



**EQUAL EDUCATION'S SUBMISSION ON THE WESTERN CAPE PROVINCIAL
SCHOOL EDUCATION AMENDMENT BILL, 2018**

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SUBMITTED TO:

Western Cape Provincial Parliament

The Secretary

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A. Introduction

1. On 9 March 2018, the Western Cape Education Department (“**WCED**”) published the Western Cape Provincial School Education Bill, 2018 (the “**Bill**”), which seeks to amend the Western Cape Provincial School Education Act 12 of 1997 (the “**Western Cape Schools Act**” or the “**principal Act**”). On 25 May 2018 the Standing Committee on Education in the Western Cape Provincial Parliament circulated an invitation to participate in public hearings and to submit written submissions on the Bill.¹
2. Equal Education (EE) is a membership-based democratic movement of learners, teachers, parents and community members. It is a registered non-profit organisation. Its core objective is to work for and campaign to achieve quality and equality in education in South Africa. EE conducts a broad range of activities to advance this objective, including campaigning, research, policy analysis and, where necessary, litigation.
3. EE’s concerns regarding the Bill, as set out in these submissions, relate, principally, to the following areas:
 - 3.1. the introduction of the Western Cape Schools Evaluation Authority (“**WCSEA**”);
 - 3.2. the establishment of ‘collaboration’ and ‘donor-funded’ schools and the amendment of the composition of School Governing Bodies (SGBs) in these schools;
 - 3.3. the introduction of intervention facilities; and
 - 3.4. the allowance of alcohol at schools.
4. As these submissions seek to illustrate, EE’s view is that the amendments in relation to these four areas are generally unlawful and unconstitutional, contrary to the spirit of democracy and redress in education, redundant and unlikely to improve educational outcomes, and in some cases, potentially directly harmful.

¹ We note that on 25 August 2016, the WCED published a draft version of the Bill (“**Draft Bill**”). EE

B. Executive Summary

The Western Cape Schools Evaluation Authority

5. The proposed establishment of the WCSEA as an ostensibly independent body to monitor and evaluate various aspects of education in schools appears to create overlapping and potentially conflicting roles for the head of the Western Cape Education Department (“**Head of Department**” or “**HOD**”) and the WCSEA. There also appears to have been no attempt to align the operation of the WCSEA with the extant national Whole School Evaluation (“**WSE**”) policy framework. EE’s submission is that the creation of an additional bureaucratic structure for monitoring and evaluation, especially one that does not account for the existing framework, is unjustified and ineffective.
6. Rather than enhancing monitoring and evaluation and filling potential gaps which may exist in the WSE process, the WCSEA will effectively act as the personal inspectorate of the Western Cape Education MEC (“**MEC**”). The comprehensive power and extraordinarily wide discretion afforded to the MEC to hire, fire and determine the duties of the Chief Evaluator, undermines the WCSEA’s purported independence, and the fact that the WCSEA is established in the sole direction of the political head, can result in a further abuse of power.
7. The Bill generally fails substantively to address support mechanisms for schools that require improvement. Other than broad reference to support of curriculum delivery, no specific obligations or criteria for support of schools is provided. Once again, this highlights that the establishment of the WCSEA fails to fill the gaps in existing frameworks and is at best redundant, and at worst harmful.
8. It is likely that the WCSEA may also be used as a tool to evaluate and categorise schools as ‘underperforming’, thereby influencing decisions to declare such schools ‘collaboration schools’, or ‘donor-funded’ schools in accordance with the further proposed amendments contained in the Bill.
9. EE is not opposed to accountability measures in schools. However, we recognise that forms of accountability that burden teachers with excessive record keeping without providing sufficient support or opportunities for monitoring to meaningfully inform teaching practice, may end up merely being performative exercises that not only waste time and resources, but can also be harmful to teaching practice. We are concerned that the rationale espoused by the WCED is similar to other interventions that have had these effects.
10. EE proposes that, rather than introducing additional monitoring and evaluation structures, the focus of reform initiatives should be to strengthen districts’ supportive role and internal accountability frameworks.

The establishment of collaboration schools and donor-funded public schools

11. By allowing private operating partners or donors to attain unelected representation on the School Governing Bodies of collaboration schools, the Bill runs directly contrary to the South African Schools Act 84 of 1996 (“**SASA**”) and compromises democratic school governance. It accordingly gives rise to a conflict under section 146 of the Constitution.
12. In this case, the national legislation must prevail over the provincial. Against a legacy of racially segregated education administrations, and the need for equality and redress, uniformity in matters of school governance – identified by the Constitutional Court as advancing learners’ interests – is essential.
13. Further, collaboration schools do not present a systemic solution to improve educational outcomes. Though they have been piloted in the Western Cape, the pilot project is incomplete, and its monitoring and evaluation has been woefully inadequate. In the context of its decidedly mixed effects internationally, implementing this model in South Africa is premature and irrational.
14. In addition, significant questions remain regarding the form and oversight mechanisms of collaboration schools and donor funded schools. Furthermore the lack of consultation and engagement with communities and interim SGBs at new schools which are established as collaboration schools raises significant questions around the intentions of the department and the effect this will have on the community buy-in.
15. This is compounded by the fact that the amendments differ from the pilot in several key aspects, including SGB buy-in and admissions. Several of the assurances and safeguards present in the pilot are not present in the Amendment Bill.
16. It bears emphasis that EE is not dogmatically opposed to developing and testing alternative models, to achieve better educational outcomes for learners, particularly in disadvantaged schools. However, legislative amendments that seek to introduce such models can only be rationally defended if there is a proven basis for achieving those aims. In the case of the ambiguous and poorly defined collaboration and donor-funded schools, there does not appear to be any justifiable link between the introduction of these schools and the improved educational outcomes envisioned. This scheme is touted as an innovative plan to improve the worst-off schools. But at heart, it undermines poor and working-class parents’ say over their children’s education. It also signals that the state has given up on improving these schools itself despite their duties as encompassed in section 58B of SASA.

