee chose to be referred to by a pseudonym or "anonymous" rather than any specific identifier. For those interviewees who requested during the informed consent process that researchers contact them prior to use in the final report, that approval was sought and received prior to researchers' use herein.

4. Student researchers conducted the interviews primarily in English, although in a few instances, FIDA and CREAM attorneys provided translations into and from Swahili. While the number of interviews is not such that can provide any statistical significance, the interviews provided extensive insight into—including first-hand accounts of—the realities on the ground.

(including treaties, General Comments, General Recommendations, Kenya country reports to the U.N., and U.N. Committee Concluding Observations), comparative law sources, academic journals, and reports compiled by domestic and international organisations, as well as the findings from in-country interviews.

III. THE PERVERSIVE PROBLEM OF SEXUAL ABUSE BY TEACHERS IN KENYA

“To me, the teacher is the light of students. When you bring the darkness in that sense, it is really very sad.”⁵

– Lecturer at the University of Nairobi

Sexual abuse, including sexual harassment, is all too common in Kenyan schools. This includes the sexual abuse of schoolgirls by teachers at unacceptably high rates. In fact, the CEDAW Committee, in its Concluding Observations to Kenya’s Seventh Periodic Report in 2011, expressed concern regarding the “high prevalence of sexual abuse and harassment of girls by male teachers.”⁶ And while instances of sexual abuse are notoriously underreported to the TSC and police, reports are constantly appearing in the media, putting everyone on notice that the sexual abuse of learners by teachers remains a pervasive problem in the country.⁷ In 2015, the problem of teachers sexually abusing learners hit the national stage when the High Court of Kenya decided the case of *W.J. v. Amkoah*.⁸ The *W.J.* case involves a teacher who invited two of his female students, ages twelve and thirteen, to his home, where he defiled the thirteen-year-old and attempted to defile the twelve-year-

5. Interview with Lecturer, University of Nairobi, in Nairobi, Kenya (Mar. 14, 2017).

6. Committee on the Elimination of All Forms of Discrimination against Women, Concluding Observations: Kenya, ¶ 31, U.N. Doc. CEDAW/C/KEN/CO/7 (Apr. 5, 2011) [hereinafter *CEDAW Concluding Observations*], http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKEN%2fCO%2f7&Lang=en. The CEDAW Committee also reiterated “its concern at the high prevalence of violence against women and girls and widespread incidents of sexual violence, including rape.” *CEDAW Concluding Observations*, *supra*, ¶ 21.

7. Interview with Lecturer, University of Nairobi, in Nairobi, Kenya (Mar. 14, 2017) (“Q: Have you heard of any instances of teachers abusing students? A: I think that is general knowledge. Particularly in primary [school]; it has been written in the newspaper. Particularly where girls are impregnated by their teachers. . . . It is written and written.”); Interview with Mike Wachira, Deputy Director of CREAW, in Nairobi, Kenya (Mar. 12, 2017) (“I don’t want to say the cases are more, I want to say the coverage is more on the issue. It’s becoming quite notoriously covered [by the media]. So yes, I believe it’s a serious issue that must be addressed.”).

8. See *W.J. v. Amkoah*, (2015) 331 K.L.R. 1 (H.C.K.), <http://kenyalaw.org/caselaw/cases/view/109721/>.

old.⁹ He again attempted to defile the twelve-year-old in a classroom at their school.¹⁰ The High Court held the teacher, the principal, the TSC, and the Kenyan Government all liable for these grave violations of the students' rights to education, health, and dignity.¹¹

Sexual abuse in Kenya's schools takes many forms¹² and often "is not a one-time event; *it is a process*."¹³ Teachers typically first engage in a process called "sexual grooming," whereby they befriend, entice, or coerce a student before sexually abusing them. This process takes a variety of forms but often starts with something small. Teachers might offer extra tutoring¹⁴ or buy the girl snacks to build rapport.¹⁵ Teachers also exhibit favoritism by giving the student a small, seemingly "innocent compliment," something as simple as, "your hair looks good"¹⁶ or "you are

9. *Id.* ¶ 20.

10. *Id.* ¶ 21.

11. *Id.* ¶ 157.

12. See KENYA NAT'L COMM. ON HUMAN RIGHTS, HUMAN RIGHTS: THE ELUSIVE MIRAGE? 76-77 (4th ed. 2010-2014) [hereinafter KENYA HR COMM. REPORT], <http://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf>; see also Interview with A Woman Who Works with a Development Organization, in Nairobi, Kenya (Mar. 13, 2017) ("Q: What forms does sexual abuse generally take in schools? A: Defilement mainly. But it is also [sexual] assault, indecent touch[ing] of the child. . . ."); Interview with Mike Wachira, Deputy Director of CREAW, in Nairobi, Kenya (Mar. 12, 2017) ("[T]he form that it usually takes is anything from sexual assault to anything that includes having a sexual encounter with a girl. . . .").

13. Interview with Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017); see also Interview with Martha Sunda, Child Helpline Coordinator, Childline, in Nairobi, Kenya (Mar. 13, 2017) ("Then you will also find that perpetrators sort of win their victims slowly into it. So it's already pleasurable, something that was not necessarily foreseen but it has ended up into something good, so how is that abuse?").

14. See Interview with Diana, 18-Year Old Former Schoolgirl, in Nairobi, Kenya (Mar. 14, 2017) ("Q: And do they ever ask the girls to come to their homes? A: Yeah. Q: To do what—what do they do? A: They tutor the girls, they tell them they tutor them. Q: They tell them that? And is that what they do? A: No. Q: What do they do? A: They force them to have sex.").

15. Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) ("[C]hildren are coerced using sweets, biscuits, . . . small things."); see also Interview with Kate, Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017) (telling an account of one male teacher who used to call one particular schoolgirl, "and they [would] go to the staff room, let's say at break time—he used to buy her snacks, lunchtime, chips."). Kate is a pseudonym to protect the identity of the interviewee.

16. Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017); see also Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) ("[T]he way the teacher is grooming them, speaking with them so nicely, then maybe hugging [them], telling them 'oh, you did a nice job,' and such things. And then moving on to further starting to touch them, and say 'it's okay, it's because I love you.'").

the best girl that can be taken for sports, others are not very good.”¹⁷ Another common technique is tasking the girl with typical domestic chores such as going to “fetch water for the teacher, [or] go clean his dishes.”¹⁸ The teacher seeks to gain increased access and alone time with the student and will “send you for books, you bring [the books] to the staff room, and then when you are in the staff room, that is where sex happens. Or, I [the teacher] send you to my house and I follow behind, and the girl is trapped and cannot get out.”¹⁹ One stakeholder explained the process as follows: “[Y]ou make them have confidence and favour you, so that by the time you are [having sex with the student], they have already taken you as a friend. So, they don’t see it as a violation.”²⁰ In other words, the teacher creates a situation in which the

17. Interview with S.Y., Employee at an Education-related NGO, in Nairobi, Kenya (Mar. 13, 2017).

18. Interview with Irene Omogi, Quality Management & Accreditation Coordination, GIZ, in Nairobi, Kenya (Mar. 17, 2017); *see also* Interview with Teresa Omondi Adeitan, Executive Director of FIDA-Kenya, in Nairobi, Kenya (Mar. 12, 2017) (“[T]here are rural areas in this country where you find the girls most of the time they are being sent to the teacher’s house to take water or to help the teacher with some domestic work. . . . [T]heir gender roles follow them from the house to school. . . . By the time a girl is going to a teacher’s house, and if it’s a male teacher, [the likelihood of] sexual harassment and sexual violence is very high.”); Interview with Dr. Joan Mwendu Ngunnzi, Former Deputy Director, Teachers Service Commission, in Nairobi, Kenya (Mar. 13, 2017) (“I remember one case of a girl who said, okay, the teacher sent her, said, ‘Take from me these books to my house.’ And this one was clever. She was a Class 3. She went running. She placed the books on the table and came out running. She met with the teacher, and the teacher said, ‘Where did you put the books?’ ‘I put them on the table.’ ‘Which table?’ ‘The one in your living room.’ ‘No, no, no, place them on the table in the bedroom.’ And the girl said, ‘no, no, no’ . . . [and] she took off.”); Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017) (“So it starts in a very subtle way—sending her, ‘Bring me some water,’ ‘Go and bring me a soda’ . . . These sorts of things.”).

19. Interview with Professor Grace M. Omoni, Ph.D., School of Nursing Sciences, University of Nairobi, in Nairobi, Kenya (Mar. 15, 2017); *see also* Interview with Teresa Omondi Adeitan, Executive Director of FIDA-Kenya, in Nairobi, Kenya (Mar. 12, 2017) (“As recent as 2015/early 2016, we had a case of a teacher from the coastal province who had defiled almost 14 girls. . . . [T]hose teachers who are alone in the staffroom. . . that’s what he does. When he calls you to the staff room, that’s what he’ll do.”); Interview with Beril Awino, Affected Person, in Nairobi, Kenya (Mar. 14, 2017) (“A teacher can lie to you to come to my house and study, and that’s not what. You are not going to his house to study.”).

20. Interview with S.Y., Employee at an Education-related NGO, in Nairobi, Kenya (Mar. 13, 2017); *see also* Interview with Martha Sunda, Child Helpline Coordinator, Childline (Mar. 13, 2017) (“We have cases where the child has ended up married to their teacher. So we are called to go rescue the child and you go there and they are looking at you like, ‘What is wrong with you? I made a decision to come live with my boyfriend.’ So you must explain to them that legally, by law, this is wrong; and they still can’t see why this is wrong.”); Interview with Tabitha Saoyo, Programme Manager, Sexual & Reproductive Health & Rights, KELIN Kenya, in Nairobi, Kenya

student trusts the teacher and is less likely to resist his sexual advances. Professor Ndungo emphasized that the process is part of “building rapport, so that finally, the girl will melt into his hands.”²¹

When grooming behaviors go unchecked, they often escalate into more severe forms of sexual abuse, including rape and defilement. Sometimes, the sexual abuse results in the schoolgirl becoming pregnant.²² Dr. Joan Ngunnzi, Former Deputy Director of the Teachers Service Commission, discussed one such story from her research on this topic. The girl

carried water for the teacher for two years, bringing water from home in a jerry can. I asked her, ‘Why were you carrying water for the teacher? [She replied:] ‘The teacher said that he liked the water from my home. It tastes good’ I asked her, ‘So, how . . . did the teacher get you pregnant then?’ She said, ‘One day he told me to go to visit him. . . . I took him as my father. I never imagined that he could think of doing something like that.’²³

Abuse of power by a teacher is always inappropriate, regardless of the schoolgirl’s age. Sometimes teachers abuse their position to such a

(“You find students who are told that you need to remain behind while the rest of the girls go to evening classes and you are told, ‘You need to remain behind, I need to see you.’ Or you have a teacher who tells students—[for example] if it’s a boarding school and it’s at night—the teacher [may say] ‘You need to come to the staff room and see me. And then the student doesn’t recognize the immediate danger signs that this teacher may actually be a predator.”); Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) (“[F]or children to be sexually abused, there is what we call a ‘grooming period.’ It starts with a small touch, then it moves on to [more] slight touches, until the child ‘gets used to it,’ in quotes. They think that it’s okay. Then it moves on to actual defilement.”).

21. Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017) (“It may start with just sending her to go to the office to collect [his] things. Sending her to buy some bananas or fruits. Or sending them to the shop. Or throwing a statement here or there like ‘your hair looks good.’ For the girl, she may think it is an innocent compliment. But finally he is building rapport, so finally the girl will melt into his hands.”).

22. Interview with Marie Yambo, Health Reporter, in Nairobi, Kenya (Mar. 13, 2017) (“[T] here’s been reports in the media of girls being impregnated by their teachers. . . . Very many reports have been written about that.”); Interview with Professor Grace M. Omoni, Ph.D., School of Nursing Sciences, University of Nairobi, in Nairobi, Kenya (Mar. 15, 2017) (“Q: Of the schoolgirls who [you counselled] who are pregnant, who do they generally become pregnant by? A: From my research, most of them were teachers.”).

23. Interview with Dr. Joan Mwende Ngunnzi, Former Deputy Director, Teachers Service Commission, in Nairobi, Kenya (Mar. 13, 2017).

degree that they manipulate schoolgirls into believing they are in a genuine boyfriend-girlfriend relationship.²⁴ Yet, if the schoolgirl is under the age of eighteen, she cannot legally consent to sexual activity.²⁵ Even if the schoolgirl is eighteen or older, the inequality of power between a student and her teacher is such that a relationship is always coercive, never consensual.²⁶ Professor Ndungo similarly stated: “[T]here cannot be consent between a student and a teacher. Because the teacher is senior, the teacher has power. The student doesn’t have power. So you will use your position as a teacher to intimidate this girl.”²⁷

The great influence and respect that teachers enjoy in the community and among students further aggravates the issue. Former Deputy Chief Justice of the Supreme Court Nancy Baraza explained: “[W]e are taught to respect a teacher.”²⁸ Teachers serve as role models and

24. Interview with Paul Ojera, Principal, Ralia Education Centre, in Nairobi, Kenya (Mar. 15, 2017); Interview with Mbeti Michuki, Legal Counsel & Program Officer, FIDA-Kenya, in Nairobi, Kenya (Mar. 12, 2017); *see also* Interview with Martha Sunda, Child Helpline Coordinator, Childline, in Nairobi, Kenya (Mar. 13, 2017) (“[B]ecause of who teachers are, then they take interest in some of the children, and it’s prestigious to be liked by the teacher, so why not? So without support from the parents, and the encouragement of other people, in and of themselves, they like the idea of being in a relationship with a teacher. Teacher’s pet.”).

25. The Sexual Offences Act (2014) Cap. 62A § 8(1) (Kenya) (Defilement is defined as “an act which causes penetration with a child.”); The Children Act (2012) Cap. 141 § 2 (Kenya) (A child is defined as someone under the age of eighteen.).

26. Interview with Mike Wachira, Deputy Director of CREAM, in Nairobi, Kenya (Mar. 12, 2017) (“Q: What forms does this sexual abuse take in schools—what does it look like? A: Essentially it’s a person who’s in the position of authority or trust who abuses that position. . . . anything that includes a sexual encounter with a girl. I don’t want to say ‘relationship’ because . . . [this] is someone abusing that relationship to be able to commit a criminal offense.”).

27. Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017); *see also id.* (“Q: You said that there can be no consent when it’s a teacher and a student—do you think that is true even when the student is 18 or older? A: Yes, I [do]. In fact, we are talking about it in the context of the university. At the university, we have people who are over 18, but if you are going to have a relationship with a student, even though the student is 18 years, we still feel you have power over that student. You may be using your power and your position to abuse this girl. [It’s] what we call ‘sexually transmitted grades’—where the teacher will give you marks for sex. . . . But we are saying, you are using your position as a lecturer, or as a teacher, to abuse this person. We are saying that age notwithstanding, there is a relationship where [the student is] junior and I am senior; I [the teacher/professor] have power, you [the student] don’t have power.”); Interview with Aggrey Machelule, Judge, Family Division, Milimani Law Courts, in Nairobi, Kenya (Mar. 15, 2017) (“And . . . all things being equal, you are taking advantage of your position as a teacher. . . . So . . . consent would be very difficult for me. . . .”).

28. Interview with Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court, in Nairobi, Kenya (Mar. 15, 2017) (“[Y]ou respect a teacher; we are taught to respect a teacher. So, a teacher is luring you into his house and you don’t know he is going to harm you.”).

mentors.²⁹ “Whatever the teacher says is law.”³⁰ And as one schoolgirl explained to the former Deputy Director of the Teachers Service Commission, Dr. Joan Ngunnzi: “The teacher told me to take off my clothes. How could I say no? He is a teacher.”³¹ Another interviewee explained that “for children, it’s even more mortif[ying] if it’s a teacher because children look up to teachers. So if a teacher then violates you, it becomes very difficult to handle.”³² The high status of teachers therefore discourages girls from reporting abuse “because the schoolgirl knows that teacher is an authority figure in [her] life, so talking about it is not very easy.”³³ Schoolgirl “Diana” gave her view on what she would do if she was sexually abused by a teacher: “[T]he teacher is older than me, so it is my word against his, so I should not say anything. I don’t think I would report.”³⁴

The lack of reporting across the board in Kenya is a key reason why teachers go unpunished and schoolgirls continue to be abused. A joint study conducted by the Teachers Service Commission (TSC) and the Centre for Rights Education Awareness (CREAW) found that “12,660 girls in Kenya were sexually abused by male teachers” between 2003 and 2007.³⁵ But as large as that number is, it fails to capture the magnitude of the problem. “[W]hat is reported is sometimes just the tip of the iceberg.”³⁶ Indeed, the same joint study found that 90% of cases never reach the TSC at all, meaning that the number of girls sexually

29. Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017).

30. *Id.*

31. Interview with Dr. Joan Mwendu Ngunnzi, Former Deputy Director, Teachers Service Commission, in Nairobi, Kenya (Mar. 13, 2017).

32. Interview with Agnes Kola, National Women’s Rights Coordinator, ActionAid Kenya, in Nairobi, Kenya (Mar. 13, 2017).

33. Interview with Irene Omogi, Quality Management & Accreditation Coordination, GIZ, in Nairobi, Kenya (Mar. 17, 2017); *see also* Interview with S.Y., Employee at an Education-related NGO, in Nairobi, Kenya (Mar. 13, 2017) (“Sometimes, they fear teachers because of their authority.”).

34. Interview with Diana, 18-Year-Old Former Schoolgirl, in Nairobi, Kenya (Mar. 14, 2017). Diana is a pseudonym to protect the identity of the interviewee.

35. Hakijamii, *Sex Abuse in Schools: How Safe is the Girl Child?*, KENYA EDUC. RIGHTS UPDATE (Nov. 2009), at 1 [hereinafter *Sex Abuse in Schools*], <http://www.hakijamii.com/wp-content/uploads/2016/05/Education-Concern-Nov-2009.pdf>; *see also* Evelyne Opondo & Onyema Afulukwe, *Supplementary Information on the List of Issues for Kenya Scheduled for Review by the Committee on the Rights of the Child during its 71st Session*, CTR. FOR REPROD. RIGHTS 8 (Dec. 15, 2015), http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/KEN/INT_CRC_NGO_KEN_22638_E.pdf.

36. Interview with Tabitha Saoyo, Programme Manager, Sexual & Reproductive Health & Rights, KELIN Kenya, in Nairobi, Kenya (Mar. 14, 2017); *see also* Interview with Teresa Omondi

abused by their teachers is much, much higher than the 12,660 figure suggests.³⁷ Although cases of sexual abuse are widely reported in the daily newspapers in Kenya,³⁸ there is a lack of reporting to the TSC and to the police. “The culture [in Kenya] frowns upon reporting negative issues on authority figures.”³⁹

Conversations with interviewees during the IWHRC Fact-Finding Trip revealed that while most teachers know they should report sexual abuse committed by fellow teachers, they do not report.⁴⁰ Some teachers believe that sexual abuse by a teacher “will spoil the school’s reputation” and so the cases will be “hushed up, and not brought out in the open.”⁴¹ Teresa Omondi Adeitan spoke of the “brotherhood” among teachers, calling it “quite a serious fraternity” and explained that “you

Adeitan, Executive Director of FIDA-Kenya, in Nairobi, Kenya (Mar. 12, 2017) (“By the time one person is reporting, ten have not.”).

37. *Sex Abuse in Schools*, *supra* note 35, at 2; see also EDUC. FOR ALL GLOB. MONITORING REPORT, UNESCO, & U.N. GIRLS EDUC. INITIATIVE, POLICY PAPER 17: SCHOOL-RELATED GENDER-BASED VIOLENCE IS PREVENTING THE ACHIEVEMENT OF QUALITY EDUCATION FOR ALL 4 (2015) [hereinafter POLICY PAPER ON SRGBV], <http://unesdoc.unesco.org/images/0023/002321/232107E.pdf> (finding that over thirty-nine percent of school principals in Kenya stated that “teacher-pupil sexual harassment had occurred in their schools”). Meanwhile, according to a news report, 164 reports of teachers molesting students reached the TSC in 2010–2011, a number that is visibly far lower than the incidence rate reflected in the joint TSC-CREAW study. See *Jail the teachers who molest their students*, DAILY NATION (Oct. 13, 2011), <http://www.nation.co.ke/oped/Editorial/Jail-the-teachers-who-molest-their-students-/440804-1254962-e7duipz/index.html>.

38. See, e.g., Ian Ngeta, *School owner jailed for defiling girl as punishment*, STANDARD (Nov. 25, 2016) (Kenya), <https://www.standardmedia.co.ke/article/2000224665/school-owner-jailed-for-defiling-girl-as-punishment>; Darlington Manyara, *Meru teacher charged with sexual assault as abuse scourge hits country*, DAILY NATION (Mar. 16, 2016) (Kenya), <http://www.nation.co.ke/counties/meru/Teacher-charged-with-sexually-assaulting-10-pupils-/1183302-3118334-12fdbes/index.html>; Faith Karanga, *Highridge School teacher in defilement case to remain in custody*, STANDARD DIGITAL (Oct. 20, 2015) (Kenya), <http://www.standardmedia.co.ke/article/2000180137/highridge-school-teacher-in-defilement-case-to-remain-in-custody>; Joseph Kiir, *Defilement case against Njoro teacher for today*, THE STAR (Jul. 7, 2015) (Kenya), https://www.the-star.co.ke/news/2015/07/07/defilement-case-against-njoro-teacher-for-today_c1164620; Joseph Muchiri, *Police in Embu arrest teacher over girl’s defilement*, STANDARD (Kenya) (Nov. 25, 2013), <http://www.standardmedia.co.ke/article/2000098590/police-in-embu-arrest-teacher-over-girl-s-defilement/?pageNo=2>.

39. Interview with Irene Omogi, Quality Management & Accreditation Coordination, GIZ, in Nairobi, Kenya (Mar. 17, 2017).

40. Interview with S.Y., Employee at an Education-related NGO, in Nairobi, Kenya (Mar. 13, 2017) (“Q: What about teachers—do they know they should report it if [they] see[] their fellow teacher sexually abusing students? A: . . . Most of them know about the [reporting] channel, but most of them don’t report at all.”).

41. Interview with Everlyne Nyongesa, Women’s Health Rights Advocate/Former Teacher, in Nairobi, Kenya (Mar. 17, 2017).

might really be side-lined or sometimes called a ‘traitor’” if you report.⁴² Because of this culture, “[i]t is very difficult for [teachers] to tell on another teacher [or] to testify against another teacher.”⁴³ Instead, most teachers tend to cover.⁴⁴

Most schoolgirls similarly do not report teachers and instead “suffer in silence.”⁴⁵ One underlying motivator to keep quiet comes from the imbedded patriarchy in Kenyan society.⁴⁶ Another is that schoolgirls fear no one will believe them or that they will be blamed for the abuse due to the myth that girls invite rape. They do not report because they do not want to face accusatory questions, such as “What did you go to do there?”⁴⁷ or “How did [you] get into that situation?”⁴⁸ Some “are

42. Interview with Teresa Omondi Adeitan, Executive Director, FIDA-Kenya, in Nairobi, Kenya (Mar. 12, 2017).

43. *Id.*

44. Interview with Andrew Mwanthi, County Chief Officer, Education, Children, Youth, Gender Affairs, Culture, & Social Services, in Nairobi, Kenya (Mar. 13, 2017).

45. Interview with Irene Omogi, Quality Management & Accreditation Coordination, GIZ, in Nairobi, Kenya (Mar. 17, 2017); *see also* Interview with A Woman Who Works with a Development Organization, in Nairobi, Kenya (Mar. 13, 2017) (“[T]his is something that happens in secrecy—so there is a lot of silence around violence.”); Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017) (“[W]omen are socialized to feel they are the ones that caused the problem. And they feel they are responsible—they are blamed for what happened. So many times, we call it ‘forced silence.’ You don’t talk about it. You blame yourself.”).

46. Interview with Agnes Kola, National Women’s Rights Coordinator, ActionAid Kenya, in Nairobi, Kenya (Mar. 13, 2017) (“[T]he whole patriarchal context . . . [I]f you say, ‘A teacher raped me, . . . even the women would hush the girls: ‘Do not report, do not.’ So it’s the whole patriarchal context and for the girl to even come out and report, you’d have to be very brave.”).

47. Interview with Honourable Lady Justice Hannah Okwengu, Judge of Appeal/Chairperson, Kenya Women Judges Association, in Nairobi, Kenya (Mar. 15, 2017) (explaining that “if, for example, it has gone to the extent of you being molested, you don’t want to talk because you think that you might be blamed. Sometimes the student has gone to the teacher’s house, and they are not supposed to go there, so you fear that if it comes out, you would be asked, ‘What did you go to do there?’ and things like that.”).

48. Interview with A Woman Who Works with a Development Organization, in Nairobi, Kenya (Mar. 13, 2017) (“More often than not, you will get in trouble if you are reporting. It is just the attitude about how we treat the whole thing—that the victim, or the survivor, is to blame. It is the attitude that we have towards the person who reports—‘How did she get into that situation? She must have done something!’ . . . [A]nd that is why the fear and the stigma we are talking about becomes very real to you because you will be judged for actually seeking a solution.”); *see also* Interview with Mbeti Michuki, Legal Counsel & Programme Officer, FIDA-Kenya, in Nairobi, Kenya (Mar. 12, 2017) (“And so, when a child comes and says, ‘The teacher did this to me,’ then the parent or caregiver would think, ‘But why would the teacher do that?’ So this child is the one who has the problem and not the teacher.”).

labelled as prostitutes, that she may have wanted it.”⁴⁹ A woman who works with a development organization in Nairobi explained that “many people will keep quiet because [they think] ‘how will they think of me?’ The guilt and the shame and the stigma that you face! You would rather not tell anybody. . . . [I]t is always because of the blame [that] people shut down.”⁵⁰ Others fear being reprimanded by teachers in school or potential re-victimization if they report the abuse.⁵¹ And some are actually intimidated and threatened not to report.⁵² Finally, schoolgirls do not report because they are ashamed by the stigma and the belief that their “value drops down as a young woman in society.”⁵³

Even when schoolgirls or fellow teachers do report the abuse, far too few teachers are penalized for their actions.⁵⁴ A typical outcome is that

49. Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017).

50. Interview with A Woman Who Works with a Development Organization, in Nairobi, Kenya (Mar. 13, 2017).

51. Interview with Teresa Omondi Adeitan, Executive Director, FIDA-Kenya, in Nairobi, Kenya (Mar. 12, 2017) (“Q: [W]hat would you say are the main reasons for [students] not reporting? A: Of course fear. If you are still remaining in that school, there is fear that teachers will—I know a lot of teachers will—reprimand you. Unless he is a really bad person and everyone is hoping for someone to call him out. But you would be [known as] that student who has reported a teacher. . . . [Re-]victimization is very high.”); Interview with Njeri, Legal Officer, CREAW (Mar. 12, 2017) (“[G]enerally students fear teachers. So for fear of [re-]victimization, they wouldn’t [report].”); *id.* (“Q: What are they afraid of specifically? A: Of being punished, of being sent [away] from school. [Re-]victimization from a particular teacher socially if he teaches in [her] class.”).

52. Interview with Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court of Kenya, in Nairobi, Kenya (Mar. 15, 2017) (“They don’t report because there is so much intimidation. So, they don’t report. Intimidation of the highest order.”); Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017) (“When [sexual abuse] happens, [girls] are always told, ‘If you talk about it, I’m going to kill you.’”); Interview with Martha Sunda, Child Helpline Coordinator, Childline, in Nairobi, Kenya (Mar. 13, 2017) (responding to a question on why students do not report sexual abuse by a teacher: “[I]t may be that they are threatened not to speak or talk about it . . .”); Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) (“[T]he children also become very afraid of speaking out because they are threatened. They may be threatened [by the teacher saying] that ‘if you do this, I will lose my job.’ Then that leads to the guilt that whenever it is found out, then [the student thinks], ‘I’ve messed up someone’s life.’”); Interview with Diana, 18-Year Old Former Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017) (“[T]he teacher threatens [schoolgirls] like, ‘If you say anything, I’ll kill you.’”).

53. Interview with Dr. Bernard Olayo, Specialist, World Bank, in Nairobi, Kenya (Mar. 15, 2017).

54. Interview with the Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court of Kenya, in Nairobi, Kenya (Mar. 15, 2017) (“These children are pregnant and they just now join that cycle of poverty and discrimination for the rest of their lives. [Meanwhile,] the teachers walk off scot-free. They are predators, they are known, but nothing happens to them.”).

teachers continue to teach.⁵⁵ Sometimes the teacher will even remain in the same school with the girl that he violated.⁵⁶ In other instances, teachers are simply transferred to other schools.⁵⁷ A 2009 study by Kenyatta University “of more than 1,200 girls in 70 schools across 10 Kenyan districts found that when [school] girls were impregnated by teachers,” only 25 percent of those teachers were fired.⁵⁸ An estimated 45 percent of the teachers “suffered minor consequences, typically either a demotion or a transfer to another school.”⁵⁹ The remaining 30 percent of teachers suffered no consequences at all.⁶⁰ As several interviewees noted, transferring the teacher is “just like transferring the problem”⁶¹ and puts future schoolgirls at risk of victimization. “Because if they were violators in a public school, what would stop them from being violators in a private school?”⁶²

55. Interview with Dr. Stewart Kabaka, Senior Assistant Director of Medical Services, Ministry of Health, Department of Family Health, in Nairobi, Kenya (Mar. 17, 2017) (“Q: Have you heard of any cases where the abuser was the student’s teacher? A: Oh yeah, quite a number; quite a number. Some of them have been interdicted . . . but so many are still out there.”).

56. See Interview with Diana, 18-Year-Old Former Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017) (“Q: What happened to the teacher? A: Nothing. Q: Nothing? So, the teacher stayed in school. And the girl? A: She also had to stay in school. Q: She also had to stay in school? And did this teacher still teach her in the classroom? A: Yeah.”).

57. See *id.* (“Q: And do you think teachers get moved to other schools or do you think they get sacked more? A: They get moved to other schools.”); see also Interview with Honourable Lady Justice Hannah Okwengu, Judge of Appeal/Chairperson, Kenya Women Judges Association, in Nairobi, Kenya (Mar. 15, 2017) (“A transfer might just be transferring the problem—but sometimes if they didn’t really have enough evidence but they have reason to be suspicious, [the TSC] transfer[s] him and you also hear of similar complaints from wherever [the teacher] go [es].”); Interview with Agnes Kola, National Women’s Rights Coordinator, ActionAid Kenya, in Nairobi, Kenya (Mar. 13, 2017) (“[T]he problem that we have is that a teacher will be interdicted, will be transferred to another school. So that means the problem has just moved to another school. So the issue has not been solved.”).

58. See Press Release, Ctr. For Reprod. Rights, Kenyan High Court: Education Sector Fails to Protect Students from Sexual Abuse (May 28, 2015), <https://www.reproductiverights.org/press-room/kenyan-high-court-education-sector-fails-to-protect-students-from-sexual-abuse>; see also Interview with the Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court of Kenya, in Nairobi, Kenya (Mar. 15, 2017) (“For me, it is a police case. A girl is pregnant, go and find out who made this girl pregnant. . . . Once they disclose who it is, let that man get fired and face the law. We don’t see much of that.”).

59. See Press Release, Ctr. For Reprod. Rights, *supra* note 58.

60. *Id.*

61. Interview with Evelyn Opondo, Regional Director for Africa, Centre for Reproductive Rights, in Nairobi, Kenya (Mar. 15, 2017); see also Interview with A Woman Who Works with a Development Organization, in Nairobi, Kenya (Mar. 13, 2017) (“[Y]ou transfer that teacher and you have just transferred that problem to another facility and to another school.”).

62. Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities and Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017) (“[I]f somebody’s being

The schools themselves foster this impunity. Many instances are hushed up—for example, by a head teacher or principal who is more concerned about the reputation of the school than the well-being of its learners. “It just depends on who the perpetrator is because sometimes you will find that the head teacher will cover. . . .”⁶³ Marie Yambo, a Health Reporter in Nairobi, told a story of a 12-year-old girl she interviewed in 2015 on teenage pregnancy. The girl had told her mother that the perpetrator was a teacher. But the headmaster denied it and said it was not a teacher in the school.⁶⁴

Even for cases that trigger criminal liability, interviewees stressed that in most cases, the survivor of the abuse will not see justice through the court system. This is largely due to the common practice of teachers—and other perpetrators—settling with the girl’s parents out of court.⁶⁵ Often the teacher “tries to negotiate with the parents of the girl.”⁶⁶ He will “buy[] his way out”—paying the parents an amount of money, so “[it] goes nowhere.”⁶⁷ Poverty plays a key role in this practice of settling

punished, and they are just going to change their job from a public school to a private school, then we are doing nothing. Because if they were violators in a public school, what would stop them from being violators in a private school?”).

63. Interview with An Educator in Kenya, in Kiambu County, Kenya (Mar. 16, 2017); *see also* Interview with Joshua Malit, Deputy Principal, Milimani Secondary School, in Nairobi, Kenya (Mar. 13, 2017) (“[I]f now [sexual abuse] is happening, and then the principal is not informing the TSC, then it means that principal lacks what you call integrity. And therefore, that—that principal is now promoting what you call impunity. And this is the kind of impunity that you talk about in the country.”).

64. Interview with Marie Yambo, Health Reporter, in Nairobi, Kenya (Mar. 13, 2017) (“[T]he headmaster totally refused that it happened. . . . But who do you believe? Do you believe the headmaster who wants to protect the name of the school and probably the teacher, or do you believe the mother who got the information from her daughter?”).

65. Interview with Alex K. Simyu, Police Officer, Central Station, in Nairobi, Kenya (Mar. 14, 2017) (“[T]he offender tries to negotiate with the parents of the girl.”); *see also* Interview with A Woman Who Works With A Development Organization, in Nairobi, Kenya (Mar. 13, 2017) (“[Y]ou will find that a lot of these cases are also solved by out of court settlement. The parents will go somewhere and this person [the abuser] will pay some fine or they will be asked to marry the girl. There are all sorts of settlements that are done.”); Interview with Irene Omogi, Quality Management & Accreditation Coordinator, GIZ, in Nairobi, Kenya (Mar. 17, 2017) (“The other challenge that we have in this country is out of court settlement. Once a case has been reported, even to the chief/local authority, the perpetrator goes to the parents [of] this child, and pays some little money and it’s done.”); Interview with Teresa Omondi Adeitan, Executive Director, FIDA-Kenya (Mar. 12, 2017) (“[T]here is a lot of settling of sexual offenses matters through payment of goods and sitting and agreeing [in the community]. . . .”).

66. Interview with Alex K. Simyu, Police Officer, Central Station, in Nairobi, Kenya (Mar. 14, 2017).

67. Interview with Dr. Stewart Kabaka, Senior Assistant Director of Medical Services, Ministry of Health, Department of Family Health, in Nairobi, Kenya (Mar. 17, 2017) (“Q: And why do you think

cases of sexual abuse out of court. A schoolteacher in Nairobi explained: “[E]ven if it is a question of 5,000 [Shillings that] you give to a poor mother, she sees food.”⁶⁸ Sometimes, teachers even pay as little as 1,000 Kenyan Shillings—approximately 10 U.S. Dollars—for the family’s silence.⁶⁹ The teacher may even pay a dowry to the family in exchange for marriage with the girl as another form of settlement because “when they [are] married, there’s no complaint.”⁷⁰ Or “maybe the girl will have the baby,” and the teacher intimidates the girl by telling her: “I will support the baby, but if you go ahead with this [court case], then it’s up to you. You will take care of the baby on your own.”⁷¹

that is—why are they still teaching? A: There’s [a] cultural issue. And [it’s also a] poverty issue—where somebody buys his way out. [T]he ones who are always violated usually come from very poor families. So the teachers [think] ‘If I [do] this, I’m sure I’m going to get away with it.’ . . . Then they negotiate with the parents and say, ‘I can pay this amount of money,’ the parents say okay and [it] goes nowhere. That’s what happens.”).

68. Interview with Angelica Ouya, in Nairobi, Kenya (Mar. 14, 2017); *see also* Interview with S.Y., Employee at an Education-related NGO, in Nairobi, Kenya (Mar. 13, 2017) (“The other challenge is around . . . poverty. Because I am a parent. I have a child in school. My child reports to me this and as a child, she may not have the courage to take the issue forward, but me, I have, but someone comes and bribes me to make sure this thing is over, and I am given some small token to make sure it ends there.”); Interview with Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court of Kenya, in Nairobi, Kenya (Mar. 15, 2017) (“I am just assuming that some parents may be approached and given something little to shut up their complaint. So, it ends there.”); Interview with Tabitha Saoyo, Program Manager, Sexual & Reproductive Health & Rights, KELIN Kenya, in Nairobi, Kenya (Mar. 14, 2017) (“[F]or poor families and for ignorant victims, they either choose to remain silent or alternatively settle out of court. With enticing commodities the perpetrator will buy you a new phone or they will exchange goods with your family. We have had instances, especially in Nairobi slum areas, where families exchange cooking oil, rice, bags of flour, . . . commodities that would naturally be used in a family setting are used to repay the family of the complainant, the girl who has been the victim [of the sexual abuse].”). The Kenya Human Rights Commission acknowledged that the cost of secondary school fees remains “prohibitive” and “not affordable to most people,” further exacerbating the need for money among schoolgirls. KENYA HR COMM. REPORT, *supra* note 12, at 60.

69. *See* Interview with Dr. Joan Mwendu Ngunnzi, Former Deputy Director, Teachers Service Commission, in Nairobi, Kenya (Mar. 13, 2017).

70. *Id.*; *see also* Interview with an Officer, Ministry of Education, in Nairobi, Kenya (Mar. 14, 2017) (“[I]n secondary schools, you’ll find that they will marry. ‘Cause a girl may be almost an adult. But according to the law, up to 18 years, the girl is a child. [That] should not happen. But again, you see, as I was saying, the teacher says, ‘I want to marry’—they settle it out [of court], and people will not know.”); Interview with a Teacher in Nairobi, in Nairobi, Kenya (Mar. 15, 2017) (“My sister, too, in her school, there was a case where a teacher married a student. Immediately after Form 4, he married that girl.”).

71. Interview with Marie Yambo, Health Reporter, in Nairobi, Kenya (Mar. 13, 2017).

The schoolgirl, on the other hand, must bear her scars for the rest of her life, as she is left physically and psychologically injured.⁷² Dr. Stewart Kabaka, who coordinates school health programs, explained how sexually abused girls are identified: “Usually they [come] with complaints of physical violence, bleeding or something of the sort that needs medical intervention. Some give vague excuses [for the injuries] but [with] probing, the clinician may realize sexual abuse is the main reason.”⁷³ Physical damage is often accompanied by mental health conditions, including “young adult depression.”⁷⁴ Dr. Kabaka explained: “Someone who has been sexually abused—whether it’s a girl or a child or a mother—they will come with some . . . trauma on their face, and you can see it, either in a form of depression or . . . in low [self-] esteem. . . .”⁷⁵ In fact, “severe self-esteem issues” are a common result of sexual abuse.⁷⁶ Professor Ndungo says this is manifested in “hating yourself and feeling that you are worthless [because] you have brought shame to not only yourself, but to the school, the teacher, to your parents. So they feel worthless.”⁷⁷

72. See Interview with Eunice Macharia, Social Worker/Counselor, Freely in Hope, in Nairobi, Kenya (Mar. 15, 2017) (“Having hope again in living [is important] because most of them are very much in denial, and [have] hatred. Like they need to release more of [the] hatred that they have in them.”); Interview with an Officer, Ministry of Education, in Nairobi, Kenya (Mar. 14, 2017) (“One, it’s an abuse. So, a child is traumatized.”); Interview with Anonymous at International Organization, in Nairobi, Kenya (Mar. 14, 2017) (discussing the possibilities of psychological issues and early pregnancy from the sexual abuse).

73. Interview with Dr. Stewart Kabaka, Senior Assistant Director of Medical Services, Ministry of Health, Department of Family Health, in Nairobi, Kenya (Mar. 17, 2017).

74. Interview with Professor Grace M. Omoni, Ph.D., School of Nursing Sciences, University of Nairobi, in Nairobi, Kenya (Mar. 15, 2017) (“[T]he mental injury is—what I got from my study—is depression . . . young adult depression. The younger they were, they were more depressed than the older ones. The fifteen year olds, sixteen, eighteen—th[ose] ones were depressed, but anyone younger than that, they were *very* depressed.” (emphasis added)).

75. Interview with Dr. Stewart Kabaka, Senior Assistant Director of Medical Services, Ministry of Health, Department of Family Health, in Nairobi, Kenya (Mar. 17, 2017).

76. Interview with Eunice Kilonzo, Senior Health Reporter, in Nairobi, Kenya (Mar. 13, 2017) (“I know girls who end up with severe self-esteem issues . . . they would always walk bent so that their breasts are not shown, so that other people would not see that they have breasts.”); see also WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 164 (Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi & Rafael Lozano eds., 2002), http://www.who.int/violence_injury_prevention/violence/world_report/en/FullWRVH.pdf.

77. Interview with Professor Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017); see also Interview with Beryl Arogo, Counseling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) (“[T]hese children become very confused, because this is someone they trusted, so it leads to a lot of mistrust towards other people. They may lose their self-esteem, self-confidence. They may even blame themselves and feel guilty.”).

The sexual abuse often interferes with girls' education and may even force girls out of school, which can have an irrevocable impact on their future, leaving them unable to care for themselves and their families. Often girls will "start having poor grades, they will not be able to concentrate,"⁷⁸ or "the education of the girl can be terminated because [she] will get pregnant."⁷⁹

Losing out on education affects schoolgirls economically and negatively impacts Kenyan society as a whole.⁸⁰ A psychologist at the Gender Violence Recovery Centre in Nairobi gave an example of the long-term impact if a girl stops going to school:

I will speak [of] the informal settlements, where [a] mother dropped out of school. She became a teen mother. Chances are that her daughter would become a teen mother [and] drop out of school. And it leads to this cycle of poverty that they are unable to get out of because without an education, they are unable to sustain themselves. They are unable to make [a] productive livelihood for themselves. So they end up being dependent [and] they end up getting abused.⁸¹

78. Interview with Professor Grace M. Omoni, Ph.D., School of Nursing Sciences, University of Nairobi, in Nairobi, Kenya (Mar. 15, 2017); *see also* Interview with a Teacher/Counselor, Public School, in Nairobi, Kenya (Mar. 17, 2017) ("I've seen instances where you are in class, you are teaching, and they are in a daze. They are lost. The teachers, they say, 'I was in class, and so-and-so was absent minded.' So, I've told them when you find this student absent minded, . . . sometimes, it's an indicator of what they went through, of what happened to them. . . . She will tell me she can't concentrate.").

79. Interview with Lecturer, University of Nairobi, in Nairobi, Kenya (Mar. 14, 2017); *see also* Interview with Diana, 18-Year-Old Former Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017) (telling of two incidents where schoolgirls dropped out of school because they got pregnant by a teacher); Interview with Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court, in Nairobi, Kenya (Mar. 15, 2017) ("These are little children pregnant. They will never benefit from the school program, no.").

80. *See* Interview with Joshua Malit, Deputy Principal, Milimani Secondary School, in Nairobi, Kenya (Mar. 13, 2017) ("[C]hildren must be protected [from sexual abuse]. We don't want to take them for granted because they are the future leaders. Therefore, if we joke around with their life, what will happen?"); Interview with Marie Yambo, Health Reporter, in Nairobi, Kenya (Mar. 13, 2017) ("And so, it is something that should never happen, because a teacher is a mentor. And you're mentoring this child to become the next lawyer, the next president, or whoever; [someone] who will change this society, who will change their community.").