The establishment of intervention facilities

17. The proposal to introduce “intervention facilities” is vague and there is a risk that such facilities will:

- 17.1. contravene the suggestions of the 1995 Inter-Ministerial Committee on Young People at Risk (the “**IMC**”) and South African Law Commission’s (the “**SALC**”) review of the Child Care Act of 1983 (“**Child Care Act**”) by diverting the focus on preventative and community-centred care for youth at risk to a model of isolated and exclusionary care that has been proved ineffective;
- 17.2. stigmatise youth that are sent to such facilities;
- 17.3. violate national legislation relating to school suspension and expulsion; and
- 17.4. unfairly subject Western Cape learners to prolonged disciplinary interventions that their peers in the rest of the country do not have to face.

18. Given the lengthy process of transforming the highly problematic system of reform schools of the apartheid era, EE is concerned that the introduction of intervention facilities would be a regressive step. Ideally, resources should instead be spent on ensuring the establishment of a proper functioning inclusive education system that supports all learners without having to isolate and exclude learners at risk from their families and communities, or to deny them the opportunity to have a normal schooling experience.

19. Although innovative solutions are needed, we should be sure that these are not vague and open-ended, but are rather clear in scope and purpose. Most importantly, they must uphold the best interests of children and avoid the potential of compounding exclusion and marginalisation.

The allowance of alcohol on school premises

20. Despite the administrative requirement to submit a written application involving the HOD, the real power and control of the use and sale of alcohol appears to lie with the SGB or principal, as the case may be, who, once authorised, may permit the use and sale of alcohol at schools or at school activities for any purpose.

21. Both the DBE and the Western Cape Government have taken heed of statistics that show the devastating effects of drug and alcohol abuse in South Africa, and *especially* in the Western Cape. The relevant policy documents and safety guides

repeatedly emphasize the need to keep schools as alcohol- and drug-free zones, and to take proactive steps to promote healthy behaviour and lifestyles, and to prevent alcohol and drug abuse.

22. The proposed section 45B does not further this mandate and should be removed in its entirety.

C. The Western Cape Schools Evaluation Authority

23. Clause 8 of the Bill intends to amend the principal Act by creating an independent body to monitor and evaluate various aspects of education in schools, and to advise the MEC on these aspects.
24. The WCSEA's main function will be advisory, but it will also have inspection, research and reporting functions, with powers, under certain circumstances, to enter and seize financial records without notice.

The proposed amendments

25. Clause 8 of the Bill proposes to amend the principal Act through the introduction of sections 11A to 11H. The relevant amendments can be summarised as follows:
- 25.1. In terms of the proposed section 11A, the MEC is empowered to establish an evaluation authority known as the WCSEA "*to conduct independent evaluations of schools*". The proposed section 11E also gives the MEC the power to dissolve the WCSEA after due process if the WCSEA fails to perform its functions satisfactorily, is no longer effective, or acts in a manner not in the best interests of education.
- 25.2. The evaluation authority will be headed by the "Chief Evaluator", who has the authority to appoint "Lead Evaluators" and "Evaluators". Significantly, in terms of the proposed section 11A, the MEC has the absolute power to appoint and remove the Chief Evaluator, and in terms of section 11E, determines the remuneration and allowances of the Chief Evaluator, Lead Evaluator and Evaluators after consultation with the financial head. The Chief Evaluator is appointed for a non-renewable term of four years.
- 25.3. Proposed section 11B provides eligibility criteria for the appointment of the Chief Evaluator, Lead Evaluator and Evaluators.
- 25.4. In terms of the proposed section 11C, the MEC also has the sole power to remove the Chief Evaluator, "*after due process*", if the Chief Evaluator no longer meets the eligibility criteria set out in section 11B, or on any other reasonable ground which includes "*misconduct, incapacity or incompetence*". The Chief Evaluator is in turn empowered to remove Lead Evaluators and Evaluators on similar grounds.
- 25.5. In terms of proposed section 11D(1), the Chief Evaluator, as head of the WCSEA, has the responsibility of keeping the MEC informed of the following:

- 25.5.1 the quality of education in schools;
 - 25.5.2 the extent to which education meets diverse learners' needs through a holistic approach;
 - 25.5.3 educational standards achieved in the school;
 - 25.5.4 the quality of leadership and management in the school;
 - 25.5.5 the financial resources made available at the school and these resources are managed economically, efficiently and effectively;
 - 25.5.6 the development of internal procedures of self-evaluation and the production of school improvement plans;
 - 25.5.7 the safety, behaviour and attendance of learners and staff at the school;
 - 25.5.8 the social and cultural development of learners at the school;
 - 25.5.9 performance management and development of educators in the school;
 - 25.5.10 the relationship between parents, the community and the school.
- 25.6. Notably, the MEC has the power to exempt the Chief Evaluator from performing any of the duties set out in section 11D(1).
- 25.7. The proposed section 11D(2) states that the Chief Evaluator must, upon request of the MEC, advise the MEC on any matter as requested, and must evaluate and report on a school or class in a school, as specified in the request.
- 25.8. Section 11D(4), as proposed, sets out the powers of the Chief Evaluator, Lead Evaluator or Evaluators (which powers the MEC has the authority to revoke in terms of the proposed section 11D(6)(c)(ii)):
- 25.8.1 on two school days' notice (unless there are reasonable grounds to believe that not providing notice is necessary for the effective performance if the additional powers of the WCSEA) to the district director, principal and governing body, to obtain access to and evaluate a school or classroom in a school, observe lessons and gather information, and conduct an interview with a governing

body, a Department official, member of school staff, learner or parent;

25.8.2 to submit a request for documentation to the school principal; and

25.8.3 without notice, to enter a school and seize financial records, statements and documents, if there is *prima facie* proof of financial mismanagement and a reasonable suspicion that the records and documents will be hidden, destroyed or tampered with if notice is given.

25.9. In addition to the listed duties and powers conferred on the Chief Evaluator, in terms of proposed section 11D(6), the MEC is empowered to authorise the Chief Evaluator to perform additional duties or to exercise additional powers if the MEC has reason to believe that the Chief Evaluator has the capacity to perform these additional duties or to exercise these additional powers, and if it would be in the public interest for the Chief Evaluator to do so. The MEC is also empowered to revoke such additional duties or powers if the Chief Evaluator no longer has the requisite capacity, and it is in the public interest to do so.

25.10. According to proposed section 11F, the HOD is expected to provide the WCSEA with "*general support and the necessary resources*" to perform its functions, "*including administrative support and infrastructure support*". The Bill goes on to provide that the HOD must designate officials of the WCED to provide such administrative support, and that the HOD shall consider the findings and recommendation of the Chief Evaluator and implement appropriate measures to facilitate improvements.

25.11. Finally, proposed section 11H empowers the MEC to make regulations on the procedures and terms for the appointment and removal of the Chief Evaluator, Lead Evaluator and Evaluators, the procedures for the exercise of the powers granted in terms of section 11D(4), the manner in which the Chief Evaluator must inform the MEC of matters set out in the proposed section 11D(1), the preparation and publication of reports by the WCSEA, and any other matters which may be necessary or expedient to prescribe in order to achieve the objects of the WCSEA.

26. We will now proceed to set out our concerns with the proposed WCSEA. These concerns do not arise from an opposition to better monitoring and evaluation. On the contrary, the Bill will not improve monitoring and evaluation, but will instead lead to bureaucratisation, duplication, and a lack of uniformity without providing support to underperforming schools.

No clear alignment with existing frameworks for monitoring and evaluation

27. It is important to note at the outset that a national framework exists for the monitoring and evaluation of schools. EE's submission is that the creation of a separate bureaucratic structure for monitoring and evaluation, in the form of the WCSEA, is at best redundant, and at worst, fails to align with national frameworks and established structures for monitoring and evaluation.
28. The legislative framework that currently applies to the monitoring and evaluation process in schools is as follows:
- 28.1. The Constitution of the Republic of South Africa, 1996 (the "**Constitution**") designates that the provision of basic education is a concurrent function between National and Provincial Government, in terms of Schedule 4.
 - 28.2. Section 61(e) of SASA empowers the National Minister of Basic Education to make regulations to prescribe a national process for the monitoring and evaluation of education in public and independent schools.
 - 28.3. Section 3(4) of the National Education Policy Act, 1996 furthermore grants the National Minister the power to determine a national policy for, amongst other things, monitoring and evaluation of the entire education system.
 - 28.4. The Whole School Evaluation policy ("**WSE policy**") was published in July 2001 and provides for a national framework for evaluation of the entire education system. The framework comprises self-evaluation in schools, supported by external evaluation by the provincial education department. In terms of the WSE policy, provinces are responsible for appointing a competent, well-trained and accredited supervisory unit, with appropriate administrative support. Significantly, the WSE policy provides that provincial supervisory units (responsible for the day-to-day operations of whole-school evaluation) must function under the direction of the Head of Department, within a nationally co-ordinated framework.
 - 28.5. In addition to this, section 9 of the principal Act currently empowers the provincial Head of Department to authorise, in writing, a person to inspect a school or hostel, in consultation with the principal of the school concerned, for the purpose of evaluating performance or monitoring compliance with national norms and standards.
29. Accordingly, while monitoring and evaluation is presently the function of provincial government, it occurs within a national legislative framework and is subject to the standards and structures set out in national WSE policy, which generally identifies the Head of Department as primarily responsible.

30. Against this background, the extent to which the functions of the proposed WCSEA overlap, conflict with or differ from those already granted to the Head of Department is entirely unclear.
31. The confusion regarding overlapping roles is compounded by the proposed section 11F, which requires the Head of Department to provide general support and resources to the WCSEA to perform its functions, and to designate officials from the Department to “*provide administrative support*” to the WCSEA. However, the proposed amendments do not detail any substantive relationship or rules of engagement or coordination between the Head of Department and WCSEA so as to ensure alignment of their monitoring and evaluation functions (and the most efficient use of resources).
32. Therefore, the introduction of an additional bureaucratic layer to perform evaluation and monitoring of schools (at the behest of the MEC) does not appear justifiable, particularly where the responsibilities of this parallel structure appear either to duplicate or conflict with existing structures.
33. Instead, EE submits that national frameworks regarding monitoring should be strengthened and properly implemented.