81. Interview with Beryl Arogo, Counseling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017); *see also* Interview with Marie Yambo, Health Reporter, in Nairobi, Kenya (Mar. 13, 2017) ("I could see these women whose lives are just going to be a cycle. . . . [T]he mother is trying to take the child to school, and then the teacher is actually the one

Ms. Yambo put it this way: “[S]omebody who is charged with nurturing a child of the future is the same person who will destroy that child’s life. . . . That is very unfair.”⁸² And Mike Wachira, Deputy Director at CREAW, noted that

if you’re looking in terms of trying to achieve the sustainable development goals (such as education for all and the goals that deal with gender equality), there is no way that Kenya as a nation will be able to reach those goals and achieve the targets that it must achieve if it does not address issues that affect learning in schools and create a safe learning environment for girls.⁸³

The TSC has acknowledged the pervasiveness of the problem and has taken several important steps to address it. In 2010, the TSC expressed concern for the “increasing cases of violence (physical, psychological, and sexual) against pupils/students” in its TSC Circular No. 3 on the Protection of Pupils/Students from Sexual Abuse.⁸⁴ TSC Circular No. 3 outlines specific prohibitions on teacher-learner interactions and mandates reporting by a teacher who has a “reasonable . . . suspicion” that a learner has been sexually abused.⁸⁵ However the current system has a number of deficiencies that reduce the effectiveness of the TSC’s prohibitions and mandates related to sexual abuse. For example, as discussed further *infra* in Sections IV and VII, Circular No. 3 does not explain what kind of disciplinary action will be taken against a teacher who violates these provisions, and the relevant laws—the Teachers Service Commission Act (TSC Act) and the TSC’s Code of Regulations for Teachers, 2015 (Code of Regulations)—fail to provide a sufficient means for enforcement. In 2016, the National Gender and Equality Commission found that the TSC Act “is weak in [the] aspect of punishing the teachers who defile or rape children yet do not get

abusing the child. What are the chances that this girl will actually go beyond where the mother is? The chances are very slim.”).

82. Interview with Marie Yambo, Health Reporter, in Nairobi, Kenya (Mar. 13, 2017).

83. Interview with Mike Wachira, Deputy Director of CREAW, in Nairobi, Kenya (Mar. 12, 2017).

84. TEACHERS SERV. COMM’N, TSC/CIRCULAR NO.: 3/2010 PROTECTION OF PUPILS/STUDENTS FROM SEXUAL ABUSE, TSC/ADM/192A/VOL.VII/151, at 1 (Apr. 29, 2010) (Kenya) [hereinafter TSC CIRCULAR NO. 3], <http://www.kcse-online.info/tsc/circulars/CIRCULAR%20%20ON%20SEXUAL%20ABUSE.PDF>.

85. *Id.* ¶ 2.

prosecuted or when prosecuted leads to acquittal.”⁸⁶

The weaknesses of the current system are highlighted on a regular basis by media reports of teachers sexually abusing their students. These frequent news reports of rampant sexual abuse have continued in the years following the TSC’s issuance of Circular No. 3 and the passing of the TSC Act. For example, one article reported that from 2011 to 2014, more than 200 students were impregnated by their teachers in Homa Bay County, but the TSC interdicted only three teachers.⁸⁷ In 2013, nearly twenty girls in a primary school in Mt. Elgon County became pregnant by their teachers,⁸⁸ a situation that the former Deputy Chief Justice of the Supreme Court has called “a national shame.”⁸⁹ And in Mbale, four girls between the ages of twelve and fourteen “were subjected to sexual trauma on a daily basis” by two of their primary school teachers—ages forty and forty-six—from 2013 until October 2014, when the two teachers were finally arrested.⁹⁰ These teachers had even been dismissed from their previous schools for sexually abusing students,⁹¹ but that did not prevent them from being rehired. At one school, it took a mob of enraged parents storming the school for the TSC to finally summon a head teacher accused of

86. See NAT’L GENDER AND EQUAL. COMM’N, LOST CHILDHOOD: DRIVERS OF CHILD PREGNANCY IN KENYA 96 (2016), <http://www.ngeckkenya.org/Downloads/Lost%20Childhood%20Drivers%20of%20Child%20Pregnancy%20in%20Kenya.pdf> [hereinafter LOST CHILDHOOD].

87. Frank Otieno, *Teachers Service Commission Sends Home Three Teachers for Allegedly Defiling Students*, STANDARD (KENYA) (Oct. 18, 2014), <https://www.standardmedia.co.ke/article/2000138610/teachers-service-commission-sends-home-three-teachers-for-allegedly-defiling-students>. Teachers impregnating schoolgirls in Homa Bay is particularly alarming because Homa Bay is “the county that is leading with HIV prevalence in Kenya. So . . . it poses a very huge risk to the girls.” Interview with Agnes Kola, National Women’s Rights Coordinator, ActionAid Kenya, in Nairobi, Kenya (Mar. 13, 2017).

88. See Interview with Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court, in Nairobi, Kenya (Mar. 15, 2017); Eric Lungai, *Why Randy Teachers Sleep with Students*, STANDARD (KENYA) (Jul. 6, 2015), <https://www.sde.co.ke/thenairobian/article/2000167112/why-randy-teachers-sleep-with-students>; Jessica Nyaboke, *Sexual Abuse on the Rise*, THE STAR (KENYA) (Jul. 2, 2013), http://www.the-star.co.ke/news/2013/07/02/sexual-abuse-on-the-rise_c795305.

89. Interview with Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court, in Nairobi, Kenya (Mar. 15, 2017) (“I’m telling you the case about Mt. Elgon—it’s a national shame, a complete national shame. Half of the class pregnant, little girls pregnant, by teachers.”).

90. Tahudu Kitunzi, *Teachers Defile Their Students After Promising Them Sponsorship*, DAILY MONITOR (Kenya) (Oct. 27, 2014), <http://www.monitor.co.ug/News/National/Teachers-arrested-for-defiling-their-students/688334-2500880-13ee12ez/index.html>.

91. *Id.*

sexually abusing thirty-five students.⁹² And in October 2016, it was students who were arrested for protesting the defilement of a schoolgirl by her teacher, rather than the teacher himself.⁹³ Yet despite these shocking news reports, the TSC only dismissed twenty-two teachers who were found to have had sexual relations with their students in 2016.⁹⁴ The individuals interviewed during the IWHRC Fact-Finding Trip in March 2017—from teachers to schoolgirls to judges—confirmed the theme of these news reports: that sexual abuse continues to be prevalent in Kenya’s schools, that schoolgirls are the learners that are primarily targeted by teachers for the abuse, and that the current legal structure has failed to effectively curb the abuse.

IV. THE RELEVANT LEGAL FRAMEWORK

The human rights of schoolgirls are enshrined in Kenya’s Constitution and domestic statutes, as well as the international and regional treaties to which Kenya is a State Party. The 2010 Constitution, which serves as the supreme law of the country,⁹⁵ identifies a number of the human rights laid out in this report among the “national values and principles of governance” in Kenya.⁹⁶ The Constitution also contains a Bill of Rights, which guarantees a number of relevant human rights to “all persons,” including schoolgirls.⁹⁷ In addition, the Constitution states in Article 2(6) that “any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”⁹⁸ Kenya has ratified numerous international and regional human rights treaties that similarly afford schoolgirls’ fundamental rights, which are violated when schoolgirls are sexually abused by their teachers. These treaties include the International Covenant on Civil and Political Rights

92. Antony Gitonga, *TSC Summons Teacher Who ‘Sexually Abused 35 Schoolgirls’*, STANDARD (Kenya) (Aug. 8, 2014), <https://www.standardmedia.co.ke/article/2000130904/tsc-summons-teacher-who-sexually-abused-35-schoolgirls>.

93. Amos Kerich, *Six Pupils Arrested After Protesting Defilement of Class 8 Girl by Teacher*, THE STAR (Kenya) (Oct. 28, 2016), http://www.the-star.co.ke/news/2016/10/28/six-pupils-arrested-after-protesting-defilement-of-class-8-girl-by_c1445869.

94. Ouma Wanzala, *Sexual Harassment Rampant in Schools, Says UN Report*, DAILY NATION (Kenya) (Dec. 12, 2016), <http://www.nation.co.ke/news/education/Sexual-abuse-rampant-in-schools-reveals-UN-report/2643604-3482716-u9hgd9z/>.

95. CONSTITUTION (2010) (Kenya).

96. *Id.* art. 10(2)(b) (“The national values and principles of governance include . . . human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.”).

97. *See id.* arts. 19-20.

98. *Id.* art. 2(6).

(ICCPR),⁹⁹ the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁰⁰ the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),¹⁰¹ the Convention on the Rights of the Child (CRC),¹⁰² the African Charter on Human and Peoples' Rights (African Charter),¹⁰³ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),¹⁰⁴ and the African Charter on the Rights and Welfare of the Child (African Children's Charter).¹⁰⁵ In its 2010 Replies to the CEDAW Committee's List of Issues, the Kenyan Government explained that Kenya's Constitution "domesticates all international instruments that have been ratified by the government," that Article 2(5) of the Constitution "makes the general rules of international law applicable in Kenya," and that under article 2(6), "any treaty or convention ratified by Kenya shall form part of the law of Kenya."¹⁰⁶ Thus, the individual's rights and the Kenyan government's positive obligations stemming from international and regional human rights treaties have the force of law in Kenya.

Kenya has also enacted domestic statutes that provide protection for schoolgirls' human rights, and the Kenyan High Court's decision in *W. J. v. Amkoah*¹⁰⁷ specifically underscores the government's responsibility to protect schoolgirls from sexual abuse. The Children Act, enacted in

99. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (acceded to by Kenya May 1, 1972, entered into force Mar. 23, 1976).

100. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N. T.S. 3 [hereinafter ICESCR] (acceded to by Kenya May 1, 1972, entered into force Jan. 3, 1976).

101. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (acceded to by Kenya Mar. 9, 1984, entered into force Sept. 3, 1981).

102. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (ratified by Kenya July 30, 1990, entered into force Sept. 2, 1990).

103. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 [hereinafter African Charter] (ratified by Kenya Jan. 23, 1992, entered into force Oct. 21, 1986).

104. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, O.A.U. Doc. CAB/LEG/66.6 (Sept. 13, 2000) [hereinafter Maputo Protocol] (ratified by Kenya Oct. 6, 2010, entered into force Nov. 25, 2005).

105. African Charter on the Rights and Welfare of the Child, July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49 (1990) [hereinafter African Children's Charter] (ratified by Kenya July 25, 2000, entered into force Nov. 29, 1999).

106. Comm. on the Elimination of Discrimination against Women, Pre-Session Working Grp. of the Forty-Eighth Session, *Responses to the List of Issues and Questions with Regard to the Consideration of the Seventh Periodic Report: Kenya*, ¶¶ 2, 9, U.N. Doc. CEDAW/C/KEN/Q/7/Add.1 (Dec. 23, 2010).

107. *W.J. v. Amkoah*, (2015) 331 K.L.R. 1 (H.C.K.), <http://kenyalaw.org/caselaw/cases/view/109721/>.

2001, outlines the rights of the child and makes provision for the care and protection of children in Kenya.¹⁰⁸ For example, it states that a child shall be protected from abuse and sexual exploitation.¹⁰⁹ The Children Act is meant to give effect to the principles of two international human rights treaties, the Convention on the Rights of the Child (CRC), and the African Charter on the Rights and Welfare of the Child (African Children's Charter).¹¹⁰ The Sexual Offences Act was enacted in 2006 and defines certain unlawful sexual acts and provides criminal sanctions.¹¹¹ For example, the Act criminalizes defilement, which is an act which "causes penetration" of a child.¹¹² Finally, the Kenyan High Court declared in 2015 that "all schools and school teachers are at all times under the legal capacity of a guardian and are under a duty to protect all students from sexual and gender based violence or harm by teachers."¹¹³

V. SEXUAL ABUSE AT SCHOOL: A VIOLATION OF SCHOOLGIRLS' FUNDAMENTAL HUMAN RIGHTS

When a schoolgirl is sexually abused by a teacher, her fundamental human rights are violated. These rights include: the right to education; the right to freedom from discrimination and equality before the law; the right to health; the right to life; the right to dignity; the right to freedom from degrading treatment; and the right to freedom from violence. The following section examines each of these rights in turn and explains how the sexual abuse of schoolgirls results in the violation of these fundamental human rights.

A. *The Right to Education*

"Of course there is the immediate impact, which is a pregnancy can occur. There is also the issue of the emotional damage, [which] might

108. The Children Act (2012) Cap. 141 (Kenya).

109. The "protection from abuse, etc." provision states that "[a] child shall be entitled to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person" and "[a]ny child who becomes the victim of abuse . . . shall be accorded appropriate treatment and rehabilitation in accordance with such regulations as the Minister may make." The "protection from sexual exploitation" provision states that "[a] child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials." *Id.* §§ 13, 15.

110. *Id.* pmbl.

111. The Sexual Offences Act (2014) Cap. 62A (Kenya).

112. *Id.* § 8(1).

113. *W.J. v. Amkoah* (2015) 331 K.L.R. 1, ¶ 158(c) (Kenya).

make them less fit for education and really damage their quality of life. A significant portion of the girls may not complete their education."¹¹⁴

– Irene Omogi, GIZ

When schoolgirls are sexually abused by a teacher, they cannot realize their right to education. The Constitution of Kenya guarantees every person the right to education in Article 43(1) (f).¹¹⁵ Schoolgirls' right to education is also guaranteed in numerous international and regional human rights treaties, including the ICESCR¹¹⁶ and the African Charter.¹¹⁷ In addition, the right to education is specifically recognized for children in Kenya's domestic law, including in the Constitution and the Children Act,¹¹⁸ and in international and regional treaties, such as the CRC and the African Children's Charter.¹¹⁹ And the Children Act expressly places responsibility on the government for the provision of such education to every child.¹²⁰

The right to education requires the Kenyan government to take certain action, including protecting schoolgirls from sexual abuse in school and reducing the drop-out rate of girls from school. For example, the Maputo Protocol requires all States Parties, including Kenya, to "protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such

114. Interview with Irene Omogi, Quality Management & Accreditation Coordination, GIZ, in Nairobi, Kenya (Mar. 17, 2017).

115. CONSTITUTION art. 43(1) (f) (2010) (Kenya) ("Every person has the right to education.").

116. ICESCR, *supra* note 100, art. 13(1) ("The States Parties to the present Covenant recognize the right of everyone to education.").

117. African Charter, *supra* note 103, art. 17(1) ("Every individual shall have the right to education.").

118. CONSTITUTION art. 53(1)(f) (2010) (Kenya) ("Every child has the right to free and compulsory basic education."); The Children Act (2012) Cap. 141 § 7(2) (Kenya) ("Every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child.").

119. CRC, *supra* note 102, art. 28(1) ("States Parties recognize the right of the child to education . . ."); African Children's Charter, *supra* note 105, art. 11 ("Every child shall have the right to education.").

120. The Children Act (2012) Cap. 141 § 7(1) (Kenya) ("Every child shall be entitled to education the provisions of which shall be the responsibility of the Government and the parents.").

practices.”¹²¹ The Maputo Protocol also instructs States Parties to take “specific positive action” to “promote the enrolment and retention of girls in schools.”¹²²

Sexual abuse by a teacher impedes schoolgirls’ ability to realize fully their right to education by negatively impacting their learning process, academic performance, and school attendance. Moreover, the affected learners’ personal development, which is one of the principal aims of the right to education, is negatively impacted by the abuse. Finally, when schoolgirls are denied their education, it has far-reaching consequences not only for the individual victim but for Kenyan society as a whole.

1. Violations of the Right to Education: Disrupting the Learning Process, Causing Poor Academic Performance, and Impacting Girls’ Attendance

*“The child is there to learn. And a teacher goes out of the way to . . . violate [the student] or ask the student out. For me, I don’t even have words for it—it hurts the future of that child.”*¹²³

– Lecturer at the University of Nairobi

The negative impact of sexual abuse reverberates throughout the schoolgirl’s educational experience. A schoolgirl who has been sexually abused is unable to focus during lessons. She stops participating in class discussions. She begins to receive poor marks in her classes. She stops regularly attending school or drops out completely. The following sections elaborate on the harmful effects of sexual abuse on schoolgirls’ education.

a. Disruption of the Schoolgirl’s Learning Process

Both the Ministry of Education and the TSC have recognized that sexual abuse negatively affects students’ ability to learn in school. In 2008,

121. Maputo Protocol, *supra* note 104, art. 12(1)(b).

122. *Id.* art. 12(2)(c); *see also* CEDAW, *supra* note 101, art. 10(f) (“States Parties shall take all 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 . . . [including] [t]he reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely.”).

123. Interview with Lecturer, University of Nairobi, in Nairobi, Kenya (Mar. 14, 2017).

the Ministry of Education issued a Safety Standards Manual for Schools in Kenya, stating that “[a]bused children are often psychologically traumatised and are unable to concentrate in learning.”¹²⁴ In 2010, the TSC’s Circular No. 3 alerted teachers and other TSC personnel to the fact that “sexual abuse against pupils/students . . . interferes negatively with their learning process.”¹²⁵ The learning process necessarily includes the ability to pay attention and participate in classroom activities. Yet, a schoolgirl who has been sexually abused may feel distraught, depressed, and overwhelmed, which makes her unable to concentrate during lessons or on her schoolwork.¹²⁶ Professor Grace Omoni, who teaches at the School of Nursing Sciences at the University of Nairobi, described the impact on a girl’s ability to learn as follows:

[E]ven if they come to school, they are not themselves. . . . They will not be able to concentrate. Or if that teacher comes to give lectures, they will not understand what is being taught because they are scared of this teacher who sexually abused them. . . . The girls will be mentally and physically suffering.¹²⁷

Similarly, Miriam Wachira, a Child Advocate at the non-governmental organisation, CRADLE, explained: “[T]he impact [of sexual abuse]—education-wise—it can be huge. How can you concentrate in class? This huge monster. And the fear that it has on you.”¹²⁸

124. MINISTRY OF EDUC., SAFETY STANDARDS MANUAL: FOR SCHOOLS IN KENYA 47 (2008), http://cwsglobal.org/wp-content/uploads/2017/01/CWS-SSZ-Schools-Manual_Kenya.pdf [hereinafter SAFETY STANDARDS MANUAL].

125. TSC CIRCULAR NO. 3, *supra* note 84, ¶ 2.

126. See Interview with Professor Catherine Ndungo, Associate Dean, School of Humanities and Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017) (“The minute you have that kind of situation, you are no longer going to focus on your studies. You are going now to focus on yourself as the failure. So maybe that explains why they perform poorly.”); Interview with a Teacher/Counsellor, Public School, in Nairobi, Kenya (Mar. 17, 2017) (“I’ve seen instances where you are in class, you are teaching, and they are in a daze. They are lost. The teachers, they say, ‘I was in class, and so-and-so was absent minded.’ So, I’ve told them when you find this student absent minded, it’s not indiscipline . . . sometimes, it’s an indicator of what they went through, of what happened to them. . . . She will tell me she can’t concentrate.”).

127. Interview with Professor Grace M. Omoni, Ph.D., School of Nursing Sciences, University of Nairobi, in Nairobi, Kenya (Mar. 15, 2017).

128. Interview with Miriam Wachira, Child Advocate, The CRADLE – The Children’s Foundation, in Nairobi, Kenya (Mar. 15, 2017); see also Interview with Beryl Arogo, Counseling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) (“There is that fear. There will always be that nagging part—that ‘What if this happen[s], what will I do? How will I respond?’ So there will be an inability to concentrate in school.”).

In addition to an inability to pay attention, a schoolgirl who has been sexually abused may stop participating in class. The Policy Paper on School-Related Gender-Based Violence by the Education for All Global Monitoring Report, UNESCO, and the U.N. Girls' Education Initiative (UNGEI) states that school-related gender-based violence "can negatively impact school participation."¹²⁹ Sexually abused schoolgirls "might not participate [in school] as well as they could have because of the psychological trauma that they undergo."¹³⁰ A schoolgirl may stop raising her hand or speaking up during class discussions.¹³¹ "Mary", a schoolgirl from Makina, spoke of this happening to a fellow student: "There is a girl . . . [and] people could just know that [the teacher] wanted the girl. . . . [S]he feared [the teacher]. In class, she couldn't answer. . . . [S]he was just looking down when the teacher was in class."¹³² The ability to pay attention and to participate in class are both important parts of schoolgirls' learning process. They are essential to receiving a full education. When a schoolgirl's learning process is disrupted by sexual abuse by a teacher, her right to education is violated.

b. Poor Academic Performance

When a schoolgirl is sexually abused, it negatively impacts her grades and overall academic performance. In fact, the Ministry of Education's Safety Standards Manual lists "poor achievement" as an indicator that a child has been subjected to sexual abuse.¹³³ If a schoolgirl begins to receive poor marks as a result of sexual abuse, it is an indication of a serious interference with her education. During the IWHRC Fact-Finding Trip, the detrimental effect of sexual abuse by a teacher on a girl's performance in school was widely acknowledged by stakeholders in Kenya.¹³⁴ According to Isaac Agalo, the Principal of Shammah High

129. POLICY PAPER ON SRGBV, *supra* note 37, at 10. The Policy Paper defined school-related gender-based violence as "acts or threats of sexual, physical or psychological violence occurring in and around schools, perpetrated as a result of gender norms and stereotypes, and enforced by unequal power dynamics" and noted that school-related gender-based violence "can negatively impact school participation." *Id.*

130. Interview with Everlyne Nyongesa, Women's Health Rights Advocate/Former Teacher, in Nairobi, Kenya (Mar. 17, 2017).

131. *See* Interview with a Teacher/Counsellor, Public School, in Nairobi, Kenya (Mar. 17, 2017) ("You go to class, she is so withdrawn. One minute she is ok, the next moment, she is so withdrawn.").

132. Interview with Mary, Schoolgirl from Makina, Age 17, in Nairobi, Kenya (Mar. 15, 2017). Mary is a pseudonym to protect the identity of the interviewee.

133. SAFETY STANDARDS MANUAL, *supra* note 124, at 49.

134. *See* Interview with Jedidah Wakonyo Waruhiu, Commissioner, Kenya National Commission on Human Rights, in Nairobi, Kenya (Mar. 17, 2017) ("Q: And in your work with the

School in Kibera, “if she was performing well, she is going to start producing dismal performance.”¹³⁵ A women’s health rights advocate and former teacher similarly explained that unless the psychological trauma the girls undergo from sexual abuse in school is addressed, “their performance [in school] will not be as optimal as it would have been [if they had not been sexually abused].”¹³⁶

The negative impact of sexual abuse on academic performance is also well recognized by international organizations and policymakers. For example, a 2016 report by UNESCO and U.N. Women acknowledged that school-related gender-based violence “interferes with the education of many young people and is correlated with lower academic achievement.”¹³⁷ Academic performance demonstrates how much a schoolgirl is getting from her time in the classroom, but beyond that, a schoolgirl’s academic performance impacts her ability to continue on to higher levels of education. If a schoolgirl receives poor grades, this may impede her ability to go to university.¹³⁸ Poor academic performance resulting from sexual abuse by a teacher is one way in which the abuse violates the schoolgirls’ right to education.

Human Rights Commission, can you talk about the impact of sexual abuse on school girls? A: Yeah, . . . poor performance, in terms of exams”); Interview with Professor Grace M. Omoni, School of Nursing Sciences, University of Nairobi, in Nairobi, Kenya (Mar. 15, 2017) (“They start having poor grades . . . and they will never pass . . .”).

135. to report to the head teacher.ra. hould be able to say no. This should be included in the bill and this is what women activist Interview with Isaac Agalo, Principal, Shammah High School, in Nairobi, Kenya (Mar. 16, 2017); *see also* Interview with Njeri, Legal Officer, CREAW, in Nairobi, Kenya (Mar. 12, 2017) (“[They] do not perform as well as they would [have] had the incident not happened.”); Interview with Beryl Arogo, Counseling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) (“When a child is affected [by sexual abuse], their performance [in school] may go down. They lose interest in their school work . . .”).

136. Interview with Everlyne Nyongesa, Women’s Health Rights Advocate/Formal Teacher, in Nairobi, Kenya (Mar. 17, 2017). *See also* Interview with Irene Omogi, Quality Management & Accreditation Coordination, GIZ, in Nairobi, Kenya (Mar. 17, 2017) (“[I]t affects [her] wellbeing—psychologically, emotionally, and otherwise. It means the girl will not be concentrating enough to perform well in school.”).

137. UNESCO & UN WOMEN, GLOBAL GUIDANCE ON ADDRESSING SCHOOL-RELATED GENDER-BASED VIOLENCE 21 (2016), <http://unesdoc.unesco.org/images/0024/002466/246651E.pdf> [hereinafter GLOBAL GUIDANCE]. *See also* POLICY PAPER ON SRGBV, *supra* note 37, at 10 (noting that school-related gender-based violence “can negatively impact . . . learning levels.”).

138. *See* Interview with Peter M. Hunjah, Bishop, Springs of Life Ministries, in Tala, Kenya (Mar. 16, 2017) (“[T]he teacher will just use this girl as a sex tool. . . . So, what’s going to happen: we have less going to the high school [and only] one or two going to the university because they kind of get derailed by the man before them or the rape.”).

c. Negative Effects on Girls' Attendance and Promotion of Female Drop-outs

Schoolgirls who are being sexually abused by a teacher may begin to skip class or drop out of school altogether. Regular attendance is an integral part of receiving an education, and if girls are not attending school, their right to education will not be realized. Sexual abuse by a teacher drives a girl out of school for a myriad of reasons. For instance, a schoolgirl may stop attending school in order to avoid her abuser, who works at the school in a position of authority over her. In addition, a schoolgirl may stop going to school in order to escape being subjected to further sexual abuse from that teacher. According to Njeri, a Legal Officer at CREAM, girls might “be hesitant to go back to school because they don’t want a repeat of the same incident. They might drop out of school altogether, so they do not access education at all.”¹³⁹ Eunice Macharia, a Counsellor at Freely in Hope, described how the presence of a sexually abusive teacher impacts a girl’s decision to attend school:

[W]hen the sexual violence happens to [girls] in school, they drop out because . . . they don’t want to see the teacher. The next thing is to drop out because of how they feel. The anger in them. They cannot even be able to face that man again. That person is still in the school, and you know how schools have rules. You have to follow rules and . . . the person that is giving you rules is the one that abused you. So, they end up dropping out.¹⁴⁰

139. Interview with Njeri, Legal Officer, CREAM, in Nairobi, Kenya (Mar. 12, 2017); *see also* Interview with S.Y., Employee at an Education-related NGO, in Nairobi, Kenya (Mar. 13, 2017) (“Q: What happens to . . . the girls who have been sexually abused or sexually harassed? A: . . . [It] affects their ego and they cannot learn much in school. . . . [Some] will simply drop out. . . . They are harassed, abused, and they just end up moving away.”); Interview with A Woman Who Works with an International Organization, in Nairobi, Kenya (Mar. 13, 2017) (“Q: [H]ave you seen sexual abuse against schoolgirls being a barrier for them staying in school? A: Many, yes. And mainly from teachers”); Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) (“That’s another sign: truancy. They may run away from schools . . . some of them may choose not to go on with school”); *id.* (“If they don’t get proper psychological care, then they [will] most likely drop out of school.”).

140. Interview with Eunice Macharia, Social Worker/Counsellor, Freely in Hope, in Nairobi, Kenya (Mar. 15, 2017). Freely in Hope is a non-governmental organization focused on providing educational opportunities to victims of sexual violence. *See also* Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) (“[I]t can affect their education a lot because their faith in teachers, people they think are role models . . . may be lost. . . . [T]hey’ll start equating [all] teacher[s] to be the same.”).

In many cases, a schoolgirl also stops attending school in order to avoid the school itself, which has been transformed from a place of positive learning experiences to a place of misuse and victimization. Sexually abused students “just become very negative toward school. [They say,] ‘I am not going to school.’ Most of them will leave their homes with a school uniform, with a bag, and don’t go to school.”¹⁴¹ An Officer at the Ministry of Education spoke of how “the child may be made to hate school. Because if [the abuse happens] where I’m going to school . . . I hate school. I don’t want to be there. I don’t want to be associated. So the child may even drop out of school.”¹⁴²

Finally, pregnancy as a result of the sexual abuse is another reason why schoolgirls stop attending school. The UNESCO Policy Paper on School-Related Gender-Based Violence (SRGBV) states that “[g]irls subjected to SRGBV in the form of rape, forced, or coerced sex, can have early and unintended pregnancies and, as a consequence, an increased risk of their education being curtailed.”¹⁴³ Martha Sunda, Child Helpline Coordinator, was one of many interviewees who spoke to this: “[T]he child is defiled. They get pregnant. They drop out of school . . . so they end up losing out on their education.”¹⁴⁴ Jedidah

141. Interview with Miriam Wachira, Child Advocate, The CRADLE – The Children’s Foundation, in Nairobi, Kenya (Mar. 15, 2017).

142. Interview with an Officer, Ministry of Education, in Nairobi, Kenya (Mar. 14, 2017); *see also* Interview with Everlyne Nyongesa, Women’s Health Rights Advocate/Former Teacher, in Nairobi, Kenya (Mar. 17, 2017) (“When [girls are] abused in school . . . some of them might not even want to go back to school anymore because they identify the school [with the sexual abuse that occurred]. . . . Some of them might want to drop out.”); Interview with Martha Sunda, Child Helpline Coordinator, Childline, in Nairobi, Kenya (Mar. 13, 2017) (“[I]t could be that their association with school is now affected because it’s not a safe place for them anymore, so they choose not to go back to school. . . . [B]ecause all teachers are bad . . . or, school is not safe.”).

143. POLICY PAPER ON SRGBV, *supra* note 37, at 17.

144. Interview with Martha Sunda, Child Helpline Coordinator, Childline, in Nairobi, Kenya (Mar. 13, 2017); *see also* Interview with Diana, 18-Year-Old Former Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017) (“Q: You said maybe like two girls this happened to? A: Ah. She dropped out. Q: She dropped out. And why did she drop out? A: She got pregnant. Q: By the teacher? A: Mhm.”); Interview with Lecturer, University of Nairobi, in Nairobi, Kenya (Mar. 14, 2017) (“[H]ere we are emphasizing the girls, because you see, the education of the girl can be terminated because they will get pregnant.”); Interview with Christine Mwende, Machakos County Assembly Member, in Machakos, Kenya (Mar. 16, 2017) (“Girls sometimes get pregnant along the way and they drop out of school.”); Interview with S.Y., Employee at an Education-related NGO, in Nairobi, Kenya (Mar. 13, 2017) (“Q: What happens to . . . the girls who have been sexually abused or sexually harassed? A: . . . Some of them, if they get pregnant, they deliver their children and are married off at that early age.”); Interview with a Guidance and Counseling Teacher in Kibera, in Nairobi, Kenya (Mar. 17, 2017) (“Q: If a teacher gets a schoolgirl pregnant, what happens to the girl? A: I think they drop from school. She drops from school, she goes to raise the child, and . . . she can

Wakonyo Waruhiu, Commissioner at the Kenya National Commission on Human Rights, believes girls become pregnant and drop out of school because they are inadequately protected from sexual abuse: “If a child falls out of school because of early pregnancy, which is a result of abuse, that’s the challenge. I don’t think as a nation we are committed enough to protect the plight of the girl—either generally, le[t] alone specifically, in the classroom.”¹⁴⁵

When sexual abuse leads girls to stop attending school, their education is abruptly and wrongfully cut short. Thus, schoolgirls’ right to education is violated when they are sexually abused because it significantly interferes with their learning process, academic performance, and school attendance.

2. Disregard for Schoolgirls’ Personal Development, A Primary Purpose of the Right to Education

When schoolgirls are sexually abused by a teacher, they are denied the opportunity for full development of their personality and the socialization provided by the school environment. An education is critical to schoolgirls’ personal development, which includes social, emotional, and psychological development.¹⁴⁶ Indeed, the development of an individual’s personality is recognized by international and regional human rights treaties as one of the key purposes of the right to education. The ICESCR states that education “shall be directed to the full development of the human personality.”¹⁴⁷ In addition, both the CRC and the African Children’s Charter mandate that the education of a child be directed to “the development of the child’s personality, talents and mental and physical abilities to their fullest potential.”¹⁴⁸ As the Committee on the Rights of the Child has noted, “school plays an

never go back again to school.”); Interview with Lecturer, University of Nairobi (Mar. 14, 2017) (“Q: What happens to a girl [who is sexually abused by her teacher], does it affect her academic performance? A: Sure, it is a challenge. First of all, if you are in primary school and you’re pregnant, the best you can do is quit.”); Interview with Irene Omogi, Quality Management & Accreditation Coordination, GIZ, in Nairobi, Kenya (Mar. 17, 2017) (“[Sexual abuse by a teacher] mainly comes out when a pregnancy occurs. [I]t happens a lot. A significant portion of the girls end up not completing their schooling because of that.”).

145. Interview with Jedidah Wakonyo Waruhiu, Commissioner, Kenya National Commission on Human Rights, in Nairobi, Kenya (Mar. 17, 2017).

146. See GLOBAL GUIDANCE, *supra* note 137, at 22 (“Education is an important socializing mechanism and it is critical for the social, emotional and psychological development of young people.”).

147. ICESCR, *supra* note 100, art. 13(1).

148. CRC, *supra* note 102, art. 29(1)(a); African Children’s Charter, *supra* note 105, art. 11(2)(a).

important role in the life of many adolescents, as the venue for learning, development and socialization.”¹⁴⁹ The Committee on the Rights of the Child further specified that education “goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.”¹⁵⁰

When a schoolgirl is sexually abused, it damages her social development and prevents her from relating to and forming relationships with other people. Social development “focuses on a child’s ability to relate positively with other people at different stages of life.”¹⁵¹ Eunice Macharia from Freely in Hope described how sexual abuse harms schoolgirls’ ability to interact with their peers: “When the girl has [experienced] sexual violence, she’s ashamed [and she] doesn’t even want to associate with other girls [her] age.”¹⁵² Dr. Bernard Olayo, a Specialist at the World Bank, explained how sexually abused girls “develop almost [a] fatal hatred for men. And sometimes, as they grow up afterwards, they cannot even establish normal male-female relationships because there’s just so much fear of what a man can do to her that it destroys her whole ability to relate with people.”¹⁵³

The harmful effects of sexual abuse on a schoolgirl’s individual development can ultimately prevent a schoolgirl from ever achieving her full potential as a person. “Una” is a woman who survived sexual abuse as a child. She described how the experience limited her ability to achieve her educational and professional aspirations:

149. Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, ¶ 13, U.N. Doc. CRC/GC/2003/4 (July 1, 2003), <http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC4.pdf> [hereinafter *CRC General Comment 4*].

150. Committee on the Rights of the Child, *General Comment No. 1: Article 29(1): The Aims of Education*, ¶¶ 1, 2, U.N. Doc. CRC/GC/2000/1 (Apr. 17, 2001), [http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/a\)GeneralCommentNo1TheAimsofEducation\(article29\)\(2001\).aspx](http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/a)GeneralCommentNo1TheAimsofEducation(article29)(2001).aspx).

151. THE NAT’L COUNCIL FOR CHILDREN’S SERV., NATIONAL PLAN OF ACTION FOR CHILDREN IN KENYA 2015-2022, 16 (2015), http://www.childrenscouncil.go.ke/images/documents/Policy_Documents/National-Plan-of-Action-for-Children-in-Kenya-2015.pdf.

152. Interview with Eunice Macharia, Social Worker/Counsellor, Freely in Hope, in Nairobi, Kenya (Mar. 15, 2017).

153. Interview with Bernard Olayo, Specialist, World Bank, in Nairobi, Kenya (Mar. 15, 2017); see also Interview with Eunice Macharia, Social Worker/Counsellor, Freely in Hope, in Nairobi, Kenya (Mar. 15, 2017) (“[Y]ou find once you go through trauma, you don’t want to see a man. So [counselling] helped to curb that fear and being told that not everyone is the same.”).

THE HUMAN RIGHTS OF KENYAN SCHOOL GIRLS

Even now, after all those years, I even think about what happened. [I]t has affected . . . my education. I was a very bright girl in high school, and I would have gone to campus to [follow] my dream . . . to become a clinical officer. But, immediately it happened. Even the course that I did, which I thought I could pass, it was so hard for me to keep things and remember . . . I think I was capable of achieving much more.¹⁵⁴

By impeding a girl's personal development and ability to socialize with others and denying her the opportunity to reach her fullest potential, sexual abuse violates the girl's fundamental right to education.

3. Long-Term Impacts on Kenyan Society

*"When you educate the girl, you educate the whole community."*¹⁵⁵

— Lecturer at the University of Nairobi

When schoolgirls' education is disrupted by sexual abuse, it not only negatively impacts them individually, but also Kenyan society as a whole. The Committee on Economic, Social and Cultural Rights has explained how realization of the individual right to education works towards the betterment of society:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women. . . . Increasingly, education is recognized as one of the best financial investments States can make.¹⁵⁶

154. Interview with Una, Victim of Sexual Abuse, in Nairobi, Kenya, (Mar. 15, 2017). Una is a pseudonym to protect the interviewee's identity.

155. Interview with Lecturer, University of Nairobi, in Nairobi, Kenya (Mar. 14, 2017).

156. Committee on Economic, Social and Cultural Rights, *General Comment No. 13, The Right to Education (Article 13 of the Covenant)*, ¶ 1, U.N. Doc. E/C.12/1999/10 (Dec. 8, 2005), [http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/dGeneralCommentNo13TheRighttoEducation\(article13\)\(1999\).aspx](http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/dGeneralCommentNo13TheRighttoEducation(article13)(1999).aspx).

An education equips a girl with the tools she needs to become an engaged and productive member of society.¹⁵⁷ It gives her a means to contribute to her community and the country at large.¹⁵⁸ Girls' education provides a wide range of practical benefits to society, including "improving the welfare of the family and the quality of the labour force, increasing the tax base, and boosting levels of agricultural output."¹⁵⁹ Jedidah Wakonoyo Waruhiu of the Kenyan National Commission on Human Rights urged that teachers be made to understand that "they are delivering a service that also has a very long-term impact in terms of the well-being of this country and the economy of this country."¹⁶⁰ When a schoolgirl is denied her fundamental right to education by abuse in the school setting, she loses out on so many opportunities, including the chance "to become the next lawyer, the next president, or whoever; [someone] who will change this society, who will change their community."¹⁶¹

157. *See generally* UNESCO & U.N. WOMEN, COMMENTS FOR CONSIDERATION BY THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW) FOR GENERAL RECOMMENDATION ON GIRLS'/WOMEN'S RIGHT TO EDUCATION (2014), http://www.ohchr.org/Documents/HRBodies/CEDAW/WomensRightEducation/UNESCO_UNwomen.pdf. *See also id.* at 7 ("Educating girls and women is decisive not only for improving their own living conditions but also because it yields personal, social and development benefits: e.g. it empowers women and improves their life chances, those of their families and their communities; it reduces poverty and vulnerability to violence, diseases and child and maternal mortality."). *See also* in Nairobi, Kenya (16 ou should be able to say no. This should be included in the bill and this is what women activist

158. *See* GLOBAL GUIDANCE, *supra* note 137, at 23 ("Education plays a particularly important and formative role in society and represents a global common good (UNESCO, 2015a). It has the ability to contribute to the development of peaceful and prosperous societies and can promote good governance. The international community has accepted that education plays a critical role in empowering children to become active participants in the transformation of their societies. . . . As a violation of children's rights, SRGBV limits children's ability to enjoy the benefits of education and participate fully in their own development and their society's development as a result.").

159. African Committee on Human and Peoples' Rights, Solemn Declaration on Gender Equality in Africa, July 8, 2004, <http://www.achpr.org/instruments/declaration-on-gender-equality-in-africa/>.

160. Interview with Jedidah Wakonoyo Waruhiu, Commissioner, Kenya National Commission on Human Rights, in Nairobi, Kenya (Mar. 17, 2017); *see also* Interview with Marie Yambo, Health Reporter, in Nairobi, Kenya (Mar. 13, 2017) ("[T]hese are the women of tomorrow. If you do not nurture them, teach them in the right way, and help them . . . tap into the opportunities that are there in the future, what happens to this community? . . . [T]hese are the leaders of this community in the next few years. But if their lives are really being destroyed here, how far can this community really move?").

161. Interview with Marie Yambo, Health Reporter, in Nairobi, Kenya (Mar. 13, 2017); *see also* Interview with Joshua Malit, Deputy Principal, Milimani Secondary School, in Nairobi, Kenya (Mar. 13, 2017) ("[C]hildren must be protected [from sexual abuse]. We don't want to take them

When schoolgirls are educated, there are far-reaching benefits for Kenyan society. Conversely, the violation of a schoolgirl's right to education because of sexual abuse by a teacher has widespread consequences. Every girl deserves the opportunity to receive a full education because it is her fundamental human right, but it is also in the best interest of all Kenyans to advocate for schoolgirls' right to education and to take a stand against sexual abuse by teachers.

B. The Right to Freedom from Discrimination and Equality Before the Law

Sexual abuse violates schoolgirls' right to equality and freedom from discrimination on the basis of sex. The Kenyan Constitution guarantees the right to be treated equally before the law, without discrimination, in Article 27.¹⁶² Article 27(3) specifically guarantees that "[w]omen and men have the right to equal treatment, including the right to equal opportunities."¹⁶³ Furthermore, the Constitution's prohibition against discrimination applies to both direct and indirect discrimination by both the State and private actors.¹⁶⁴ Therefore, it encompasses all teachers, whether they are employed by the TSC (a government entity) or teach in private schools. Kenya similarly guarantees this right to freedom from discrimination under multiple international treaties to which Kenya is a party, including CEDAW,¹⁶⁵

for granted because they are the future leaders. Therefore, if we joke around with their life, what will happen?"

162. CONSTITUTION art. 27(1) (2010) (Kenya) ("Every person is equal before the law and has the right to equal protection and equal benefit of the law."); *see also* Committee on Economic, Social and Cultural Rights, *General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, ¶ 10, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2005%2f4&Lang=en [hereinafter *CESCR General Comment 16*].

163. CONSTITUTION art. 27(3) (2010) (Kenya).

164. *Id.* art. 27(4) ("[T]he State shall not discriminate directly or indirectly against any person on any ground, including . . . sex . . ."); *id.* art. 27(5); *see also* *CESCR General Comment 16, supra* note 162, ¶ 12 (explaining that "[d]irect discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women, which cannot be justified objectively.").

165. CEDAW, *supra* note 101, art. 2(d)-(e) ("States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise . . ."); *see also* Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, ¶ 10, U.N. Doc.

the ICCPR,¹⁶⁶ the African Charter,¹⁶⁷ and the Maputo Protocol.¹⁶⁸ While Kenya's Constitution does not contain a definition of "discrimination," several of the international and regional treaties to which Kenya is bound provide definitions that can guide the Kenyan Government. For example, the Maputo Protocol defines discrimination against women as: "any distinction, exclusion or restriction *or any differential treatment* based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women . . . of human rights and fundamental freedoms in all spheres of life."¹⁶⁹ CEDAW similarly defines discrimination against women as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁷⁰

Furthermore, the CEDAW Committee has also instructed in its General Recommendation No. 19 on Violence Against Women that the Convention's definition of discrimination against women encompasses gender-based violence, which is "violence that is directed against a woman because she is a woman or that affects women

CEDAW/C/GC/28 (2010), <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CEDAW/C/GC/28&Lang=E> [hereinafter *CEDAW General Recommendation 28*] ("States parties have an obligation not to cause discrimination against women through acts or omissions; they are further obliged to react actively against discrimination against women, regardless of whether such acts or omissions are perpetrated by the State or by private actors.").

166. ICCPR, *supra* note 99, art. 26.

167. African Charter, *supra* note 103, art. 3.

168. Maputo Protocol, *supra* note 104, art. 2 ("States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures.").

169. *Id.* art. 1(b) (emphasis added). The Maputo Protocol instructs that the term "women" "means persons of female gender, including girls." *Id.* art. 1(b).