Lack of support for schools

34. To the concern that the proposed WCSEA creates bureaucracy, duplication and a lack of uniformity can be added another: it is, on its own terms, simply inadequate. In particular, the absence of supportive mechanisms to assist schools that require improvement means that the WCSEA is likely to suffer the same pitfalls as the existing WSE Policy.² These failures include the tendency of district officials to visit schools only to monitor the implementation of policies, and rarely to provide the support schools need in order to achieve such implementation.
35. Under the Bill, the Chief Evaluator is, at most, empowered to publish reports and make recommendations for improvement. However, there is no mention of the kind of support envisaged for schools to achieve such improvement. And while clause 9A introduces monitoring and “support” mechanisms for curriculum delivery, it sets out no substantive criteria or guidelines, and it is not clear how these processes or powers relate to the WCSEA, if at all.

² De Clercq, F. (2007). School monitoring and change: a critical examination of Whole School Evaluation. *Education as Change*, 11(2), 79-113.

Shalem, Y. (2003). Do we have a theory of change? Calling change models to account. *Perspectives in Education*, 21(March), 29–49.

36. Rather than introducing more monitoring and evaluation structures, what is needed is for districts to recognise the essential nature of their support role and to revise their own accountability structures.³
37. As researchers have noted, there is a need for “reciprocity of accountability”⁴ and ensuring that “[f]or every increment of performance [required], [there is] a responsibility to provide the additional capacity to produce that performance”. Thus, the WCED needs to provide adequate support before it can enforce accountability measures.
38. Absent this component of support, there is a risk that the WCSEA will function solely as a policing and punitive structure rather than a constructive improvement mechanism for schools and communities.

The WCSEA operates under the control of the MEC and lacks independence

39. The proposed amendments contained in the proposed sections 11A -11H purport to establish an “independent” evaluations authority.
40. However, these amendments, as summarised in paragraph 23 above, grant the MEC broad discretionary powers to hire and fire members of the WCSEA, as well as to determine the powers of these members, thereby undermining the ostensible independence of the WCSEA.
41. The Constitutional Court has emphasised in numerous cases that independent bodies charged with investigative functions must have sufficient institutional and operational independence to shield them from actual or perceived political influence.⁵ It has also held that the sufficiency of an institution’s independence turns, *inter alia*, on the method of appointment and removal, security of tenure, and oversight and accountability mechanisms.⁶
42. Against this standard, the Bill would grant the MEC the authority to exempt the Chief Evaluator from performing his or her duties in terms of the Bill, to revoke the powers conferred on the Chief Evaluator, Lead Evaluator, or Evaluators, or to authorise the Chief Evaluator to perform additional duties or exercise additional powers. The extent of these powers is inimical to the WCSEA’s independence.

³ De Clercq, F. (2007). School monitoring and change: a critical examination of Whole School Evaluation. *Education as Change*, 11(2), 79-113.

⁴ Elmore, R. F. (2006). *School Reform from the Inside Out: Policy, Practice, and Performance*. Cambridge, Mass.: Harvard Education Press, 89.

⁵ See *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) (“*Glenister II*”) *Helen*

Suzman Foundation v President of the Republic of South Africa 2015 (2) SA 1 (CC)

⁶ *Glenister II* at para 207, *McBride v Minister of Police* 2016 (11) BCLR 1398 (CC) at paras 31 and 37.

43. Similarly, the MEC's power to remove the Chief Evaluator prior to the completion of his or her term on a broad basis including that of "reasonable grounds" may undermine the WCSEA's independence. The Constitutional Court recently emphasised that the power of the political or executive authority to remove the head of an independent investigative entity must be circumscribed by clear guidelines in order to safeguard the entity's independence.⁷
44. In addition, the MEC is authorised to make regulations on a wide range of areas, including the procedures and terms relating to the appointment, removal and exercise of the powers of the Chief Evaluator, Lead Evaluator and Evaluators. Thus, while granting the Chief Evaluator the power to appoint and remove the Lead Evaluator and Evaluators appears to be an attempt to dilute the MEC's authority, this is undone by the MEC's wide powers to influence the appointment and removal processes through regulation.
45. If the WCSEA is to play a valuable role in effectively enhancing monitoring and evaluation beyond existing frameworks, there must be accountability across all levels of the system – from the classroom, through to the districts and the provincial department itself. As long as it is not structured to evaluate the education system as a whole, the WCSEA runs the risk of blaming schools for systemic problems and proposing remedies only at the level of the school.
46. Disappointingly, however, rather than enhancing independent accountability at all levels, the current proposed structure of the WCSEA will effectively act as the personal inspectorate of the MEC, operating entirely under her/his influence. As elaborated on below, this has the potential to result in an abuse of power, including the targeting of specific categories of schools.

The use of the WCSEA to identify potential "collaboration schools"

47. The introduction of the WCSEA has been proposed alongside the introduction of collaboration schools or donor-funded schools. The latter amendments are addressed in more detail below. For present purposes, we focus on the potential that the creation of the WCSEA, over which the MEC wields extensive powers, poses significant abuse-of-power risks regarding collaboration schools.
48. The proposed section 12C(1) empowers the MEC to identify a public school for declaration as a collaboration school *"if he or she is satisfied that such declaration is in the interests of education at the school, having regard to relevant reports on the school, including reports on the performance of the school"*. Similarly, section 12D(1) of the Bill states that the MEC may enter into an agreement with a donor and governing body of a public school in terms of which

⁷ See *McBride v Minister of Police* 2016 (11) BCLR 1398 (CC).

an existing public school could be declared a donor-funded public school, if such declaration is in the *"interests of education in that school"*.

49. As noted above, the proposed section 11D(2) empowers the MEC to direct the Chief Evaluator to advise her or him on matters, as requested, and to evaluate and report on a school or class in a school. The independence of the Chief Evaluator is, in turn, and for the reasons set out above, compromised insofar as the exercise by the MEC of authority over such Chief Evaluator is concerned.
50. The potential accordingly exists that the WCSEA may be used by the MEC to identify and target particular schools. Armed with the WCSEA's evaluation, the MEC would then be in a position to compel such schools to become collaboration schools or donor-funded schools.

Using the WCSEA to create competition between schools will not improve performance

51. The proposed section 11D(3) states that *"the Chief Evaluator shall compile and publish reports, which shall include empirical findings and, where applicable, recommendations for improvement"*.
52. In the press statement that accompanied the publication of the Draft Bill published in August 2016, the Western Cape MEC for Education, Debbie Schafer, stated that the new assessments would focus on *"a smaller set of criteria... especially the quality of teaching and learning in the classroom."*⁸ She added that the tools and criteria for measurement have yet to be finalised. According to the MEC, the WCSEA's animating principle is *"to publicise results so that parents can have a look at them and see how their schools are performing, and hopefully by making things more transparent, it will also enforce more accountability at the school, so the schools will have a bit of healthy competition between each other to see that they can... that they actually improve."*⁹
53. Taken together, the refinement of the evaluation criteria and the publication of evaluation results for parents to use in the choice of schools, points to a policy objective of promoting school competition as a means of increasing school performance.
54. An increase in school accountability and transparency is important. However, whether competition amongst schools increases education quality is far from

⁸ Western Cape Government. Department of Education. (2016). *Proposed Amendments to Western Cape Provincial School Education Act, 1997*. Retrieved: 24 August 2016.

⁹ SABC News and Current Affairs. (2016). Western Cape Proposes Amendments to Education Act. SABC. August 2016. Radio.

clear, and may, in fact, have harmful effects.¹⁰ A report published by the OECD in 2011 provides a systematic review of evidence from school choice programs in OECD countries. It cites various empirical studies that “*find no significant benefit in terms of achievement in attending another public school [instead of] their local one for transferring students.*”¹¹ Furthermore, the report shows that across the board, “*more affluent parents are more likely to exercise school choice.*”¹² This is because, “*information acquisition has very high costs, especially for parents who lack the needed social capital, the resources, the time, the connections or the cultural resources to effectively choose.*”¹³

55. The upshot of a “competitive” public school policy is two-fold:

55.1. First, the poorest students will be left at the worst performing schools. Research shows that school choice programs in England, the USA and Chile resulted in an increase in educational inequality and stratification.¹⁴

55.2. Secondly, while schools might have a *publicity*-orientated response to school competition, research demonstrates that they rarely have a *performance*-orientated response and effect.¹⁵ In other words, research shows that competition amongst schools rarely results in improved outcomes and is likely to simply motivate schools to advertise themselves as the ‘top’ school in the province rather than focusing on performance outcomes.

Some forms of accountability may be harmful

56. The introduction of the WCSEA should be seen within a broader conversation around performance management and accountability systems in education. There was a shift globally in the 1990s towards school-based management (SBM) which foregrounded management dimensions of schools and required principals to run their schools as organisations. South Africa followed this trend.

¹⁰ See, for example, Cullen, J., B. Jacob and S. Levitt. (2006), The Effects of School Choice on Participants: Evidence from Randomized Lotteries. *Econometrica*. 74(5).

Hastings, J., T. Kane & D. Staiger. (2005). Parental Preferences and School Competition: Evidence from a Public School Choice Program. *NBER Working Paper n°11805*. National Bureau of Economic Research.

¹¹ Musset, P. (2012). School Choice and Equity: Current Policies in OECD Countries and a Literature Review. *OECD Education Working Papers*. 66. OECD Publishing. 25.

¹² Ibid. 32.

¹³ Ibid. 33.

¹⁴ Ball, S.J. (2006). *Education Markets, Choice and Social Class: the market as a class strategy in the UK and the USA.*; Hsieh, C., Urquiola, M. (2006). The effects of generalized school choice on achievement and stratification: Evidence from Chile's voucher program. *Journal of Public Economics*. 90. 8-9. 1477-1503.; Whitty, G. (1997). Creating Quasi-Markets in Education: A Review of Recent Research on Parental Choice and School Autonomy in Three Countries. *Review of Research in Education*. 22. 12-21.

¹⁵ Hess, Frederick M. (2002) *Revolution at the Margins: The Impact of Competition on Urban School Systems*. Washington, D.C.: Brookings Institution Press. 5.