170. CEDAW, *supra* note 101, art. 1; *see also* Human Rights Committee, *General Comment No. 18, Non-discrimination*, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 (Nov. 10, 1989), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/INT_CCPR_GEC_6622_E.doc (defining discrimination as implying "any distinction, exclusion, restriction or preference which is based on any ground such as . . . sex . . . and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.").

disproportionately.”¹⁷¹ And in its Seventh Report on the implementation of CEDAW, the Kenyan Government in fact acknowledged that discrimination against women on the basis of sex manifests itself as gender-based violence in Kenya.¹⁷² Such gender-based violence includes “acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”¹⁷³ Kenya’s Department of Justice has identified discrimination against women, “including sexual violence in all its manifestations,” as a foremost challenge facing women’s rights in Kenya.¹⁷⁴ Sexual abuse committed against schoolgirls by their teachers therefore constitutes a form of discrimination because the teachers directly target the schoolgirls and because schoolgirls are disproportionately affected by the abuse.

1. Teachers Target Schoolgirls on the Basis of Sex

Sexual abuse by teachers violates schoolgirls’ right to freedom from discrimination under the Constitution and international law because teachers directly target female students on the basis of their sex. In *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, the African Commission confirmed that sexual abuse against women amounts to discrimination under the African Charter.¹⁷⁵ The female complainants in that case, who had been sexually abused at a demonstration,

171. Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19, Violence Against Women*, ¶ 6, U.N. Doc. A/47/38 (1994), http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf [hereinafter *CEDAW General Recommendation 19*].

172. Republic of Kenya, *Seventh Periodic Report of States Parties Under Article 18 of the Convention on the Elimination of Discrimination against Women*, ¶ 6, U.N. Doc. CEDAW/C/KEN/7 (Mar. 24, 2010), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKEN%2f7&Lang=en; see also Federation of Women Lawyers Kenya and The Centre on Housing Rights and Evictions, *Joint Submission of Shadow Report to the United Nations Committee on the Elimination of Discrimination against Women*, at 7 (2011), http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KEN/INT_CEDAW_NGO_KEN_48_9393_E.pdf (“[T]he State Party report acknowledges that discrimination against women has been manifested in various forms, including gender-based violence.”).

173. *CEDAW General Recommendation 19*, *supra* note 171, ¶ 6.

174. OFFICE OF THE ATTORNEY GEN. AND DEP’T OF JUSTICE, NATIONAL POLICY AND ACTION PLAN ON HUMAN RIGHTS 30 (2014) (Kenya), <http://www.knchr.org/Portals/0/Bills/National%20Human%20Rights%20Policy%20and%20Action%20Plan.pdf> [hereinafter NATIONAL POLICY ON HUMAN RIGHTS].

175. *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Communication. 323/2006, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶¶ 120, 153, 179, 180 (Dec. 16, 2011), http://www.achpr.org/files/sessions/10th-eo/comunications/323.06/achpreos10_232_06_eng.pdf.

argued that the gender-specific “explicit targeting”¹⁷⁶ constituted discrimination on the basis of sex, in violation of Articles 2 and 18(3) of the African Charter.¹⁷⁷ The African Commission agreed. To establish a violation of these articles, the African Commission looked to the verbal and physical assaults against the victims to conclude that the differential treatment of the women victims exhibited “a form of a systematic sexual violence targeted at the women.”¹⁷⁸ The Commission determined that the names the women were called—such as “whore”—are generally not used against males¹⁷⁹ and that accusing the victims of prostitution is a classification that is also “gender-specific.”¹⁸⁰ Moreover, the Commission found that the types of physical assault described by the women—“breasts fondling and touching or attempting to touch ‘private and sensitive parts’”¹⁸¹—were, in fact, gender-specific and evidence of targeting the victims due to their gender because such acts of sexual abuse could “only be directed to women.”¹⁸²

During the IWHRC Fact-Finding Trip, stakeholders and schoolgirls alike identified the explicit targeting by teachers of schoolgirls¹⁸³—as opposed to schoolboys—with the very same verbal and physical gender-based acts of sexual abuse that can only be targeted at women and girls. CREAM Legal Officer Njeri explained how girls are targeted: “A teacher would refer to you growing breasts or something . . . in front of the others, in front of the class. For example, by referring to your breasts, that they are bigger than they should be.”¹⁸⁴ Beyond the verbal targeting, Senior Health Reporter Eunice Kilonzo has “heard of girls having their breasts grabbed, of their butts being touched by their teachers.”¹⁸⁵ Diana, an eighteen-year-old former schoolgirl from the Kibera slum, spoke of similar specific targeting of schoolgirls by

176. *Id.* ¶ 86.

177. *Id.* ¶¶ 75, 90, 118 (“Article 18(3) of the African Charter provides that ‘The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.’”).

178. *Id.* ¶ 152.

179. *Id.* ¶ 143.

180. *Id.* ¶ 145.

181. *Id.* ¶ 144.

182. *Id.*

183. Alex K. Simyu, a Police Officer at the Central Station, observed that sexual abuse in schools occurs “[m]ostly from male teachers to female students.” Interview with Alex K. Simyu, Police Officer, Central Station, in Nairobi, Kenya (Mar. 14, 2017).

184. Interview with Njeri, Legal Officer, CREAM, in Nairobi, Kenya (Mar. 12, 2017).

185. Interview with Eunice Kilonzo, Senior Health Reporter, in Nairobi, Kenya (Mar. 12, 2017).

teachers that she witnessed in her school. For example, teachers only say “[t]o the girl students” that “they want to have sex with them.”¹⁸⁶ Also in Diana’s school, “girls are released from school later than boys because the teacher says that the girls have to remain . . . because they think that [it’s] good to flirt with them.”¹⁸⁷ Diana said that teachers do not make comments to boys about their appearance or their bodies [like they do to girls],¹⁸⁸ an obvious example of distinct treatment on the basis of sex.

Furthermore, numerous stakeholders in Kenya cited examples in which only schoolgirls are sent to a teacher’s house to purportedly study or do tasks typically performed by the girl-child, such as fetching water.¹⁸⁹ These instances ultimately end in physical sexual abuse: “[G]irls are sent to fetch water for teachers, and when they deliver that water, is when they get pregnant in that house.”¹⁹⁰ Njeri spoke of how this targeting of female students by teachers may transpire when schoolgirls are sent to a teacher’s house to perform chores and are then sexually abused:

Some girls need extra classes, then a teacher offers to do the extra classes in their own homes. So since the girls really want to perform well, they accompany the teacher. So the teacher goes and gives them little duties like ‘do dishes for me,’ ‘do laundry,’ [or] ‘clean my house, and then you can actually do the study.’ . . . I know of a particular instance where [school-girls] had gone [to the teacher’s house] as a group and the[re] the teacher sent the other . . . two girls, to go buy something. And they have just left one girl. And the [teacher] commits the act [of sexual abuse] and tells the girl, ‘Do not ever talk about this. If you ever talk about it, I will kill you.’¹⁹¹

186. Interview with Diana, 18-Year Old Former Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017).

187. *Id.*

188. *Id.* (“Q: Do teachers ever make comments to boys like about how [boys] look or their bodies? A: No.”).

189. Interview with Irene Omogi, Quality Management & Accreditation Coordination, GIZ, in Nairobi, Kenya (Mar. 17, 2017) (“I think a lot of this happens in the rural areas, where you have girls being made to do work for teachers, like they are sent to go fetch water for the teacher, go clean his dishes, especially when he is staying alone. This provide[s] the teacher an opportunity to take advantage of the girl. . .”).

190. Interview with Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court, in Nairobi, Kenya (Mar. 15, 2017).

191. Interview with Njeri, Legal Officer, CREAW, in Nairobi, Kenya (Mar. 12, 2017).

Girls can also be targeted by the teacher for tutoring, which puts them at greater risk of being sexually abused. “[T]hey tutor the girls, they tell them they tutor them. . . . [and then] [t]hey force them to have sex [while at the house].”¹⁹² Citing one schoolgirl’s experience with a teacher, Diana reported that, “The girl was asked to . . . go so that he could check and tutor her. Then the teacher—the teacher had sex with her.”¹⁹³ This direct targeting of schoolgirls “based solely on the sex” is “gender-specific and discriminatory by extension.”¹⁹⁴

2. Schoolgirls Are Disproportionately Impacted

Sexual abuse also constitutes discrimination against schoolgirls because they are disproportionately impacted by the sexual abuse perpetrated by teachers. Kenya’s Ministry of Education, Science, and Technology has acknowledged that “women and girls are found to be disproportionately more affected by [gender-based violence].”¹⁹⁵ In its Concluding Observations to Kenya’s Seventh Periodic Report, the CEDAW Committee expressed its concern regarding the “high prevalence of sexual abuse and harassment *of girls by male teachers*.”¹⁹⁶ During the IWHRC Fact-Finding Trip, Dr. Joan Ngunnzi, former Deputy Director at the Teachers Service Commission, confirmed this discrepancy in the impact of sexual abuse on schoolgirls versus schoolboys: “Most of [the victims of sexual abuse in schools] were female [students].”¹⁹⁷ Michael Otiento, Legal Counsel for Childline, a children’s

192. Interview with Diana, 18-Year Old Former Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017).

193. *Id.*

194. Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt, Communication. 323/2006, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 153 (Dec. 16, 2011), http://www.achpr.org/files/sessions/10th-eo/communications/323.06/achpreos10_232_06_eng.pdf.

195. MINISTRY OF EDUC., SCI., AND TECH., EDUCATION AND TRAINING SECTOR GENDER POLICY 16 (2d ed. 2015), <http://www.daogewe.org/index.php/publications/reports/66-gender-policy-guidelines-2015-final/file>.

196. CEDAW *Concluding Observations*, *supra* note 6, ¶ 31 (emphasis added).

197. Interview with Dr. Joan Mwendu Ngunnzi, Former Deputy Director, Teachers Service Commission, in Nairobi, Kenya (Mar. 13, 2017); *see also* Interview with Njeri, Legal Officer, CREAW, in Nairobi, Kenya (Mar. 12, 2017) (discussing against whom and by whom sexual harassment mostly occurs: “Mostly against girls. . . . by teachers”); Interview with Irene Omogi, Quality Management & Accreditation Coordination, GIZ, in Nairobi, Kenya (Mar. 17, 2017) (“Q: Have you ever heard that sexual abuse of students by teachers is a problem [in Kenya]? A: It is a problem. . . . You see a lot of that in primary school. Especially the girls in class 7 and 8, the 13 and 14 year old [girls]. . . .”); Interview with Lecturer, University of Nairobi, in Nairobi, Kenya (Mar. 14, 2017) (“Q: Do you think that girls are more likely to be subject to sexual violence in schools than boys? A: That is what I know.”).

rights NGO in Kenya, similarly noted that “compared to boys, [school] girls are more vulnerable to violence. By violence, I mean in terms of physical violence, sexual violence.”¹⁹⁸ Indeed, sexual abuse by male teachers against schoolgirls specifically is so pervasive and mounting¹⁹⁹ in Kenya, that there are “pockets of [the] country where it’s actually notorious.”²⁰⁰ Former Deputy Chief Justice of the Supreme Court, Honourable Nancy Baraza, described this rampant nature of sexual abuse that exists against schoolgirls: “[E]very year at exam time, end of the year, half of the class is pregnant, little girls, pregnant, by teachers.”²⁰¹ While some schoolboys are also subject to sexual abuse by teachers, the proportion of sexual abuse cases involving male students is far lower than those involving female students.

Due to both the direct targeting and the disproportionate impact of sexual abuse by teachers on schoolgirls, these girls are being discriminated against and denied equal treatment in violation of the fundamental human rights afforded to them by the Kenyan Constitution and international human rights law.

C. *The Right to Health*

“[Sexual abuse] is a violation to their right as human beings and a violation [of their right] to health.”²⁰²

— Dr. Geoffrey Wango, Senior Lecturer, University of Nairobi

198. Interview with Michael Otieno, Legal Counsel, Childline, in Nairobi, Kenya (Mar. 13, 2017); see also Interview with Honourable Lady Justice Hannah Okwengu, Judge of Appeal/Chairperson, Kenya Women Judges Association, in Nairobi, Kenya (Mar. 15, 2017) (When asked about whether the types of cases brought under the Sexual Offences Act have “specifically dealt with sexual abuse against schoolgirls,” Honourable Lady Justice Hannah Okwengu responded, “Oh, yes! Most of them! Especially the defilement—most of them would be young girls who are still in school.”).

199. In 2010, the CEDAW Committee expressed particular concern over what impact the TSC Circular has had on eliminating sexual abuse against girls, as “[s]exual harassment by male teachers is seemingly on the rise.” Comm. on the Elimination of Discrimination against Women, Pre-Session Working Grp. of the Forty-Eighth Session, *List of Issues and Questions with Regard to the Consideration of Periodic Reports: Kenya*, ¶ 21, U.N. Doc. CEDAW/C/KEN/Q/7 (Sept. 2, 2010).

200. Interview with An Educator in Kenya, in Kiambu County, Kenya (Mar. 16, 2017) (“[T]here are pockets of this country where [sexual abuse against schoolgirls by teachers is] actually notorious.”).

201. Interview with Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court, in Nairobi, Kenya (Mar. 15, 2017).

202. Interview with Dr. Geoffrey Wango, Senior Lecturer, Psychology Department, University of Nairobi, in Nairobi, Kenya (Mar. 13, 2017).

When a teacher sexually abuses a schoolgirl, she is unable to realize her fundamental right to the highest attainable physical and mental health in violation of the Constitution and international law. Constitution Article 43(1)(a) guarantees that “every person has the right to the highest attainable standard of health.”²⁰³ The ICESCR and the African Charter similarly call on States Parties to ensure the realization of the “highest attainable standard of physical and mental health.”²⁰⁴ In addition, the CRC and the African Children’s Charter guarantee the same right to those under the age of eighteen.²⁰⁵ And the Maputo Protocol specifically calls on States Parties to protect women’s right to health,²⁰⁶ including sexual and reproductive health.²⁰⁷ The right to health under the Maputo Protocol expressly includes “the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS” as well as “the right to decide whether to have children.”²⁰⁸ The Committee on Economic, Social and Cultural Rights has similarly described the right to health in broad terms, including “the right to control one’s health and body, including sexual and reproductive freedom.”²⁰⁹ All of the above-

203. CONSTITUTION art. (1) (a) (2010) (Kenya). In its 2015 decision in the case *W.J. v. Amkoah*, the High Court of Kenya found that “all acts of sexual and gender based violence” perpetrated against schoolgirls by their teacher “amount to [a] violation of the right to health as provided for under Article 43(1) of the Constitution. . . .” *W.J. v. Amkoah* (2015) 331 K.L.R. 1, ¶ 158(b) (H.C.K.), <http://kenyalaw.org/caselaw/cases/view/109721/>.

204. ICESCR, *supra* note 100, art. 12(1) (“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”); see African Charter, *supra* note 103, art. 16(1) (“Every individual shall have the right to enjoy the best attainable state of physical and mental health.”).

205. CRC, *supra* note 102, art. 24(1) (“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.”); African Children’s Charter, *supra* note 105, art. 14(1) (“Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.”).

206. The Maputo Protocol defines “women” to mean all “persons of female gender, including girls.” Maputo Protocol, *supra* note 104, art. 1(k).

207. *Id.* art. 14(1) (“States Parties shall ensure that the right to health of women, *including sexual and reproductive health* is respected and promoted.”) (emphasis added).

208. *Id.* art. 14(1)(b), (d). The CEDAW Committee similarly emphasized in its General Recommendation No. 24 that “[t]he issues of HIV/AIDS and other sexually transmitted diseases are central to the rights of women and adolescent girls to sexual health.” Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24, Women and Health*, ¶ 18, U.N. Doc. A/54/38/Rev.1 (Jan. 21, 1999), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (scroll down to Gen. Rec. 24) [hereinafter *CEDAW General Recommendation 24*].

209. U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 14, The Right to the Highest Attainable Standard of Health*, ¶ 8, U.N. Doc. E/C.12/2000/4 (May 2000), <http://www.refworld.org/pdfid/4538838d0.pdf> [hereinafter *CESCR General Comment 14*].

referenced aspects of a schoolgirl's health are jeopardized when they are victims of sexual abuse. Indeed, the CEDAW Committee in its General Recommendation No. 24 has described gender-based violence as "a critical health issue for women."²¹⁰

1. The Detrimental Impact of Sexual Abuse on Schoolgirls' Physical Health

Sexual abuse has a detrimental impact on schoolgirls' physical health in violation of their right to health. Several interviewees during the IWHRC Fact-Finding Trip spoke to the physical health effects suffered by girls who are sexually abused. CRADLE's Miriam Wachira explained that the health risk of sexual abuse is exacerbated for school-age girls because of "the fact that at a very young age they are being sexually abused" and "the impact [that] has on their bodies."²¹¹

In cases of physically forced penetration, schoolgirls typically sustain extensive physical damage. A U.N. Study on All Forms of Violence Against Women identified the physical effects of forced penetration to include genital injuries, pelvic inflammatory disease, and other gynaecological disorders.²¹² According to Dr. Bernard Olayo, if the girl is still

210. CEDAW General Recommendation 24, *supra* note 208, ¶ 15.

211. Interview with Miriam Wachira, Child Advocate, The CRADLE – The Children's Foundation, in Nairobi, Kenya (Mar. 15, 2017). The Committee on the Rights of the Child has identified pregnancy and "problems related to sexual and reproductive health, including HIV/AIDS" as "significant factors in health problems" among adolescents. *CRC General Comment 4*, *supra* note 149, ¶¶ 2, 20 (stating that "adolescence is a period characterized by rapid physical . . . maturation" that poses "new challenges to health and development owing to [adolescents'] relative vulnerability.").

212. U.N. Secretary General, *In-depth Study on All Forms of Violence Against Women: Report of the Secretary General*, ¶¶ 159, 164, U.N. Doc. A/61/ 122/Add. 1 (Jul. 6, 2006) [hereinafter *U.N. In-Depth Study*] (outlining the reproductive health consequences of violence against women including gynaecological disorders, pelvic inflammatory disease, sexually transmitted infections, bleeding or infection, chronic pelvic pain and urinary tract infections). *See generally* Brief for the Republic of Kenya in the High Court of Kenya at Nairobi Constitutional and Human Rights Division Pet. No 133 of 2011 in the Matter of the Convention on the Rights of the Child and in the Matter of Articles 2, 10, 20, 22, 23, 27, 28, 29, 43, & 259(1) of the Constitution of Kenya and in the Matter of Sections 8(1), (3) of the Sexual Offences Act and in the Matter of Sections 4 and 7 of the Children Act and in the Matter of Education Act Cap. 211, Inc. Center for Reproductive Rights as Amici Curiae Supporting Pet'rs, *W.J. v. Amkoah*, 7 (2012) (Kenya), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/PETITION-331-OF-2011-CENTER-FOR-REPRODUCTIVE-RIGHTS-AMICUS-BRIEF.pdf> [hereinafter *CRR Brief*]; Nduku Kilonzo et al., *Sexual Violence in Sub-Saharan Africa: The Need for Strengthened Medico-Legal Linkages*, 17 *REPROD. HEALTH MATTERS* 10, 10 (2009); WORLD HEALTH ORGANIZATION, *GUIDELINES FOR MEDICO-LEGAL CARE FOR VICTIMS OF SEXUAL VIOLENCE* 12 (2003), <http://apps.who.int/iris/bitstream/10665/42788/1/924154628X.pdf> [hereinafter *GUIDELINES FOR MEDICO-LEGAL CARE*].

a virgin when she is raped, then “you find the hymen is broken [and] some are very gruesome. You find a lot of genital injuries. . . . [You also find] multiple injuries on the body from when the girl [tries] to resist that kind of attack.”²¹³ Dr. Stewart Kabaka, Senior Assistant Director of Medical Services in the Ministry of Health’s Department of Family Health also described cases involving physical injury, where there would be “some bleeding, or something of the sort, that needs medical intervention.”²¹⁴

If the sexual abuse results in pregnancy, it poses another set of health risks to the schoolgirl, including risks beyond the immediate physical injuries. One such risk is the development of fistulas. Because adolescents lack fully formed pelvises, the pregnancy will put them at risk of developing obstetric fistulas.²¹⁵ In Kenya, some 3,000 women and girls develop fistulas each year, with adolescent girls comprising the highest risk group.²¹⁶ A midwife in Nairobi familiar with obstetric fistulas said that a fistula will present a “lifelong challenge.”²¹⁷ Fistulas can affect the rectal area, the vagina and the bladder “with a lot of impact on the [girl’s] small vagina.”²¹⁸ Women and girls with fistula tears are unable to control the flow of urine and feces.²¹⁹ Additionally, fistulas increase a woman’s chance for infection and lead to long-term consequences like miscarriage and infertility.²²⁰

213. Interview with Bernard Olayo, Specialist, World Bank, in Nairobi, Kenya (Mar. 15, 2017); see also Interview with An Educator in Kenya, in Kiambu County, Kenya (Mar. 16, 2017) (“[Sexual abuse by a teacher] traumatizes a girl for life, it cuts short their education, you are also . . . exposing them to other dangers like STIs, STDs, and HIV/AIDS.”).

214. Interview with Dr. Stewart Kabaka, Senior Assistant Director of Medical Services, Ministry of Health, Department of Family Health, in Nairobi, Kenya (Mar. 17, 2017).

215. WORLD HEALTH ORGANIZATION, OBSTETRIC FISTULA: GUIDING PRINCIPLES FOR CLINICAL MANAGEMENT AND PROGRAMME DEVELOPMENT 6 (2006), http://apps.who.int/iris/bitstream/10665/43343/1/9241593679_eng.pdf [hereinafter WHO OBSTETRIC FISTULA].

216. HUMAN RIGHTS WATCH, I AM NOT DEAD, BUT I AM NOT LIVING: BARRIERS TO FISTULA PREVENTION AND TREATMENT IN KENYA 1, 13 (2010), <https://www.hrw.org/sites/default/files/reports/kenya0710webwcover.pdf>; see WHO OBSTETRIC FISTULA, *supra* note 215, at 6 (indicating that in Nigeria and Ethiopia over 50% of girls who became pregnant before 18 developed obstetric fistulas).

217. Interview with A Midwife, in Nairobi, Kenya (Mar. 16, 2017).

218. *Id.*

219. See *Obstetric Fistula*, U.N. POPULATION FUND, <https://www.unfpa.org/obstetric-fistula#> (last visited Mar. 1, 2018).

220. See *id.* (“Left untreated, obstetric fistula causes chronic incontinence and can lead to a range of other physical ailments, including frequent infections, kidney disease, painful sores and infertility.”); Kayla McGowan & Sarah Hodin, [Part 1] *Obstetric Fistula: A Global Maternal Health Challenge*, Maternal Health Task Force (May 23, 2017), <https://www.mhtf.org/2017/05/23/part-1-obstetric-fistula-a-global-maternal-health-challenge/> (“Women who experience OF are also at

Sexual abuse also exposes schoolgirls to HIV and other STIs, to the detriment of their physical health, including their fertility. Dr. Kabaka noted that “[m]any people are infected with HIV/AIDS in this region.”²²¹ According to a 2014 United Nations Programme on HIV/AIDS (UNAIDS) study, over 1.5 million people in Kenya are HIV positive, with a prevalence rate of 5.9% among those aged fifteen to forty-nine.²²² The HIV prevalence is particularly concerning because a “teacher is thinking that this [is a] child—I don’t need to use a condom with her.”²²³ According to a WHO report on the effects of sexual violence on health, adolescence increases susceptibility to contracting HIV because young girls’ “vaginal mucous membrane has not yet acquired the cellular density providing an effective barrier that develops in the later teenage years.”²²⁴ Coupled with the lack of condom use, situations of forced penetration cause abrasions and cuts that allow the virus to enter through the vaginal mucosa.²²⁵ Moreover, even when the STI is not HIV, it still harms the schoolgirl’s physical health by affecting her fertility. Dr. Olayo noted that “one incident of sexually transmitted infection reduces that fertility by close to a third. But we know that if a girl has maybe five infections there is [a] very [high] likelihood that she will never get pregnant the normal way, because those infections go and block your tubes.”²²⁶ These numerous physical effects suffered by schoolgirl survivors of sexual abuse prevent them from realizing their fundamental right to health.

greater risk of developing infertility problems and maternal and neonatal complications in subsequent pregnancies including: – Miscarriage and stillbirth – Maternal and neonatal death – Uterine rupture – Anemia – Recurrent fistula – Urinary tract infections.”)

221. Interview with Dr. Stewart Kabaka, Senior Assistant Director of Medical Services, Ministry of Health, Department of Family Health, in Nairobi, Kenya (Mar. 17, 2017).

222. KENYA AIDS, RESPONSE PROGRESS REPORT: PROGRESS TOWARD ZERO 7 (2014), http://www.unaids.org/sites/default/files/country/documents/KEN_narrative_report_2014.pdf.

223. Interview with Eunice Kilonzo, Senior Health Reporter, in Nairobi, Kenya (Mar. 13, 2017); *see also* Interview with Bernard Olayo, Specialist, World Bank, in Nairobi, Kenya (Mar. 15, 2017) (“In one difficult case I dealt with, it was very obvious that man was HIV positive, that the teacher was HIV positive.”).

224. WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 164 (Etienne G. Krug et. al. eds., 2002) [hereinafter WHO WORLD REPORT], http://apps.who.int/iris/bitstream/10665/42495/1/9241545615_eng.pdf.

225. CRR Brief, *supra* note 212, at 8; *see* Unicef Fact Sheet: Child Sexual Abuse (2009), [https://web.archive.org/web/20161019161820/https://www.unicef.org/lac/Break_the_Silence_Initiative-Fact_sheet\(1\).pdf](https://web.archive.org/web/20161019161820/https://www.unicef.org/lac/Break_the_Silence_Initiative-Fact_sheet(1).pdf) (discussing the health effects of sexual abuse against children in the Caribbean); WHO WORLD REPORT, *supra* note 224, at 164.

226. Interview with Bernard Olayo, Specialist, World Bank, in Nairobi, Kenya (Mar. 15, 2017).

2. Mental Trauma Caused by Sexual Abuse

Sexual abuse also violates schoolgirls' right to the highest attainable health because of the impact it has on the girl's mental and emotional health. According to a U.N. In-Depth Study on All Forms of Violence Against Women, "the psychological consequences of violence against women can be as grave as the physical effects."²²⁷ Indeed, when it comes to schoolgirl victims of such violence, "these girls go through massive psychological trauma."²²⁸ That trauma may manifest in that "they cannot trust men; they may not want to have sex, or may have sexual dysfunctions" as a result of the abuse.²²⁹ A psychologist at the Gender Violence Recovery Centre in Nairobi detailed some additional forms of mental trauma suffered by schoolgirls following sexual abuse:

They can suffer from guilt feelings, they can feel ashamed, they can develop shame in their bodies. They can hate their bodies because they feel 'it is this body that is making me to be defiled.' They can develop of course the post-traumatic stress disorders, including nightmares. They may develop even eating conditions—they may eat less or eat more, so that they don't feel attractive.²³⁰

Additionally, they "may develop self-harming habits like self-cutting"²³¹ withdraw, or even commit suicide.²³²

227. *U.N. In-Depth Study*, *supra* note 212, at 164; *see also Kenya's Unending Toll for Rape Survivors* (Feb. 15, 2016), <https://www.hrw.org/news/2016/02/15/kenya-unending-toll-rape-survivors> (arguing that the mental trauma characterized by profound feelings of hopelessness, self-hatred, shame, anger, and sadness, and often reinforced by a sense of isolation from being stigmatized as rape victims leaves a lasting impact on victims of sexual violence); GUIDELINES FOR MEDICO-LEGAL CARE, *supra* note 212, at 14 (discussing the particular psychological effects on child victims of sexual violence that continue well into adulthood including depression, anxiety, post-traumatic stress disorder, cognitive distortions, externalized emotional distress, and interpersonal difficulties, including sexual problems).

228. Interview with Bernard Olayo, Specialist, World Bank, in Nairobi, Kenya (Mar. 15, 2017).

229. Interview with Dr. Lydia Okutoyi, Obstetrician Gynecologist and Head of Department, Patient Safety and Quality Health Care Department, Kenyatta National Hospital, in Nairobi, Kenya (Mar. 16, 2017).

230. Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017).

231. *Id.*

232. *Id.*

In the aftermath of sexual abuse, schoolgirls most commonly suffer from depression.²³³ Sometimes it is the result of self-blaming behavior—belief that their actions somehow precipitated the rape²³⁴—and eventually leads to feelings of hopelessness and depression.²³⁵ Professor Grace Omoni, Ph.D., a nurse at the University of Nairobi said

the mental injury is—what I got from my study—is depression . . . young adult depression. The younger they were, they were more depressed than the older ones—like the fifteen-year olds, sixteen, eighteen. [T]h[ose] ones were depressed, but anyone who was younger than that, they were *very* depressed.²³⁶

Some symptoms of depression include loss of interest and pessimistic views of the future.²³⁷

Schoolgirls can also experience severe post-traumatic stress disorder (PTSD) from the abuse. Schoolgirls who have been abused sexually exhibit an irrational fear of physical contact and “[don’t] want to be touched anywhere.”²³⁸ This can include even doctors: “You may see that they seem very scared—very scared to be examined, very scared for

233. GUIDELINES FOR MEDICO-LEGAL CARE, *supra* note 212, at 13-14 (outlining the most common psychological effects on victims of sexual violence); Save the Children, *Too Often in Silence: A Report on School-Based Violence in West and Central Africa* 6 (2010) [hereinafter Save the Children], https://www.unicef.org/cotedivoire/Too_often_in_silence_Report.pdf.

234. Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) (“Q: Why do they blame themselves? A: Sometimes, the perpetrator tells them ‘If you weren’t this beautiful, I wouldn’t do it. It’s your fault.’ So they will blame the child. It’s [the idea that] ‘you drove me to do this.’”).

235. Ronnie Janoff-Bulman, *Characterological Versus Behavioural Self-Blame: Inquiries Into Depression*, 37 J. PERSONALITY & SOC. PSYCHOL. 1798, 1802 (1979), <http://dx.doi.org/10.1037/0022-3514.37.10.1798>; see also U.N. *In-Depth Study*, *supra* note 212, at 165 (stating that depression and attempted suicide are closely associated with intimate partner violence and that for girls who have been raped this increases the risk for suicide); Interview with Dr. Lydia Okutoyi, Obstetrician Gynecologist and Head of Department, Patient Safety and Quality Health Care Department, Kenyatta National Hospital, in Nairobi, Kenya (Mar. 16, 2017) (“Some seem depressed, not wanting to relate to other people.”); Interview with Dr. Stewart Kabaka, Senior Assistant Director of Medical Services, Ministry of Health, Department of Family Health, in Nairobi, Kenya (Mar. 17, 2017) (“Once [they’re] abused [as] a child . . . they will come and either they are depressed, [or] they have low-esteem.”).

236. Interview with Professor Grace M. Omoni, Ph.D., School of Nursing Sciences, University of Nairobi, in Nairobi, Kenya (Mar. 15, 2017).

237. Anthony S. Hale, *ABC of Mental Health: Depression*, 43 BRITISH MED. J. 43, 43 (1997), <http://0-www.jstor.org.gull.georgetown.edu/stable/pdf/25175074.pdf>.

238. Interview with Dr. Stewart Kabaka, Senior Assistant Director of Medical Services, Ministry of Health, Department of Family Health, in Nairobi, Kenya (Mar. 17, 2017).

their private parts.”²³⁹ Dr. Bernard Olayo further explained that “most doctors are men,” and “there is another man who is going to touch them.”²⁴⁰ Beyond doctors, victims of sexual abuse may be unable to “establish normal male-female relationships.”²⁴¹

Unfortunately, in the context of schoolgirls, the mental trauma is even more pronounced because adolescence is such a formative period in a person’s life.²⁴² In its General Comment No. 4, the Committee on the Rights of the Child recognized that certain mental disorders and psychosocial illness—such as those that stem from sexual abuse—“are relatively common among adolescents.”²⁴³ The Committee on Economic, Social, and Cultural Rights has stated that health is fundamental to the exercise of other human rights.²⁴⁴ According to the World Health Organization, mental health is absolutely vital to the overall wellbeing of individuals and can impede all the other aspects of health, including physical and social health.²⁴⁵

Schoolgirls who are sexually abused by their teachers cannot realize the highest attainable standard of physical or mental health, protect themselves against sexually transmitted infections, or exercise a choice of whether to have children. As such, Kenya is in violation of its obligations under its own Constitution and numerous international and regional human rights treaties.

D. *The Right to Life*

In some instances, the health consequences from sexual abuse can result in premature death, thereby violating a schoolgirl’s right to life. Constitutional Article 26 guarantees that “every person has the right to

239. Interview with Dr. Lydia Okutoyi, Obstetrician Gynecologist and Head of Department, Patient Safety and Quality Health Care Department, Kenyatta National Hospital, in Nairobi, Kenya (Mar. 16, 2017).

240. Interview with Bernard Olayo, Specialist, World Bank, in Nairobi, Kenya (Mar. 15, 2017).

241. *Id.*; see also Interview with Miriam Wachira, Child Advocate, The CRADLE – The Children’s Foundation, in Nairobi, Kenya (Mar. 15, 2017) (explaining her own experience after being sexually abused as a child: “I was thinking, anything sexual, or anything in a relationship . . . I’d be very afraid of it.”).

242. See *CRC General Comment 4*, *supra* note 149, at ¶ 2 (adolescence characterized by rapid physical, cognitive and social changes, including sexual and reproductive maturation); see also *Save the Children*, *supra* note 233, at 26 (arguing children, and girls, in particular, are vulnerable during adolescence).

243. *CRC General Comment 4*, *supra* note 149, ¶ 22.

244. *CESCR General Comment 14*, *supra* note 209, ¶ 1.

245. THE WORLD HEALTH REPORT 2001, MENTAL HEALTH: NEW UNDERSTANDING, NEW HOPE, WHO 3-4 (2001), http://www.who.int/whr/2001/en/whr01_en.pdf?ua=1.

life.”²⁴⁶ Kenya has similarly guaranteed this right under the ICCPR and the Maputo Protocol.²⁴⁷ A schoolgirl’s right to life is threatened by sexual abuse when 1) a schoolgirl is exposed to HIV/AIDs through sexual abuse by her teacher; 2) the sexual abuse results in a pregnancy that her young body cannot handle; or 3) the emotional effects of the abuse drive the girl to suicide.

Given the lack of access to antiretroviral drugs in Kenya, a schoolgirl’s right to life is threatened by sexual abuse when she contracts HIV from the sexual abuse. Sexually abused schoolgirls face a substantial risk of contracting HIV²⁴⁸ and the lack of access to antiretroviral can result in death. According to a recent UNAIDS report, young women in sub-Saharan Africa are the most vulnerable because “they are at high risk of HIV infection, have low rates of HIV testing, and have poor adherence to treatment.”²⁴⁹ Human Rights Watch reported that around 150,000 children in Kenya are infected with HIV, 60,000 of which urgently need antiretroviral treatment.²⁵⁰ Yet only one-third of those children are getting the necessary treatment; the other 40,000 remain without antiretroviral drugs and will “soon die if they do not get the drugs.”²⁵¹ In a country like Kenya, where HIV-positive children are unable to acquire antiretroviral drugs, a schoolgirl infected with HIV by her teacher is at a high risk of losing her life.

Sexual abuse by teachers also threatens the life of the schoolgirl if the abuse results in pregnancy. A schoolgirl’s age and the risks associated with childbirth for young mothers substantially increase her risk of dying in childbirth. In 2014, the CEDAW Committee and Committee on the Rights of the Child jointly reported that “[p]regnancy-related deaths are the leading cause of mortality for girls between 15 and

246. CONSTITUTION art. 26(1) (2010) (Kenya).

247. ICCPR, *supra* note 99, art. 16 (“Everyone shall have the right to recognition everywhere as a person before the law.”); Maputo Protocol, *supra* note 104, art. 4(1) (“Every woman shall be entitled to respect for life. . . .”); *see also* African Charter *supra* note 103, art. 4 (“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his right.”).

248. *See supra* Section IV.C.1.

249. Press Release, UNAIDS, UNAIDS Announces 18.2 Million People on Antiretroviral Therapy, But Warns That 15-24 Years of Age Is a Highly Dangerous Time For Women (Nov. 16, 2016), http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2016/november/20161121_PR_get-on-the-fast-track.

250. Human Rights Watch, *A Question of Life or Death: Treatment Access for Children Living with HIV in Kenya*, at 2 (2008), <https://www.hrw.org/report/2008/12/16/question-life-or-death/treatment-access-children-living-hiv-kenya>.

251. *Id.*

19 years of age . . . around the world.”²⁵² Adolescents also face adverse health risks such as eclampsia, a condition that can prove fatal.²⁵³ Because their bodies are not fully developed, the narrow size of their pelvis puts them at a high risk for prolonged or obstructed labour that can lead to death.²⁵⁴

The risk posed by these complications is compounded by Kenya’s high maternal mortality rate (MMR). The chances of young girls dying in childbirth in Kenya are alarmingly high, with a maternal mortality rate of 510 per 100,000 live births.²⁵⁵ The CEDAW Committee and Committee on the Rights of the Child together recognized the substantial risk that young girls face in pregnancy-related deaths in their Joint General Recommendation No. 31.²⁵⁶ According to Dr. Bernard Olayo, unwanted pregnancy, youth, and the poverty of a girl are all factors inextricably linked to high MMR:

I can tell you which woman is likely to die in the process of childbirth. They are not abnormal, their characteristics are very clear. You can predict very accurately who is likely to die in the process of childbirth. Typically you have a young mother, the pregnancy was not intended and by and large they have no

252. Committee on the Elimination of All Forms of Discrimination against Women & Committee on the Rights of the Child, *Joint General Recommendation No. 31*, ¶ 22, U.N. Doc. C/GC/31-CRC/C/GC/18, (Nov. 14, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/627/78/PDF/N1462778.pdf?OpenElement>. The WHO has identified complications during pregnancy and childbirth as the second leading cause of death for girls 15 to 19 globally. See WHO, *Adolescent Pregnancy Fact Sheet* (2014), <http://www.who.int/mediacentre/factsheets/fs364/en/>.

253. Therese Locoh, *Early Marriage and Motherhood in Sub-Saharan Africa*, 26 WOMEN’S INT’L NETWORK NEWS 53, 53 (2000).

254. *Id.*; *Childbride, 12, Dies in Yemen After Struggling To Give Birth For Three Days*, DAILYMAIL (Mar. 17, 2010), <http://www.dailymail.co.uk/news/article-1213168/Fawziya-Abdullah-Youssef-dies-labour-Child-bride-12-dies-Yemen-struggling-birth-THREE-days.html> (“A 12-year-old Yemeni child bride died after struggling to give birth for three days, a local human rights organisation said.”).

255. *Maternal Mortality Ratio: Modeled Estimate, Per 100,000 Live Births*, WORLD BANK (2015), <http://data.worldbank.org/indicator/SH.STA.MMRT>.

256. See Committee on the Elimination of All Forms of Discrimination against Women & Committee on the Rights of the Child, *Joint General Recommendation No. 31*, ¶ 22, U.N. Doc. C/GC/31-CRC/C/GC/18 (Nov. 14, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/627/78/PDF/N1462778.pdf?OpenElement> (“[C]hild marriage is often accompanied by early and frequent pregnancy and childbirth, resulting in higher than average maternal morbidity and mortality rates”); see also *CRC General Comment 4*, *supra* note 149, ¶ 27 (Jul. 2003) (“State parties should take measures to reduce maternal morbidity and mortality in adolescent girls.”).

money in the pocket. That's a very dangerous pregnancy. If you have a teenage pregnancy, not married, the pregnancy wasn't intended and there's no money in the pocket, or in the family, that's a dangerous thing. If I see that woman, even if it's in the third month of pregnancy, I can predict the problems that will come. First, when she is very young that body is not prepared to hold that baby to term. The pelvis is so small so there's no way that that baby is going to come out the natural way. Because the pregnancy wasn't wanted and the stigma around it, she will not even go for antenatal care.²⁵⁷

Finally, while physical effects of sexual abuse are often more readily apparent, mental effects in schoolgirls can likewise lead to death. A 2014 WHO report on suicide prevention emphasized that among the 15 to 29 age group, "suicide is the second leading cause of death globally."²⁵⁸ And in a 2016 study, the WHO discusses the connection between depression and suicide and notes that in 2012 Kenya had a large number of suicides regionally, with an estimated 10.8 per 100,000.²⁵⁹ Sexually abused schoolgirls in Kenya can suffer from feelings of guilt and post-traumatic stress disorder that "may [cause them to] commit suicide."²⁶⁰ Mental trauma suffered by victims of sexual abuse, including severe depression, creates a real risk of suicide, putting the schoolgirl's life in danger, thereby violating her fundamental right to life.

E. *The Right to Dignity*

Sexual abuse by a teacher damages a schoolgirl's self-worth and self-esteem, in violation of her right to dignity. Article 28 of the Constitution guarantees every individual the right to dignity and "the right to have that dignity respected and protected."²⁶¹ The Constitution's Bill of Rights further declares that "[t]he purpose of recognising and protecting human rights is to preserve the dignity of individuals."²⁶² Kenya has

257. Interview with Bernard Olayo, Specialist, World Bank, in Nairobi, Kenya (Mar. 15, 2017).

258. WHO, *Preventing Suicide: A Global Imperative*, at 3 (2014), http://apps.who.int/iris/bitstream/10665/131056/1/9789241564779_eng.pdf?ua=1&ua=1.

259. WHO, *World Health Statistics 2016: Monitoring Health For the SDGs-Suicide*, at 63 (2016), http://www.who.int/gho/publications/world_health_statistics/2016/en/.

260. Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017).

261. CONSTITUTION art. 28 (2010) (Kenya).

262. *Id.* art. 19(2).

also guaranteed the right to dignity to every individual under the African Charter²⁶³ and specifically to every woman under the Maputo Protocol.²⁶⁴ The Maputo Protocol includes within its right to dignity, the right of every woman to “the free development of her personality”²⁶⁵ and to be protected from “all forms of violence, particularly sexual and verbal violence.”²⁶⁶ Furthermore, from the origins of the current international human rights framework, the right to dignity has been recognised as inherent. The first sentence of the Universal Declaration of Human Rights (UDHR), the first and most fundamental human rights document, affirms “the inherent dignity” of all human beings.²⁶⁷ The Committee on the Rights of the Child defines “the concept of dignity” as requiring “that every child is recognized, respected and protected as a rights holder and as a unique and valuable human being with an individual personality, distinct needs, interests and privacy.”²⁶⁸ When schoolgirls are victims of sexual abuse at the hands of their teachers, their right to dignity, as guaranteed by the Constitution and human rights treaties, has been violated.

263. See African Charter, *supra* note 103, art. 5 (“Every individual shall have the right to the respect of the dignity inherent in a human being.”).

264. See Maputo Protocol, *supra* note 104, art.3(1) (“Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.”).

265. *Id.* art. 3(2).

266. *Id.* art. 3(4).

267. G.A. Res. 217A (III), Universal Declaration of Human Rights pmbl. (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/> (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”); see also *id.* art. 1 (“All human beings are born free and equal in dignity and rights.”). Major international treaties such as the ICCPR and the ICESCR similarly declare in their preambles that all human rights derive from the inherent dignity of the person. See ICCPR, *supra* note 99, pmbl. (“Recognizing that these rights derive from the inherent dignity of the human person”); ICESCR, *supra* note 100, pmbl. (“Recognizing that these rights derive from the inherent dignity of the human person”). The ICESCR also recognises the right of all persons to an education “directed to the full development of the human personality and its sense of dignity.” ICESCR, *supra* note 100, art. 13(1). The CRC calls upon State Parties to ensure that children are “brought up . . . in the spirit of peace, dignity, tolerance, freedom, equality, and solidarity.” CRC, *supra* note 102, pmbl.