Principals started being viewed as 'managers' who are offered 'solutions' to 'performance problems' in the form of 'business approaches'.¹⁶

57. This use of business models into the education sphere often occurs with *"little reflection about the suitability of business models for schools"*.¹⁷ When discourses drawn from business are imposed on education, *"private sector values – primarily those of efficiency, effectiveness and economy – usually become the criteria of success"*.¹⁸ Other issues such as *"care, trust and equity increasingly become second-order"*.¹⁹
58. The 2017 UNESCO Global Monitoring Report, which focuses on accountability, highlights how harmful some market-based reforms in education can be. The report warns *"there is little evidence that performance-based accountability, which focuses on outcomes over inputs and uses narrow incentives, improves education systems"*.²⁰ This approach to accountability is blame-focused and use punishments to force compliance. Further, rewards-based systems such as performance-related teacher pay, are *"associated with undesirable consequences"*. These include the fact that peer collaboration may deteriorate, teachers often become demotivated, the curriculum is more likely to be narrowed and teaching to the test is emphasised.²¹
59. The UNESCO report further warns that performance-based approaches to accountability developed in high income countries, are often portrayed as good practice in dialogue with low and middle income countries that face very different challenges and constraints.
60. It is EE's understanding that the WCSEA is modelled on the Office for Standards in Education ("**Ofsted**"), the school inspectorate in the United Kingdom (UK). While details on how the WCSEA will be run are still unclear, the WCSEA runs the risk of making some of the same mistakes as Ofsted. Running Ofsted is not only very expensive,²² its introduction has also been accompanied by what teachers describe as an onerous amount of paperwork, record keeping and excessive lesson-by-lesson planning. Teachers have indicated that in their experience, this administration is largely a performative process for the inspectorate, and not one that improves their teaching. As such it is seen to have

¹⁶ Christie, P. (2010). *Landscapes of leadership in South African schools: Mapping the changes. Educational Management Administration & Leadership*, 38(6), 699. 17 Ibid., 698.

¹⁷ Bottery, M. (2006). Educational leaders in a globalising world: a new set of priorities?. *School Leadership and Management*, 26(1), 7.

¹⁸ Ibid., 7.

¹⁹ Ibid., 7.

²⁰ Unesco (2017). *Accountability in Education: Meeting our commitments. Global Education Monitoring Report 217/18*, Paris: Unesco Publishing, xiv.

²¹ Ibid, xiv, 64.

²² Ouston, J., Fidler, B. & Earley, P. (1997). What do schools do after OFSTED school inspections or before?, *School Leadership & Management*, 17:1, pp. 95-104.

had “*no lasting impact*” on teaching practice outside “*nominal compliance with its formal procedures in the run-up to and during the inspection visit*”.²³

61. Ofsted’s inspections and evaluations have resulted in teachers substituting time intended for teaching and learning to strategically plan for the inspections, with the aim to impress inspectors.²⁴ Moreover, teachers have expressed feeling disenfranchised with the criteria imposed by Ofsted as it focuses on inspection standards that are most easily measurable such as Mathematics and English, at the expense of creative facets of schooling such as art or sport.²⁵
62. In fact, teachers feel that this preoccupation with record-keeping has negatively affected their teaching.²⁶ A study analysing the results of 3000 schools confirms these teacher experiences. The study found that Ofsted inspections had no positive effect on examination achievement at comprehensive schools, which make up the largest proportion of UK schools.²⁷ The study concluded that “*if anything, it made it worse*”.²⁸ Where the inspections did have a slight effect was in selective and grant-maintained schools where achievement was likely to be well above average to begin with.
63. Since the worst-performing schools will be affected most by the recommendations of the WCSEA, it is these schools that will be forced to dedicate disproportionate time and resources on the new, narrower evaluation criteria. In the United States, this has meant that students at underperforming schools are disadvantaged further as their schools focus on limited evaluation criteria and neglect “*those learning possibilities that emphasise the development of a critical intelligence, the stimulation of our imagination, [and] the quest to make meaning out of our own experience*”.²⁹
64. Research conducted by the Association of Teachers and Learners, an education professionals union in the United Kingdom, confirm that Ofsted’s persistent inspections and target-setting at schools has also had harmful effects on

²³ Ibid. p. 605.

²⁴ Ibid

²⁵ McBeath, J. (2016) Ofsted: The Pros, Cons and Alternatives “Ofsted does not help schools improve: a self-evaluation system would be more effective”

<https://www.theguardian.com/teacher-network/2016/mar/06/scrap-ofsted-pros-cons-alternatives>

Retrieved: 3 August 2018

²⁶ Ibid. p. 618.

²⁷ Shaw, I., Newton, D. P., Aitkin, M. & Darnell, R., (2003)., *Do OFSTED Inspections of Secondary Schools Make a Difference to GCSE Results?*, *British Educational Research Journal*, 29 (1), 2003, pp. 63-75.

²⁸ Ibid. pp. 63-75.

²⁹ Shapiro, S. (2005). Public school reform: The mis-measure of education. In H. Shapiro & D. Purpel, (Eds.), *Critical social issues in American education: Democracy and meaning in a globalizing world*, 3rd edition. Mahwah, NJ: Lawrence Erlbaum Associates. 289.

teachers' mental health.³⁰ A 1998 study found that school inspections and evaluations can exacerbate distress among teachers who feel that their professional competence is being called into question, scrutinised and "*brought under intensive and critical gaze*".

65. At its core, teaching requires a unique emotional commitment to the profession, but research has shown that relentless inspections by the evaluating body has led to what educationalists Jeffrey and Woods refer to as "*illustrations of deprofessionalisation*". They recognise that the persistent focus on preparing for inspections can lead to the routinisation of work, representing "*a move from professional to technician status*".³¹

Conclusion

66. Against the backdrop of the extant national WSE monitoring and evaluation framework, EE's core submission is that the creation of an additional bureaucratic structure for monitoring and evaluation is not justified. The proposed establishment of the WCSEA appears to create overlapping and potentially conflicting roles for the Head of Department and the WCSEA.

67. Worse still, rather than enhancing monitoring and evaluation beyond the WSE framework (for example, through the introduction of independent accountability running through all levels of the education system), the WCSEA will effectively act as the personal inspectorate of the MEC. The comprehensive power and wide discretion afforded to the political head to hire, fire and determine the duties of the Chief Evaluator, undermines the WCSEA's purported independence.

68. Together with other provisions, the Bill also creates the risk of an abuse of power by the MEC resulting in the targeting of certain categories of schools.

69. The proposed amendments have only a thin description of support mechanisms for schools that require improvement. This highlights the redundancy of the WCSEA, in that it is precisely the problem with the existing monitoring and evaluation framework.

70. EE is not opposed to accountability measures in schools. However, we recognise that forms of accountability that burden teachers with excessive record keeping without providing sufficient support or opportunities for monitoring to meaningfully inform teaching practice, may end up merely being performative exercises that not only waste time and resources, but can also be harmful to teaching practice.

³⁰ Hopkins, E. & Hendry, H. (2016). Teachers' views of the impact of school evaluation and external inspection processes. *Improving Schools Journal*. 19(1). 53-61.

³¹ Jeffrey, B. & Woods, P. (2006). Feeling Deprofessionalised: the social construction of emotions during an OFSTED inspection. *Cambridge Journal of Education*, 26(3). 325-343.

We are concerned that the rationale espoused by the WCED is similar to other interventions that have had these effects.

71.EE submits that the focus of reform initiatives should be to strengthen districts' supportive role and internal accountability frameworks.

D. Collaboration Schools and Donor-Funded Schools

Description of the proposed amendments

72. The Draft Bill seeks to introduce two new categories of public schools:

- a. Collaboration schools (proposed section 12C); and
- b. Donor-funded public schools (proposed section 12D).

73. These categories specifically enable the formal introduction of private actors into the public schooling system, namely:

73.1. A “*donor*” defined as a person “who provides funds or property to a collaboration school or donor-funded public school for the purposes of improving education delivery in the province”; and

73.2. An “*operating partner*” defined as “a non-profit organisation that is authorised to place their capacity, skills or resources at the disposal of a collaboration school to empower the governing body, school management team and educators at the school to develop systems, structures, cultures and capacities necessary to deliver quality education”.

74. Proposed section 12C reads:

Collaboration Schools

(1) *The Provincial Minister may identify a public school contemplated in section 12(1)(a) to (f) for declaration as a collaboration school if he or she is satisfied that such declaration is in the interests of education at the school, having regard to relevant reports on the school, including reports on the performance of the school.*

(2) *Subject to subsection(1), the [MEC] may enter into an agreement with—*

- (a) *a donor;*
- (b) *an operating partner; and*
- (c) *the governing body of a public school,*

in terms of which an existing public school contemplated in section 12(1)(a) to (f) is to be declared a collaboration school.

(3) *The Provincial Minister may on recommendation of the Head of Department, enter into an agreement with a donor and an operating partner for the establishment of a new collaboration school and establish the school.*

- (4) *The agreements contemplated in subsections (2) and (3) shall contain the minimum requirements prescribed by the Provincial Minister.*
- (5) *On conclusion of an agreement contemplated in subsection (2), the Provincial Minister may, by notice in the Provincial Gazette, declare the public school concerned to be a collaboration school.*
- (6) *The Provincial Minister may not make a declaration contemplated in subsection (5) unless he or she has called for public comment in respect of the intended declaration and given due consideration to any comments received.*
- (7) *If an agreement with an operating partner or donor contemplated in subsection (2)(a) or (b) or subsection (3) is terminated, the Provincial Minister may, on the recommendation of the Head of Department, enter into a new agreement with a new operating partner or donor, as the case may be, and the school may retain its status as a collaboration school.*
- (8) *If a new agreement is not entered into as contemplated in subsection (7)—*
 - (a) *the school concerned shall cease to be a collaboration school;*
 - (b) *the Provincial Minister shall, by notice in the Provincial Gazette, declare the school to be the applicable type of public school contemplated in section 12(1)(a) to (f); and*
 - (c) *a new governing body shall be composed in the prescribed manner.*
- (9) *The membership of the governing body of a collaboration school shall comprise 50 per cent of representatives of the operating partner with voting rights and 50 per cent of the other members of the governing body, with voting rights: Provided that the Provincial Minister may, on good cause shown, declare that the governing body of a particular collaboration school shall comprise more than 50 per cent of the other members of the governing body with voting rights.*
- (10) *In the event of an equality of votes at a meeting of a governing body of a collaboration school where the operating partner with voting rights comprises 50 per cent of that governing body, the matter must be determined by a majority vote at a general meeting of parents present and voting.*
- (11) *The Western Cape Education Department must maintain the employment of educators and non-educators who, at the time of the declaration of a collaboration school in terms of subsection (5), are employed at the school in posts established in terms of the Employment of Educators Act or the Public Service Act, 1994 (Proclamation 103 of 1994), in accordance with the conditions of employment applicable to those posts for as long as those educators and non educators remain in those posts.*