268. Committee on the Rights of the Child, *General Comment No. 13, The Right of the Child to Freedom From All Forms of Violence* (57th Sess., 2011), ¶ 3, U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011) [hereinafter *CRC General Comment 13*], http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f13&Lang=en. Given that many schoolgirls are indeed children, and even those who have obtained the age of majority are still undergoing a vulnerable process of growth, development, and learning in school, this definition is particularly relevant.

While the concept of dignity can encompass so much, at its core, the right to dignity guarantees the right to recognition of an individual's worth. One scholar argues that there is a basic minimum content of dignity which has certain elements: first, that "every human being possesses an intrinsic worth, merely by being human," and second, "that this intrinsic worth should be recognized and respected by others."²⁶⁹ The High Court of Kenya described dignity in a similar way in a 2013 decision: "[r]ecognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern."²⁷⁰ As Commissioner at the Kenya National Commission on Human Rights expressed, even the schoolgirls themselves know that "there is a certain respect and protection that [they] deserve."²⁷¹ While these girls may not be able to articulate that as a human right, they know it is "an issue of dignity."²⁷²

The former Deputy Chief Justice of the Supreme Court of Kenya has called sexual abuse, including sexual harassment, a "clear violation of anybody's dignity, specifically the dignity of that girl."²⁷³ She explained that dignity involves the individual value of a person, and when a schoolgirl is sexually abused by a teacher "or when you sexually harass this girl, then you have violated [that right]."²⁷⁴ Indeed, the High Court of Kenya recently held in *W.J. v. Amkoah* that the victim's right to dignity is violated when she is subject to sexual violence at the hands of her teacher.²⁷⁵ High Court Judge Mumbi Ngugi found that the right to dignity guaranteed under Constitution Article 28 is "a continuing one"

269. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 THE EUR. J. OF INT'L L. 655, 679 (2008), <http://www.ejil.org/pdfs/19/4/1658.pdf>.

270. Kituo Cha Sheria et. al v. Att'y Gen. (2013) 19 K.L.R. 1, ¶ 66 (H.C.K.), <http://kenyalaw.org/caselaw/cases/view/84157>.

271. Interview with Jedidah Wakonyo Waruhiu, Commissioner, Kenya National Commission on Human Rights, in Nairobi, Kenya (Mar. 17, 2017).

272. *Id.*

273. Interview with the Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court, in Nairobi, Kenya (Mar. 15, 2017); *see also* Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi Kenya (Mar. 17, 2017) ("Sexual abuse by a teacher really lowers a girl's dignity."); Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017) ("This is a crime against humanity, as far as I'm concerned. You have violated the life of that girl.").

274. Interview with the Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court, in Nairobi, Kenya (Mar. 15, 2017).

275. *W.J. v. Amkoah* (2015) 331 K.L.R. 1, ¶¶ 119, 123 (H.C.K.), <http://kenyalaw.org/caselaw/cases/view/109721/>.

and is violated when “a teacher defiles a child.”²⁷⁶ Judge Ngugi reasoned that defilement by a teacher leads to a schoolgirl’s “experiencing emotional and psychological trauma, to feelings of being an outsider in society, and as somehow to blame for the acts of the perpetrator.”²⁷⁷ She concluded that this experience “amounts to a violation of the right to dignity and self-worth of the victim of abuse, which is continuous in its effects.”²⁷⁸

To schoolgirls, their sense of dignity encompasses the recognition of their worth as an individual. Sexual abuse by teachers violates a schoolgirl’s right to dignity by damaging her self-esteem and her perception of her own self-worth. The Kenyan Government, in the Safety Standards Manual for Schools in Kenya, published by the Ministry of Education, has admitted that sexual abuse in schools has harmful effects on learners’ “ego and self-esteem.”²⁷⁹ According to Beryl Arogo, a counselling psychologist, “[s]exual abuse by a teacher really lowers a girl’s dignity because this is someone who is in a position of power, and a girl may end up hating [her]self” and “feeling guilty.”²⁸⁰ Professor Ndungo similarly explained that these girls start “having low self-esteem, hating yourself, and feeling that you are worthless. You have brought shame—not only to yourself, but to the school, the teacher, to your parents. So they feel worthless.”²⁸¹ Dr. Kabaka, who has treated

276. *Id.* ¶ 119.

277. *Id.*

278. *Id.* While this case involved defilement and attempted defilement of children, the holding should be interpreted broadly to include all sexual abuse against all schoolgirls, even those over the age of eighteen. While these harms are exacerbated when the victim is a child, the Maputo Protocol, which Kenya is bound by, explicitly protects all women’s right to dignity, which encompasses all schoolgirls. *See* Maputo Protocol, *supra* note 104, art. 3(1). Even schoolgirls who may not be legal minors are still in the vulnerable stage of development and knowledge acquisition. The feelings of trauma, isolation, and shame that Judge Ngugi described are applicable to all victims and for acts of sexual abuse less “severe” than defilement or attempted defilement.

279. SAFETY STANDARDS MANUAL, *supra* note 124, §§ 2.2, 6.10.

280. Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017).

281. Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017); *see also* Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) (“They may lose their self-esteem, self-confidence. They may even blame themselves and feel guilty.”); *id.* (explaining that schoolgirls who suffer from sexual abuse by their teachers “may not understand what may be going on, and unconsciously, they start feeling ashamed because they may feel like, ‘This does not feel right, but then again, this is someone in authority. This is someone I should trust, so maybe it’s okay.’”); Interview with Everlyne Nyongesa, Women’s Health Rights Advocate/Former Teacher, in Nairobi, Kenya (Mar. 17, 2017) (“Some of them, of

survivors of sexual abuse, noted that “someone who has been sexually abused—whether it’s a girl or a child or a mother—they will come with some trauma on their face, and you can see it, either in the form of depression or . . . in low [self]-esteem. . . .”²⁸² Some girls may develop such severe self-esteem issues that they start changing their behaviour to draw less attention to themselves. Eunice Kilonzo, Senior Health Reporter, described how some girls “would always walk bent so that their breasts are not shown, so that other people would not see that they have breasts.”²⁸³

Sexual abuse at the hands of a teacher violates a schoolgirl’s right to dignity because of this damage to her self-esteem and self-worth. By failing to protect schoolgirls from abuse, Kenya stands in violation of its Constitution and binding international treaty law.

F. *The Right to Freedom from Degrading Treatment*

Sexual abuse by a teacher also violates a schoolgirl’s right to freedom from degrading treatment. The Constitution ensures that every person has the right to security of her person, including the right to not be “treated or punished in a cruel, inhuman or degrading manner.”²⁸⁴ In addition, the Basic Education Act protects all “pupil[s]” from being subject to degrading treatment, “whether physical or psychological.”²⁸⁵ Numerous international human rights treaties similarly afford schoolgirls this right, including the ICCPR,²⁸⁶ the CRC,²⁸⁷ the African Charter,²⁸⁸ and the Maputo Protocol.²⁸⁹ And in its General Recommendation No. 19,

course it affects their self-esteem.”); Interview with Isaac Agalo, Principal, Shammah High School, in Nairobi, Kenya (Mar. 16, 2017) (“She will also be suffering from low self-esteem.”); Interview with Eunice Macharia, Social Worker/Counselor, Freely in Hope, in Nairobi, Kenya (Mar. 14, 2017) (“Is, has, their esteem goes down, and they don’t want to even to speak about it.”).

282. Interview with Dr. Stewart Kabaka, Senior Assistant Director of Medical Services, Ministry of Health, Department of Family Health, in Nairobi, Kenya (Mar. 17, 2017).

283. Interview with Eunice Kilonzo, Senior Health Reporter, in Nairobi, Kenya (Mar. 13, 2017).

284. CONSTITUTION art. 29(f) (2010) (Kenya).

285. The Basic Education Act (2013) § 36(1) (Kenya).

286. ICCPR, *supra* note 99, art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

287. CRC, *supra* note 102, art. 37(a) (“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”).

288. African Charter, *supra* note 103, art. 5 (“All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”).

289. Maputo Protocol, *supra* note 104, art. 4(1) (“All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.”).

the CEDAW Committee clarified that gender-based violence impairs a woman's enjoyment of her fundamental right "not to be subject to . . . degrading treatment."²⁹⁰

Degrading treatment encompasses a broad range of behaviour. According to the Human Rights Committee (HRC), degrading treatment includes not only "acts that cause physical pain," but also those "that cause mental suffering to the victim."²⁹¹ Similarly, the African Commission has defined degrading treatment to include "not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience."²⁹² The Commission also stated that "prohibition" should be "interpreted as widely as possible to encompass the widest possible array of physical and mental abuses."²⁹³ Moreover, the High Court of Kenya has declared that treatment "which brings a person dishonour or contempt" is degrading.²⁹⁴ Notably, the HRC Committee emphasized that the prohibition of degrading treatment in the ICCPR "protects, in particular, children [and] pupils . . . in teaching and medical institutions."²⁹⁵

Sexual abuse is one of the most degrading forms of treatment imaginable. Indeed, a Lecturer at the University of Nairobi called sexual abuse at the hands of one's teacher "degrading of the highest level."²⁹⁶ A Commissioner at the Kenya National Commission on Human Rights similarly described sexual abuse as something that "truly insults me and

290. CEDAW General Recommendation 19, *supra* note 171, ¶ 7.

291. Human Rights Committee, *General Comment No. 20, Article 7: Prohibition of Torture, or Other Cruel, Inhuman, or Degrading Treatment or Punishment* (44th Sess., 1992), ¶ 5, (Sept. 30, 1992) [hereinafter *HRC General Comment 20*], http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fICCPR%2fGEC%2f6621&Lang=en.

292. *Curtis Francis Doebller v. Sudan*, Communication 236/00, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], ¶ 36 (May 2003), http://www.achpr.org/files/sessions/33rd/communications/236.00/achpr33_236_00_eng.pdf. This definition of degrading treatment was reiterated in *Egyptian Initiative for Pers. Rights v. Egypt*, Communication 323/06, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], ¶ 196 (Dec. 16, 2011), http://www.achpr.org/files/sessions/10th-co/communications/323.06/achpreos10_232_06_eng.pdf ("Having discussed the principle of inhuman and degrading treatment and indignity, the African Commission will rely on the criterion provided by its jurisprudence that: 'Acts of inhuman and degrading treatment "not only cause serious physical or psychological suffering, but also humiliate the individual. . . ."'").

293. *Doebller*, Comm. 236/00, ¶ 37.

294. *Richard Muasya v. Att'y Gen.* (2010) 705 K.L.R. 1, ¶ 166 (H.C.K.), https://archive.org/stream/RichardMuasyaVsTheAttorneyGeneralOthers/MuasyaJudgment_djvu.txt.

295. *HRC General Comment 20*, *supra* note 291, ¶ 5.

296. Interview with Lecturer, University of Nairobi, in Nairobi, Kenya (Mar. 14, 2017).

degrades me as a woman.”²⁹⁷ Sexual abuse at the hands of a teacher degrades a schoolgirl in three specific ways: by treating her as a sexual object rather than a learner, denying her autonomy over her own body, and exposing her to ridicule by her peers and within her community.

First, sexual abuse by a teacher degrades a schoolgirl because the teacher treats her as a sexual object. When a teacher sexually abuses or harasses a schoolgirl, he objectifies her and uses her for his own sexual gratification. Even “just talking about body parts in a degrading or dehumanising manner” can make that girl “feel like [she is] out of place in school.”²⁹⁸ A teacher who makes comments about a schoolgirl’s body, telling her that she is “beautiful,”²⁹⁹ is looking at his student with an eye not toward education, but toward fulfilling his sexual desires. That teacher is reducing that schoolgirl to a sexual object or a “sex tool.”³⁰⁰ One schoolgirl described how a teacher would give a girl she knew in school money and then demand sex in return:

[The teacher said,] ‘I’ve been giving you money all the time. And I want mine, you give me mine now. I want you to give me the money I give you.’ And the girl says, ‘I don’t know where to get the money, what do I do?’ He says, ‘Don’t worry, I don’t want money, I just want you.’³⁰¹

297. Interview with Jedidah Wakonyo Waruhiu, Commissioner, Kenya National Commission on Human Rights, in Nairobi, Kenya (Mar. 17, 2017).

298. Interview with A Woman Who Works with a Development Organization, in Nairobi, Kenya (Mar. 13, 2017).

299. See Interview with Kate, Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017) (“A: The teachers also tell the girls how they look. Q: What do they say about how they look? A: Their bodies, they’re smart, they are beautiful.”); Interview with A Woman in Nairobi, in Nairobi, Kenya (Mar. 14, 2017) (“Sometimes a teacher calls a girl in the office, telling her ‘You are beautiful, I will pay for your school fees.’”).

300. Interview with Peter M. Hunjah, Bishop, Springs of Life Ministries, in Tala, Kenya (Mar. 16, 2017); see also Interview with Eunice Kilonzo, Senior Health Reporter, in Nairobi, Kenya (Mar. 13, 2017) (“[I]f somebody’s sexually harassing you, they’re using your body. They’re saying stuff about you with a sexual end. They’re driving you to a sexual end . . .”).

301. Interview with Mary, Schoolgirl from Makina, Age 17, in Nairobi, Kenya (Mar. 15, 2017); see also Interview with a Guidance and Counselling Teacher in Kibera, in Nairobi, Kenya (Mar. 17, 2017) (“Q: So what would a schoolgirl have to do to get these benefits from the teacher? . . . A: Well, she has to accept to have sex with the teacher.”); Interview with Geoffrey Wango, Senior Lecturer, Psychology Department, University of Nairobi, in Nairobi, Kenya (Mar. 12, 2017) (discussing an example of how “maybe a university lecturer or professor lures the girl to give her marks in exchange for sex”).

The treatment itself, in reducing the schoolgirl to a sexual object, is degrading and violates her right to freedom from such treatment, regardless of what effect this behaviour may have on the schoolgirl.

Sexual abuse also denies a schoolgirl autonomy over her body by removing her choice of whether, when, and with whom she engages in sexual activity. Because of the power imbalance between a teacher and his students, students cannot exercise agency in the decision. Dr. Ngunnzi recounted what one schoolgirl told her: “[She said,] ‘the teacher told me to take off my clothes. How could I say no? He is a teacher.’”³⁰² Even students who are not minors cannot truly consent to the sexual relationship.³⁰³ In fact, the Sexual Offences Act criminalizes such relationships, regardless of age:

Any person who, being the head-teacher, teacher, or employee in a primary or secondary school or special institution of learning, whether formal or informal, takes advantage of his or her official position and induces or seduces a pupil or student to have sexual intercourse with him or her or commits any other offence under this Act . . . shall be guilty of an offence of abuse of position of authority.³⁰⁴

Because of the power imbalance in a teacher-student relationship, a schoolgirl is not free to choose whether to engage in the sexual activity. This is a denial of a schoolgirl’s autonomy over her own body.

Finally, a teacher’s sexual abuse degrades a schoolgirl by exposing her to ridicule by her peers and community. The teacher degrades the schoolgirl because his abuse “brings [her] dishonour and contempt.”³⁰⁵ The girl who is unfortunate enough to be chosen by her teacher for the sexual abuse is often subject to further ridicule by others in school, and her reputation in the community is tarnished. She will often be teased

302. Interview with Dr. Joan Mwende Ngunnzi, Former Deputy Director, Teachers Service Commission, in Nairobi, Kenya (Mar. 13, 2017).

303. Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017) (explaining that even if a schoolgirl is over 18, the teacher still has “power over that student” and is “using your power and your position to abuse this girl”); *see also* discussion of the power imbalance between a teacher and learner in Section III, *supra*.

304. Sexual Offences Act (2014) Cap. 62A § 24(4) (Kenya).

305. Richard Muasya v. Att’y Gen. (2010) 705 K.L.R. 1, ¶ 166 (H.C.K.), https://archive.org/stream/RichardMuasyaVsTheAttorneyGeneralOthers/MuasyaJudgment_djvu.txt.

or bullied by the other students while at school.³⁰⁶ Even other teachers may tell the girl that she “is a bad girl—she put herself in [this] circumstance and was careless.”³⁰⁷ Survivors of sexual abuse are also shamed by their families and communities. Some are “labelled as prostitutes, that she may have wanted it.”³⁰⁸ When a girl is raped, her “value drops down as a young woman in society.”³⁰⁹ This tainted perception may even prevent the girl from marrying later on in life.³¹⁰ Through no fault of their own, these girls are degraded not only by the abuse itself, but also by the havoc it wreaks upon their reputation.

Sexual abuse against schoolgirls violates their right to freedom from degrading treatment under domestic and international law by treating them as sexual objects, denying them autonomy, and subjecting them to ridicule and shame.

G. *The Right to Freedom from Violence*

Sexual abuse is a form of violence that violates schoolgirls’ right to be free from such violence under the Constitution and international law. Constitution Article 29(c) guarantees to each person the right to be free from any form of violence “from either public or private

306. See Interview with Diana, 18-Year-Old Former Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017) (“Like other students mock her.”); Interview with Agnes Kola, National Women’s Rights Coordinator, ActionAid Kenya, in Nairobi, Kenya (Mar. 13, 2017) (“There’s also the whole issue of being ridiculed.”); Interview with Joshua Malit, Deputy Principal, Milimani Secondary School, in Nairobi, Kenya (Mar. 13, 2017) (“[She] will be mocked. . . . [I]f for example, my name is Mr. Malit, then I am involved with any sexual activity with a girl . . . she will be called Mrs. Malit. . . . Do you think this fellow will be comfortable in school? No.”); Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) (“The other children may be talking about it, laughing, and it’s very uncomfortable for the survivor and [her] family.”).

307. Interview with Kate, Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017).

308. Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017).

309. Interview with Bernard Olayo, Specialist, World Bank, in Nairobi, Kenya (Mar. 15, 2017); see also Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) (“. . . then there’s also the shame that the family feels . . .”); Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017) (“[Y]ou have brought shame to not only yourself, but to the school, the teacher, to your parents.”); Interview with Una, Victim of Sexual Abuse, in Nairobi, Kenya (Mar. 14, 2017) (“No, I did not tell my parents because my dad, even after I got pregnant, without knowing what was happened my dad could not take me into the family, because it is to him, I was not supposed to give birth outside wedlock . . .”).

310. See Interview with Peter M. Hunjah, Bishop, Springs of Life Ministries, in Tala, Kenya (Mar. 16, 2017) (“Nobody’s ready to marry them.”).

sources.”³¹¹ The Constitution reiterates this right specifically for children in Article 53(1): “Every child has the right . . . to be protected from abuse . . . all forms of violence, [and] inhuman treatment and punishment.”³¹² Moreover, the CRC requires that State Parties take action to protect the child from “all forms of physical or mental violence,” which includes “any persistent harmful interactions with the child.”³¹³ The CRC Committee emphasizes in its General Comment 13 that “the choice of the term violence . . . must not be interpreted in any way to minimize the impact of, and need to address, non-physical and/or non-intentional forms of harm. . . .”³¹⁴ And the Declaration on the Elimination of Violence against Women defines “violence against women” as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women.”³¹⁵

Yet despite these strong protections against violence in the law, schoolgirls across Kenya continue to be subjected to violence at the hands of their teachers. In its 2015 periodic report to the Committee on the Rights of the Child, the Government of Kenya admitted that “[v]iolence in schools remains a major concern.”³¹⁶ During the IWHRC Fact-Finding Trip, a guidance and counselling teacher in Kibera recounted one heart-breaking instance of such violence occurring at the primary school level:

There was a primary school I remember, where I was schooling, there was a teacher there who had actually raped a girl. The girl was in Standard Three, around six years [old]. The girl was looking after the animals in the school compound—and the teacher called her, after calling her, he took her to his house, and then raped her. [I]t was critical—the girl was taken to the hospital. The case was also taken by the police. The teacher was also taken to court. But sincerely speaking, there was no

311. CONSTITUTION art. 29(c) (2010) (Kenya).

312. *Id.* art. 53(1)(d).

313. *CRC General Comment 13*, *supra* note 268, ¶ 21(a).

314. *Id.*

315. G.A. Res. 48/104, art. 1, Declaration on the Elimination of Violence against Women (Dec. 20, 1993) [hereinafter DEVAW], <http://www.un.org/documents/ga/res/48/a48r104.htm>. DEVAW is considered a companion to CEDAW, to which Kenya is a State Party.

316. *List of Issues in Relation to the Combined Third to Fifth Periodic Reports of Kenya* (71st Sess., 2016), ¶ 100, U.N. Doc. CRC/C/Ken/Q/3-5/Add.1 (Nov. 10, 2015), http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/KEN/CRC_C_KEN_Q_3-5_Add-1_21968_E.docx.

punishment done to the teacher. He was later reinstated in another school.”³¹⁷

Legal Counsel at ChildLine described how a teacher has used sexual violence in lieu of more traditional methods of corporal punishment: If a girl were to find her name on the list of troublemakers, “as a way of punishing you, the teacher uses sexual methods.”³¹⁸ While the schoolboys “would be caned and released to go back to class, . . . the girls [would be required to] remain back”³¹⁹ and then violated sexually. This teacher would call girls to the staffroom, make them lie down on a sofa and then “use his fingers and ask you to pray to God to forgive you of the sins you committed—that is, noisemaking [during class].”³²⁰ These horrifying examples illustrate how sexual abuse by teachers undoubtedly constitutes “violence” under the law.

Yet, according to the law, this behaviour does not need to rise to the level of physical assault to constitute violence. When a schoolgirl is repeatedly subjected to sexual comments, shamed about her female body (*e.g.*, that her breasts are bigger than they should be),³²¹ or inappropriate touching from her teacher, she is in essence told that she is only of value in meeting the teacher’s sexual needs. Sexual comments and “lesser” forms of sexual abuse equally qualify as “violence” under the international standards set out above and therefore equally violate the girl’s right to freedom from such violence.

VI. KENYA’S POSITIVE OBLIGATIONS TO RESPECT, PROTECT, AND FULFILL SCHOOLGIRLS’ HUMAN RIGHTS

The Constitution and binding international law impose positive obligations upon the State: The Government must not only refrain from violating schoolgirls’ human rights, but also take affirmative steps to

317. Interview with a Guidance and Counselling Teacher in Kibera, in Nairobi, Kenya (Mar. 17, 2017).

318. Interview with Michael Otieno, Legal Counsel, Childline, in Nairobi, Kenya (Mar. 13, 2017).

319. *Id.* (“[B]ut then this was a mixed school, so for the boys, they would be caned, and released to go back to class. For the girls, they will remain back.”).

320. *Id.*

321. *See* Interview with Njeri, Legal Officer, CREAW, in Nairobi, Kenya (Mar. 12, 2017) (“A teacher would refer to you growing breasts, or something. And maybe shame you in front of the others, in front of the class. For example, by referring to your breasts, that they are bigger than they should be.”).

respect, protect, and fulfill those rights.³²² Constitution Article 21(3) specifies that “[a]ll state organs and all public officers have the duty to address the needs of vulnerable groups within society, including women . . . children, [and] youth.”³²³ Moreover, both the Constitution and international human rights treaties specifically call on the Kenyan government to enact legislation to ensure the delineated human rights are realized.³²⁴ And many international and regional treaties also specifically obligate Kenya, as a state party, to protect schoolgirls from violence—which includes sexual abuse—and to take special measures

322. See CONSTITUTION art. 21(1) (2010) (Kenya) (“It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.”); see also NATIONAL POLICY ON HUMAN RIGHTS, *supra* note 174, at 7 (stating that the Kenyan Government’s “primary responsibility” is to “observe, respect, protect, promote and fulfil the rights and fundamental freedoms in accordance with the Constitution of Kenya, 2010”); Maputo Protocol, *supra* note 104, art. 14(1) (“States parties shall ensure that the right to health of women, including sexual and reproductive health[,] is respected and promoted.”); CEDAW *General Recommendation* 28, *supra* note 165, ¶ 9 (“Under article 2 [of CEDAW], States parties must address all aspects of their legal obligations under the Convention to respect, protect and fulfil women’s right to non-discrimination and to the enjoyment of equality. . . . The obligation to protect requires that States parties protect women against discrimination by private actors. . . . The obligation to fulfil requires that States parties take a wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto. . . .”); CESCR *General Comment* 14, *supra* note 209, ¶ 33 (“The right to health, like all human rights, imposes three types of levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn the obligation to fulfil contains obligations to facilitate, provide and promote.” (emphasis added)).

323. CONSTITUTION art. 21(3) (2010) (Kenya).

324. See *id.* art. 21(4) (obliging the State to “enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms”); CEDAW, *supra* note 101, art. 3 (instructing State Parties to “take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”); Maputo Protocol, *supra* note 104, art. 2 (requiring States Parties to “combat all forms of discrimination against women through appropriate legislative, institutional and other measures”). In this regard, States Parties must “enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination . . . ,” “integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life,” “take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist,” and “support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.” Maputo Protocol, *supra* note 104, art. 2 (1); see also CRC, *supra* note 102, art. 4 (“States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.”).

with respect to the education of female students. For example, the Maputo Protocol calls on states parties to “take all appropriate measures to protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other education institutions and provide for sanctions against the perpetrators of such practices.”³²⁵ And “in exercising [its] obligations [under the CRC] in relation to the health and development of adolescents,” the Government of Kenya “[must] create a safe and supportive environment for adolescents . . . including in schools.”³²⁶ To this end, the Committee on the Rights of the Child urges states parties to the CRC to “take the necessary actions to prevent and prohibit all forms of violence and abuse, including sexual abuse. . . by school personnel. . . .”³²⁷ In addition, the African Children’s Charter requires states parties to “take special measures in respect of female. . . children, to ensure equal access to education for all sections of the community.”³²⁸ Finally, under CEDAW, Kenya has a specific obligation to reduce the drop-out rate of female students from school.³²⁹ To fulfill this obligation, Kenya must also address sexual abuse by teachers as a major underlying cause of girls’ decision to drop out.

325. Maputo Protocol, *supra* note 104, art. 12(1)(b); *see also* DEVAW, *supra* note 315, art. 4, 4(d), 4(f) (“States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should . . . [d]evelop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence [and] [d]evelop in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence. . . .”); CESCR *General Comment 14*, *supra* note 209, ¶ 51 (“Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties . . . [including] the failure to protect women against violence or to prosecute perpetrators.”).

326. *CRC General Comment 4*, *supra* note 149, ¶ 35.

327. *Id.* ¶ 17; *see also* CEDAW *Concluding Observations*, *supra* note 6, ¶ 32, 32(c) (“The Committee urges the State to . . . [e]nforce a zero tolerance policy with respect to sexual abuse and harassment in schools and ensure that perpetrators are punished appropriately.”).

328. African Children’s Charter, *supra* note 105, art. 11(3)(e).

329. CEDAW, *supra* note 101, art. 10(f) (“States Parties shall take all 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 . . . [t]he reduction of female student drop-out rates. . . .”); *see also* The African Commission on Human and Peoples’ Rights, Resolution on the Right to Education in Africa (58th Sess., 2016), ACHPR/Res. 346 (LVIII) (2016), <http://www.achpr.org/sessions/58th/resolutions/346/> (“The Commission calls on States Parties to fulfill their duties with respect to access to education, in particular to ensure that children that drop from school, in particular pregnant children, have the opportunity to complete their education.”).

Thus, the Constitution and international and regional treaties put the onus on the Kenyan Government to effectuate schoolgirls' human rights, including through the enactment of legislation, to ensure that every schoolgirl receives a safe and complete education.

VII. EFFECTIVE MEASURES THE GOVERNMENT MUST TAKE TO FULFILL ITS OBLIGATIONS AND BETTER PROTECT KENYAN SCHOOLGIRLS' RIGHTS

Recognizing the widespread nature of sexual abuse of learners by their teachers, the Government of Kenya has taken several important first steps to address the problem in line with the aforementioned positive obligations. But more must be done to effectively protect learners in Kenya's schools from such abuse and respect and fulfill schoolgirls' human rights. In 2010, the TSC took a major step in addressing the issue when it released its Circular No. 3 on "Protection of Pupils/Students from Sexual Abuse."³³⁰ In an attempt to curb sexual abuse by teachers, Circular No. 3 identifies both specific prohibited teacher-learner interactions (such as sending a learner to a teacher's house) and mandates that teachers report any reasonable suspicion of sexual abuse.³³¹ Furthermore, Circular No. 3 states that "[a]ny breach of the provisions of this circular"—such as a failure to report sexual abuse—"shall result in disciplinary action."³³² The TSC released another circular addressing sexual abuse in 2017, called Circular No. 6/2017 on "Safety of Learners in Learning Institutions."³³³ This document—which is addressed to all principals, head teachers, and teachers—requires all "Heads of Institutions" to put in place measures that protect learners and safeguard their rights.³³⁴ It states that instances of sexual abuse should be "thoroughly investigated, documented, and action taken with

330. TSC CIRCULAR NO. 3, *supra* note 84.

331. *Id.* ¶ 2 (requiring any teacher who has "reasonable grounds to believe that sexual abuse has been committed against a pupil/student" to report to the "head teacher, education officials, School Management Committees, Board of Governors, Police or any organization within with Child Protection issues in the area AND the Teachers Service Commission within 24 hours." (emphasis in original)).

332. *See id.* at 4 ("Any breach of the provisions of this circular shall result in disciplinary action.").

333. TEACHERS SERV. COMM'N, TSC/ADM/192A/VOL.IX/8, SAFETY OF LEARNERS IN LEARNING INSTITUTIONS (Mar. 21, 2017) (Kenya) [hereinafter TSC CIRCULAR NO. 6], <https://www.tsc.go.ke/index.php/media-centre/downloads/category/39-circulars?download=106:safety-of-learners-in-learning-institutions-2017>.

334. This includes learners' rights outlined in "the provisions of the Constitution, TSC Act, 2012, Basic Education Act, and Code of Regulations for Teachers (2015) and the Teachers Service Commission Code of Conduct and Ethics (2015)." TSC CIRCULAR NO. 6, *supra* note 333, at 2.

expediency”³³⁵ and clarifies that when the sexual abuse is “of both criminal and professional nature, police and other security agencies should be involved.”³³⁶

In addition, the TSC implemented a program known as the Beacon Teachers Movement in 2014³³⁷ and promulgated its Code of Regulations for Teachers in 2015.³³⁸ The Beacon Teachers Movement identified 1,000 role model teachers who then trained an additional 4,000 teachers “with the aim of developing a culture of non-violence and zero tolerance of sexual and physical abuse of children by teachers.”³³⁹ The TSC’s 2015 Code of Regulations contains important provisions regarding the issue of sexual abuse against schoolgirls. For example, the Regulations forbid any person who has been convicted of a sexual offense against a learner from registering with the Commission.³⁴⁰ And a teacher may be subject to disciplinary action for engaging in “immoral behaviour,” which includes “sexual intercourse” and “sexual harassment or flirtation.”³⁴¹ A teacher may also be removed from the Register for engaging in immoral behaviour with a learner.³⁴²

335. *Id.* ¶ VII.

336. *Id.*

337. Plan Int’l, *Terms of Reference: Consultancy for Development of ‘Beacon Teachers’ Training Curriculum and Training Guidelines*, at 1-2 (2016), <http://plan-international-kenya.org/tender/resource/download/tender-attached-file-one-name-37.pdf>. The Beacon Teachers Movement was established in partnership with Plan International, ChildLine Kenya, and the Gender Violence Recovery Centre. It was part of a larger effort to eliminate violence against children, including sexual violence, and bolster child protection systems in Kenya. Initially, the program trained teachers from five counties, including Nairobi, Kisumu, Mombasa, Kwale, and Kilifi.

338. The Teachers Service Commission Code of Regulations for Teachers (2015) KENYA GAZETTE SUPPLEMENT No. 167 [hereinafter Code of Regulations].

339. Plan Int’l, *Terms of Reference: Action Research and Documentation of Best Practices on EU Funded Integrated Approaches to Child Protection Project*, at 2 (2017), <http://plan-international-kenya.org/tender/resource/download/tender-attached-file-one-name-15.pdf>.

340. Code of Regulations, *supra* note 338, ¶ 41(2)(a). Article 30 of the TSC Act permits the removal from the Register of any teacher who has been so convicted. The Teachers Service Commission Act, No. 20 (2012) KENYA GAZETTE SUPPLEMENT No. 101 art. 30(1)(c) [hereinafter TSC Act], http://www.kenyaschoolforintegratedmedicine.org/wp-content/uploads/2014/09/Teachers-Service-Commission-Act_No20-of-2012.pdf (“The Commission may, after inquiry, cause to be removed from the register the name of any person . . . who has been convicted of a sexual offence or an offence against a pupil or student.”).

341. Code of Regulations, *supra* note 338, § 140(a). The Third Schedule of the TSC Act similarly outlines “Disciplinary Offences” to include “Immoral behavior, including but not limited to . . . sexual intercourse. . . [and] sexual harassment or flirtation.” TSC Act, *supra* note 340, Third Schedule.

342. Code of Regulations, *supra* note 338, § 141(a).

Although its Circulars, Beacon Teachers Movement, and Code of Regulations illustrate efforts taken by the TSC to curb sexual abuse of schoolgirls by its teachers, there are crucial gaps and deficiencies in this current system. This includes confusion as to what exactly constitutes sexual abuse, an absence of clear and comprehensive procedures for teachers to follow in reporting sexual abuse, and a lack of enforcement for sexually abusive conduct by teachers or for failure to comply with the TSC's reporting mandate. For example, as noted in Section III, *supra*, Circular No. 3 does not identify the source of law pursuant to which such action would be taken or give any indication of what type(s) of disciplinary action such violation may trigger. Nor does the TSC Circular No. 6/2017 provide any guidance on what specific steps should be taken in the event of sexual abuse or how to exactly report such abuse to the authorities. One interviewee noted that “[f]or you to see somebody who has been convicted” for sexually abusing a student, “it means the person has gone overboard. He has done several [instances] of harassment and abuse to the children.”³⁴³ As a result, sexual abuse of schoolgirls continues to remain a pervasive problem in Kenya.

The following section outlines the key proposals for reform. A principal component of the proposed reform is for the TSC to issue a robust set of Learner Protection Guidelines to replace its TSC Circular No. 3 and a new, user-friendly set of Standard Operating Procedures for Reporting. Within these documents and the TSC Act and TSC Code of Regulations, the proposals break down into four main areas. First, the TSC should expand and update its definitions related to the issue of sexual abuse. This includes broadening its definitions of sexual abuse and sexual harassment, as well as adopting a new definition of sexual grooming. These definitions should be applied uniformly throughout the TSC's body of documents and the TSC Act. Second, the TSC should provide teachers with clear procedures for reporting, clarifying precisely what must be reported and to whom reports must be made. This includes changing the reporting requirement (currently set forth in Circular No. 3) from reporting to both the head teacher and the TSC to reporting all instances of sexual abuse to either a TSC county office or TSC headquarters. The reporting mandate should also require that all sexual conduct that may carry a criminal charge be reported to the police. These requirements need to not only be set forth in the new Learner Protection Guidelines and Standard Operating Procedures on Reporting, but also within the Code of Regulations to provide for

343. Interview with S.Y., Employee at an Education-related NGO, in Nairobi, Kenya (Mar. 13, 2017).

enforcement of the reporting mandate. In addition, the timeframe for reporting should be expanded from 24 hours to 72 hours to encourage more reporting, and protections should be instituted to guarantee confidentiality in reporting and non-retaliation for reporting. Third, the TSC should mandate dismissal and de-registration of all teachers who are found guilty of committing sexual abuse. Fourth, the TSC should implement programming for teachers and guidance counsellors to educate them on the issue of sexual abuse in school, including the proper reporting procedures.

A. Issuance of Comprehensive Learner Protection Guidelines and Standard Operating Procedures on Reporting

The TSC must continue building on its current framework to protect all learners in Kenya from sexual abuse in the school context. On March 13, 2017, the CEDAW Committee asked Kenya to “provide an update on the status of measures to combat the abuse of learners, in particular women and girls, by teachers,” including “the development of a learners’ protection policy to protect girls from being impregnated by their teachers.”³⁴⁴ An important first step in this regard is to issue two new documents: a set of “Learner Protection Guidelines” to replace its Circular No. 3 with a new, more robust set of guidelines for teachers on explicitly prohibited conduct as well as reporting and referral requirements³⁴⁵ and a Standard Operating Procedures Mechanism on Reporting (“SOPs” or “SOPs on Reporting”) that sets out clear, comprehensive instructions on what teachers must do when they suspect or know of any instance of sexual abuse.³⁴⁶ The Learner Protection Guidelines will provide straightforward instructions to teachers, including a prohibition on sexual abuse against learners, as well as requirements to protect learners from sexual abuse, report all instances of

344. Committee on the Elimination of Discrimination against Women, *List of Issues and Questions in Relation to the Eighth Periodic Report of Kenya* (68th Sess., 2017), U.N. Doc. CEDAW/C/KEN/Q/8 (Mar. 13, 2017), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKEN%2fQ%2f8&Lang=en.

345. The Georgetown University Law Center International Women’s Human Rights Clinic has prepared a draft set of such guidelines called the Learner Protection Guidelines on Sexual Abuse. That draft is attached to this report as Appendix A.

346. The Georgetown University Law Center International Women’s Human Rights Clinic has prepared a draft set of such standard operating procedures called the Standard Operating Procedures Reporting Mechanism on Learner Protection. A draft set of SOPs is attached to this report as Appendix B.

sexual abuse, and assist learners who have been sexually abused.³⁴⁷ The SOPs on Reporting must provide detailed steps to teachers on how to report sexual abuse of a learner.³⁴⁸ One stakeholder's discussion of teachers' unawareness of reporting mechanisms and subsequent failure to act, reflects the importance of providing clear and definite guidelines: "[Teachers] may not know they have a channel [by] which they can report . . . most of them don't report at all."³⁴⁹ In addition to the creating these two core documents, the Commission should amend the TSC Act and its Code of Regulations to update and harmonize its body of work.

B. *Updated Definitions Related to Sexual Abuse*

1. Expansion of the Definition of Sexual Abuse

The TSC should revise the definition of "sexual abuse" in its Circular No. 3 to cover a more comprehensive list of sexually inappropriate acts that teachers engage in with learners. Specifically, the TSC's definition of sexual abuse needs to be expanded to encompass additional forms of inappropriate sexual conduct by teachers that are not covered by the current definition. For example, the current definition includes "sexual intercourse," "sexual assault," and the "touching of a [learner's] body which is of a sexual nature,"³⁵⁰ but it does not specify that forcing

347. In its submission to the CEDAW Committee on its General Recommendation on Girls' and Women's Right to Education, Human Rights Watch specifically recommends that states "[e]nsure and enforce prohibitions on sexual violence and harassment by teachers, staff, and students as necessary for the fulfilment of a girl's right to education." HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH SUBMISSION GENERAL RECOMMENDATION ON GIRLS'/WOMEN'S RIGHT TO EDUCATION 3 (Jun. 23, 2014), <https://www.hrw.org/news/2014/06/23/human-rights-watch-submission-general-recommendation-girls/womens-right-education>.

348. Human Rights Watch urges "states to adopt and disseminate a set of standard procedural guidelines governing how schools are to address allegations of sexual violence and harassment, and explaining how schools should treat victims and perpetrators." *Id.*

349. Interview with S.Y., Employee at an Education-related NGO, in Nairobi, Kenya (Mar. 13, 2017); *see also* Interview with Lecturer, University of Nairobi, in Nairobi, Kenya (Mar. 14, 2017) ("Q: How would you feel about a program for the teachers in these schools, educating them on the reporting procedures, and what to do in this case? A: As I said, that is long overdue, if it has not taken place."); Interview with Irene Omogi, Quality Management & Accreditation Coordination, GIZ, in Nairobi, Kenya (Mar. 17, 2017) (When asked what is the best way to protect girls from sexual abuse in school, Ms. Omogi said that in part, the government needs to "have in place the structures for addressing [the abuse]; once a case is reported, it should be adequately addressed and followed to the end.").

350. TSC CIRCULAR NO. 3, *supra* note 84, at 2 (defining sexual abuse as: "sexual intercourse, sexual assault, touching of a pupil/student's body which is of a sexual nature, any suggestive language or gesture, any form of inducement, threats or violence to force them to engage in

a learner to touch any part of the teacher's body in a sexual nature also constitutes sexual abuse. Nor does it currently include a teacher exposing his or her body parts to a learner.

As Dr. Geoffrey Wango, a Senior Lecturer in the Psychology Department of the University of Nairobi, explained, "there are so many [sexually abusive] things that a teacher can do to a student. . . . [For example, a teacher] can tell the child to undress."³⁵¹ Technically speaking, a teacher forcing a child to undress would not be considered "sexual abuse" under the TSC's current definition. And even if the TSC views it as such, the current definition in the Circular does not make it clear to teachers that such conduct constitutes sexual abuse and therefore triggers the reporting requirement within the Circular. The revised definition should include language that covers this and similar types of behaviour, such as "making a learner exhibit his or her body in a sexual nature so as to be seen by the teacher or any other person." In addition, the National Gender and Equality Commission has described how "girls are very vulnerable to male teachers' demands. Teachers use threats, inducement, and even punishment to ensure that girls yield to their demands."³⁵² Yet, the TSC's current definition of sexual abuse includes only "inducement, threats or violence to force [the learner] to engage in *sexual intercourse*."³⁵³ But that language is narrow in scope and exempts conduct that is undoubtedly sexually abusive toward the learner. The TSC should expand this language in the definition to include "any form of inducement, threats or violence to force [a learner] to engage in *any sexual activity*."³⁵⁴

Further, some aspects of Circular No. 3's definition of sexual abuse are unclear. The definition should be revised to define "sexual abuse" using detailed language that describes the conduct in a way that does not necessitate a legal termination. For example, the term "sexual assault," is used, but not defined within the Circular (although it is defined as a sexual offense under the Sexual

sexual intercourse, exposing pornographic material or any form of flirtation with or without consent.").

351. Interview with Dr. Geoffrey Wango, Senior Lecturer, Psychology Department, University of Nairobi, in Nairobi, Kenya (Mar. 13, 2017).

352. LOST CHILDHOOD, *supra* note 86, at 36.

353. TSC CIRCULAR NO. 3, *supra* note 84, at 2 (emphasis added).

354. The Union Territory Child Protection Society, in conjunction with the Department of Social Welfare, Women, and Child Development released An Advisory for Child Protection in Schools in Chandigarh, India. This advisory includes "the manipulation or coercion of a child into sexual activity" in its definition of sexual abuse. THE UNION TERRITORY CHILD PROTECTION SOC., AN ADVISORY FOR CHILD PROTECTION IN SCHOOLS 10 (2016) (India), <http://www.chandigarh.gov.in/pdf/dsw2016-advCouncil.pdf>.

Offences Act).³⁵⁵ Using descriptive terminology such as “penetration of any part of the learner’s or teacher’s body by any object or body part”³⁵⁶ provides greater clarity as to what constitutes sexual abuse and avoids using terms such as “sexual assault,” which require a legal determination under the Sexual Offences Act. These proposed changes comprise a critical first step in addressing the sexual abuse of schoolgirls because they would clarify exactly what behaviour constitutes sexual abuse and empower the Commission to discipline any teacher who acts in such a way.

The proposed revised definition of sexual abuse reads as follows:

“sexual abuse” means sexual intercourse or any other penetration of any part of the learner’s or teacher’s body by any object or body part; touching of a learner’s body or making a learner touch the teacher’s or any other person’s body in a sexual nature; exhibiting any object or part of the body to be seen by the learner in a sexual nature; making a learner exhibit his or her body in a sexual nature so as to be seen by the teacher or any other person; any form of inducement, threats, or violence to force a learner to engage in any sexual activity; any sexually suggestive word, sound, language, or gesture, whether made orally or in writing; exposing of pornographic material; any form of flirtation; repeatedly following, watching, or contacting a learner either directly or through electronic, digital, or any other means with the intent to commit a sexual offence or any other act of sexual abuse.³⁵⁷

Updating the definition in line with these recommendations will help to better protect schoolgirls—and, indeed, all learners—from sexual abuse by teachers. This definition should be used consistently across TSC documents, including the proposed Learner Protection Guidelines, SOPs on Reporting, Code of Regulations, and TSC Act.

355. The Sexual Offences Act (2014) Cap. 62A § 5 (Kenya) (“Any person who unlawfully penetrates the genital organs of another person with any part of the body of another or that person; or an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes; manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person’s body is guilty of an offence termed sexual assault.”).

356. See HELPING UGANDA SCHOOLS, TEACHERS HANDBOOK 18, http://helpingugandaschools.org/assets/Teachers_Handbook.pdf (including “penetrative acts” in its definition of sexual abuse).

357. Appendix A, *infra*, at 3; Appendix B, *infra*, § 4.

2. Addition of a Definition of Sexual Grooming

Sexual grooming of learners is a process that frequently precedes and leads to the sexual abuse by teachers, yet currently there is no definition identifying what qualifies as sexual grooming behaviour and no prohibition against such conduct within the TSC documents. As noted by Professor Catherine Ndungu of the Kenyatta University School of Humanities and Social Sciences, “it is not a one-time event; it is a process.”³⁵⁸ A Counseling Psychologist at the Gender Violence Recovery Centre explained that “[c]hildren who have been groomed can easily fall back into being defiled. It’s easy for them to be defiled again because someone has groomed them on a daily basis until it becomes a way of life. . . .”³⁵⁹ Numerous other interviewees during the IWHRC Fact-Finding Trip identified sexual grooming as a common and pervasive tactic used by teachers. As discussed in Section III, *supra*, stakeholders identified the grooming tactics rampantly employed by teachers, including seeking one-on-one time with the learner, giving special gifts to learners, giving learners repeated tasks, and getting the learner alone at the teacher’s home.³⁶⁰ Identifying, prohibiting, and punishing the conduct that qualifies as “sexual grooming” is an imperative step toward protecting schoolgirls from sexual abuse by their teachers. The TSC must therefore put forth a clear and comprehensive definition that includes these types of identifiable actions.

Sexual grooming has become a more widely acknowledged problem in school settings around the world, and numerous institutions have begun defining such conduct. The TSC can therefore look to educational institutions that already prohibit such conduct for guidance in crafting its definition. Some useful policies to model include the Australian Catholic Education Office’s *Protection of Children Grooming*

358. Interview with Prof. Catherine Ndungu, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017).

359. Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017).

360. See Interview with Mary, Schoolgirl from Makina, Age 17, in Nairobi, Kenya (Mar. 15, 2017) (speaking about a teacher who would keep one girl behind while the other students went home); Interview with Mbeti Michuki, Legal Counsel & Programme Officer, FIDA-Kenya, in Nairobi, Kenya (Mar. 12, 2017) (“[The teacher gives the student] favours like . . . money or sweets and all those things.”); Interview with Honourable Nancy Baraza, Former Deputy Chief Justice, Supreme Court, in Nairobi, Kenya (Mar. 15, 2017) (“[T]ake these books to my house. Go cook for me. Fetch water for me.”); *id.* (“[G]irls are sent to fetch water for teachers, and when they deliver that water is when they get pregnant in that house.”). See Section III, *supra*, for further discussion on sexual grooming by teachers.

Policy,³⁶¹ the Maltby Lilly Hall Academy's *Sexual Exploitation and Grooming Policy*,³⁶² and the U.S. Department of Education's *Educator Sexual Misconduct Policy*.³⁶³ The Australian Policy and Maltby Lilly Hall Policy in particular provided strong definitions for sexual grooming.³⁶⁴

The proposed definition set forth in the proposed Learner Protection Guidelines, SOPs on Reporting, and TSC Act and Code of Regulations is as follows:

“sexual grooming” means a process deliberately undertaken by a teacher or any other person with the aim of befriending, influencing and/or coercing a learner into performing an act that leads to sexual abuse. Such acts include but are not limited to spending inappropriate one-on-one time with a learner; enticing a learner using gifts, money, or a promise of higher grades; showing special attention to one learner over other learners; assigning special tasks to a learner, such as fetching water, cooking, cleaning, and preparing tea; sending of learners to the

361. *Protection of Children: Grooming Policy*, CATHOLIC EDUC. OFF. 2 (2015), http://www2.ceosale.catholic.edu.au/uploadedFiles/06_Policies_And_Publications/files/Policies/CEOSale%20Grooming%20Policy%202015.pdf.

362. *Sexual Exploitation and Grooming Policy*, MALTBY LILLY HALL ACAD. 2 (2015), http://www.maltbylillyhallacademy.com/_site/data/files/policies/0FB0F500112796E079B624D944F20ED2.pdf.

363. *Educator Sexual Misconduct: A Synthesis of Existing Literature*, U.S. DEP'T OF EDUC. 1 (2004), <http://www.wrightslaw.com/pubs/sex.misconduct.doe.2004.pdf>.

364. Beyond comparative administrative policies on sexual grooming, research, and comparative analysis of legislation in several countries yielded examples of countries that criminalize sexual grooming, including the United Kingdom's 2015 Serious Crime Act, the Jamaica Sexual Offences Act, the Victoria, Australia's Crimes Amendment (Grooming) Act, Singapore's Penal Code, and New Zealand's Crimes Act. *See* Sexual Communication with a Child, SERIOUS CRIME ACT 2015 § 67(1) (U.K.), <http://www.legislation.gov.uk/ukpga/2015/9/section/67/enacted>; Sexual Grooming of a Child, No. 12 of 2009, THE SEXUAL OFFENCES ACT § 9(1)(a) (Jam.), <http://moj.gov.jm/sites/default/files/laws/Sexual%20Offences%20Act.pdf>; Crimes Amendment (Grooming) Act, No. 7 of 2014, CRIME ACT 1958 § 49B (Austl.), [http://www.legislation.vic.gov.au/domino/web_notes/ldms/pubstatbook.nsf/f932b66241ecf1b7ca256e92000e23be/D9C89EA3CD5464C4CA257C8A00168E8B/\\$FILE/14-007abookmarked.pdf](http://www.legislation.vic.gov.au/domino/web_notes/ldms/pubstatbook.nsf/f932b66241ecf1b7ca256e92000e23be/D9C89EA3CD5464C4CA257C8A00168E8B/$FILE/14-007abookmarked.pdf); Sexual Grooming of Minor Under 16 2007, PEN. CODE § 376E (Sing.), [http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=9f804d76-c39f-4e35-8cfe-1be8dd20bfe9;page=0;query=DocId%3A%22025e7646-947b-462c-b557-60aa55dc7b42%22%20Status%3Ainforce%20Depth%3A0;rec=0;Meeting Young Person Following Sexual Grooming, etc., CRIMES ACT 1961 §131B \(N.Z.\), <http://legislation.govt.nz/act/public/1961/0043/latest/DLM329200.html>. While this report does not advocate for the criminalization of the conduct defined as sexual grooming, it urges the Government of Kenya—and the TSC specifically—to do more to curb this extremely common practice employed by teachers to lure schoolgirls into sexual activity.](http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=9f804d76-c39f-4e35-8cfe-1be8dd20bfe9;page=0;query=DocId%3A%22025e7646-947b-462c-b557-60aa55dc7b42%22%20Status%3Ainforce%20Depth%3A0;rec=0;Meeting%20Young%20Person%20Following%20Sexual%20Grooming%20etc.;CRIMES%20ACT%201961%20%24131B%20(N.Z.))

teacher's house.³⁶⁵

A comprehensive definition outlining the specific conduct that qualifies as “sexual grooming” will ensure that it is more detectable for purposes of reporting and disciplining inappropriate teacher-student interactions. It also puts teachers on notice that these commonly employed tactics will not be tolerated.

3. Expansion and Harmonization of the Definition of Sexual Harassment

The TSC should adopt a more comprehensive definition of sexual harassment and apply it uniformly throughout its body of documents. First, a singular definition of sexual harassment would provide needed clarity for the TSC itself and for the teachers. Currently, the TSC Act contains no definition of sexual harassment, though “sexual harassment” is listed as an “immoral behaviour” and disciplinary offense in the Third Schedule of the Act.³⁶⁶ In addition, the TSC Code of Regulations for Teachers and the Code of Conduct and Ethics for Teachers—both issued in 2015—contain two different definitions of sexual harassment. The Code of Regulations defines sexual harassment as “an act by a teacher who makes any sexual advances or requests including sexual gestures, cat calls, jokes or comments including innuendos to a learner and fellow employees.”³⁶⁷ Meanwhile, the Code of Conduct and Ethics for Teachers defines it as “an act by a teacher who persistently makes any sexual advances or requests including gestures, cat calls, jokes or comments including innuendos, regarding another person's sexuality if the person doing it knows or ought to know or has reasonable grounds to know, are unwelcome.”³⁶⁸

Second, a more comprehensive definition of sexual harassment would provide broader protection for learners. It would include a wide variety of sexually inappropriate behaviours, which are currently being

365. Appendix A, *infra*, at 3-4; Appendix B, *infra*, § 4.

366. TSC Act, *supra* note 340, Third Schedule (a) (iv).

367. Code of Regulations, *supra* note 338, § 3.

368. The Teachers Service Commission (Code of Conduct and Ethics for Teachers) Regulations (2015) KENYA GAZETTE SUPPLEMENT No. 126 § 2. The authors of this report were informed by the local partner organizations and during the IWHRC Fact-Finding Trip that the Code of Regulations is the governing document for purposes of the matters discussed herein; therefore, that has been the focus in this report. However, it is worth noting the inconsistency in definitions within these two sets of regulations to emphasize the potential confusion within the current system, the inability to effectively enforce the prohibitions, and the need to ensure uniformity across all TSC documents, particularly when it comes to defining prohibited behavior.

directed at schoolgirls. For example, it would include any act of a sexual nature by a teacher, including exhibiting an image or an object to a learner. The definition should include other sexually inappropriate behaviours, such as repeatedly following or watching a learner.³⁶⁹ A schoolgirl from Makina described an instance of sexual harassment by a teacher at her school that demonstrated this type of behaviour: “[W]hen the teacher is dictating notes, he will walk, just walk to the place where the girl is. He is just roaming there. He does not roam around the class, just the place where the girl is.”³⁷⁰ The definition of sexual harassment should also include “contacting a learner either directly or through electronic, digital or any other means.”³⁷¹ For example, “Kate,” a schoolgirl in Nairobi, knew her friend was in a relationship with a teacher because she saw their conversations through text messages.³⁷² The proposed definition will provide meaningful guidance to teachers on what exactly constitutes sexual harassment and is therefore unacceptable behavior. In this way, it will allow the Commission to discipline all teachers who act in any of these ways toward learners.

In addition to its current definitions, the TSC can look to comprehensive definitions from other countries for useful guidance on how to improve its definition to better identify sexually harassing conduct. For example, Section 11 of India’s Protection of Children from Sexual Offences Act has several characteristics in its definition of sexual harassment that the TSC should adopt.³⁷³ First, India’s definition includes

369. See Interview with Dr. Geoffrey Wango, Senior Lecturer, Psychology Department, University of Nairobi, in Nairobi, Kenya (Mar. 13, 2017) (“So you see, the big girl goes to the [teacher’s] house [to cook and] the teacher just follows the big girl when she’s in the house. So, that is exploitation in so many perspectives.”).

370. Interview with Mary, Schoolgirl from Makina, Age 17, in Nairobi, Kenya (Mar. 15, 2017). Mary is a pseudonym to protect the name of the interviewee.

371. Appendix A, *infra*, at 4; Appendix B, *infra*, § 4; Appendix C, *infra*, § 2(c); Appendix D, *infra*, § 2(1); Appendix E, *infra*, § 2.

372. Interview with Kate, Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017) (“Q: And do any of your friends who were in relationships with teachers—how did you find out? A: Let’s say they have a phone. . . . So, I see the [teacher’s messages] when they used to contact the girl. . . .”). Kate is a pseudonym to protect the identity of the interviewee.

373. The Protection of Children from Sexual Offences Act, No. 32 of 2012, PEN. CODE § 11 (India) [hereinafter Protection of Children from Sexual Offences Act], <https://indiacode.nic.in/bitstream/123456789/2079/1/201232.pdf> (defining sexual harassment upon a child as “when such person with sexual intent utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or shows any object to a child in any form or media for pornographic purposes; or repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other

open-ended language such as “any word,” “any sound,” or “any gesture” (made by a person with sexual intent).³⁷⁴ The use of the word “any,” makes clear that even one incident may constitute sexual harassment. It does not require a certain number of actions or even repetition of those actions. It is also broad because it places no restriction on the type of word, sound, or gesture; any type may qualify as sexual harassment if it is made with sexual intent. Second, India’s definition includes a wide range of actions. As discussed earlier, it includes both exhibiting objects or body parts, as well as repeatedly or constantly following, watching, or contacting a child. It also includes making a child exhibit his or her body or showing any object to a child for pornographic purposes.³⁷⁵ Third, India’s definition includes modern forms of media and communication. For example, it includes following, watching, or contacting a child “through electronic, digital or any other means.”³⁷⁶ It also includes a person with sexual intent who “threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act.”³⁷⁷ Electronic and digital means of communication and media are modern ways that sexual harassment may take place. This is especially important because the TSC’s definition of sexual harassment applies to inappropriate behaviors directed at children and youths.

The TSC should update its definition of sexual harassment to provide consistency throughout its documents and stronger protections for learners from sexually harassing behaviors by teachers. Consistent definitions are crucial for putting teachers on notice of what exactly is prohibited and for ensuring the ability to enforce the prohibitions.

C. *Necessary Updates to the TSC’s Mandatory Reporting Requirement*

The TSC must update its current reporting mandate to add clarity to the process and protective measures for those reporting and must amend its Code of Regulations to create an enforcement mechanism. As discussed in Section III, *supra*, teachers often fail to report sexual abuse despite Circular No. 3’s mandate because the requirements are

means; or threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or entices a child for pornographic purposes or gives gratification therefor”).

374. *Id.* § 11.

375. *Id.*

376. *Id.* § 11(iv).

377. *Id.* § 11(v).

imprecise and largely unknown³⁷⁸ and because of a fear of reporting resulting from a lack of any assurance of confidentiality or protections against acts of retaliation for reporting.³⁷⁹ These measures are needed to encourage reporting and ensure the disciplining of those teachers who fail to comply with the mandate.

1. Mandatory Reporting of All Instances of Sexual Abuse and Sexual Grooming to the Relevant TSC Office

The TSC should mandate in both an amended Code of Regulations and in the proposed Learner Protection Guidelines that a teacher report any knowledge or reasonable suspicion of sexual abuse and/or acts of sexual grooming by another teacher or TSC agent to the relevant TSC office. Although TSC Circular No. 3 currently requires teachers to report instances of sexual abuse against a learner,³⁸⁰ there is no enforcement mechanism in the law for this mandate.³⁸¹ And there is currently no requirement within the Circular or the law to report acts that qualify as sexual grooming of a learner.³⁸² The law that is intended to enforce the circular—the TSC Code of Regulations—speaks only in terms of discretionary reporting and is not sufficiently comprehensive. For example, Regulation 144 of the TSC Code of Regulations provides that an individual alleging “misconduct” by a teacher “*may* report the allegation.”³⁸³ However, the “misconduct” currently identified in the Regulations relates only to professional misconduct and does not refer to the sexual abuse or sexual grooming of a learner.³⁸⁴ Instead, certain forms of sexual abuse and grooming are

378. See discussion *supra* Section III.

379. See Interview with Dr. Joan Mwendu Ngunnzi, Former Deputy Director, Teachers Service Commission, in Nairobi, Kenya (Mar. 13, 2017) (“Nobody wants [it] to be known that they are the ones who reported.”); see also Section III., *supra*.

380. TSC CIRCULAR NO. 3, *supra* note 84, ¶ 2 (“Any teacher who at any given time has reasonable grounds to believe that sexual abuse has been committed against a pupil/student in their school, in any other school, or outside the school, must report such a case or suspicion”)

381. See generally TSC Act, *supra* note 340; Code of Regulations, *supra* note 338.

382. Although Circular No. 3 expressly states that teachers are prohibited from sending students/pupils to their houses, the reporting requirement in paragraph 2 only applies to “sexual abuse” and sending a learner to a teacher’s home does not fall within the Circular’s definition of “sexual abuse.” See TSC CIRCULAR NO. 3, *supra* note 84.

383. Code of Regulations, *supra* note 338, § 144 (emphasis added).

384. *Id.* § 140(b).

identified as “immoral behaviour.”³⁸⁵ The proposed amendments add the concept of “sexual misconduct” to the regulations, with a comprehensive list of behaviors or actions that qualify as sexual abuse or sexual grooming, and change the language in Regulation 144 on reporting from the discretionary “may” to a mandatory, enforceable “must.”³⁸⁶ Amending the wording in Regulation 144 from “may” to “must” will thereby remove the problematic discretion in the law and create an enforcement mechanism for the TSC’s reporting requirement for instances of sexual abuse.³⁸⁷ It will also create consistency across the relevant TSC documents.

Examples from regional neighbors also support mandating reporting of sexual abuse against learners within the law.³⁸⁸ For example, Sierra Leone’s Teacher Code of Conduct places an onus on teachers to report alleged acts of sexual abuse: “teachers, other education personnel, parents and other stakeholders are required to report verbally or in written form a breach of the principles and standards in the Code.”³⁸⁹ South Africa’s Children’s Amendment Act 41 of 2007 also requires reporting sexual abuse against children “on reasonable grounds.”³⁹⁰ Additionally, instances of sexual abuse in schools in India must be reported upon “reasonable cause to suspect that a child is suffering or is likely to suffer significant harm.”³⁹¹ Both Botswana³⁹² and India³⁹³ put in place punishments for teachers and other individuals for failing to report cases of child abuse and other sexual offenses. Kenya should follow these comparative examples to mandate reporting of sexual abuse of learners to the TSC within its laws.

385. *Id.* § 140(a) (“The Commission may take disciplinary action against a teacher who commits any of the following offences – (a) Immoral behavior, including but not limited to— (i) sexual intercourse; (ii) sodomy; . . . (iv) sexual harassment or flirtation.”).

386. Appendix E, *infra*, § 15 (amending Regulation 144).

387. See *supra* text accompanying notes 381-83.

388. MURIEL POISSON, GUIDELINES FOR THE DESIGN AND EFFECTIVE USE OF TEACHER CODES OF CONDUCT 40 (2009), <http://teachercodes.iiep.unesco.org/teachercodes/guidelines/Guidelines.pdf> (“It should be mandatory for administrative authorities to report serious misconduct.”).

389. The Code of Conduct for Teachers and Other Education Personnel in Sierra Leone (2009) § 3.2, http://teachercodes.iiep.unesco.org/teachercodes/codes/Africa/Sierra_Leone.pdf.

390. Children’s Amendment Act 41 of 2007 § 110(1) (S. Afr.), www.gov.za/sites/www.gov.za/files/a41-07.pdf.

391. THE UNION TERRITORY CHILD PROTECTION SOC., AN ADVISORY FOR CHILD PROTECTION IN SCHOOLS 13 (2016) (India), <http://www.chandigarh.gov.in/pdf/dsw2016-advCouncil.pdf>.

392. Children Act, No. 8 (2009) § 25 (Bots.), <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/97343/115462/F-447304512/BTW97343.pdf>.

393. Protection of Children from Sexual Offences Act, *supra* note 373, § 21.

Furthermore, given the devolution of the TSC that has taken place since the issuance of TSC Circular No. 3, the proposed Learner Protection Guidelines should include a clear requirement that teachers report every instance of sexual abuse and sexual grooming to either the local county TSC office or TSC headquarters.³⁹⁴ The devolution of the Kenyan Government coming out of the 2010 Constitution has led to the creation of TSC offices within each county. Taking into account this devolution, the proposed Learner Protection Guidelines give teachers the ability to fulfill their reporting mandate by reporting the instance of sexual abuse or grooming either to the county TSC office or the headquarters in Nairobi. The county offices are located closer to the schools, which provides teachers with a more convenient location for lodging the report and may therefore encourage reporting. However, it still leaves the option of reporting to the headquarters in case there is any reason the reporting teacher does not feel comfortable reporting the matter to the county office. A major goal with this amended language is to provide precision and simplicity and to streamline the reporting process.

Interviewees during the IWHRC Fact-finding Trip expressed widespread support for mandating reporting of sexual abuse and conduct that qualifies as sexual grooming and for streamlining that reporting to the TSC. Stakeholders reiterated the current problem with Circular No. 3's reporting requirement that suggests that teachers should report abuse to the head teacher in addition to the TSC. An employee at an education-related NGO explained that "in most cases, [sexual abuse] is reported to the head teacher of the school, and it remains between the head teacher and the teacher."³⁹⁵ Andrew Mwanthi, County Chief Officer of Education, Children, Youth, Gender Affairs, Culture and Social Services, noted the similar danger of having the head teacher or principal in charge of reviewing the reports of sexual abuse from a reporting box at the school: "[t]he school administration may have a key, or they may break and then repair [the box] if they suspect that some information has been put into the box."³⁹⁶

394. TSC Circular No. 3 currently states that the reporting must be made "to the head teacher, education officials, School Management Committees, Board of Governors, Police or any organization working with Child Protection issues in the area **AND** the Teachers Service Commission." TSC CIRCULAR NO. 3, *supra* note 84, ¶ 2 (emphasis in original). This wording has created confusion because, in practice, teachers believe they need to report to the head teacher.

395. Interview with S.Y., Employee at an Education-related NGO, in Nairobi, Kenya (Mar. 13, 2017).

396. Interview with Andrew Mwanthi, County Chief Officer, Education, Children, Youth, Gender Affairs, Culture, & Social Services, in Nairobi, Kenya (Mar. 13, 2017).

According to Joshua Malit, a Deputy Principal in Nairobi:

[I]f now [sexual abuse] is happening, and then the principal is not informing the TSC, then it means that principal lacks what you call integrity. And therefore, that—that principal is now promoting what you call impunity. And this is the kind of impunity that you talk about in the country.³⁹⁷

Finally, Catherine Ndungo, an Associate Dean at Kenyatta University, explained that “you find that the principal is trying to cover it up . . . because the teachers are the violators, they will not publicise it. . . . Some of them are also the violators, so they do not feel compelled to do anything about it.”³⁹⁸

Mandating reporting directly to the relevant county TSC office and eliminating the additional step of reporting to the head teacher, among other options, therefore also tackles the detrimental and common scenario of the head teacher or principal covering up for teachers under his/her administration or where the head teacher or principal is the one accused of sexual abuse and has the ability to bury the incident.³⁹⁹

2. Mandatory Reporting of Certain Instances of Sexual Abuse to the Police

For sexual abuse that may carry a criminal charge, the TSC should require teachers to report the conduct not only to the TSC office, but also directly to the police.⁴⁰⁰ Currently, TSC Circular No. 3 includes the

397. Interview with Joshua Malit, Deputy Principal, Milimani Secondary School, in Nairobi, Kenya (Mar. 13, 2017); *see also* Interview with Professor Grace M. Omoni, Ph.D., School of Nursing Sciences, University of Nairobi, in Nairobi, Kenya (Mar. 15, 2017) (“Q: [With] instances of sexual abuse, do you think there should be a mandatory reporting system for that? A: Yes, there should be a mandatory reporting system.”).

398. Interview with Prof. Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017); *see also* Interview with An Educator in Kenya, in Kiambu County, Kenya (Mar. 16, 2017) (“It just depends on who the perpetrator is because you will find sometimes that the head teacher will cover. . . . [S]o for me, I would say [to report to] . . . the police and an organization working with children and also the TSC.”).

399. *See* Interview with Miriam Wachira, Child Advocate, The CRADLE – The Children’s Foundation, in Nairobi, Kenya (Mar. 15, 2017) (“Actually what you’ll find is that when the school management notices abuse, the first thing they try is to cover it up.”).

400. This would exclude any acts that could not support a charge under the Sexual Offences Act—for example, suggestive words, sounds, language, or gestures, or flirtation would not trigger the requirement to report to the police.

police as one of several options that the teacher may report to in addition to the TSC, stating:

Any teacher who at any given time has reasonable grounds to believe that sexual abuse has been committed against a pupil/student . . . must report such case to the head teacher, education officials, School Management Committees, Board of Governors, Police *or* any organization working with Child Protection issues in the area. . . .⁴⁰¹

However, numerous stakeholders in Kenya identified the crucial need for teachers to report certain instances of sexual abuse to the police in order to initiate criminal prosecution and supported involving the police in the matter from the moment the sexual abuse is discovered or suspected. Tabitha Saoyo, Programme Manager for Sexual and Reproductive Health and Rights at KELIN Kenya, emphasized this need to report sexual abuse directly to police, explaining:

[I]f you need access to justice, the formal justice mechanism in Kenya requires that you have to first report to the police. The investigations have to happen and the police will compile a file, which is then forwarded to the office of the Director of Public Prosecution. . . . [W]hen I say that the access to justice starts with the police—it starts with the fact that the police are the ones who are mandated by law to do investigations of any sexual violence that happens.⁴⁰²

Additionally, maintaining a criminal process alongside the administrative process increases the likelihood that a teacher will be found guilty in court, rather than simply be removed from the TSC register. Honourable Lady Justice Hannah Okwengu, Judge of Appeal and Chairperson of the Kenya Women Judges Association, noted:

[T]hese are criminal matters, and there is need to deal with them—investigate and handle them—as fast as possible. . . . So when the matter is reported to the police, action is taken, the person is charged, the court will now [be] involved. . . . They will involve other people that deal with children so that they

401. TSC CIRCULAR NO. 3, *supra* note 84, ¶ 2 (emphasis added).

402. Interview with Tabitha Saoyo, Programme Manager, Sexual & Reproductive Health & Rights, KELIN Kenya, in Nairobi, Kenya (Mar. 14, 2017).

are able to deal with the matter in a professional way, the way the matter should be dealt with.⁴⁰³

Hon. Lady Justice Okwengu highlighted by way of comparison the limited responses to reports of sexual abuse available to the TSC in these matters:

What will the TSC do other than sacking? Because [under] their mandate, the worst that can happen is to sack the teacher. They will not be able to take the[e] [teacher] to jail, they will just have to now again refer the matter to the police. And by then, a lot of water will have gone under the bridge.⁴⁰⁴

Police are also more accessible within the counties than other authoritative bodies such as the TSC, given the fact that there are multiple police stations in each county, compared to a single TSC office per county.

Again, the TSC can look to numerous other countries' laws for examples on mandating reporting of sexual abuse to the police. For instance, in Sierra Leone, The Child Right Act of 2007 mandates reporting to the police instances of abuse against children, which would include defilement.⁴⁰⁵ Lesotho's Children's Protection and Welfare Act of 2011 also stipulates that if an individual "is of the opinion that a child is . . . sexually abused, he shall immediately inform . . . police."⁴⁰⁶ Furthermore, The Protection of Children from Sexual Offences Act, 2012, of India mandates that "any person . . . who has apprehension . . . or has knowledge that [an offence under this Act] has been committed . . . shall provide such information to (a) the Special Juvenile Police Unit."⁴⁰⁷ Kenya should therefore look to these examples and mandate teachers' reporting of sexual abuse that may carry a criminal charge, to the police.

403. Interview with Honourable Lady Justice Hannah Okwengu, Judge of Appeal/Chairperson, Kenya Women Judges Association, in Nairobi, Kenya (Mar. 15, 2017).

404. *Id.*

405. The Child Right Act (2007) § 38(6) (Sierra Leone), www.sierra-leone.org/Laws/2007-7p.pdf.

406. Children's Protection and Welfare Act, No. 7 (2011) § 36(1) (Lesotho), <http://jafbase.fr/docAfrique/Lesotho/children%20act%20lesotho.pdf>.

407. Protection of Children from Sexual Offences Act, *supra* note 373, § 19(1).

3. Expanded Reporting Window—From 24 to 72 Hours

The TSC should enlarge the timeframe within which a teacher must report any suspicion or knowledge of sexual abuse and sexual grooming to an enforceable 72 hours. If it is determined that a teacher was aware of or suspected sexual abuse or sexual grooming of a learner and failed to report it within the mandated timeframe, the teacher should be subject to disciplinary action by the TSC.

Numerous stakeholders in Kenya agreed that the TSC's current 24-hour reporting window for sexual abuse is not realistic or effective. The TSC Circular No. 3 of 2010 currently requires teachers to report suspicions of sexual abuse within 24 hours of having "reasonable grounds to believe that sexual abuse has been committed."⁴⁰⁸ However, by and large, reporting of sexual abuse within 24 hours is not occurring in Kenya. Mbeti Michuki, Legal Counsel and Program Officer at FIDA-Kenya, noted that "the 24-hour limit is very restrictive."⁴⁰⁹ Honourable Justice Aggrey Muchelule of the Family Division, Milimani Law Courts, similarly stated that "24 hours would be limiting."⁴¹⁰ Hon. Lady Justice Okwengu agrees:

[The TSC] should not be strict about 24 hours. You see, what happens when you . . . come to report after two to three days, then they tend to say, 'Now because you did not report within 24 hours, this one now cannot be—cannot be pursued.' . . . They should understand that in many situations, it is not easy to report within the 24 hours.⁴¹¹

The logic for a 72-hour reporting timeframe therefore is linked to a common desire by reporting teachers to further ascertain validity of the suspected abuse, as well as to stay within the standard period during which evidence of sexual abuse remains viable. This period of time also corresponds with the window in which abuse survivors can seek effective care to reduce the risk of both pregnancy and HIV infection: "[I]n terms of post-rape care, we are still talking about 72 hours when a survivor is about to actually get help. Expanding [the 24 hours] to a little bit

408. TSC CIRCULAR NO. 3, *supra* note 84, ¶ 2.

409. Interview with Mbeti Michuki, Legal Counsel & Programme Officer, FIDA-Kenya, in Nairobi, Kenya (Mar. 12, 2017).

410. Interview with Honourable Justice Aggrey Muchelule, Family Division, Milimani Law Courts, in Nairobi, Kenya (Mar. 15, 2017).

411. Interview with Honourable Lady Justice Hannah Okwengu, Judge of Appeal/Chairperson, Kenya Women Judges Association, in Nairobi, Kenya (Mar. 15, 2017).

more time, might allow for this information. . . .”⁴¹² Specifically considering the medical and evidentiary advantages to a 72-hour reporting window, Honourable Justice Aggrey Muchelule agreed that the reporting timeframe should be linked to the importance of preserving evidence.⁴¹³ Miriam Wachira, Child Advocate with CRADLE, also advocated for a 72-hour reporting period, noting that someone may want to first ascertain more information before asserting the allegation.⁴¹⁴

The TSC can look to comparative law and guidelines on reporting sexual abuse and requisite procedures following sexual abuse for examples to follow in mandating a maximum 72-hour reporting period. For instance, in its guidelines on the prevention of sexual abuse in public schools, South Africa mandates that “[a]ll cases of sexual violence or rape must be reported to the South African Police Services within 72 hours of occurrence.”⁴¹⁵ Additionally, in USAID’s *Lessons and Tools from Sexual Violence Services in Africa*, the importance of a 72-hour window is stressed by noting “the need for survivors to seek [sexual violence] health services as soon as possible, no later than 72 hours of the assault.”⁴¹⁶

Ultimately, it is evident that a 72-hour timeframe for reporting instances of sexual abuse of a learner is a more feasible and effective mandate for the TSC to embrace and enforce as part of its reporting procedures to successfully combat sexual abuse against schoolgirls.

4. Confidentiality in the Reporting Process

The TSC must ensure confidentiality in the reporting process to encourage teachers, other school personnel and students to report

412. Interview with A Woman Who Works with a Development Organization, in Nairobi, Kenya (Mar. 13, 2017).

413. Interview with Honourable Justice Aggrey Muchelule, Family Division, Milimani Law Courts, in Nairobi, Kenya (Mar. 15, 2017) (“Q: So [the reporting timeframe] should maybe be tied to the preservation of physical evidence? A: Yes.”); *see also* Interview with Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017) (“[I]f I cannot prove this girl was violated, if I have no evidence to show she was violated, how will I ever go to court and have a conviction?”).

414. Interview with Miriam Wachira, Child Advocate, The CRADLE – The Children’s Foundation, in Nairobi, Kenya (Mar. 15, 2017).

415. DEPARTMENT OF EDUCATION, GUIDELINES FOR THE PREVENTION AND MANAGEMENT OF SEXUAL VIOLENCE AND HARASSMENT IN PUBLIC SCHOOLS 14 (2008) (S. Afr.), <http://www.thutong.doc.gov.za/ResourceDownload.aspx?id=44563>.

416. UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, LESSONS AND TOOLS FROM SEXUAL VIOLENCE SERVICES IN AFRICA 35 (2010), http://www.popcouncil.org/uploads/pdfs/2010HIV_PEPFAR_SGBV_Toolkit.pdf.

instances of sexual abuse, sexual harassment, and sexual grooming. Failure to maintain confidentiality can have a chilling effect that deters reporting. A confidentiality provision will facilitate trust and confidence in the reporting procedure and better protect learners from sexual abuse. The TSC should include the confidentiality provisions in both the Learner Protection Guidelines and the Standard Operating Procedures for Reporting. It must prohibit the disclosure of any information about the sexual abuse allegations and investigation to any person other than those individuals directly responsible for handling the report and investigation. This means that any teacher or TSC agent reporting sexual abuse—or suspicion thereof—shall not reveal to any other teacher, school personnel, or any other person the identities of the teacher(s) or learner(s) involved in the incident.

Numerous stakeholders in Kenya interviewed during the IWHRC Fact-Finding Trip supported including a confidentiality provision as a means of encouraging reporting among teachers and students alike.⁴¹⁷ Dr. Joan Mwende Ngunnzi, a former Deputy Director of the Teachers Service Commission said confidentiality would be a good idea because “[teachers] will report, and they don’t want to be known that they were the ones who reported.”⁴¹⁸

There are universities and government employers around the world that include confidentiality provisions in their sexual violence/harassment policies and that the Kenyan Government can use as models. Some strong examples include the U.S. Department of Education Office for Civil Rights Sexual Harassment Guidance, which emphasised

417. See Interview with Tabitha Saoyo, Programme Manager, Sexual & Reproductive Health & Rights, KELIN Kenya, in Nairobi, Kenya (Mar. 14, 2017) (“Q: Do you think that instituting confidentiality for reporting would encourage more schoolgirls to come forward? A: [I]t would. . . . [C]oming forward is more than just reassurance that your name or your face will not be shown.”); Interview with Dr. Geoffrey Wango, Senior Lecturer, Psychology Department, University of Nairobi, in Nairobi, Kenya (Mar. 13, 2017) (“Q: Do you think that mandating or instituting a policy of confidentiality in reporting would encourage schoolgirls to come forward? A: Yes, it would. It would.”); Interview with Diana, 18-Year Old Former Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017) (“Q: Do you think it would be helpful to have like a box where girls could go and say private things about what happened to them? A: Yeah. Q: Yeah? How do you think that would help? A: It would help because the person in the box would have more time with the girls than the teachers. Q: Mhm. . . . [W]hat would the person who checks the box—what do you think they would do? A: I think they would report the teacher to the authorities or something.”).

418. Interview with Dr. Joan Mwende Ngunnzi, Former Deputy Director, Teachers Service Commission, in Nairobi, Kenya (Mar. 13, 2017); see also Interview with Honourable Lady Justice Hannah Okwengu, Judge of Appeal/Chairperson, Kenya Women Judges Association, in Nairobi, Kenya (Mar. 15, 2017) (“[The] idea of reporting anonymously would be good.”).

the “sensitive nature” of reports involving sexual abuse.⁴¹⁹ Limiting disclosure to the extent possible was drawn from Uganda’s *Makerere University Policy & Regulations on Sexual Harassment Prevention*, South Africa’s *Guidelines for the Prevention and Management of Sexual Violence & Harassment in Public Schools*, UC Berkeley’s *Sexual Violence Prevention & Response Harassment & Violence Support & Education*, and Carroll County Public Schools’ *Sexual Harassment Policy*.⁴²⁰ Preventing disclosure of information gathered during the investigation process was pulled from both *The Public Interest Disclosure: Internal Reporting Policy and Procedures* of the New South Wales Office of Environment & Heritage and the Mammoth Lakes Fire Protection District’s *Standard Operating Procedures*.⁴²¹ Finally, the *National Standard Operating Procedures for Prevention and Response to Sexual Gender-Based Violence* in Liberia provided the list of people reporters are prohibited from disclosing information to, as well as the mandate that employees must sign an agreement to continue confidentiality during and after employment.⁴²²

5. Inclusion of a Non-Retaliation Clause

The TSC should add a non-retaliation clause to the TSC Code of Regulations and the proposed Learner Protection Guidelines to encourage reporting and protect individuals who report. The non-retaliation provision would prohibit any teacher or other TSC agent

419. U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE (1997), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html>.

420. See MAKERERE UNIVERSITY, POLICY & REGULATIONS ON SEXUAL HARASSMENT PREVENTION (2006) (Uganda), <https://policies.mak.ac.ug/sites/default/files/policies/Makerere-University-Sexual-Harrassment-Policy%26Regulation-2006.pdf>; DEPARTMENT OF EDUCATION, GUIDELINES FOR THE PREVENTION AND MANAGEMENT OF SEXUAL VIOLENCE AND HARASSMENT IN PUBLIC SCHOOLS (2008) (S. Afr.), <http://www.thutong.doe.gov.za/ResourceDownload.aspx?id=44563>; BERKELEY, SEXUAL VIOLENCE PREVENTION & RESPONSE: HARASSMENT & VIOLENCE SUPPORT & EDUCATION, [http://survivorsupport.berkeley.edu/Confidential-Resources-Anonymous-Reporting-and-Privacy; Sexual Harassment: Administrative Regulation](http://survivorsupport.berkeley.edu/Confidential-Resources-Anonymous-Reporting-and-Privacy;SexualHarassment:AdministrativeRegulation), CARROLL COUNTY PUBL. SCH. 2 (2016), <https://www.carrollk12.org/boe/Administrative%20Regulations/G%20-%20Personnel/GBAA.Sexual%20Harassment.Regis.pdf>.

421. THE PUBLIC INTEREST DISCLOSURE: INTERNAL REPORTING POLICY AND PROCEDURES, NEW SOUTH WALES OFF. OF ENV’T & HERITAGE 12 (2016), <http://www.environment.nsw.gov.au/resources/whoware/PublicInterestDisclosure/public-interest-disclosure-PID-internal-reporting-policy-procedures-160715.pdf>; MAMMOTH LAKES FIRE PROTECTION DIST., STANDARD OPERATING PROCEDURES: WORKPLACE HARASSMENT AND DISCRIMINATION, http://mammothlakesfd.homestead.com/Operations/SOPs/Workplace_Harassment_Policy.pdf.

422. NATIONAL STANDARD OPERATING PROCEDURE FOR PREVENTION AND RESPONSE TO SEXUAL GENDER-BASED VIOLENCE IN LIBERIA 11 (2009) (Liber.), https://www.law.berkeley.edu/wp-content/uploads/2015/10/Liberia_MOGD_National-SOPs-for-Prevention-Response-to-SGBV_2009.pdf.

against whom a report of sexual abuse is made to take any retaliatory action against any person involved in the report, including fellow teachers or learners. Knowing that acts of retaliation are prohibited under the law and will be subject to discipline will help combat the fear of reporting and encourage teachers and students alike to report and fully cooperate in the ensuing investigations. Retaliation under this clause encompasses actions such as threats, intimidation, reprisal, or any adverse action related to employment or performance (such as excluding a reporting individual from an activity because of the individual's involvement in a sexual abuse investigation).⁴²³ Furthermore, any individual who retaliates against an individual who has reported an instance of sexual abuse in accordance with the TSC's guidelines shall face disciplinary action by the TSC.⁴²⁴

Under the current system, reporting individuals are not guaranteed any measure of personal security or protection against retaliation by the perpetrator. Nor does the current system have any means of disciplining acts of retribution.⁴²⁵ The TSC's failure to ensure non-retaliation against those who report sexual abuse or cooperate in an investigation, as well as against the abused learner and her family, has contributed to the overall failure to report instances of sexual abuse against learners. "[Y]ou might really be side-lined or sometimes called a 'traitor'" if you report.⁴²⁶ Because of this culture, "it is very difficult for [teachers] to tell on another teacher [or] to testify against another teacher."⁴²⁷ This fear of retaliation extends to the abused learner, as well. Njeri at CREAM recounted a typical scenario in which the teacher "commits the [sexual abuse] and tells the girl, 'Do not ever talk about this. If you ever talk about it, I will kill you.'"⁴²⁸ The non-retaliation clause in the Code of Regulations and guidelines on learner protection would therefore expressly prohibit this kind of exclusionary retaliation

423. See Draft Learner Protection Guidelines attached to this report as Appendix A.

424. See proposed amendments to the TSC Code of Regulations, attached to this report as Appendix D.

425. See Interview with An Educator in Kenya, in Kiambu County, Kenya (Mar. 16, 2017) ("[T]he victim will end up suffering greatly if [she] report[s].").

426. Interview with Teresa Omondi Adeitan, Executive Director, FIDA-Kenya, in Nairobi, Kenya (Mar. 12, 2017).

427. *Id.*

428. Interview with Njeri, Legal Officer, CREAM, in Nairobi, Kenya (Mar. 12, 2017); see also Interview with Catherine Ndungo, Associate Dean, School of Humanities & Social Sciences, Kenyatta University, in Nairobi, Kenya (Mar. 14, 2017) ("When [sexual abuse] happens, [girls] are always told, 'If you talk about it, I'm going to kill you.'"); Interview with Diana, 18-Year Old Former Schoolgirl, in Nairobi, Kenya (Mar. 17, 2017) ("[T]he teacher threatens [schoolgirls] like, 'If you say anything, I'll kill you.'").

by a teacher toward a reporting or cooperating individual and provide a mechanism by which the TSC can take disciplinary action in response to such conduct.

Domestic and regional comparative examples from educational institutions support the TSC's inclusion of a non-retaliation clause. In Kenya, the Policy on Sexual and Gender-Based Violence at Kenyatta University unequivocally prohibits retaliation against an individual who, in good faith, reports sexual abuse.⁴²⁹ In Uganda, Makerere University's Policy & Regulations on Sexual Harassment Prevention also unambiguously proscribes retaliation against any individual who presents "evidence of sexual harassment."⁴³⁰ South Africa calls for the fair treatment of complainants of sexual abuse in schools,⁴³¹ and the University of Ghana's 2010 Anti-Sexual Harassment Policy includes a non-retaliation clause which stipulates involvement of a formal body—akin to the TSC—that is responsible for monitoring retaliatory acts during an investigation of sexual abuse.⁴³² Following these examples, Kenya's TSC should also include a non-retaliation clause in the Code of Regulations and Learner Protection Guidelines.

D. Mandatory Dismissal of Teachers Who Sexually Abuse Students

*"[T]hese are people that parents entrust their children with, and whether it's in primary school or it's in secondary school, it should never be tolerated."*⁴³³

—Marie Yambo, Health Reporter

The TSC must mandate dismissal for sexual abuse. Despite President Kenyatta's reaffirmation of "zero-tolerance" towards "any violence or

429. POLICY ON SEXUAL AND GENDER-BASED VIOLENCE, KENYATTA UNIVERSITY 29 (REV. 2013) (Kenya), <http://www.ku.ac.ke/gender/images/service/Policy%20on%20Sexual%20and%20Gender%20Based%20Violence%20book1.pdf>.

430. MAKERERE UNIVERSITY, POLICY & REGULATIONS ON SEXUAL HARASSMENT PREVENTION 8 (2006) (Uganda), <https://policies.mak.ac.ug/sites/default/files/policies/Makerere-University-Sexual-Harrassment-Policy%26Regulation-2006.pdf>.

431. DEPARTMENT OF EDUCATION, GUIDELINES FOR THE PREVENTION AND MANAGEMENT OF SEXUAL VIOLENCE AND HARASSMENT IN PUBLIC SCHOOLS 14 (2008) (S. Afr.), <http://www.thutong.doe.gov.za/ResourceDownload.aspx?id=44563>.

432. UNIVERSITY OF GHANA, ANTI-SEXUAL HARASSMENT POLICY 15 (2010), <http://www.ug.edu.gh/paddocs/Anti-SexualHarassmentPolicy.pdf>.

433. Interview with Marie Yambo, Health Reporter, in Nairobi, Kenya (Mar. 13, 2017).

discrimination against our women or girls,”⁴³⁴ zero tolerance cannot truly exist until the TSC mandates the dismissal of any teacher who sexually abuses a learner. The CEDAW Committee has also called upon Kenya to “enforce a zero-tolerance policy with respect to sexual abuse and harassment in schools and ensure that perpetrators are punished appropriately.”⁴³⁵ However, as the law stands today, the TSC has the *discretion* to take disciplinary action against a teacher who commits sexual abuse. Under the current legal framework, the TSC is not required to take *any* action to remove offending teachers from school. Section 34 (3) of the TSC Act states that the TSC, “after interdicting a teacher, *may* take the following disciplinary actions against a registered teacher. . . .”⁴³⁶ Similarly, Regulation 140 in the TSC Code of Regulations states that the TSC “*may* take disciplinary action against a teacher who commits any of the following offences—immoral behaviour, including but not restricted to—i) sexual intercourse; ii) sodomy; iii) lesbianism; and iv) sexual harassment or flirtation.”⁴³⁷

If the TSC does choose to take action against a teacher who commits a sexual offence against a learner, that disciplinary action may only be minor under the current framework. Section 34(3) of the TSC Act contains a list of disciplinary action that may be taken against a registered teacher—it ranges from a warning letter to suspension to dismissal.⁴³⁸ And while Regulation 141 of the TSC Code of Regulations does include “immoral behaviour” among its list of offences that *may* lead to removal from the Register,⁴³⁹ the decision to remove a teacher remains discretionary. If the offence is not found to warrant removal, the Commission has the option to merely “warn the teacher in writing.”⁴⁴⁰ The disciplinary action taken, if any, may be insufficient to effectively deter and punish perpetrators of sexual abuse. Without mandating dismissal, the TSC cannot fully protect learners and the issuance of the Learner Protection Guidelines will be largely futile in curbing sexual abuse.

434. Hon. Uhuru Kenyatta, President of the Republic of Kenya, Speech at the Official Launch of the Gender Based Violence Joint Gov’t of Kenya and United Nations Program and the African Union End Child Marriage Campaign, Comesa Grounds (Mar. 8, 2017), <http://www.president.go.ke/2017/03/08/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-during-the-official-launch-of-the-gender-based-violence-gbv-join/>.

435. CEDAW *Concluding Observations*, *supra* note 6, ¶ 32(c).

436. TSC Act, *supra* note 340, § 34(3) (emphasis added).

437. Code of Regulations, *supra* note 338, § 140(a) (emphasis added).

438. TSC Act, *supra* note 340, § 34(3) (a)–(j).

439. Code of Regulations, *supra* note 338, § 141(a).

440. *Id.* § 154(2) (b) (i).

Stakeholders interviewed during the IWHRC Fact-Finding Trip uniformly supported mandatory dismissal for all instances of sexual abuse in order to best protect learners and deter further instances of abuse.⁴⁴¹ An officer at the Ministry of Education believes that teachers found to have sexually abused a child “should not even be employed by anybody else. . . . They have abused. They w[ill] abuse again. . . . And they have abused a child. I would have no mercy.”⁴⁴² A Commissioner at the Kenya National Commission on Human Rights felt that a mandatory dismissal policy “needs to be very clear. That’s the only way we can build and develop a culture that respects the dignity and protects the dignity of everybody—including the girl.”⁴⁴³ In response to a question about whether there may be any hesitancy to call for the dismissal of teachers for all instances of sexual abuse because that may lead to a lack of teachers, a County Chief Officer of Education, Children, Youth, Gender Affairs, Culture, and Social Services replied: “[w]e may not entertain indecency for the sake of the service.”⁴⁴⁴ In order to address the concerns of stakeholders, the TSC should mandate dismissal of any teacher found to have sexually abused a learner.

Other African countries already mandate dismissal of teachers who have been found guilty of sexual abuse. In South Africa, the Education Laws Amendment 53 of 2000 provides for mandatory dismissal if a teacher is found guilty of “serious misconduct,” which includes “committing an act of sexual assault on a learner, student or other employee” or “having a sexual relationship with a learner of the school where he or she is employed.”⁴⁴⁵ District Education Board Secretaries

441. See Interview with Isaac Agalo, Principal, Shammah High School, in Nairobi, Kenya (Mar. 16, 2017) (“Q: And do you think that a teacher should be, if they find that they were sexually abusing a student, that they should be fired, dismissed? A: Yes, dismissal.”); Interview with Rachel, Schoolgirl from Makina, in Nairobi, Kenya (Mar. 16, 2017) (“Q: Ok. Do you think that a teacher should always be fired if they have a sexual relationship with a student? A: Yes.”); Interview with Geoffrey Wango, Senior Lecturer, Psychology Department, University of Nairobi, in Nairobi, Kenya (Mar. 13, 2017) (“So even an attempt [to sexually abuse a learner] should lead to dismissal.”); Interview with Eunice Kilonzo, Senior Health Reporter, in Nairobi, Kenya (Mar. 13, 2017) (“If a teacher [sexually abuses a learner], they need to go out. They don’t need to be in that community.”).

442. Interview with An Officer, Ministry of Education, in Nairobi, Kenya (Mar. 14, 2017).

443. Interview with Jedidah Wakonyo Waruhiu, Commissioner, Kenya National Commission on Human Rights, in Nairobi, Kenya (Mar. 17, 2017).

444. Interview with Andrew Mwanthi, County Chief Officer, Education, Children, Youth, Gender Affairs, Culture & Social Services, in Nairobi, Kenya (Mar. 13, 2017).

445. Employment of Educators, Act Amendment Act 53 of 2000, GN 1195 of GG 21783 (Nov. 22, 2000) § 17(1)(b)-(c) (S. Afr.), <http://www.nationalskillsauthority.org.za/wp-content/uploads/2015/11/Education-Laws-Amendment-Act-No.-31-of-2007.pdf>.

in Zambia also have a Teachers' Code of Conduct that prohibits sexual violence and calls for the dismissal of any teacher found guilty of it.⁴⁴⁶ Uganda cancels both the certificates of teachers who engage in acts of sexual abuse against learners, as well as the operational licenses of schools where the abuse occurs.⁴⁴⁷ Kenya should join its peers and take this progressive step forward towards deterring sexual abuse in schools by requiring dismissal upon a finding of sexual abuse.

Furthermore, stakeholders in Kenya support mandatory dismissal even for instances of sexual harassment and sexual grooming. This is because sexual harassment is both harmful in and of itself and may lead to further instances of abuse. The intent behind sexual harassment is the same as that behind other forms of sexual abuse: teachers are "driving [a schoolgirl] to a sexual end."⁴⁴⁸ Moreover, teachers who are only temporarily suspended or warned after one instance of harassment may use that time to "perfect their art."⁴⁴⁹ Miriam Wachira, a Child Advocate, agreed that dismissal must be mandatory even after the first sexual comment because teachers "are trying the waters, so why put the children at risk? Because what you will discover, they will think, 'I cat-called and nothing really happens, so they would take the next step.'"⁴⁵⁰ The former Deputy Director of the TSC agreed and felt that the punishment for flirting should be dismissal because "[t]he teacher who behaves immorally in the presence of children will end up defiling them."⁴⁵¹

The requirement of mandatory dismissal should be included in both the TSC Act and the TSC Code of Regulations. The language in both documents should be changed from "may" to "must." The Act should require the TSC to de-register and forbid the TSC from reinstating any teacher who sexually abuses a learner. The Code of Regulations must then make clear that if found guilty in a disciplinary proceeding of an

446. WOMEN AND LAW IN S. AFR.-ZAM. ET AL., "THEY ARE DESTROYING OUR FUTURES" SEXUAL VIOLENCE AGAINST GIRLS IN ZAMBIA'S SCHOOLS 35 (Oct. 2012), <http://www.lawschool.cornell.edu/womenandjustice/Conferences-and-Events/upload/Sexual-Violence-Against-Girls-in-Zambia-s-Schools.pdf>.

447. Martins E. Ssekweyama, *Uganda: Government to Cancel Schools' Licenses Over Sexual Abuse of Students*, THE MONITOR (May 10, 2016), <http://allafrica.com/stories/201605100063.html>.

448. Interview with Eunice Kilonzo, Senior Health Reporter, in Nairobi, Kenya (Mar. 13, 2017).

449. Interview with Geoffrey Wango, Senior Lecturer, Psychology Department, University of Nairobi, in Nairobi, Kenya (Mar. 13, 2017).

450. Interview with Miriam Wachira, Child Advocate, in Nairobi, Kenya (Mar. 15, 2017).

451. Interview with Dr. Joan Mwende Ngundzi, Former Deputy Director, Teachers Service Commission, in Nairobi, Kenya (Mar. 13, 2017).

act of sexual abuse against a learner, a teacher will be dismissed and deregistered.⁴⁵² These changes will ensure that at the first sign of abuse, teachers are removed from schools. Permitting discretion in taking disciplinary action in cases of sexual abuse is dangerous and allows teachers to escape punishment. In order to send a strong message that sexual abuse is a violation of learners' human rights, dismissal must be mandatory. Without mandatory dismissal, the government is merely paying lip-service to the idea of "zero tolerance" for teachers committing sexual abuse against learners.

E. Mandatory Teacher Training

*"We need to prepare them before they even come to the class, before they come to interact with children."*⁴⁵³

To better protect students from sexual abuse in school, the TSC must require teachers to undergo regular trainings on the requirements set forth in the relevant laws and TSC policies and procedures as well as on: 1) recognizing when conduct qualifies as sexual grooming or sexual abuse and 2) the proper reporting and referral procedures. Numerous stakeholders support instituting teacher training on the recognition, prevention, and reporting of sexual abuse,⁴⁵⁴ a practice that a Lecturer at the University of Nairobi feels is "long overdue."⁴⁵⁵ According to Nairobi County Chief Officer Andrew Mwanthi, "[I]gnorance is not a defence;" "[a]s an educationalist. . . . [Y]ou should be aware of all

452. See Appendix E, *infra*, § 12 (inserting Regulation 140A); Appendix E, *infra*, § 14 (inserting Regulation 141A).

453. and this is what women activistou should be able to say no. This should be included in the bill and this is what women activistInterview with A Woman Who Works with a Development Organization, in Nairobi, Kenya (Mar. 13, 2017).

454. Interview with S.Y., Employee at an Education-related NGO, in Nairobi, Kenya (Mar. 13, 2017) ("One way is to train teachers and the head teachers on how to combat sexual abuse and sexual harassment, and also, let them know the right channel to follow to report the cases."); Interview with A Woman Who Works with a Development Organization, in Nairobi, Kenya (Mar. 13, 2017) ("Perhaps also including this in the teacher's training—that this is something you do, the same way attempts have been made to talk about the Sexual Offences Act and the police training. Why are we not talking about it when we are training teachers? We need to prepare them before they even come to the class, before they come to interact with children."); Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017) ("Q: What do you think about requiring Teachers Training Colleges to specifically teach on the TSC's sexual abuse guidelines? A: I think it is very important.").

455. Interview with Lecturer, University of Nairobi, in Nairobi, Kenya (Mar. 14, 2017).

information related to [the] education function.”⁴⁵⁶ Ms. Omogi of GIZ similarly emphasized the need for training teachers on protecting learners from sexual abuse:

[H]aving the teachers taught on sexual violence would be very, very important because for a child going to school, and for a child whose been abused, there’s always that withdrawing and other signs. So it could be easy for the teacher to know the signs and how to respond—if a child has been abused, [for the teacher to] realize that has happened, and what steps [she or] he is supposed to take, what advice [she or] he is supposed to give the child and the parents.⁴⁵⁷

Christine Mwende, a Machakos County Assembly Member, even thinks training should occur as often as once a term.⁴⁵⁸

Currently, there is no mandate within the TSC Act or Code of Regulations for teacher training on issues of sexual abuse, including the recognition thereof and procedures for reporting it to the TSC and, if necessary, the police. However, the Code of Regulations’ language does provide generally for the TSC to institute such training. The Code of Regulations tasks the Commission to work with other government agencies to “develop and review the entry qualifications to various levels of teacher education, training programmes, and advise the national government accordingly.”⁴⁵⁹ And pursuant to Regulations 46 and 47, the Commission may designate a “Curriculum Support Officer,” to “identify the training needs of teachers and heads of institutions and

456. Interview with Andrew Mwanthi, County Chief Officer, Education, Children, Youth, Gender Affairs, Culture, & Social Services, in Nairobi, Kenya (Mar. 13, 2017).

457. Interview with Irene Omogi, Quality Management & Accreditation Coordination, GIZ, in Nairobi, Kenya (Mar. 17, 2017). Ms. Arogo at the Gender Violence Recover Centre articulated some of the signs that teachers should look for to determine whether a student has been abused: the child may be using “different words to refer to their private parts,” (“it may be a word they have been taught by the perpetrator”), or “if it was a very lively child, the[] [child] may withdraw,” or the child “may stop eating or may start eating too much,” “may sleep too much or too little. Maybe their walking style changes because they are injured,” or “maybe sometimes they will start crying for no reason.” Interview with Beryl Arogo, Counselling Psychologist, Gender Violence Recovery Centre, in Nairobi, Kenya (Mar. 17, 2017).

458. Interview with Christine Mwende, County Assembly Member, in Machakos County (Mar. 16, 2017).

459. Code of Regulations, *supra* note 338, § 43(1)(a).

advise the Commission accordingly.”⁴⁶⁰

Countries around the world require the training of teachers on how to handle sexual abuse. For example, Afghanistan’s Law on Elimination of Violence Against Women requires that the Ministry of Women Affairs “conduct seminars, workshops, conferences and other training programs for the staff of governmental and nongovernmental institutions, organizations and local residents in order to increase public awareness, identification of violence cases and their consequences, and find solutions.”⁴⁶¹ The law also guarantees the implementation of such training programs.⁴⁶² South Africa and Mexico similarly mandate sexual abuse training for teachers. South Africa’s Guidelines for the Prevention and Management of Sexual Violence and Harassment in Public Schools guarantees “[o]ngoing training sessions for school-based educators and school governing body members and all other persons covered by these guidelines” encompassing “the scope and meaning of sexual violence and harassment, the means of preventing inappropriate behaviour, and appropriate action to be taken when sexual violence and harassment has occurred.”⁴⁶³ The Kenyan Government must take action to ensure its teachers receive the necessary training for how to identify and respond to cases of sexual abuse by teachers; without such training, the other changes to the law will be limited in their impact.

VIII. CONCLUSION

As outlined in this report, Kenyan schoolgirls suffer from a number of human rights violations when they are sexually abused by their teachers, including those that obstruct their access to education and their ability to participate in Kenyan society on an equal basis with their male peers. Although the Constitution and the TSC’s own documents grant schoolgirls certain rights and protections, gaps and deficiencies remain

460. *Id.* §§ 46(2), 47(a); *see also id.* § 52, 52(2)(c) (providing that the “Commission shall develop an open performance appraisal system for teachers in its employment to strengthen supervision[,]” including to “identify training needs”).

461. Law on Elimination of Violence Against Women (Afg. 2009, Art. 8(4)), <http://www.refworld.org/pdfid/5486d1a34.pdf>.

462. *Id.* Art. 8(6).

463. DEPARTMENT OF EDUCATION, GUIDELINES FOR THE PREVENTION AND MANAGEMENT OF SEXUAL VIOLENCE & HARASSMENT IN PUBLIC SCHOOLS 4 (2008) (S. Afr.); *see also* Ley General de Acceso de las Mujeres a Una Vida Libre de Violencia (General Law on Women’s Access to a Life Free of Violence) [LGAMVLV] art. 45(XI), Diario Oficial de la Federación [DOF] 1-2-2007 (Mex.) (mandating the Public Education Ministry to “[p]rovide training activities for all staff in education centers in the field of human rights of girls and women and policies for the prevention, treatment, punishment and eradication of violence against violence against women”).

within the current legal structure. As a result, the current system does not sufficiently protect schoolgirls from continued sexual abuse by their teachers. Sexual abuse permeates every facet of a schoolgirl's life—impacting not only her education and sense of self-worth, but also her development as a person, her physical and mental health, and her ability to pull herself out of a cycle of poverty. In the most severe cases, the detrimental impact of sexual abuse by teachers can even threaten the girl's life. The culture of silence and impunity surrounding sexual abuse by authority figures like teachers discourages schoolgirls and fellow teachers from reporting sexual abuse. There are a number of specific steps that the Government of Kenya must take to comply with its constitutional and international treaty obligations and to better protect its schoolgirls. They have been laid out in Section VII of this report and can be reviewed in the accompanying legislative and policy proposals, attached as appendices herein.

APPENDIX A

**[DRAFT] Learner Protection Guidelines on Sexual Abuse
Table of Contents**

<i>Preamble</i>	2
I. DEFINITIONS	3
II. PURPOSE.....	5
III. SCOPE	5
IV. PROHIBITED TEACHER-LEARNER INTERACTIONS.....	5
<i>Sexual Activity</i>	
<i>Inducement, Coercion, Threats, or Intimidation to Engage in Sexual Activity</i>	
<i>Romantic Relationships</i>	
<i>Sending Learners to the Teacher's Home</i>	
<i>Examples of Prohibited Conduct</i>	6
V. PROTOCOL FOR THE SUPERVISION OF LEARNERS.....	7
<i>One-on-one Situations with Learners</i>	
<i>Chaperoning Co-Curricular Activities Outside School</i>	
VI. MANDATORY REPORTING.....	7
<i>Reporting to the TSC</i>	
<i>Reporting to the Police</i>	
VII. RECOGNIZING SIGNS OF SEXUAL ABUSE.....	8
VIII. CONFIDENTIALITY.....	8
IX. NON-RETALIATION.....	9
X. REFERRALS.....	9
<i>Medical Treatment</i>	
<i>Counseling</i>	
<i>Legal Aid</i>	
<i>Referral to Government Ministries</i>	
XI. IMPLEMENTATION.....	10
<i>School Rules</i>	
<i>Dissemination of Documents</i>	
<i>Obligation of TSC to Ensure Report to Police</i>	
<i>Publication of Offenders on Website</i>	
XII. ENFORCEMENT.....	10

“The effects of sexual abuse are so far reaching that it is useless to invest so much in education and not invest in child protection. So . . . it’s child protection first. Education, yes, but with child protection.”

- Dr. Joan Mwendu Ngunnzi, Former Deputy Director of the Teachers Service Commission

Preamble

Pursuant to the Kenyan Constitution (2010), the Teachers Service Commission Act (2012), the Sexual Offences Act (2006), and various international and regional human rights treaty obligations and in accordance with the standards of the profession espoused in the TSC Code of Regulations for Teachers, 2015 and the TSC Code of Conduct and Ethics for Teachers Regulations, 2015, the Commission seeks to provide and sustain a safe learning environment free from all forms of sexual abuse. These Guidelines are issued pursuant Constitution Article 237, which identifies as one of the Commission’s core functions that it “exercise disciplinary control over teachers.”

The Commission is concerned with the continued high level of sexual abuse that learners face at the hands of their teachers. The Commission recognizes that this sexual abuse has profound and far-reaching negative effects on learners and it is a serious violation of their fundamental human rights. These rights include the right to: education, equality before the law and non-discrimination, health, life, dignity, freedom from degrading treatment, and freedom from violence. These rights are guaranteed to every learner through the Bill of Rights in Kenya’s Constitution and numerous international and regional human rights treaties, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; the Convention on the Elimination of all Forms of Discrimination Against Women; the Convention on the Rights of the Child; the African Charter on Human and Peoples’ Rights; the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; and the African Charter on the Rights and Welfare of the Child.

The Guidelines are meant to ensure that the Commission is fulfilling its obligations under domestic and international human rights treaty law.

Kenya’s Constitution, the TSC Act, and international law oblige the Commission to protect the best interest of the child. Constitution Article 53(2) states that “A child’s best interests are of paramount importance in every matter concerning the child.” And Section 4(a) of the TSC Act instructs that “[i]n the performance of its functions

and the exercise of its powers, the Commission shall . . . tak[e] into account the best interests of the child under Article 53 of the Constitution.” The Convention on the Rights of the Child (“CRC”) as well as the African Charter on the Rights and Welfare of the Child echo this mandate for promoting and protecting the best interest of the child. Article 3(2) of the CRC calls upon States Parties—including Kenya—to “ensure the child such protection and care as is necessary for his or her well-being . . . and, to this end, shall take all appropriate legislative and administrative measures.” And CRC Article 19 requires the State to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” Article 12(1)(c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa similarly requires the Kenyan Government to “protect women, especially the girl-child, from all forms of abuse, including sexual harassment in schools and other education institutes and provide sanctions against the perpetrators of such practices.” These Guidelines embrace Kenya’s specific obligations under international law to protect learners from all forms of violence.

In response to the widespread issue of sexual abuse of learners and in line with Kenya’s obligations under international human rights law and its own Vision 2030 and development indicators under the Sustainable Development Goals, the Commission hereby issues the Learner Protection Guidelines on Sexual Abuse, 2017. These Guidelines build on and replace the Commission’s previous Circular No. 3 of 2010 on “Protection of Pupil/Students from Sexual Abuse.” The Guidelines not only prohibit these individuals from sexually abusing learners, but also require them to protect learners against sexual abuse, report instances of sexual abuse, and to offer learners assistance in the event of abuse. All teachers, and other agents or employees of the Commission are subject to these Guidelines.

I. Definitions

In these Learner Protection Guidelines, unless the context otherwise requires—

“learner” means any person, regardless of age, who is undergoing instruction in any educational institution at any level, including pre-primary, primary, secondary and tertiary, whether public or private.

“school personnel” means all non-teaching school employees, including but not limited to, administrative staff, nurses, counselors, school food service workers, groundkeepers, and custodians.

“sexual abuse” means sexual intercourse or any other penetration of any part of the learner’s or teacher’s body by any object or body part; touching of a learner’s body or making a learner touch the teacher’s or any other person’s body in a sexual nature; exhibiting any object or part of the body to be seen by the learner in a sexual nature; making a learner exhibit his or her body in a sexual nature so as to be seen by the teacher or any other person; any form of inducement, threats, or violence to force a learner to engage in any sexual activity; any sexually suggestive word, sound, language, or gesture, whether made orally or in writing; exposing of pornographic material; any form of flirtation; repeatedly following, watching, or contacting a learner either directly or through electronic, digital, or any other means with the intent to commit a sexual offence or any other act of sexual abuse.

“sexual grooming” means a process deliberately undertaken by a teacher or any other person with the aim of befriending, influencing and/or coercing a learner into performing an act that leads to sexual abuse. Such acts include but are not limited to spending inappropriate one-on-one time with a learner; enticing a learner using gifts, money, or a promise of higher grades; showing special attention to one learner over other learners; assigning special tasks to a learner, such as fetching water, cooking, cleaning, and preparing tea; sending of learners to the teacher’s house.

“sexual harassment” with respect to a learner means any act of a sexual nature, including sexual advances or requests, by a teacher in the form of words, gestures, sounds, cat-calls, jokes or comments, including innuendos, whether made orally or in writing; making a learner exhibit his or her body so as to be seen by the teacher or any other person; or exhibiting an image, object, or part of body so as to be seen by the learner; or repeatedly following, watching, or contacting a learner either directly or through electronic, digital or any other means with the intent to commit a sexual offence or any other act of a sexual nature.

“sexual intercourse” means any physical contact between two individuals involving penetration or stimulation of the genital organs of at least one.

“sexual offence” means any offence prescribed under the Sexual Offences Act.

“teacher” means any person who carries on the profession of teaching in any educational institution, whether public or private, at any level, including pre-primary, primary, secondary, or tertiary.

“TSC agent” means any individual who is registered or employed by the TSC, or who acts on behalf of the TSC, including national and county officials.

II. Purpose

The primary purpose of the Learner Protection Guidelines on Sexual Abuse (“Guidelines”) is to protect all learners from sexual abuse by teachers. To that end, the Guidelines provide meaningful instruction to teachers on what types of interactions with learners are forbidden, mandate that teachers report all reasonable suspicions of sexual abuse, and instruct teachers to promptly refer learners who have been sexually abused to necessary medical treatment and counseling services. It is expected that all teachers and other TSC agents observe and adhere to the provisions of these Guidelines in all their interactions with learners. The Guidelines put those individuals on notice of their responsibilities towards learners and also inform them that any failure to follow these Guidelines will result in disciplinary action by the Commission.

III. Scope

These Guidelines apply to all teachers registered by the TSC, at both public and private educational institutions in Kenya. It also applies to all other agents and employees of the TSC. The Guidelines are meant to protect all learners from all forms of sexual abuse by teachers and other TSC agents, whether that abuse occurs on or off school grounds, in the public or private sphere. The provisions of these Guidelines are binding on all teachers and TSC agents and any violation of these Guidelines will result in disciplinary action as set forth by the TSC Act and the Code of Regulations for Teachers.

IV. Prohibited Teacher-Learner Interactions

Sexual Activity: No teacher shall engage in any sexual activity whatsoever with a learner, including, but not limited to, those interactions identified as “sexual abuse” for purposes of these Guidelines.

Inducement, Coercion, Threats, or Intimidation to Engage in Sexual Activity: No teacher shall induce, coerce, threaten or intimidate a learner in any way in order to engage in sexual activity with that learner. Prohibited behaviour includes promises of or actual payment of any kind, including but not limited to school fees, uniforms, or cash payments; changes to any academic marks or test results; or the granting of special school privileges.

Sexual Grooming: No teacher shall engage in any form of conduct defined as “sexual grooming” in these Guidelines, including but not limited to, sending a learner to the teacher’s house for any reason whatsoever.

Romantic Relationships: No teacher shall date or have a romantic relationship with a learner under any circumstances whatsoever.

Examples of Prohibited Conduct

- A teacher says to a learner, “I like your cooking. Go to my house after school and cook for me.”
- A teacher asks a learner to go to his home and fetch his books.
- A teacher buys snacks or treats for one learner in particular.
- A teacher tells a learner she looks pretty.
- A teacher whistles or “cat-calls” at a learner.
- A teacher looks at a learner in a suggestive manner, such as looking a learner’s body up and down or staring at her breasts.
- A teacher remarks on the size of a learner’s breasts.
- A teacher leaves a note in the learner’s book when he returns her homework that says he wants to date her.
- A teacher asks a student to stay after school and tells her she’s beautiful and that he would like to marry her.
- A teacher tells a learner she will get a good grade in his class if she lets him touch her breasts.
- A teacher tells a learner he will give her money if she performs oral sex on him.
- A teacher makes suggestive gestures to a learner such as blowing kisses, rubbing hands over his own body, or unzipping or unbuttoning items of his own clothing.
- A teacher asks or forces a learner to sit in the teacher’s lap.
- A teacher shows sexually explicit material to a learner or leaves the material in a place where a learner would be likely to access it.
- A teacher sends a learner text messages of a sexual nature.
- A teacher moves close to a learner seated at a desk and grazes her breast or places a hand on the learner’s thigh.
- A teacher touches a learner’s genitals or buttocks as a form of punishment.
- A teacher sends a learner to the staff room to go get books, follows the learner, and forces him/her to have sex.

V. Protocol for Supervision of Learners

One-on-One Situations with Learners: Teachers should make reasonable efforts to avoid being in one-on-one situations with learners. Any one-on-one situations which do occur should be school-related and should be in an observable and interruptible distance from another adult or student.

Chaperoning Co-Curricular Activities Outside of School: All head teachers and principals shall ensure that for any co-curricular activities outside of the school, learners will be accompanied by at least one teacher of the same sex.

VI. Mandatory Reporting

Reporting to the TSC: Any teacher or other TSC agent who has reasonable grounds to believe that any act of sexual abuse, sexual harassment or sexual grooming as defined in these Guidelines or any sexual offence within the meaning of the Sexual Offences Act has been committed against a learner by a teacher, other TSC agent, or school personnel against must report such knowledge or belief to the TSC office in the county in which the concerned institution is situated or the TSC Headquarters in Nairobi within 72 hours.

Reporting to the Police: Any teacher or other TSC agent who has reasonable grounds to believe that **any sexual offence within the meaning of the Sexual Offences Act and/or any of the follow forms of sexual abuse** has been committed against a learner by a teacher, TSC agent, or other school personnel **must also report** such knowledge or belief to the police within 72 hours:

- sexual intercourse or any other form of penetration of any part of the learner's body or teacher's body by any object or body part;
- touching of a learner's body or making a learner touch the teacher's or any other person's body in a sexual nature;
- exhibiting any image, object or part of the body to be seen by the learner in a sexual nature;
- making a learner exhibit his or her body in a sexual nature so as to be seen by the teacher;
- any form of inducement, threats or violence to force a learner to engage in any sexual activity;
- exposing pornographic material; or

- repeatedly following, watching, or contacting a learner either directly or through electronic, digital, or any other means with the intent to commit a sexual offence.

VII. Recognizing Signs of Sexual Abuse

Teachers and other TSC agents should be attentive to learners in their care and actively watch for whether any learners show any signs or symptoms of sexual abuse. The non-exhaustive list below of potential signs and symptoms of sexual abuse is intended to assist teachers in identifying whether any learner in his or her care has been sexually abused.

Behavioural Symptoms

- Loss of interest in school or other activities
- Missing school or leaving school early
- Difficulty concentrating in school
- Crying
- Change in appetite
- Change in sleep pattern
- Self-harm or suicide attempts
- Substance abuse
- Age-inappropriate understanding of sexual behaviour
- Inappropriate seductive behaviour
- Sexualized drawings or play
- Sexually aggressive behaviour with peers
- Reluctance to join in normal activities that involve undressing

Physical Symptoms

- Bleeding from the vagina or anus
- Difficulty or pain in passing urine or feces
- Persistent vaginal discharge
- Foul odor from the genital region
- Pregnancy

VIII. Confidentiality

Any teacher or other TSC agent involved in the reporting or investigation of the sexual abuse of a learner, including the reporting teacher and the individual at the TSC County Office or headquarters who receives the initial report, is required to maintain confidentiality and to

THE HUMAN RIGHTS OF KENYAN SCHOOL GIRLS

not disclose any information about the process or allegations to any person except for those individuals directly responsible for handling the report. This means that any teacher or TSC agent reporting sexual abuse, or a suspicion thereof, shall not reveal to any other teacher, school personnel, or any other person the identities of either the teacher(s) or learner(s) involved in the incident. The reporting teacher shall only reveal the identities of the individuals involved to the relevant TSC office and, if required by these Guidelines, to the police, or as directed by a judge or magistrate.

The confidentiality of the teacher(s) and learner(s) also shall be maintained throughout the duration of the TSC investigation and shall not be disclosed beyond what is needed to complete an investigation, provide an appropriate remedy, initiate and implement disciplinary action, or comply with any law or these Guidelines shall be subject to disciplinary action.

IX. Non-Retaliation

Any teacher or other TSC agent against whom any report of sexual abuse is made is prohibited from taking any retaliatory action against any persons, including fellow teachers or learners, for reporting or for cooperating in an investigation. Retaliation includes threats, intimidation, reprisal, or adverse actions related to employment or school performance.

X. Referrals

Medical Treatment: In cases of physical sexual abuse, including sexual intercourse or penetration of any kind, teachers and other TSC agents should recommend to the learner that he or she seek treatment at a medical facility within 72 hours of the abuse, to allow for the proper maintenance of medical evidence and to be provided with medication to prevent pregnancy and antiretroviral medication to reduce the risk of HIV infection. The teacher or TSC agent should also inform learners that it is advisable to not shower until they been examined by a medical professional.

Counseling: In all cases of sexual abuse, teachers or other TSC agents should recommend that the learner seek counseling and refer the learner to a counselor or the National Childline Helpline Number 116.

Legal Aid: In all cases of sexual abuse that must be reported to the police, teachers or other TSC agents should refer

the learner to a legal aid organization to assist the learner with the criminal proceedings.

Referral to Government Ministries: In all cases of sexual abuse which must be reported to the police, reporting teachers or other TSC agents should also make a report to the Department of Children's Services and the Ministry of Education, for a determination of whether the learner should be transferred to another institution of learning away from the current abusive environment.

XI. Implementation

Dissemination of TSC Documents: The TSC shall disseminate a copy of these Guidelines and the Standard Operating Procedures Reporting Mechanism on Learner Protection to every educational institution, whether public or private. The TSC shall also provide a copy to every newly licensed teacher as part of the registration process. Copies must also be made available on the TSC's website.

School Rules: Head teachers and principals must include specific provisions in their school rules aimed at protecting learners from sexual abuse. These rules must include the requirements and prohibitions set forth in these Guidelines and must be made available at the school, including to all school personnel and learners.

TSC to Ensure Reporting to Police: It is the duty of the TSC office receiving the report of sexual abuse, whether that is a county office or the TSC headquarters in Nairobi, to ensure that all reports of sexual abuse that trigger reporting to the police in Section VI of these Guidelines have in fact been reported to the police.

Publication of Offenders on Website: The names of teachers who have been found guilty of sexual abuse against a learner in a disciplinary proceeding under the TSC Act or the Code of Regulations for Teachers or convicted of a sexual offence against a learner in a court of law shall be published on the TSC website and in a national newspaper.

XII. Enforcement

Any teacher who engages in any of form of sexual abuse or other prohibited conduct set forth in these Guidelines will

THE HUMAN RIGHTS OF KENYAN SCHOOL GIRLS

be subject to disciplinary action as set forth by the TSC Act and the Code of Regulations for Teachers.

Any teacher who fails to report an instance of sexual abuse in accordance with these Guidelines will be subject to disciplinary action as set forth by the TSC Act and the Code of Regulations for Teachers.

APPENDIX B

**[DRAFT] Standard Operating Procedures Reporting Mechanism on
Learner Protection**

Foreword

The Teachers Service Commission (“TSC”) developed the Standard Operating Procedures Reporting Mechanism on Learner Protection to ensure a coordinated and effective approach to responding to allegations of sexual abuse within Kenyan schools. These procedures are intended for use by all teachers and other TSC agents involved in reporting sexual abuse in the school setting.

The continued prevalence of sexual abuse against learners in Kenya, particularly schoolgirls, and its devastating effects on learners’ ability to exercise their fundamental rights to education, equality before the law and non-discrimination, health, life, dignity, freedom from degrading treatment, and freedom from violence, as enshrined in the Constitution of Kenya (2010), has led to the development of these procedures. The TSC is committed to maintaining a safe learning environment, free from violence, and requires teachers in the learning environment to adhere to these procedures in reporting all instances of sexual abuse.

To effectively respond to and prevent sexual abuse, a coordinated and cooperative approach between teachers, TSC agents, local police, and other persons critical in the sexual & gender-based violence supply chain, is needed. In this regard, the TSC calls upon all teachers involved in the reporting process to utilise these procedures. Only such an approach will safeguard the emotional, mental, and physical well-being of learners. As such, these procedures will assist teachers and other TSC agents to put into effect the reporting requirements outlined in the Learner Protection Guidelines of 2017.

**TEACHERS SERVICE COMMISSION KENYA
STANDARD OPERATING PROCEDURES
REPORTING MECHANISM ON LEARNER PROTECTION**

TABLE OF CONTENTS

- 1. Purpose**
- 2. Scope**
- 3. Authority**
- 4. Definitions**

- 5. Timing of Reporting**
- 6. Procedures for Reporting Sexual Abuse**
 - 6.1. Reporting to the TSC**
 - 6.2. Reporting to the Police**
- 7. Procedures for Supporting Learner Survivors of Sexual Abuse**
 - 7.1. Referral to a Medical Facility**
 - 7.2. Referral to Counselling**
 - 7.3. Referral to Legal Aid Provider**
 - 7.4. Referral to Other Government Ministries**
- 8. Preservation of Evidence**
- 9. Confidentiality**
 - 9.1. Reporters of Sexual Abuse**
 - 9.2. Investigators of Sexual Abuse**

Appendix A – Reporting Pathway for Sexual Abuse of a Learner by a Teacher

Appendix B – Examples of Sexual Abuse

Appendix C – Learner Protection Case Recording Form

Appendix D – Checklist for TSC Official Receiving Report of Sexual Abuse

Annex – Directory

1. Purpose

The purpose of these Standard Operating Procedures on Reporting (“SOPs” or “Standard Operating Procedures”) is to promote a safe learning environment, free from sexual abuse, intimidation, and exploitation. The Teachers Service Commission (“TSC”) recognises that sexual abuse in school continues to be a problem in both public and private educational institutions in Kenya and violates the learner’s fundamental rights as enshrined in Kenya’s Constitution, the TSC Act, and the TSC Code of Regulations, as well as international and regional human rights treaties to which Kenya is a state party. These SOPs are intended to better protect those rights, including learners’ right to education, right to equality and non-discrimination, right to dignity, right to be free from degrading treatment, right to health, and right to life, and freedom from violence. These Procedures also serve as an affirmative step toward fulfilling the Kenyan Government’s obligations under international law and its own Vision 2030 and development indicators under the Sustainable Development Goals in order to ensure the realisation of these human rights.

These Standard Operating Procedures on Reporting give clear direction and guidance to teachers and other TSC agents involved in reporting sexual abuse in the school setting in implementing the Learner Protection Guidelines and to upholding the rights and security of each learner under their supervision. The TSC adopts these Procedures with a commitment to: (1) Eliminating, preventing and effectively responding to cases of sexual abuse against learners in schools (2) Carrying out efficient, timely and transparent investigations into allegations of sexual abuse against learners in schools (3) Exercising its disciplinary function to the full extent prescribed under the law in cases of sexual abuse against learners in schools (4) Promoting a safe learning environment, in which sexual abuse is not tolerated; and (5) Cultivating a climate where teachers and students alike are well-informed and supported in reporting sexual abuse. These procedures will take immediate effect upon adoption.

2. Scope

The Standard Operating Procedures apply to all teachers registered by the TSC and other TSC agents. The procedures set forth herein apply whether the sexual abuse occurs on or off school grounds, in the public or private sphere. These Operating Procedures establish a standard for reporting all incidents of sexual abuse occurring on or after the effective date of adoption of these procedures, regardless of when the act(s) occurred.

3. Authority

The Constitution of Kenya (Rev. 2010)
Teachers Service Commission Act (2012)
Teachers Service Commission Code of Regulations (2015)
The Sexual Offenses Act (2006)
Teachers Service Commission Learner Protection Guidelines for Teachers (2017)

4. Definitions

In these Standard Operating Procedures, unless the context otherwise requires—

“learner” means any person, regardless of age, who is undergoing instruction in any educational institution at any level, including pre-primary, primary, secondary and tertiary, whether public or private.

“school personnel” means all non-teaching school employees, including but not limited to, administrative staff, nurses, counsellors, school food service workers, groundkeepers, and custodians.

“sexual abuse” means sexual intercourse or any other penetration of any part of the learner’s or teacher’s body by any object or body part; touching of a learner’s body or making a learner touch the teacher’s or any other person’s body in a sexual nature; exhibiting any object or part of the body to be seen by the learner in a sexual nature; making a learner exhibit his or her body in a sexual nature so as to be seen by the teacher or any other person; any form of inducement, threats, or violence to force a learner to engage in any sexual activity; any sexually suggestive word, sound, language, or gesture, whether made orally or in writing; exposing of pornographic material; any form of flirtation; repeatedly following, watching, or contacting a learner either directly or through electronic, digital, or any other means with the intent to commit a sexual offence or any other act of sexual abuse.

“sexual grooming” means a process deliberately undertaken by a teacher or any other person with the aim of befriending, influencing and/or coercing a learner into performing an act that leads to sexual abuse. Such acts include but are not limited to spending inappropriate one-on-one time with a learner; enticing a learner using gifts, money, or a promise of higher grades; showing special attention to one learner over other learners; assigning special tasks to a learner, such as fetching water, cooking, cleaning, and preparing tea; sending of learners to the teacher’s house.

“sexual harassment” with respect to a learner means any act of a sexual nature, including sexual advances or requests, by a teacher in the form of words, gestures, sounds, cat-calls, jokes or comments, including innuendos, whether made orally or in writing; making a learner exhibit his or her body so as to be seen by the teacher or any other person; or exhibiting an image, object, or part of body so as to be seen by the learner; or repeatedly following, watching, or contacting a learner either directly or through electronic, digital or any other means with the intent to commit a sexual offence or any other act of a sexual nature.

“sexual intercourse” means any physical contact between two individuals involving penetration or stimulation of the genital organs of at least one.

“sexual offence” means any offence prescribed under the Sexual Offences Act.

“teacher” means any person who carries on the profession of teaching in any educational institution, whether public or private, at any level, including pre-primary, primary, secondary, or tertiary.

“**TSC agent**” means any individual who is registered or employed by the TSC, or who acts on behalf of the TSC, including national and county officials.

5. Timing of Reporting

Any teacher or other TSC agent with reasonable grounds to believe that any sexual abuse, sexual harassment or sexual grooming as defined in these procedures, or any sexual offence within meaning of the Sexual Offences Act, has occurred against a learner, shall report the abuse within 72 hours.

6. Procedures for Reporting Sexual Abuse

6.1. Reporting to the TSC: Any teacher or other TSC agent who has reasonable grounds to believe that any act of sexual abuse, sexual harassment or sexual grooming as defined in these procedures or any sexual offence within the meaning of the Sexual Offences Act has been committed against a learner by a teacher or other TSC agent or school personnel, must report such knowledge or belief to the TSC office in the county in which the learner’s educational institution is situated or the TSC headquarters in Nairobi.

6.1.1. Reports can be made by one of the following means: in-person, by phone, typed via e-mail, or handwritten. If the report is handwritten, the reporting individual must include the date that the report was written

6.1.2. Anyone who makes a report of sexual abuse of a learner, must also complete a Learner Protection Case Recording Form, found in Appendix C. This form must be completed regardless of the means in which the report is submitted to the TSC office under 6.1.1.

6.1.3. The Learner Protection Case Recording Forms will be made available at every school’s administrative or other designated office, online at the TSC’s website, and at the reception/information desk of each county TSC office and TSC the TSC headquarters in Nairobi.

6.1.4. Each reporting individual is obligated to answer all questions fully and honestly when completing any report.

6.2. Reporting to the Police: Any teacher or other TSC agent who has reasonable grounds to believe that another teacher or other TSC agent or school personnel has committed any sexual offence within the meaning of the Sexual Offences Act and/or

any of the following forms of sexual abuse against a learner, must also report such belief to the police:

- i. Sexual intercourse or any other penetration of any part of the learner's or teacher's body by any object or body part;
- ii. Touching of a learner's body or making a learner touch the teacher's or any other person's body in a sexual nature;
- iii. Exhibiting any image, object or part of the body to be seen by the learner in a sexual nature;
- iv. Making a learner exhibit his or her body in a sexual nature so as to be seen by the teacher;
- v. Any form of inducement, threats, or violence to force a learner to engage in any sexual activity;
- vi. Exposing pornographic material;
- vii. Repeatedly following, watching, or contacting a learner, either directly or through electronic, digital, or any other means with the intent to commit a sexual offence.

6.2.1. A directory of relevant police contact information may be found in the Annex attached to these Standard Operating Procedures.

7. Procedures for Supporting Learner Survivors of Sexual Abuse

- 7.1. Referral to a Medical Facility:** In cases of sexual abuse where penetration has likely occurred, including sexual intercourse, reporting teachers or other TSC agents should recommend that the learner seek treatment at a medical facility within 72 hours of the abuse, to allow for the proper gathering of medical evidence and to reduce the risks of HIV infection and pregnancy.
- 7.2. Referral to Counselling Services:** In all cases of sexual abuse, reporting teachers or other TSC agents, where possible, should recommend that the learner victim seek counselling, and refer the learner to a counsellor or the National Childline Helpline Number, 116.
- 7.3. Referral to Legal Aid Provider:** In all cases of sexual abuse which must be reported to the police, reporting teachers or other TSC agents should refer the learner to a legal aid organisation and/or contact the legal aid organization at the request of the learner.
- 7.4. Referral to Government Ministries:** In all cases of sexual abuse which must be reported to the police, reporting teachers or

other TSC agents should also make a report to the Department of Children's Services and the Ministry of Education, for a determination of whether the learner should be transferred to another institution of learning away from the current abusive environment.

8. Preservation of Evidence

[To be completed by the Teachers Service Commission, with information from CREAM.]

9. Confidentiality

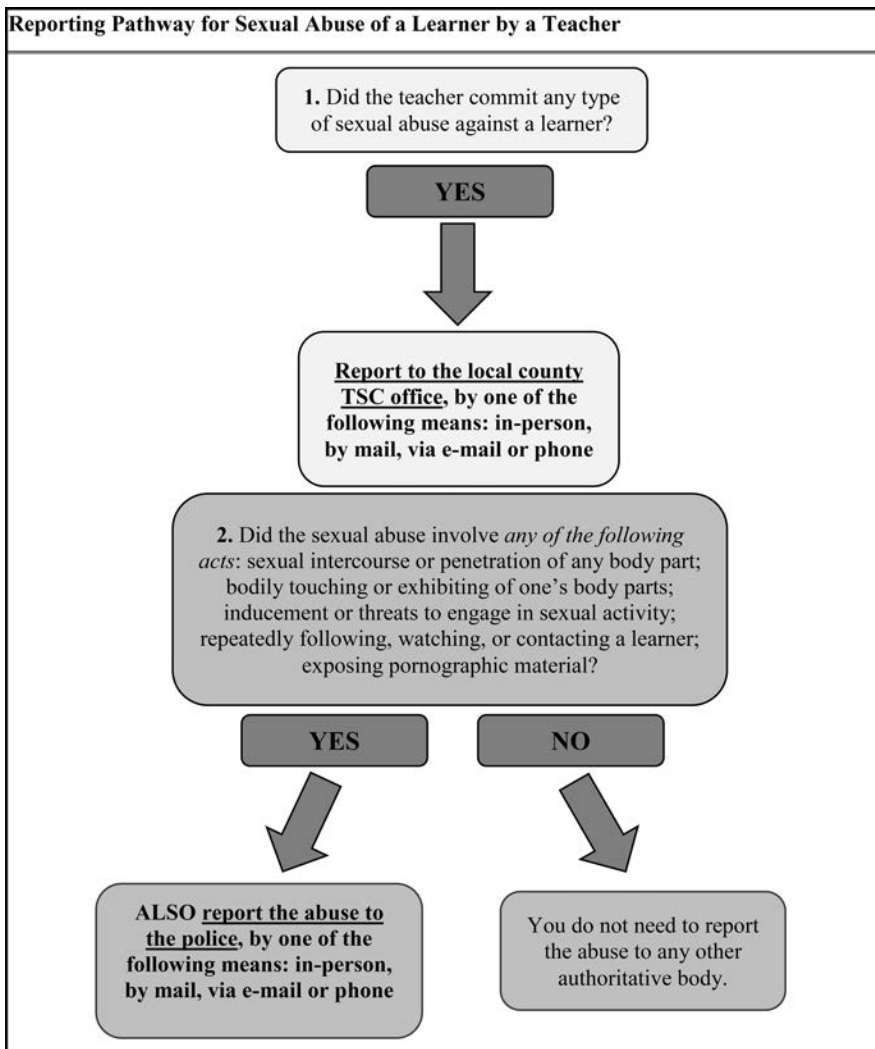
In an effort to protect the identity of learners who are survivors and remove barriers to reporting, the TSC requires that all teachers and other TSC agents adhere to strict confidentiality regarding all matters related to the issue of sexual abuse that they are reporting. Due to the sensitive nature of such reports, the individual reporter, the TSC, and the school involved must ensure that any information pertaining to the incident be handled in a secure and effective manner. This means that any teacher or TSC agent reporting sexual abuse or suspicion thereof, shall not reveal to any other teacher, school personnel, or any other person the identities of either the teacher(s) or learner(s) involved. The reporting teacher shall only reveal the identities of the perpetrator(s) and the victim(s) to the relevant TSC County Office and, if required by these procedures, to the police, or as directed by a judge or magistrate.

9.1. Reporters of Sexual Abuse: To the extent permitted by law, reporters must limit information-sharing to only those individuals directly responsible for handling the school's investigation into allegations of sexual abuse. Reporting individuals are prohibited from disclosing any information not contained within the public record about the survivor to teachers, students, the press, family members, or even psycho-social healthcare providers, without the written permission of the survivor, or the parents or guardian, in the case of minors.

9.2. Investigators of Sexual Abuse: All teachers and TSC agents involved in the investigation or handling of a report, are required to maintain confidentiality and limit information disclosure regarding the process or allegations, to only those teachers, other TSC agents, police, and individuals from the Office of the Director of Public Prosecution directly involved in the investigation.

- 9.2.1. All teachers and TSC agents will be required to sign an agreement of confidentiality, pledging to keep this information private, during and after employment.
- 9.2.2. All statements made by, and documents received from, the reporter, shall be kept confidential during and after the investigation.

APPENDIX A



APPENDIX B

The following examples are meant to be illustrative, not exhaustive.

Examples of Sexual Abuse to Report to the TSC and Police:

A teacher tells a learner she will get a good grade in his class if she lets him touch her breasts.

A teacher tells a learner he/she will give her money if that learner performs oral sex on the teacher.

A teacher forces a learner to sit in his/her lap.

A teacher shows sexually explicit material to a learner or leaves the material in a place where a learner would be likely to access it.

A teacher moves close to a learner seated at a desk and grazes/touches her breast or places his hand on her thigh.

A teacher touches a learner's genitals as a form of punishment.

A teacher sends a learner to the staff room to go get books, follows the learner to the staff room, and forces the learner to have sex with him/her.

Examples of Sexual Abuse to Report only to the TSC:

A teacher leaves a note in a learner's book when he/she returns that learner's homework and says he/she wants to date the learner or meet the learner later privately.

A teacher suggestively compliments a learner such as specifically praising that learner's physical appearance.

A teacher whistles or catcalls at a learner.

A teacher makes suggestive gestures to a learner such as blowing kisses, rubbing hands over his/her own body, or unzipping or unbuttoning items of his/her own clothing.

A teacher says to a learner, "Go to my house after school and cook for me."

A teacher asks a learner to go to that teacher's home to fetch his/her books.

A teacher provides a gift or buys snacks or treats for a particular learner.

A teacher looks at a learner in a suggestive manner, such as looking a learner's body up and down or staring at her breasts.

THE HUMAN RIGHTS OF KENYAN SCHOOL GIRLS

A teacher sends a learner a sexually inappropriate text message.
A teacher asks a student to stay after school and tells her she's beautiful and that he would like to marry her.
A teacher remarks on the size of a learner's breasts.

APPENDIX C

Learner Protection Case Recording Form

Report ID	
	<i>The following fields are to be filled out by the reporting individual:</i>
Date of Report	
Name of Offender	
Name(s) of Learner(s)	
Details of Incident/Basis for Suspicion of Abuse	
Approximate Date of Incidents(s) (if known)	
Referral Made to Medical Facility of Counsellor? (If yes, indicate when and to whom or which facility)	
Witnesses of any other individuals involved?	
Other Notes/Information	
	<i>The following section is to be filled out by the TSC Office:</i>
Name of Personnel Receiving the Form or Conducting Intake By Phone	

CONTINUED	
Report ID	
Date Report Received	
Method by Which Report Was Submitted	
Additional Action Required	
Signature	

APPENDIX D

Checklist for TSC Official Receiving Report of Sexual Abuse

- ✓ Offender(s) and learner(s) clearly identified?
- ✓ Name, designation, and signature of the person completing the intake report recorded?
- ✓ Date and time of any incidents or when a concern was observed recorded?
- ✓ Incident described in sufficient detail, i.e. no further clarification necessary?
- ✓ Fact, opinion, and hearsay clearly identified and distinguished?
- ✓ Written in a professional manner without value judgements, stereotyping, or discrimination?
- ✓ The record can include an attached approximate body map (if relevant) to show any visible injuries/marks.

ANNEX

Directory

Teachers Service Commission
Upper Hill
Kilimanjaro Road
Private Bag
Nairobi, Kenya
Telephone: 2892000

Central Police Station
Moi Ave., Nairobi, Kenya
Telephone: 20225685

[Should the TSC choose to adopt these draft SOPs, contact information for the county TSC offices and other police stations should be added here in the finalization of the document.]

APPENDIX C

THE TEACHERS SERVICE COMMISSION (AMENDMENT)
BILL, 2018

ARRANGEMENT OF CLAUSES

Clause

PART I—PRELIMINARY

1—Short title and Commencement.

PART II—MISCELLANEOUS PROVISIONS

2—Amendment of section 2 of Cap. 212.

3—Amendment of section 11 of Cap. 212.

4—Amendment of section 27 of Cap. 212.

5—Amendment of section 30 of Cap. 212.

6—Amendment to section 31 of Cap. 212.

7—Amendment of the Third Schedule of Cap. 212.

**THE TEACHERS SERVICE COMMISSION (AMENDMENT)
BILL, 2018**
**A Bill for AN ACT of Parliament to amend the Teachers Service
Commission Act.**

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as Teachers Service Commission (Amendment) Act, 2018.
2. The Teacher Services Commission Act, 2012 (in this Act referred to as “the Principal Act”) is amended in section 2(1) by—
 - (a) deleting the definition of the term “learner” and substituting therefor the following new definition—

“learner” means any person, regardless of age, who is undergoing instruction in any educational institution at any level, including pre-primary, primary, secondary and tertiary, whether public or private;
 - (b) inserting the following definition of “sexual grooming”—

“sexual grooming” means a process deliberately undertaken by a teacher with the aim of befriending, influencing, and/or coercing a learner into performing any sexual activity; such acts include but are not limited to—

 - (i) spending inappropriate one-on-one time with a learner;
 - (ii) enticing a learner using gifts, money or a promise of higher grades;
 - (iii) showing special attention to one learner over other learners;
 - (iv) assigning special tasks to a learner such as fetching water, cooking, cleaning, and preparing tea; or F.
 - (v) sending of learners to the teacher’s house.
 - (c) inserting the following definition of “sexual harassment”—

“sexual harassment” with respect to a learner means any act of a sexual nature, including sexual advances or requests, by a teacher in the form of—

 - (i) words, gestures, sounds, cat-calls, jokes or comments, including innuendos, whether made orally or in writing;
 - (ii) making a learner exhibit any part of his or her body so as to be seen by the teacher or any other person; or
 - (iii) exhibiting any image, object, or part of the body so as to be seen by the learner; or
 - (iv) repeatedly following, watching, or contacting a learner either directly or through electronic, digital or any other means with the intent to commit a sexual offence or any other act of a sexual nature.

- (d) inserting the following definition of “sexual intercourse”—
“sexual intercourse” means any physical contact between two individuals involving penetration or stimulation of the genital organs of at least one.
 - (e) deleting the definition of the term “teacher” and substituting therefor the following new definition —
“teacher” means any person who carries on the profession of teaching in any educational institution, whether public or private, at any level, including pre-primary, primary, secondary and tertiary.
3. Section 11 of the Principal Act is amended by—
- (1) deleting subsection (g) and substituting therefor the following new subsections—
 - (g) register trained teachers;
 - (h) recruit and employ registered teachers;
 - (i) assign teachers employed by the Commission for service in any public school or institution;
 - (j) promote and transfer teachers;
 - (k) exercise disciplinary control over teachers;
 - (l) terminate the employment of teachers;
 - (m) ensure teachers comply with both the Learner Protection Guidelines on Sexual Abuse and Standard Operating Procedure Reporting Mechanism on Learner Protection Guidelines;
 - (n) do all such other things as may be necessary for the effective discharge of its functions and the exercise of its powers.
4. Section 27 of the Principal Act is amended by—
- (1) amending subsection (c) by adding after the word, “learner,” “in a court of law”;
 - (2) inserting the following new section immediately after subsection (c)—
 - (d) has been found guilty of sexual misconduct against a learner through disciplinary proceedings instituted under this Act;
 - (3) renaming the existing subsections from (d), (e), and (f) to (e), (f), and (g), respectively.
5. Section 30 of the Principal Act is amended by—
- (a) deleting subsection (1) and substituting therefor the following new subsection—
 - (1) The Commission may remove from the register the name of any person—

- (a) who the Commission is satisfied, after inquiry, has obtained registration through fraudulent means;
 - (b) who suffers from such physical or mental illness or infirmity which renders the person incapable of performing the duties of a teacher;
 - (c) who the Commission has directed should be removed as a result of disciplinary proceedings instituted under this Act;
- (b) inserting the following new section immediately after subsection (1)—
- (2) The Commission shall remove from the register the name of any person—
 - (a) who has died;
 - (b) who has been found guilty of sexual misconduct against a learner in a disciplinary proceeding instituted under this Act;
 - (c) who has been convicted of a sexual offence against a learner in a court of law;
 - (d) who has been convicted of any other criminal offence, which, in the opinion of the Commission, renders the person unfit to be a teacher.
 - (c) renumbering the existing subsections (2), (3), (4), and (5) to (3), (4), (5), and (6), respectively.
- 6.** Section 31 of the Principal Act is amended by inserting the following new subsections immediately after subsection (2)—
- (3) The Commission shall never reinstate a teacher in the register pursuant to subsection (1) or (2)—
 - (a) who has been convicted of a sexual offence against a learner in a court of law; or
 - (b) who has been found guilty of sexual misconduct against a learner in a disciplinary proceeding instituted under this Act.
- 7.** The Third Schedule Disciplinary Offenses of the Principal Act is amended by—
- (1) deleting subsection (a) and substituting therefor the following new subsection—
 - (a) Sexual misconduct against a learner, including but not restricted to—
 - (i) flirtation;
 - (ii) sexual grooming;
 - (iii) sexual harassment;

- (iv) touching of a learner's body or making the learner touch the teacher's body in a sexual nature;
 - (v) sexual intercourse or any other penetration of any part of the learner's or teacher's body by any object or body part;
 - (vi) any form of inducement, threats, or violence to force a learner to engage in any sexual activity.
- (2) inserting the following subsections (f) and (g) —
- (f) failure to report any actual knowledge or reasonable suspicion that an act of sexual misconduct as set forth in this Act and the Code of Regulations for Teachers or any sexual offence within the meaning of the Sexual Offences Act has been committed against a learner by a teacher, other TSC agent, or school personnel; and
 - (g) retaliates against a learner or against another teacher or TSC agent for reporting sexual misconduct pursuant to these Regulations, the Learner Protection Guidelines, and the Standard Operating Procedures Reporting Mechanism on Learner Protection.
- (3) renumbering the existing subsection (f) to (h).

APPENDIX D

Teachers Service Commission Act, 2012

This document was prepared by the International Women's Human Rights Clinic (IWHRC) of Georgetown University Law School for the purposes of review by the TSC. The IWHRC converted a PDF of the Teachers Service Commission Act, 2012 into a Word document for the purposes of the reader to be able to readily see the proposed changes reflected in the draft Teachers Service Commission (Amendment) Bill, 2018. The changes are identified using underlines for language added to the 2012 Act through the proposed bill and strike-throughs for removed language.

NO. 20 OF 2012

TEACHERS SERVICE COMMISSION ACT

ARRANGEMENT OF SECTIONS

Section

PART I – PRELIMINARY

1. Short title.
2. Interpretation.

**PART II – COMPOSITION AND
ADMINISTRATION**

3. Incorporation of the Commission.
4. Guiding principles.
5. Membership of the Commission.
6. Qualification for appointment of chairperson and members.
7. Disqualification from membership.
8. Procedure for nomination and appointment.
9. Oath of office.
10. Vacancy.
11. Functions of the Commission.
12. Powers of the Commission.
13. Committees of the Commission.
14. Units of the Commission.
15. Conduct of the affairs of the Commission.
16. Appointment and duties of the Secretary.
17. Removal of the Secretary.
18. Secretariat and staff of the Commission.
19. The common seal of the Commission.
20. Delegation by the Commission.
21. Legal proceedings against the Commission.
22. Protection from personal liability.

**PART III – REGISTRATION AND DISCIPLINE OF
TEACHERS AND COMPLIANCE WITH TEACHING STANDARDS**

- 23. Commission to register teachers.
- 24. Register of teachers.
- 25. Application for registration.
- 26. Qualifications for registration as a teacher.
- 27. Grounds for refusal to register.
- 28. Certificate of registration.
- 29. Correction of register.
- 30. Removal of name from the register.
- 31. Reinstatement of name in the register.
- 32. Publication of the register.
- 33. Discipline of registered teachers.
- 34. Disciplinary action.
- 35. Compliance with teaching standards.

PART IV – FINANCIAL PROVISIONS

- 36. Funds of the Commission.
- 37. Remuneration and allowances.
- 38. Annual estimates.
- 39. Financial year of the Commission.
- 40. Accounts and audit.

PART V – MISCELLANEOUS PROVISIONS

- 41. Annual report.
- 42. Management of information.
- 43. Publicity.
- 44. Offences.
- 45. General penalty.
- 46. Review.
- 47. Regulations.
- 48. Code of conduct.
- 49. Repeal of Cap. 212.
- 50. Saving and transition.

THE HUMAN RIGHTS OF KENYAN SCHOOL GIRLS

SCHEDULES

- | | |
|------------------------|---|
| FIRST SCHEDULE | – OATH/AFFIRMATION OF THE
OFFICE OF CHAIRPERSON/MEMBER/
SECRETARY |
| SECOND SCHEDULE | – PROVISIONS RELATING TO THE
CONDUCT OF BUSINESS AND
AFFAIRS OF THE COMMISSION |
| THIRD SCHEDULE | – OFFENCES |

TEACHERS SERVICE COMMISSION ACT

NO. 20 OF 2012

Date of assent: 24th August, 2012

Date of commencement: 31st August, 2012

AN ACT of Parliament to make further provision for the Teachers Service Commission established under Article 237 of the Constitution, its composition; functions and powers; the qualifications and procedure for appointment of members; and for connected purposes

[Act No. 20 of 2012.]

ENACTED by the Parliament of Kenya as follows—

PART I – PRELIMINARY

1. Short Title

This Act may be cited as the Teachers Service Commission Act, 2012.

2. Interpretation

(1) In this Act, unless the context otherwise requires—

“chairperson” means the chairperson of the Commission appointed under the Constitution and section 8;

“Commission” means the Teachers Service Commission established under Article 237 of the Constitution;

“head teacher” means the lead educator or administrator in a primary school level educational institution appointed by the Commission as such and responsible for the implementation of the educational policy guidelines and professional practices;

~~“learner” means a person undergoing instruction in an educational institution;~~

“learner” means any person, regardless of age, who is undergoing instruction in any educational institution at any level, including pre-primary, primary, secondary and tertiary, whether public or private;

“member” means a member of the Commission appointed in accordance with the Constitution and section 8 of this Act;

“principal” means the lead educator or administrator in a post-primary school level educational institution appointed by the Commission as such and responsible for the implementation of educational policy guidelines and professional practices;

“register” means the register of teachers as provided for by section 24;

“Secretary” means the Secretary to the Commission appointed by the Commission under Article 250(12) of the Constitution in accordance with the procedure set out in section 16;

“sexual grooming” means a process deliberately undertaken by a teacher with the aim of befriending, influencing, and/or coercing a learner into performing any sexual activity; such acts include but are not limited to—

- (i) spending inappropriate one-on-one time with a learner;
- (ii) enticing a learner using gifts, money or a promise of higher grades;
- (iii) showing special attention to one learner over other learners;
- (iv) assigning special tasks to a learner such as fetching water, cooking, cleaning, and preparing tea; or
- (v) sending of learners to the teacher’s house;

“sexual harassment” with respect to a learner means any act of a sexual nature, including sexual advances or requests by a teacher, in the form of—

- (i) words, gestures, sounds, cat-calls, jokes or comments, including innuendos, whether made orally or in writing;
- (ii) making a learner exhibit any part of his or her body so as to be seen by the teacher or any other person; or
- (iii) exhibiting an image, object, or part of the body so as to be seen by the learner; or
- (iv) repeatedly following, watching, or contacting a learner either directly or through electronic, digital or any other means with the intent to commit a sexual offence or any other act of a sexual nature;

“sexual intercourse” means any physical contact between two individuals involving penetration or stimulation of the genital organs of at least one.

“teacher” means a person who has been trained as a teacher as provided for in law and registered as a teacher;

“teacher” means any person who carries on the profession of teaching in any educational institution, whether public or private, at any level, including pre-primary, primary, secondary and tertiary;

“teaching certificate” means a certificate issued to a registered teacher under section 35(2) (b) of this Act;

“teaching service” means the collectivity of all individuals registered by the commission and engaged in the teaching profession whether employed by the Commission or not; and

“teaching standards” mean standards of teaching prescribed by the Commission under section 35 and the regulations made thereunder.

- (2) Until after the first general elections under the Constitution, references in this Act to the expression “Cabinet Secretary” and “Principal Secretary” shall be construed to mean “Minister” and “Permanent Secretary” respectively.

PART II – COMPOSITION AND ADMINISTRATION

3. Incorporation of the Commission

- (1) In addition to the powers of the Commission under Article 252 of the Constitution, the Commission shall have the power to—
 - (a) acquire, hold, charge and dispose of movable and immovable property; and
 - (b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.
- (2) The headquarters of the Commission shall be in the capital city, but the Commission shall establish offices in each county.

4. Guiding principles

In the performance of its functions and the exercise of its powers, the Commission shall—

- (a) be guided by the national values and principles of governance under Article 10 and the values and principles of public service under Article 232 of the Constitution, taking into account the best interests of the child under Article 53 of the Constitution; and
- (b) subject to Article 249(2) of the Constitution, consult with State and non-State actors in the education sector.

5. Membership of the Commission

- (1) The Commission shall consist of a chairperson and eight other members appointed in accordance with the Constitution and the provisions of section 8.
- (2) The chairperson and members of the Commission shall serve on a fulltime basis for a non-renewable term of six years.

6. Qualification for appointment of chairperson and members

- (1) A person shall be qualified for appointment as the chairperson if such person—
 - (a) holds a degree in education from a university recognized in Kenya;

- (b) has knowledge and experience of at least fifteen years in matters relating to education and training; and
- (c) meets the requirements of Chapter Six of the Constitution.
- (2) A person shall be qualified for appointment as a member if such person—
 - (a) holds a degree from a university recognized in Kenya;
 - (b) has knowledge and experience of at least ten years in matters relating to any of the following fields—
 - (i) education;
 - (ii) governance;
 - (iii) management; or
 - (iv) law; and
 - (c) meets the requirements of Chapter Six of the Constitution.
- (3) In appointing members of the Commission, the President shall ensure that at least two-thirds of the members have experience in education.

7. Disqualification from membership

A person shall not be qualified for appointment as a chairperson or member if the person—

- (a) is a serving member of Parliament or County Assembly;
- (b) is a serving member of a governing body of a political party;
- (c) is a member of a local authority; or
- (d) has been found in accordance with any law to have misused or abused a State office or public office or in any way to have contravened Chapter six of the Constitution.

8. Procedure for nominations and appointment

- (1) Within fourteen days of the commencement of this Act, or whenever a vacancy arises in the Commission, the President in consultation with the Prime Minister shall by notice in the Gazette declare a vacancy and constitute a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.
- (2) The selection panel constituted under subsection (1) shall consist of—
 - (a) a chairperson not being a public officer appointed by the President;
 - (b) the Cabinet Secretary in the Ministry responsible for matters relating to education or his representative;
 - (c) the Attorney General or his representative;
 - (d) the Cabinet Secretary in the Ministry responsible for public service or his representative;

- (e) one person nominated by the Federation of Kenya Employers;
 - (f) two persons, one man and one woman, nominated by the registered trade unions representing the interests of registered teachers;
 - (g) one person nominated by a recognised association of private schools; and
 - (h) a prominent educationist not serving in Government appointed by the Cabinet Secretary.
- (3) A person appointed under subsection (2) (f) shall not be a serving official of the nominating union.
 - (4) The chairperson shall convene the first meeting of the selection panel within seven days of his or her appointment.
 - (5) The selection panel shall, within seven days of convening, invite applications from persons who qualify for nomination and appointment as chairperson or member of the Commission by advertisement in at least two daily newspapers of national circulation.
 - (6) The selection panel shall within seven days of receipt of applications under subsection (5)—
 - (a) consider the applications to determine their compliance with the provisions of the Constitution and this Act;
 - (b) shortlist the applicants;
 - (c) interview the shortlisted applicants; and
 - (d) submit the names of three qualified applicants for the position of chairperson and thirteen qualified applicants for the position of a member to the President.
 - (7) The President shall, within seven days of receipt of the names forwarded under subsection (6), nominate one person and eight others for appointment as chairperson and members of the Commission and forward the names to the National Assembly for approval.
 - (8) The National Assembly shall, within twenty-one days of its sitting, consider each nomination received under subsection (7) and approve or reject any of them.
 - (9) Where the National Assembly approves the nominees, the Speaker of the National Assembly shall, within five days forward the name of the approved applicants to the President for appointment.
 - (10) The President shall, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly within seven days of receipt of the approved nominees from the Speaker of the National Assembly.

- (11) Where the National Assembly rejects any nominee, the Speaker shall within five days communicate its decision to the President and request the President to submit fresh nominations from amongst the persons shortlisted and forwarded by the selection panel under subsection (6).
- (12) If the National Assembly rejects any or all of the subsequent nominees submitted by the President for approval under subsection (10), the provisions of subsections (5) and (6) shall apply.
- (13) The panel shall stand dissolved upon the appointment of the chairperson and members under subsection (10).
- (14) Where the provisions of subsection (11) apply, the panel shall continue to exist but shall stand dissolved upon the requisite appointments being made.
- (15) The ministry responsible for public service shall provide secretariat services to the panel.
- (16) In nominating or appointing a person as a member of the Commission, the panel and the President shall—
 - (a) observe the principle of gender equity, ethnic and other diversities of the people of Kenya, and shall ensure equality of opportunity for persons with disabilities; and
 - (b) take into account the national values and principles set out in Articles 10, 27 and 232 of the Constitution.
- (17) Until after the first general election under the Constitution, the President shall in nominating persons for appointment as chairperson or member of the Commission act in consultation with the Prime Minister.
- (18) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister may by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.
- (19) Subject to this section, the panel may determine its own procedure.

9. Oath of office

The chairperson, members and the Secretary shall each make and subscribe before the Chief Justice the oath or affirmation set out in the First Schedule.

10. Vacancy

- (1) The office of the chairperson or member shall become vacant if the holder—
 - (a) dies;

- (b) by a notice in writing addressed to the President resigns from office;
- (c) is convicted of a criminal offence and sentenced to a term of imprisonment of not less than six months; or
- (d) is removed from office in accordance with Article 251 of the Constitution.
- (2) The President shall notify every resignation, vacancy or removal as the case may be in the Gazette within fourteen days of such vacancy.
- (3) Where a vacancy occurs in the membership of the Commission under subsection (1), the appointment procedure provided for in section 8 shall with necessary modifications, apply.
- (4) A member appointed under subsection (3) shall serve for a non-renewable term of six years.

11. Functions of the Commission

In addition to the functions set out in Article 237 of the Constitution, the Commission shall—

- (a) formulate policies to achieve its mandate;
- (b) provide strategic direction, leadership and oversight to the secretariat;
- (c) ensure that teachers comply with the teaching standards prescribed by the Commission under this Act;
- (d) manage the payroll of teachers in its employment;
- (e) facilitate career progression and professional development for teachers in the teaching service including the appointment of head teachers and principals;
- (f) monitor the conduct and performance of teachers in the teaching service; and
- ~~(g) do all such other things as maybe necessary for the effective discharge of its functions and the exercise of its powers.~~
- (g) register trained teachers;
- (h) recruit and employ registered teachers;
- (i) assign teachers employed by the Commission for service in any public school or institution;
- (j) promote and transfer teachers;
- (k) exercise disciplinary control over teachers;
- (l) terminate the employment of teachers;
- (m) ensure teachers comply with both the Learner Protection Guidelines on Sexual Abuse and Standard Operating Procedure Reporting Mechanism on Learner Protection Guidelines;

(n) do all such other things as may be necessary for the effective discharge of its functions and the exercise of its powers.

12. Powers of the Commission

- (1) The Commission shall have all powers necessary for the execution of its functions under the Constitution and this Act.
- (2) In the performance of its functions and in the exercise of its powers, the Commission—
 - (a) may inform itself in such manner as it considers appropriate;
 - (b) may receive written or oral statements from members of the public;
 - (c) may require the attendance of a person before it or its committee; and
 - (d) shall not be bound by the strict rules of evidence.

13. Committees of the Commission

- (1) The Commission may from time to time establish such committees as may be necessary for the better carrying out of its functions and the exercise of its powers.
- (2) Without prejudice to the generality of subsection (1), the committees may deal with issues relating to recruitment, promotion, dispute resolution and discipline of registered teachers.
- (3) The Commission may co-opt into the membership of committees established under subsection (1) any person whose knowledge and skills are necessary for the proper performance of the functions of the Commission.
- (4) A person co-opted under subsection (3) may attend the meetings of the committee and participate in its deliberations but shall have no right to vote at the meeting.
- (5) In addition to the committees established under subsection (1), the Commission shall constitute a consultative committee on the terms and conditions of service of registered teachers employed by the Commission.
- (6) The committee constituted under subsection (5) shall consist of —
 - (a) a chairperson who shall be an experienced educationist appointed by the Commission;
 - (b) a member of the Commission;
 - (c) the Secretary to the Commission;
 - (d) a representative of the Principal Secretary in the Ministry responsible for education;
 - (e) a representative of the Principal Secretary in the Ministry responsible for finance;

- (f) a representative of the Principal Secretary in the Ministry responsible for public service;
 - (g) five persons nominated by trade unions representing the interests of registered teachers; and
 - (h) a certified public secretary of good professional standing appointed by the Commission, who shall be the secretary and an ex-officio member of the committee.
- (7) The chairperson, members and secretary appointed under subsection
- (6) (g) and (h) shall serve for a term of three years renewable for one further term.
- (8) The Commission may make regulations to give further effect to this section.

14. Units of the Commission

- (1) The Commission may create within itself such directorates, divisions or units and appoint thereto such staff in accordance with the Regulations.
- (2) Each directorate, division or unit created under subsection (1) shall act in accordance with the mandate approved by the Commission and directives given in writing by the Secretary.

15. Conduct of the affairs of the Commission

- (1) The business and affairs of the Commission shall be conducted in accordance with the Second Schedule.
- (2) Except as provided in the Second Schedule, the Commission may regulate its own procedure.
- (3) The Commission may invite any person to attend any of its meetings and to participate in its deliberations, but such a person shall no right to vote at the meeting.

16. Appointment and duties of the Secretary

- (1) The appointment of the Secretary to the Commission under Article 250(12) of the Constitution shall be through a competitive recruitment process.
- (2) A person shall not qualify for appointment under subsection (1) unless such a person—
 - (a) is a citizen of Kenya;
 - (b) holds a degree in education from a university recognized in Kenya;
 - (c) has had at least ten years' experience in education, administration and management, public administration, human resource or financial management; and

- (d) meets the requirements of Chapter Six of the Constitution.
- (3) A person appointed as a Secretary under subsection (1) shall be a State officer.
- (4) The Secretary shall hold office for a term of five years but shall be eligible for re-appointment for one further term of five years.
- (5) The Secretary shall, in the performance of the functions and duties of office, be responsible to the Commission.
- (6) The Secretary shall be—
 - (a) the head of the secretariat;
 - (b) the accounting officer of the Commission;
 - (c) the custodian of all records of the Commission; and
 - (d) responsible for—
 - (i) executing decisions of the Commission;
 - (ii) assigning duties to and supervising the staff of the Commission;
 - (iii) facilitating, coordinating and ensuring the execution of the Commission's mandate;
 - (iv) ensuring staff compliance with public ethics and values;
 - (v) the proper and diligent implementation of Part IV of this Act; and
 - (vi) the performance of such other duties as may be assigned by the Commission under this Act or any other written law.

17. Removal of the Secretary

- (1) The Secretary may only be removed from office by the Commission, in accordance with the terms and conditions of service, for—
 - (a) inability to perform the functions of the office arising out of physical or mental infirmity;
 - (b) gross misconduct or misbehavior;
 - (c) incompetence or neglect of duty;
 - (d) a violation of the Constitution; or
 - (e) any other ground that would justify removal from office under the terms and conditions of service.
- (2) Before the Secretary is removed under subsection (1), the Secretary shall be given—
 - (a) sufficient notice of the allegations made against him or her; and
 - (b) an opportunity to present his or her case against the allegations, either in person or by a legal representative.

18. Secretariat and staff of the Commission

- (1) There shall be a secretariat of the Commission which shall be headed by the Secretary.

- (2) In addition to the professional, technical and administrative staff appointed by the Commission under Article 252(1)(c) of the Constitution, the Government may, upon the request by the Commission, second to the Commission such number of public officers as may be necessary for the purposes of the Commission.
- (3) Further to subsection (2), the Commission may second its staff to other national government institutions at the request of those institutions.
- (4) A public officer seconded to the Commission shall, during the period of secondment be deemed to be an officer of the Commission and shall be subject only to the direction and control of the Commission.
- (5) The staff of the Commission may be appointed subject to its approved establishment.
- (6) The Commission shall ensure that, in the appointment of members of its staff, not more than two thirds of the staff of the Commission shall be of the same gender taking into account of—
 - (a) persons with disabilities; and
 - (b) regional and ethnic diversity of the people of Kenya.

19. The common seal of the Commission

- (1) The seal of the Commission shall be such device as may be determined by the Commission and shall be kept in the custody of the Secretary and shall not be used except on the order of the Commission.
- (2) The affixing of the seal shall be authenticated by the chairperson and the Secretary or any other person authorized in that behalf by a resolution of the Commission.
- (3) The common seal of the Commission when affixed to a document and duly authenticated shall be judicially and officially noticed and unless the contrary is proved, any necessary order or authorization of the Commission under this section shall be presumed to have been duly given.

20. Delegation by the Commission

Subject to this Act, the Commission may, either generally or in particular case, delegate to any committee or to any member, officer, staff or agent of the Commission the exercise of any of the functions of the Commission under this Act.

21. Legal proceedings against the Commission

- (1) Proceedings against the Commission shall be deemed to be proceedings against the Government and shall be subject to the Government Proceedings Act.

- (2) Any notice or other processes in respect of legal proceedings under subsection (1) shall be served upon the Secretary to the Commission.

22. Protection from personal liability

- (1) No matter or thing done by a member of the Commission or any officer, staff or agent of the Commission shall, if the matter or thing is done in good faith for executing the functions, powers or duties of the Commission, render the member, officer, staff or agent personally liable to any action, claim or demand whatsoever.
- (2) The provisions of subsection (1) shall not relieve the Commission of the liability to pay compensation or damages to any person for any injury suffered by them their property or any of their interests and arising directly or indirectly from the exercise of any power conferred by this Act or by the failure, whether wholly or partially, or from any works.

PART III – REGISTRATION AND DISCIPLINE OF TEACHERS AND COMPLIANCE WITH TEACHING STANDARDS

23. Commission to register teachers

- (1) The Commission shall, in accordance with Article 237 of the Constitution, be responsible for the registration of trained teachers in the teaching service.
- (2) A person shall not engage in the teaching service unless such person is registered as a teacher under this Act.

24. Register of teachers

- (1) The Commission shall cause to be kept a register which shall contain—
 - (a) the names and addresses of every teacher registered under this Act;
 - (b) the qualifications in respect of which the registration is granted; and
 - (c) such other particulars as may from time to time be prescribed by the Commission.
- (2) A register kept under this section shall be a public document.

25. Application for registration

- (1) A person who qualifies to be registered as a teacher under this Act may apply to the Commission in the prescribed manner.
- (2) An application made under subsection (1) shall be accompanied by—

- (a) certified copies of certificates and other documents as are necessary to prove the applicant's qualification for registration; and
 - (b) the prescribed fee.
- (2) Where the Commission declines to register a person under this section, the Commission shall within thirty days notify that person in writing, stating the grounds for the decision.

26. Qualifications for registration as a teacher

A person shall be eligible to be registered as a teacher if such person—

- (a) is of good moral character; and
- (b) holds a relevant certificate issued to him or her under any law relating to education and training or regulations made under this Act.

27. Grounds for refusal to register

The Commission shall not register a person as a teacher if such person—

- (a) does not possess the prescribed qualifications;
- (b) is not of good moral character;
- (c) has been convicted of a sexual offence or an offence committed against a learner in a court of law;
- (d) has been found guilty of sexual misconduct against a learner through disciplinary proceedings instituted under this Act;
- (e) has been convicted of a criminal offence which, in the opinion of the Commission, renders the person unfit to be a teacher;
- (f) is engaged in any activities which, in the opinion of the Commission, are prejudicial to peace, good order or good government in Kenya; or
- (g) suffers from such physical or mental infirmity which in the opinion of a registered medical practitioner, renders the person incapable of performing the duties of a teacher.

28. Certificate of registration

- (1) The Commission shall issue to every teacher who is registered under this Act a certificate of registration in the prescribed form.
- (2) A certificate of registration issued under this section shall be under the seal of the Commission.

29. Correction of register

- (1) The Commission may, from time to time and as soon as is reasonably practicable make such alterations to the register as are necessary to correct any error in the particulars entered in the register.
- (2) An alteration under subsection (1) may be made by the Commission on its own motion or at the request of an interested party.

30. Removal of name from the register

- ~~(1) The Commission may, after inquiry, cause to be removed from the register the name of any person—~~
- ~~(a) who has died;~~
 - ~~(b) who the Commission is satisfied has obtained registration through fraudulent means;~~
 - ~~(c) who has been convicted of a sexual offence or an offence against a pupil or student;~~
 - ~~(d) who has been convicted of a criminal offence which, in the opinion of the Commission, renders the person unfit to be a teacher;~~
 - ~~(e) who the Commission has directed should be removed as a result of disciplinary proceedings instituted under this Act; or~~
 - ~~(f) suffers from such physical or mental illness or infirmity which renders the person incapable of performing the duties of a teacher.~~
- (1) The Commission may remove from the register the name of any person—
- (a) who the Commission is satisfied, after inquiry, has obtained registration through fraudulent means;
 - (b) who suffers from such physical or mental illness or infirmity which renders the person incapable of performing the duties of a teacher;
 - (c) who the Commission has directed should be removed as a result of disciplinary proceedings instituted under this Act.
- (2) The Commission shall remove from the register the name of any person—
- (a) who has died;
 - (b) who has been found guilty of sexual misconduct against a learner in a disciplinary proceeding instituted under this Act;
 - (c) who has been convicted of a sexual offence against a learner in a court of law;
 - (d) who has been convicted of any other criminal offence, which, in the opinion of the Commission, renders the person unfit to be a teacher.
- (3) The Commission shall cause the name and particulars of a teacher whose name is removed from the register under subsection (1) to be published in the Gazette within one month from the date of such removal.

- (4) Subject to the provisions of this Act, the removal of a teacher's name from the register shall be notified by the Commission to the person by registered mail addressed to his or her last known address.
- (5) Where the name of any teacher is removed from the register under this Act, such name shall not be reinstated except by direction of the Commission.
- (6) A teacher whose name has been removed from the register shall cease to be a teacher for purposes of this Act with effect from the date of such removal.

31. Reinstatement of name in the register

- (1) Where the name of any person has been removed from the register, the Commission may, either of its own motion or on the application of the concerned teacher made in the prescribed manner, and in either case after observing due process, direct that—
 - (a) the removal of that teacher's name from the register be confirmed; or
 - (b) the name of the teacher be restored in the register.
- (2) An application under subsection (1) may only be made after the expiry of a period of eighteen months from the date of removal of the name from the register.
- (3) The Commission shall never reinstate a teacher in the register pursuant to subsection (1) or (2)—
 - (a) who has been convicted of a sexual offence against a learner in a court of law; or
 - (b) who has been found guilty of sexual misconduct against a learner in a disciplinary proceeding instituted under this Act.

32. Publication of the register

- (1) The Commission shall cause to be published and publicized annually, in an accessible manner, a list containing the names, addresses and qualifications of all registered teachers appearing on the register as at the thirty first day of December in the previous year.
- (2) Notwithstanding subsection (1), the Commission shall cause any alterations in the entries in the register which have been made since the last publication, to be published one month from the date of such alteration.

33. Discipline of registered teachers

- (1) The Commission may, subject to the regulations made under this Act, take disciplinary action against any person registered as a teacher under this Act.
- (2) Subject to subsection (1), the discipline of teachers not in the employment of the Commission shall be limited to offences leading to removal from the register of teachers.

34. Disciplinary action

- (1) A registered teacher shall be deemed to be a teacher in the teaching service, save as otherwise provided in this Act or any other law, and shall be subject to the law and regulations from time to time in force in respect of the service.
- (2) Disciplinary offences include the offences prescribed in the Third Schedule or any other relevant law.
- (3) The Commission, after interdicting a teacher, may take the following disciplinary actions against a registered teacher—
 - (a) issue a warning letter;
 - (b) surcharge;
 - (c) suspend for such period not exceeding six months;
 - (d) cancel a registration certificate and remove the name of the teacher from the register;
 - (e) retire in the public interest;
 - (f) dismiss;
 - (i) terminate services; or
 - (j) undertake any other lawful action as it may consider appropriate.

35. Compliance with teaching standards

- (1) The Commission shall take all necessary steps to ensure that persons in the teaching service comply with the teaching standards prescribed by the Commission under this Act.
- (2) For purposes of subsection (1), the Commission shall—
 - (a) require every registered teacher to undertake career progression and professional development programmes as may be prescribed by regulations made under this Act;
 - (b) require every registered teacher to take out a teaching certificate as prescribed by regulations made under this Act;
 - (c) enter into agreements with any institution, body, department or agency of the Government pursuant to its functions and powers prescribed under this section; and
 - (d) appoint an agent or designate a member or staff of the Commission who may enter any educational institution and make an enquiry in that regard.
- (3) A teacher who fails to—

- (a) undertake a prescribed career and professional development programmes; or
- (b) take out a teaching certificate under section 35(2)(b) of this Act, shall be dealt with in accordance with the regulations.

PART IV – FINANCIAL PROVISIONS

36. Funds of the Commission

- (1) The funds of the Commission shall consist of—
 - (a) monies allocated by Parliament for purposes of the Commission;
 - (b) grants, gifts, donations or other endowments given to the Commission;
 - (c) such funds as may vest in or accrue to the Commission in the performance of its functions under this Act or under any other written law.
- (2) The receipts, earnings or accruals of the Commission and the balances at the close of each financial year shall not be paid into the Consolidated Fund, but shall be retained for purposes of the Commission under this Act.

37. Remuneration and allowances

- (1) The salaries and allowances payable to, and other terms and conditions of service of the chairperson and members of the Commission shall be determined by the Salaries and Remuneration Commission.
- (2) The staff of the Commission recruited by the Commission under Article 252(1)(c) of the Constitution shall serve on such terms and conditions as the Commission, in consultation with the Salaries and Remuneration Commission may determine.
- (3) The registered teachers recruited by the Commission under Article 237(2)(b) of the Constitution shall serve under such terms and conditions as the Committee established under section 13(5) of this Act in consultation with the Salaries and Remuneration Commission may determine.

38. Annual estimates

- (1) Before the commencement of each financial year, the Commission shall cause to be prepared estimates of the revenue and expenditure of the Commission for that year.
- (2) The annual estimates shall make provision for all the estimated expenditure of the Commission for the financial year concerned.

- (3) The Cabinet Secretary responsible for finance shall present the estimates approved by the Commission under subsection (2) for consideration and approval by the National Assembly.

39. Financial year of the Commission

The financial year of the Commission shall be the period of twelve months commencing on the first of July and ending on the thirtieth of June of the subsequent year.

40. Accounts and audit

- (1) The Commission shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Commission.
- (2) Within a period of three months after the end of each financial year, the Commission shall submit to the Auditor-General the accounts of the Commission in respect of that year together with a—
 - (a) statement of the income and expenditure of the Commission during that year; and
 - (b) statement of the assets and liabilities of the Commission on the last day of that financial year.
- (3) The annual accounts of the Commission shall be prepared, audited and reported upon in accordance with the provisions of Articles 226 and 229 of the Constitution and the Public Audit Act, 2003.

[Act No. 12 of 2003.]

PART V – MISCELLANEOUS PROVISIONS

41. Annual report

- (1) The report of the Commission under Article 254 of the Constitution, shall, in respect of the year to which it relates—
 - (a) the financial statements of the Commission;
 - (b) a description of the activities of the Commission; and
 - (c) any other information relating to its functions that, the Commission may consider necessary.
- (2) The Commission shall cause the annual report to be published in the Gazette and publicised and such other manner as the Commission may determine.

42. Management of information

- (1) The Commission shall publish and publicise any important information within its mandate affecting the nation.
- (2) A person may request for information in the public interest.
- (3) A request for information under subsection (2)—

- (a) shall be addressed to the Secretary or such other person as the Commission may for that purpose designate;
 - (b) may be subject to the payment of a reasonable fee in instances where the Commission incurs an expense in providing the information; and
 - (c) may be subject to confidentiality requirements of the Commission.
- (4) Subject to the provisions of Article 35 of the Constitution and the law relating to freedom of information and data protection, the Commission may decline to give information to an applicant where—
- (a) the request is unreasonable in the circumstances;
 - (b) the information requested is at a deliberative stage by the Commission;
 - (c) the applicant fails to pay the prescribed fee; or
 - (d) the applicant fails to satisfy any confidentiality requirements imposed by the Commission.
- (5) The right of access to information under Article 35 of the Constitution shall be limited to the nature and extent specified under this section.
- (6) Every member and staff of the Commission shall sign a confidentiality agreement.

43. Publicity

The Commission shall, in such manner as it considers appropriate, publish a notice for public information specifying—

- (a) the location of all its offices; and
- (b) its address or addresses, telephone numbers and other means of communication or contact with the Commission.

44. Offences

- (1) A person who—
- (a) procures or attempts to procure the entry of any name on the register by willfully making or producing or causing to be made or produced, either orally or in writing, any declaration, certificate or representation which the person knows to be false or fraudulent; or
 - (c) falsely or fraudulently holds himself or herself out to be a registered teacher, commits an offence and is liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding twelve months, or to both.
- (2) A person shall not—

- (a) without reasonable justification or other lawful excuse, obstruct or hinder, or threaten a member or staff or agent of the Commission in the course of duty under this Act;
 - (b) submit false or misleading information; or
 - (c) make false misrepresentation to or knowingly mislead a member or staff of the Commission acting under this Act.
- (3) A person who contravenes subsection (2) commits an offence and is liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding one year or to both.

45. General penalty

Any person convicted of an offence under this Act for which no penalty is provided shall be liable to a fine of not less than one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

46. Review

A person who is aggrieved by a decision of the Commission under this Act may apply to the Commission for review of that decision.

47. Regulations

- (1) The commission may make regulations generally for the better carrying out of its functions and the exercise of its powers under the Constitution and the provisions of this Act and, without prejudice to the generality of the foregoing, may make regulations to provide for—
- (a) the appointment, discipline and removal of staff of the Commission;
 - (b) the form and method of keeping the register and records under this Act;
 - (c) the conditions of admission to and removal from the register and of the issuance of registration and teaching certificates;
 - (d) management and administration of the function of discipline of those in the teaching service;
 - (e) the manner of compliance with prescribed teaching standards;
 - (f) guidelines on the qualifications of persons entering the teaching service;
 - (g) administration of career progression and professional development programmes for registered teachers;
 - (h) the standards and conditions of professional practice of persons registered under this Act;
 - (i) the fees payable in respect of registration and any other matter under this Act;

- (j) the disposal of fees collected, the authorization of such disbursement as may be necessary, and the management of any funds within the control of the Commission;
- (k) operations and procedures of a committee; and
- (1) any other matter incidental or ancillary to the discharge of its functions and to the exercise of its powers under this Act.
- (2) The Commission—
 - (a) shall compile and publish a code of regulations which shall apply to all registered teachers; and
 - (b) may from time to time modify or amend the code of regulations in such manner as it thinks fit.
- (3) Nothing in this Act or any regulation or rules made pursuant to this section shall supersede, lessen or in any way interfere with the powers vested in the Commission under the Constitution.

48. Code of conduct

The Commission shall develop a code of conduct for its members and staff and registered teachers.

49. Repeal of Cap. 212

The Teachers Service Commission Act is repealed.

50. Saving and transition

- (1) Notwithstanding section 49, a person who immediately before the commencement of this Act, was a staff of the Teachers Service Commission under the repealed Act, shall continue to hold or act in that office as if appointed to that position under this Act.
- (2) Every contract entered into before the commencement of this Act shall continue to be in force to the extent that the terms and conditions of the contract are not inconsistent with the provisions of this Act.
- (3) All proceedings and decisions subsisting before the commencement of this Act by virtue of the repealed Act, shall after the commencement of this Act be deemed as subsisting under this Act.
- (4) All property which immediately before the commencement of this Act was vested in the Teachers Service Commission shall, at the commencement of this Act, vest in the Commission subject to all interest, liabilities, charges, obligations and trusts affecting such property.
- (5) All matters relating to pensions, gratuities and retirement benefits of teachers in the employment of the Commission shall be governed by the law relating to pensions.

FIRST SCHEDULE

[Section 9.]

**OATH/AFFIRMATION OF THE OFFICE OF
CHAIRPERSON/ MEMBER/SECRETARY**

I, _____, having been appointed (the chairperson/member of/Secretary to) the Teachers Service Commission under the Teachers Service

Commission Act, 2012, do swear/solemnly affirm that I will at all times obey, respect and uphold the Constitution of Kenya and all other laws of the Republic; that I will faithfully and fully, impartially and to the best of my knowledge and

ability, discharge the trust, perform the functions and exercise the powers

devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice. (SO HELP ME GOD)

Sworn/Declared by the said _____

Before me this _____ day of _____

Chief Justice

SECOND SCHEDULE

[Section 15.]

**PROVISIONS RELATING TO THE CONDUCT OF
BUSINESS AND AFFAIRS OF THE COMMISSION**

1. Meetings

- (1) The Commission shall have at least six meetings in every financial year and not more than four months shall lapse between one meeting and the next meeting.
- (2) The chairperson may at any time convene a special meeting of the Commission, and shall do so within one month of the receipt by the chairperson of a written request signed by at least two other members.
- (3) Unless three quarters of the members otherwise agree, at least seven days' notice of a meeting shall be given to every member.
- (4) The chairperson shall preside over all meetings and in the absence of the Chairperson, by the vice-chairperson and in their absence, by a person elected by the Commission at the meeting for that purpose.

2. Quorum

The quorum of a meeting of the Commission shall be one half of members.

3. Voting

A decision of the Commission shall be by a majority of the members present and voting and in the case of an equality of votes the person presiding at the meeting shall have a second or casting vote.

4. Minutes

Minutes of all meetings shall be kept and entered in records kept for that purpose.

5. Conflict of interest

- (1) If any person is present at a meeting of the Commission or any committee at which any matter is the subject of consideration and in which matter that person or that person's spouse is directly or indirectly interested in a private capacity, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not, unless the Commission or committee otherwise directs, take part in any consideration or discussion of, or vote on any question touching such matter.
- (2) A disclosure of interest made under subsection (1) shall be recorded in the minutes of the meeting at which it is made.

THE HUMAN RIGHTS OF KENYAN SCHOOL GIRLS

- (3) A person who contravenes subsection (1) commits an offence and upon conviction shall be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding seven years or to both such fine and imprisonment.
- (4) No member or staff of the Commission shall transact any business or trade with the Commission.

THIRD SCHEDULE

[Section 34.]

DISCIPLINARY OFFENCES

- ~~(a) Immoral behavior, including but not restricted to~~
~~(i) sexual intercourse;~~
~~(ii) sodomy;~~
~~(iii) lesbianism; and~~
~~(iv) sexual harassment or flirtation;~~
- (a) Sexual misconduct against a learner, including but not restricted to—
(i) flirtation;
(ii) sexual grooming;
(iii) sexual harassment;
(iv) touching of a learner's body or making the learner touch the teacher's body in a sexual nature;
(v) sexual intercourse or any other penetration of any part of the learner's or teacher's body by any object or body part;
(vi) any form of inducement, threats, or violence to force a learner to engage in any sexual activity.
- (b) professional misconduct including but not restricted to—
(i) negligence of duty;
(ii) lateness to duty;
(iii) chronic absenteeism;
(iv) desertion;
(v) incitement; and
(vi) insubordination;
- (c) Infamous conduct including but not restricted to—
(i) drunkenness;
(ii) fighting; and
(iii) conduct or behavior which in the opinion of the Commission contradicts the spirit and tenor of Chapter six of the Constitution;
- (d) forgery;
- (e) mismanagement and embezzlement of public funds;
- (f) failure to report any actual knowledge or reasonable suspicion that an act of sexual misconduct as set forth in this Act and the Code of Regulations for Teachers or any sexual offence within the meaning of the Sexual Offences Act has been committed against a learner by a teacher, other TSC agent, or school personnel;
- (g) retaliates against a learner or against another teacher or TSC agent for reporting sexual misconduct pursuant to these Regulations,

the Learner Protection Guidelines, and the Standard Operating Procedures Reporting Mechanism on Learner Protection; and
(h) any other act or conduct that is incompatible with the teaching profession.

APPENDIX E

**THE TEACHERS SERVICE COMMISSION CODE OF
REGULATIONS FOR TEACHERS (AMENDED), 2018**

ARRANGEMENT OF CLAUSES

Clause

PART I—PRELIMINARY

1—Short title and Commencement.

PART II—MISCELLANEOUS PROVISIONS

- 2—Amendment of Regulation 3 of Supp. 68.
- 3—Deletion of Regulation 6 of Supp. 68.
- 4—Amendment of Regulation 17 of Supp. 68.
- 5—Amendment of Regulation 20 of Supp. 68.
- 6—Amendment of Regulation 31 of Supp. 68.
- 7—Amendment of Regulation 36 of Supp. 68.
- 8—Amendment of Regulation 48 of Supp. 68.
- 9—Amendment of Regulation 58 of Supp. 68.
- 10—Amendment of Regulation 71 of Supp. 68.
- 11—Amendment of Regulation 140 of Supp. 68.
- 12—Insertion of Regulation 140A of Supp. 68.
- 13—Amendment of Regulation 141 of Supp. 68.
- 14—Insertion of Regulation 141A of Supp. 68.
- 15—Amendment of Regulation 144 of Supp. 68.
- 16—Amendment of Regulation 145 of Supp. 68.
- 17—Amendment to Regulation 186 of Supp. 68
- 18—Amendment of the Twentieth Schedule of Supp. 68.

THE TEACHERS SERVICE COMMISSION ACT
(No. 20 of 2012)

IN EXERCISE of the powers conferred by section 47(2) of the Teachers Service Commission Act the Commission makes the following amendments to the Code of Regulations:

**THE TEACHERS SERVICE COMMISSION CODE OF
REGULATIONS FOR TEACHERS (AMENDED), 2018**

1. These Regulations may be cited as the Teachers Service Commission Code of Regulations (Amended), 2018.
2. The Teachers Service Commission Code of Regulations for Teachers, (hereinafter referred to as “the principal Regulations”) is amended in regulation 3 by —
 - (a) deleting the definition of the term “learner” and substituting therefor the following new definition—

“learner” means any person, regardless of age, who is undergoing instruction in any educational institution at any level, including pre-primary, primary, secondary and tertiary, whether public or private;
 - (b) inserting the following definition of “school personnel”—

“school personnel” means all school employees, including but not limited to, administrative staff such as the principal, secretaries, and office staff; and support staff such as nurses, counsellors, school food service workers, and custodians;
 - (c) inserting the following definition of “sexual grooming”—

“sexual grooming” means a process deliberately undertaken by a teacher with the aim of befriending, influencing, and/or coercing a learner into performing any sexual activity; such acts include but are not limited to—

 - (i) spending inappropriate one-on-one time with a learner;
 - (ii) enticing a learner using gifts, money or a promise of higher grades;
 - (iii) showing special attention to one learner over other learners;
 - (iv) assigning special tasks to a learner such as fetching water, cooking, cleaning, and preparing tea;
 - (v) sending of learners to the teacher’s house;
 - (d) deleting the definition of the term “sexual harassment” and substituting therefor the following new definition—

“sexual harassment” with respect to a learner means any act of a sexual nature, including sexual advances or requests, by a teacher in the form of—

- (i) words, gestures, sounds, cat-calls, jokes or comments, including innuendos, whether made orally or in writing;
 - (ii) making a learner exhibit his or her body or any part of his or her body so as to be seen by the teacher or any other person; or
 - (iii) exhibiting any image, object, or part of the body so as to be seen by the learner; or
 - (iv) repeatedly following, watching, or contacting a learner either directly or through electronic, digital or any other means with the intent to commit a sexual offence or any other act of a sexual nature;
 - (e) deleting the definition of the term “sexual intercourse” and substituting therefor the following new definition—
“sexual intercourse” means any physical contact between two individuals involving penetration or stimulation of the genital organs of at least one;
 - (f) deleting the definition of the term “teacher” and substituting therefor the following new definition —
“teacher” means any person who carries on the profession of teaching in any educational institution, whether public or private, at any level, including pre-primary, primary, secondary and tertiary.
3. Regulation 6 of the principal Regulations is deleted.
 4. Regulation 17(4) of the principal Regulations is amended by inserting the words “including conforming to the Third Schedule of the Act (*prohibition and definition of sexual misconduct*)” immediately after the words “professional manner.”
 5. Regulation 20(a) of the principal Regulations is amended by inserting the words “which includes conforming with §41(2) (a) (*prohibition of registry of person found guilty of sexual misconduct*) and the Third Schedule of the Act (*prohibition and definition of sexual misconduct*)” immediately after the words “good moral character.”
 6. Regulation 31 of the principal Regulations is amended by inserting the words “and in a national newspaper” immediately after the words “in the Commission’s website.”
 7. Regulation 36(2) of the principal Regulations is amended by inserting the words “except for those teachers who were removed upon a finding of sexual misconduct” immediately after the words “from the date of such removal.”
 8. Regulation 48(1) of the principal Regulations is amended by inserting the following subregulation—

- “(a) These professional teacher development programmes shall include instruction on the Learner Protection Guidelines and the Standard Operating Procedures Reporting Mechanism on Learner Protection.”
9. Regulation 58(1)(b) of the principal Regulations is amended by inserting the sentence “A person who has been convicted in a court of law or found guilty of sexual misconduct against a learner through disciplinary proceedings instituted under these Regulations and/or the Teachers Service Commission Act is not eligible for appointment.” after the words “may deem fit.”
10. Regulation 71(2) of the principal Regulations is amended by —
- (a) inserting the following subregulation—
 - (o) reporting instances of sexual misconduct to the Commission and, if required by the Learner Protection Guidelines, to the police.
 - (b) renumbering the existing paragraph (o) as (p).
11. Regulation 140 of the principal Regulations is amended by deleting subregulation (a) and renumbering subregulations (b), (c), (d), (e), (f), and (g) as (a), (b), (c), (d), (e) and (f), respectively.
12. The principal Regulations are amended by inserting the following new Regulation 140A immediately following Regulation 140.

“140A. Offences that must lead to disciplinary action.

The Commission must take disciplinary action against a teacher who commits any of the following offences—

- (a) Sexual misconduct against a learner, including but not restricted to—
 - (i) flirtation;
 - (ii) sexual grooming;
 - (iii) sexual harassment;
 - (iv) touching of a learner’s body or making the learner touch the teacher’s body in a sexual nature;
 - (v) sexual intercourse or any other penetration of any part of the learner’s or teacher’s body by any object or body part;
 - (vi) any form of inducement, threats, or violence to force a learner to engage in any sexual activity.”
- (b) Fails to report any actual knowledge or reasonable suspicion that an act of sexual misconduct as set forth in subregulation (a) or any sexual offence within the meaning of the Sexual Offences Act has been committed against a learner by a teacher, other TSC agent, or school personnel.

- (c) Retaliates against a learner or against another teacher or TSC agent for reporting sexual misconduct pursuant to these Regulations, the Learner Protection Guidelines, and the Standard Operating Procedures Reporting Mechanism on Learner Protection.
13. Regulation 141 of the principal Regulations is amended by—
- (a) deleting subregulation (a) and inserting the following new subregulations:
 - “(a) fails to report any actual knowledge or reasonable suspicion that an act of sexual misconduct as set forth in Regulation 140A (a) or any sexual offence within the meaning of the Sexual Offences Act has been committed against a learner by a teacher, other TSC agent, or school personnel;”
 - (b) retaliates against a learner or against another teacher or TSC agent for reporting sexual misconduct pursuant to these Regulations, the Learner Protection Guidelines, and the Standard Operating Procedures Reporting Mechanism on Learner Protection;”
 - (b) renumbering the existing paragraphs (b), (c), (d), (e), (f), (g), (h) and (i) to (c), (d), (e), (f), (g), (h), (i) and (j), respectively.
14. The principal Regulations are amended by inserting the following new Regulation 141A immediately following Regulation 141—
- “141A. Offences that must lead to removal from the Register.**
- (1) A teacher must be removed from the Register if the teacher commits or engages in any of the following—
 - (a) Sexual misconduct against a learner, including but not restricted to—
 - (i) flirtation;
 - (ii) sexual grooming;
 - (iii) sexual harassment;
 - (iv) touching of a learner’s body or making the learner touch the teacher’s body in a sexual nature;
 - (v) sexual intercourse or any other penetration of any part of the learner’s or teacher’s body by any object or body part;
 - (vi) any form of inducement, threats, or violence to force a learner to engage in any sexual activity.”
 - (2) Any teacher who is removed from the Register under Regulation 141A(1) must also be dismissed from employment from any public education institute.”

15. Regulation 144 of the principal Regulations is amended by inserting the following new subregulations—
- “(1) Any teacher or other TSC agent who has reasonable grounds to believe that *any form* of sexual misconduct has been committed by a teacher, other TSC agent, or school personnel against a learner must report such a belief to the county TSC office in which the concerned institution is situated or the TSC headquarters within 72 hours.
- (2) Any teacher or other TSC agent who at any given time has reasonable grounds to believe that any of the following forms of sexual misconduct has been committed by a teacher, other TSC agent, or school personnel against a learner must also report such belief to the police within 72 hours:
- (a) sexual intercourse or any other form of penetration of any part of the learner’s body or teacher’s body by any object or body part;
 - (b) touching of a learner’s body or making a learner touch the teacher’s or any other person’s body in a sexual nature;
 - (c) exhibiting any image, object or part of the body to be seen by the learner in a sexual nature;
 - (d) making a learner exhibit his or her body in a sexual nature so as to be seen by the teacher;
 - (e) any form of inducement, threats, or violence to force a learner to engage in any sexual activity;
 - (f) exposing pornographic material; or
 - (g) repeatedly following, watching, or contacting a learner either directly or through electronic, digital, or any other means with the intent to commit a sexual offence.
- (3) It is the duty of the TSC office receiving the report to ensure that the reporting required under Regulation 144(2) takes place. If the teacher or TSC agent has failed to report to the police pursuant to Regulation 144(2), the TSC office receiving the report must itself report the incident to the police.
- (4) All teachers and other TSC agent must follow any additional reporting procedures as laid out in the Learner Protection Guidelines and the Standard Operating Procedures Reporting Mechanism on Learner Protection.
- (5) A person having any allegation of misconduct against a teacher may report the allegation to:
- (a) the Secretary;
 - (b) the County Director;
 - (c) the head of institution;

- (d) the Secretary, Board of Management; or
- (e) any government law enforcing agency.
- (6) In addition to reporting to any of the offices mentioned above, nothing stops any person from seeking the assistance of a non-state agency in relation to the matter complained of.”
- 16. Regulation 145 of the principal Regulations is amended by inserting the following new subregulations immediately after subregulation 145(2) —
 - “(3) Any person involved in the reporting or investigation of a suspicion of sexual misconduct as defined in the Third Schedule of the Act, including the person who takes the initial report, any staff involved in the investigation or handling of the report, and any witnesses, are required to maintain confidentiality and to not disclose information about the process or allegations to any person except for those people responsible for handling the report.
 - (4) All teachers and other TSC agents are prohibited from taking negative action against any persons, including fellow teachers or learners, for reporting or for cooperating in an investigation. Retaliation includes threats, intimidation, reprisal, or adverse actions related to employment or school performance.
 - (5) All teachers and other TSC agent must follow any additional reporting procedures as laid out in the Learner Protection Guidelines and the Standard Operating Procedures Reporting Mechanism on Learner Protection.”
- 17. Regulation 186(b) of the principal Regulations is amended by inserting the words “and the Learner Protection Guidelines and Standard Operating Procedures Reporting Mechanism on Learner Protection” immediately following the words “of this Code.”
- 18. The Twentieth Schedule Application for Transfer of the principal Regulations is amended by inserting the following questions—
- 15. Previous findings of guilt by the TSC or any school board or management committee of disciplinary offences, including sexual misconduct under these Regulations or any other form of sexual abuse of a learner . . .
- 16. Previous criminal convictions, including for sexual offences under the Sexual Offences Act...
- 17. Previous allegations of sexual misconduct/abuse against a learner. . . .
- 18. Previous disciplinary action by the TSC for failure to report sexual misconduct/abuse by another teacher

APPENDIX F

Teachers Service Commission Code of Regulations

This document was prepared by the International Women's Human Rights Clinic (IWHRC) of Georgetown University Law Center for the purposes of review by the TSC. The IWHRC converted a PDF of the Teachers Service Commission Code of Regulations into a Word document for the purposes of the reader to be able to readily see the proposed changes reflected in the draft Teachers Service Commission Code of Regulations for Teachers (Amended), 2018. The changes are identified using underlines for added language and strike-through for removed language.

PART XI-DISCIPLINE

- 139 - Guidelines for disciplinary process.**
- 140 - Offences that may lead to disciplinary action.**
- 141 - Offences that may lead to removal from the register.**
- 142 - Economic crimes and other serious offences.**
- 143 - Consequences of economic crimes and serious offences.**
- 144 - Reporting of allegations against a teacher.**
- 145 - Mode of reporting the allegations.**
- 146 - Investigation of allegations.**
- 147 - Process of interdiction.**
- 148 - Salary status during the period of interdiction.**
- 149 - Mode of invitation to appear before a Disciplinary Panel.**
- 150 - Disciplinary proceedings.**
- 151 - Composition of the Disciplinary Panel.**
- 152 - Powers of the Commission.**
- 153 - Procedure during disciplinary hearing.**
- 154 - Determinations.**
- 155 - Administrative warning.**
- 156 - Teachers Service Review Committee.**

PART XI-DISCIPLINE

(This Part provides for offences for which teachers may be disciplined, establishes the mechanisms for effecting disciplinary action, the discipline procedure and decisions that may be arrived at in accordance with Article 237 (2) (e) of the Constitution and section 34 of the Act).

139. Guidelines in disciplinary proceedings

- (1) The Commission shall in determining each disciplinary case-
 - (a) presume a teacher innocent until proven guilty;
 - (b) inform the teacher concerned on the nature of the allegation made against the teacher and afford him reasonable time to present his defence;

- (c) accord the teacher the opportunity of being heard in person unless his conduct or the nature of the offence makes it impossible for the proceedings to be conducted in his presence or at all;
 - (d) act on general evidence or statements relating to the character or conduct of the teacher concerned; provided, that the Commission shall not be bound to receive and consider evidence only admissible in a form and manner in a court of law; or be bound by the strict rules of evidence; and
 - (e) any disciplinary action or punishment under this regulation shall not be a bar to a criminal charge or process under any written law.
- (2) The commission shall, where minors are involved as witnesses, take necessary safeguards to protect their rights in accordance with section 76(3) of the Children Act.
 - (3) The Commission may take disciplinary action against a teacher whose criminal proceedings are pending before a court of law or who has been acquitted by a court of law for an offence which the Commission is handling.
 - (4) The Commission shall in arriving at its decision regarding a teacher's disciplinary case, not be bound by the finding of any Court in criminal proceedings relating to the teacher's disciplinary case.
 - (5) The Commission shall where the charge or allegations made against the teacher involve acts or omissions constituting an offence under any written law, liaise with other law enforcement agencies in that regard.

140. Offences that may lead to disciplinary action.

The Commission may take disciplinary action against a teacher who commits any of the following offences—

- ~~(a) Immoral behavior, including but not restricted to~~
 - ~~(i) sexual intercourse;~~
 - ~~(ii) sodomy;~~
 - ~~(iii) lesbianism; and~~
 - ~~(iv) sexual harassment or flirtation;~~
- (a) professional misconduct including but not restricted to
 - (i) negligence of duty;
 - (ii) lateness to duty;
 - (iii) chronic absenteeism;
 - (iv) desertion;
 - (v) incitement; and

- (vi) insubordination
- (b) Infamous conduct including but not restricted to:
 - (i) drunkenness;
 - (ii) fighting; and
 - (iii) conduct or behavior which in the opinion of the Commission contradicts the spirit and tenor of Chapter six of the Constitution;
- (c) forgery;
- (d) mismanagement and embezzlement of public funds; and
- (e) any other act or conduct that is incompatible with the teaching profession.

140A. Offences that must lead to disciplinary action.

The Commission must take disciplinary action against a teacher who commits any of the following offences—

- (a) Sexual misconduct against a learner, including but not restricted to—
 - (i) flirtation;
 - (ii) sexual grooming;
 - (iii) sexual harassment;
 - (iv) touching of a learner's body or making the learner touch the teacher's body in a sexual nature;
 - (v) sexual intercourse or any other penetration of any part of the learner's or teacher's body by any object or body part;
 - (vi) any form of inducement, threats, or violence to force a learner to engage in any sexual activity.
- (b) Fails to report any actual knowledge or reasonable suspicion that an act of sexual misconduct as set forth in subregulation (a) or any sexual offence within the meaning of the Sexual Offences Act has been committed against a learner by a teacher, other TSC agent, or school personnel.
- (c) Retaliates against a learner or against another teacher or TSC agent for reporting sexual misconduct pursuant to these Regulations, the Learner Protection Guidelines, and the Standard Operating Procedures Reporting Mechanism on Learner Protection.

141. Offences that may lead to removal from the Register

A teacher may be removed from the Register if the teacher commits or engages in any of the following-

- ~~(a) immoral behavior with or towards a learner which may include but not limited-~~
 - ~~(i) sexual intercourse;~~

- ~~(ii) sodomy;~~
- ~~(iii) lesbianism; and~~
- ~~(iv) sexual harassment or flirtation;~~
- (a) fails to report any actual knowledge or reasonable suspicion that an act of sexual misconduct as set forth in Regulation 140A(a) or any sexual offence within the meaning of the Sexual Offences Act has been committed against a learner by a teacher, other TSC agent, or school personnel;
- (b) retaliates against a learner or against another teacher or TSC agent for reporting sexual misconduct pursuant to these Regulations, the Learner Protection Guidelines, and the Standard Operating Procedures Reporting Mechanism on Learner Protection.
- (c) obtains registration or employment or promotion through fraudulent means;
- (d) is convicted of any sexual offence or an any other offence against ~~learner or~~ a fellow member of staff;
- (e) is convicted of a criminal offence which, in the opinion of the Commission, renders a person unfit to be a teacher;
- (f) forgery, impersonation, presenting forged documents to the Commission;
- (g) mismanagement, misappropriation and embezzlement of public funds;
- (h) theft of property belonging to an educational institution;
- (i) incitement; or
- (j) any other offence which, in the opinion of the Commission, warrants removal from the Register.

141A. Offences that must lead to removal from the Register

(1) A teacher must be removed from the Register if the teacher commits or engages in any of the following—

- (a) Sexual misconduct against a learner, including but not restricted to—
 - (i) flirtation;
 - (ii) sexual grooming;
 - (iii) sexual harassment;
 - (iv) touching of a learner's body or making the learner touch the teacher's body in a sexual nature;
 - (v) sexual intercourse or any other penetration of any part of the learner's or teacher's body by any object or body part;
 - (vi) any form of inducement, threats, or violence to force a learner to engage in any sexual activity

- (2) Any teacher who is removed from the Register under Regulation 141A(1) must also be dismissed from employment from any public education institute.

142. Economic Crimes and Serious Offences

In this regulation, “economic crime” include—

- (a) fraudulent payment or excessive payment from public revenues for goods and services which are either rendered or not;
- (b) willful failure to comply with any law or applicable procedures and guidelines relating to procurement, allocation, sale or disposal of property or tendering of contracts;
- (c) mismanagement of funds or incurring expenditure or engagement in institutional projects without planning; and
- (d) any offence involving dishonesty under any written law providing for maintenance or protection of public revenue which constitute professional misconduct on the part of the teacher.

“serious offence” includes:-

- (a) offences that attract capital punishment under the law; or
- (b) other acts or omissions which in the opinion of the Commission grossly offend public policy and interest thereby making the concerned teacher unsuitable to continue serving in the Teaching Service.

143. Consequences of economic crimes and other serious offences

- (1) A teacher charged with an economic crime or serious offence shall be suspended from service and will be entitled to one half of the basic salary, with full house and medical allowances with effect from the date of the charge.
- (2) Where a teacher who is under suspension in paragraph (1) is discharged or acquitted by a court of competent jurisdiction the Commission shall lift the suspension and pay to the teacher any benefits that may have been withheld during the period of suspension.
- (3) A teacher who is held in lawful custody shall be suspended from service without pay for the period of the incarceration.
- (4) A suspension under this regulation shall be distinguished from suspension following a full disciplinary hearing under Regulation 154 (2) (b) (iii).
- (5) Where a teacher is charged with economic crimes and other serious offences the Commission shall notify the teacher of the suspension in Form U set out in the Thirty Third Schedule.

144. Reporting of allegations against a teacher.

- (1) Any teacher or other TSC agent who has reasonable grounds to believe that any form of sexual misconduct has been committed by a teacher, other TSC agent, or school personnel against a learner must report such a belief to the county TSC office in which the concerned institution is situated or the TSC headquarters within 72 hours.
- (2) Any teacher or other TSC agent who at any given time has reasonable grounds to believe that any of the follow forms of sexual misconduct has been committed by a teacher, other TSC agent, or school personnel against a learner must also report such belief to the police within 72 hours:
 - (a) sexual intercourse or any other form of penetration of any part of the learner's body or teacher's body by any object or body part;
 - (b) touching of a learner's body or making a learner touch the teacher's or any other person's body in a sexual nature;
 - (c) exhibiting any image, object or part of the body to be seen by the learner in a sexual nature;
 - (d) making a learner exhibit his or her body in a sexual nature so as to be seen by the teacher;
 - (e) any form of inducement, threats, or violence to force a learner to engage in any sexual activity;
 - (f) exposing pornographic material; or
 - (g) repeatedly following, watching, or contacting a learner either directly or through electronic, digital, or any other means with the intent to commit a sexual offence.
- (3) It is the duty of the TSC office receiving the report to ensure that the reporting required under Regulation 144(2) takes place. If the teacher or TSC agent has failed to report to the police pursuant to Regulation 144(2), the TSC office receiving the report must itself report the conduct to the police.
- (4) All teachers and other TSC agent must follow any additional reporting procedures as laid out in the Learner Protection Guidelines and the Standard Operating Procedures Reporting Mechanism on Learner Protection.
- (5) A person having any allegations of misconduct against a teacher may report the allegation to-
 - (a) the Secretary;
 - (b) the County Director;
 - (c) the head of institution;
 - (d) the Secretary, Board of Management; or

- (e) any government law enforcing agency.
- (6) In addition to reporting any of the offices mentioned above, nothing stops any person from seeking the assistance of a non state agency in relation to the matter complained of.

145. Mode of reporting the allegations.

- (1) Any person with information that a teacher has engaged in professional misconduct or any conduct contravening these Regulations may lodge a complaint in writing, clearly indicating the nature of the complaint.
- (2) Where the person making the allegation lodges a verbal complaint, the person to whom the report is made shall cause the complainant to record and sign a statement of the complaint.
- (3) Any person involved in the reporting or investigation of a suspicion of sexual misconduct as defined in the Third Schedule of the Act, including the person who takes the initial report, any staff involved in the investigation or handling of the report, and any witnesses, are required to maintain confidentiality and to not disclose information about the process or allegations to any person except for those people responsible for handling the report.
- (4) All teachers and other TSC agents are prohibited from taking negative action against any persons, including fellow teachers or learners, for reporting or for cooperating in an investigation. Retaliation includes threats, intimidation, reprisal, or adverse actions related to employment or school performance.
- (5) All teachers and other TSC agent must follow any additional reporting procedures as laid out in the Learner Protection Guidelines and the Standard Operating Procedures Reporting Mechanism on Learner Protection.

146. Investigations of allegations.

- (1) The Commission shall upon receiving an allegation touching on a teacher's professional misconduct institute investigations either directly or through its agents.
- (2) An investigation under this regulation shall where the allegation is made against a teacher other than a Head of the Institution be instituted by the—
 - (a) Board of Management of the respective educational institution, acting as an agent of the Commission;
 - (b) County Director in an institution where there is no functional Board of Management, by constituting a team of not less than three technical officers; or

- (c) Heads of institution, in consultation with the boards of management as the case may be, and the county director, jointly where the allegations made relate to a teacher in an institution other than the one the teacher is stationed.
- (3) Where an allegation is made against a head of institution—
 - (a) the county director shall institute investigations in liaison with the board of management; and
 - (b) the county director or his representative shall constitute a team of not less than three technical officers to institute investigations where there is no board of management or in the case of a primary educational institution.
- (4) Where an allegation is made against a head of institution or a teacher in an institution other than the one the had of institution or a teacher is stationed—
 - (a) both boards of management, in consultation with the county director may jointly institute investigations; and
 - (b) the county director or board of management in whose jurisdiction the teacher in question is stationed shall lead the investigation process.
- (5) The head of institution or the teacher under investigation shall not be a member of the Investigating Panel where the head of institution or teacher is the subject of investigation.
- (6) The Investigating Panel shall, upon investigation, accord the head of institution or a teacher a fair hearing during the investigation process which shall include being—
 - (a) presumed innocent until proven that he has a case to answer;
 - (b) informed of the allegation, with sufficient details to answer it;
 - (c) given at least seven days to prepare a defence;
 - (d) given an opportunity to appear in person before the Investigation Panel, unless his conduct makes it impossible for the investigation to proceed in his presence;
 - (e) present when the witnesses are being interviewed by the Investigation Panel;
 - (f) warned that any incriminating evidence may be used against him during the disciplinary proceedings; and
 - (g) given an opportunity to adduce and challenge any adverse evidence.
- (7) Where a minor is involved in the investigation, the panel shall take precaution to protect the rights of the minor.

- (8) The Investigation Panel shall, upon completing the investigation compile a written report in regard to the teacher's disciplinary status and shall present the report to the Board, the County Director and the Secretary.
- (9) The Board of Management or head of institution or any other agent shall, in conducting the investigations liaise with the county director's office for the purpose of offering technical advice.
- (10) Where the report of the investigation panel discloses that an offence has been committed, the Board of Management or the county director or the Secretary shall—
 - (a) where necessary, issue an administrative warning in writing;
 - (b) where a teacher's misconduct is as result of a medical condition, recommend to the Commission Secretary for approval of any leave or further direction as the case may be; or
 - (c) interdict the teacher using the Letter of Interdiction set out in the Thirty Fourth Schedule.
- (11) The Commission or an officer acting under its direction may undertake direct investigation into any allegation and may recommend the interdiction of a teacher in accordance with these Regulations.
- (12) An officer who undertakes or participates in an investigation of an offence, shall neither preside nor sit as a member of the disciplinary panel determining the same.

147. Process of interdiction.

The Commission or the Board of Management shall—

- (1) serve the teacher with a letter of interdiction specifying the actual allegations made against him;
- (2) ensure that the interdicted teacher or head of institution clears and leaves the educational institution within forty eight hours upon receiving the letter of interdiction;
- (3) where the Board of Management issues a letter of interdiction, it shall deliver two copies of the letter to the county director for onward transmission to the Commission's headquarters;
- (4) the Commission may avail to the teacher upon application and at the teacher's cost, any documents that the Commission may use against him during the hearing of the discipline case; and
- (5) The Commission shall reserve the right to amend the letter of interdiction constituting the charge.

148. Salary status during the period of interdiction.

- (1) A teacher shall be paid half salary during the period of interdiction except in the following cases—

- (a) chronic absenteeism;
 - (b) desertion of duty;
 - (c) having been jailed or held in legal custody;
 - (d) misappropriation or mismanagement of public funds;
 - (e) fraudulent claims and receipt of funds;
 - (f) use of false certificates;
 - (g) forgery, impersonation, collusion; and
 - (h) immoral behaviour.
- (2) A teacher under interdiction shall be required to report to the Commission's nearest sub-county office once a month with a view to ascertain the progress of the teachers discipline case and to provide an updated contact address.

149. Mode of invitation to appear before a Disciplinary Panel.

- (1) A teacher on interdiction shall be invited in writing in the manner set out in the Thirty Fifth Schedule for the hearing of the discipline case at least one month before the date of hearing which shall be sent through-
- (a) the teacher's last known address;
 - (b) the address of the teacher's next of kin; or
 - (c) hand delivery.
- (2) In addition to the notification in paragraph (1) the Commission may send the invitation-
- (a) at the last station of work through the head of institution;
 - (b) through the contact or last known address provided by the teacher;
 - (c) through the permanent address provided by the teacher at the time of employment;
 - (d) through a telephone call to the teacher;
 - (e) to the teacher's e-mail address;
 - (f) by a short text messages through the teacher's mobile phone known to the Commission;
 - (g) through the Commission's website; or
 - (h) any other mode that the Commission may use from time to time.

150. Disciplinary proceedings.

The Commission shall in accordance with section 33 of the Act, consider all the evidence, the investigation report and determine each case of interdiction whenever it is alleged that a registered teacher should be disciplined in accordance with these Regulations.

151. Composition of the Disciplinary Panel.

- (1) The discipline process will be administered at the Commission's headquarters and at the county level.
- (2) The Commission may by way of an administrative circular determine the offences or category of offences to be heard at the Commission's headquarters and at the county level.
- (3) The Discipline Panel at the headquarters shall comprise—
 - (a) at least one member of the Commission who shall be the chair of the panel;
 - (b) two directors or their representatives, appointed by the Commission Secretary; and in attendance;
 - (c) an officer representing the division dealing with matters touching on discipline; and
 - (d) any other technical officer whose attendance shall be deemed necessary.
- (4) The Discipline Panel at the county level shall comprise—
 - (a) a member of the Commission, the respective county director or an officer appointed by the Commission who shall chair the panel;
 - (b) an officer appointed by the county director;
 - (c) the county director of education or a representative; and in attendance;
 - (d) an officer designated by the county director to deal with matters touching on discipline; and
 - (e) any other technical officer or person whose attendance shall be necessary.
- (5) In the composition of the discipline panels, due regard shall be given to gender balance and regulation 146(12).

152. Powers of Commission.

The Commission shall, for the purpose of dealing with any disciplinary matter before it, have powers to—

- (a) administer oaths; and
- (b) invite any person in the manner set out in the Thirty Fifth Schedule to attend, give evidence and produce any relevant documents.

153. Procedure during disciplinary hearing

- (1) The Commission shall in determining any disciplinary matter before it—
 - (a) require the teacher to produce identification and professional documents;
 - (b) require the teacher to take oath or affirm;

- (c) inform the teacher of the professional offence alleged against him: require the teacher to respond to the allegations against him;
 - (d) accord the teacher an opportunity to present his defence; invite the person designated as a discipline officer for that purpose to present the case against the teacher; and
 - (e) accord the teacher an opportunity to mitigate where he admits the offence before the determination is rendered.
- (2) Where the teacher denies the allegation, the discipline panel shall—
- (a) examine the Commission's witnesses and allow the teacher to cross-examine the witnesses; and
 - (b) allow the teacher to give any statement or submission in mitigation.
- (3) The Commission shall inform the teacher when the proceedings come to an end and that the decision shall be communicated to the teacher in writing within twenty-eight days.
- (4) Provide appropriate facilities or resources to a teacher with special needs.

154. Determinations

- (1) The Commission shall within twenty-eight days from the hearing date, inform the teacher of its decision regarding the teacher's disciplinary case and shall give reasons for its decision in the manner set out in the Thirty Seventh Schedule.
- (2) The Commission may after hearing a teacher determine that—
- (a) a teacher is not guilty of the offence and shall revoke the interdiction in the manner prescribed under the Thirty Eighth Schedule.
 - (b) a teacher has committed an offence that does not warrant removal from the Register and may—
 - (i) warn the teacher in writing;
 - (ii) surcharge the teacher;
 - (iii) suspend the teacher for such period not exceeding six months without payment of salary and allowances;
 - (iv) retire the teacher in the public interest;
 - (v) retire the teacher under ten-fifty(10/50) year rule under the Pensions Act;
 - (vi) dismiss the teacher from the teaching service;
 - (vii) refer the teacher for medical evaluation by the Director of Medical Services with a view to determine his suitability to be retained in the teaching service; or

- (viii) undertake any other action it may consider appropriate in the circumstances.
- (c) a teacher is guilty of the offence and his name be removed from the Register.
- (3) Removal of a teacher from the Register under this regulation shall be affected by the Commission in the manner set out in the Seventh Schedule.

155. Administrative warning.

- (1) The Commission or a teacher's supervisor may issue a teacher with a Notice to Show Cause whenever an allegation is made against him for offences other than the ones listed under the Third Schedule of the Act provided that the teacher has not committed the offence habitually.
- (2) A teacher who has been served with a Notice to Show Cause shall respond in writing within seven days.
- (3) The Commission or a teacher's supervisor may, upon consideration of the teacher's response, issue the teacher with an administrative warning.

156. Teachers Service Review Committee.

- (1) There is established an *adhoc* Committee of the Commission known as the Teachers Service Review Committee which shall consider and determine reviews arising from the discipline process under these Regulations.
- (2) The Review Committee shall consist of—
 - (a) the Chairperson of the Commission or a representative;
 - (b) two other members of the Commission;
 - (c) the Secretary or his representative; and
 - (d) officer for the time being in charge of teacher discipline or a representative.
- (3) The Review Committee shall regulate its own practice and procedure.
- (4) Where a teacher is aggrieved by the decision of the Commission in a disciplinary process, the teacher may apply for review to the Teachers Service Review Committee within ninety days from the date of the letter communicating the decision.
- (5) An application by a teacher for review under these Regulations shall be accompanied by the prescribed fee set out in the Fifth Schedule.
- (6) An officer or member of the Commission who has participated in the hearing of the discipline case, shall not sit in the Review Committee over the same case.

- (7) A teacher who applies to the Commission for the review of the decision of the Commission shall demonstrate that-
 - (a) there is discovery of new evidence or fact which at the time of hearing was not within the knowledge of the teacher;
 - (b) there was an error or mistake apparent on the face of the record or on the part of the Commission in arriving at the decision;
 - (c) there was fundamental flaw in the procedure by the Commission: or
 - (d) the decision was made in breach of any written law.
- (8) The Review Committee shall upon receiving an application for review, consider the application and may-
 - (a) uphold the decision and subsequently dismiss the application for review;
 - (b) allow the review and set aside the decision; or
 - (c) vary the decision on such terms as it may deem fit.
- (9) The decision of the review committee shall be final.