- (12) *Subject to the Public Finance Management Act, 1999 (Act 1 of 1999), the Western Cape Education Department may make transfer payments to a collaboration school equivalent to the amounts required for the funding of-*
- (a) *Posts contemplated in subsection (11) which become vacant;*
 - (b) *New posts determined by the Head of Department for –*
 - (i) *Educators in terms of section 5(2) of the Employment of Educators Act;*
 - (ii) *Non-educators in terms of the Western Cape Education Department's Norms and Standards for Support Staff Provision at Ordinary Public Schools Subject to the available resources of the Western Cape Education Department.*
- (13) *Subject to the regulations contemplated in subsection (17)(b), the governing body of a collaboration school may, from the funds contemplated in subsection (12), employ educators and non-educators in accordance with the staff establishment, and terms and conditions of employment, determined by the governing body.*
- (14) *A collaboration school shall be the employer of educators and non-educators contemplated in subsection (13).*
- (15) *The employment of educators and non-educators by a governing body, contemplated in subsection (13) is subject to the Labour Relations Act, 1995, and the Basic Conditions of Employment Act, 1997 (Act 75 of 1997).*
- (16) *Despite section 60 of the South African Schools Act, the State is not liable for any act or omission by a collaboration school relating to its contractual responsibility as the employer in respect of staff employed in terms of subsection (13).*
- (17) *The Provincial Minister must make regulations regarding-*
- (a) *Transfer of payments contemplated in subsection (12); and*
 - (b) *The utilisation of funds by a governing body for the purposes contemplated in subsection (13),*
- But such regulations may not be interpreted so as to make the State the joint employer of such staff.*
- (18) *Save as provided for in this section, the provisions of this Act and any other applicable law regulating public schools apply to collaboration schools.*

75. Accordingly, collaboration schools envisage the formal introduction of two private actors - a "donor" and an "operating partner" - into a school's system. In some cases, this will be by agreement with the SGB. However, the Bill also empowers the MEC to impose donors and operating partners on a school without the SGB's agreement where she is satisfied that such declaration would be in the interests

of education. Once declared a “collaboration school”, representatives of the operating partner are afforded a 50 per cent representation on the SGB as the default position, with deviation from the position on “good cause” shown.

76. We note that collaboration schools have already been implemented by the WCED as part of a pilot project initiated at the beginning of the 2016 academic year. EE has raised concerns about this project in various forums. For present purposes, it is significant that despite the purported aim of the project being to test and evaluate the efficacy of collaboration schools in order to determine their viability, the project is incomplete, has been inadequately monitored and evaluated, and has not presented any significant results. In other words, the viability of collaboration schools is entirely unknown.

77. Section 12D reads:

“Donor-funded public schools

(1) *The Provincial Minister may enter into an agreement with—*

- (a) a donor; and*
- (b) the governing body of a public school,*

in terms of which an existing public school contemplated in section 12(1)(a) to (f) is to be declared a donor-funded public school provided that the Provincial Minister is satisfied that such declaration will be in the interests of education at the school.

- (2) *The Provincial Minister may enter into an agreement with a donor for the establishment of a new donor-funded public school and establish the school.*
- (3) *The agreements contemplated in subsections (1) and (2) shall contain the minimum requirements prescribed by the Provincial Minister.*
- (4) *On conclusion of an agreement contemplated in subsection (1), the Provincial Minister may, by notice in the Provincial Gazette, declare the public school concerned to be a donor-funded public school.*
- (5) *The Provincial Minister may not make a declaration contemplated in subsection (4) unless he or she has called for public comment in respect of the intended declaration and given due consideration to any comments received.*
- (6) *In the event of the termination of an agreement contemplated in subsection (1) or*
(2)—
 - (a) the school concerned shall cease to be a donor-funded public school;*

- (b) *the Provincial Minister shall, by notice in the Provincial Gazette, declare the school to be the applicable type of public school contemplated in section 12(1)(a) to (f); and*
- (c) *a new governing body shall be composed in the prescribed manner.*
- (7) *The membership of the governing body of a donor-funded public school may include representatives of the donor, with voting rights, up to a maximum of 50 per cent.*
- (8) *In the event of an equality of votes at a meeting of a governing body of a donor funded public school where the representatives of the donor with voting rights comprise 50 per cent of that governing body, the matter must be determined by a majority vote at a general meeting of parents present and voting.*
- (9) *The Provincial Minister may, on good cause shown, declare that the governing body of a particular donor-funded public school shall comprise more than 50 per cent of the representatives of the donor with voting rights.*
- (10) *Save as provided for in this section, the provisions of this Act and any other applicable law regulating public schools apply to donor-funded schools.”*

78. In essence, the provision empowers the MEC to enter into an agreement with a private donor and SGB to declare a school a “*donor-funded public school*”. Donor-funded public schools have no precedent in law of which we are aware.

79. Through the declaration of a school as donor-funded, the private donor thereby attains representation on the SGB. No provision exists regarding the due diligence that must occur before a donor is accepted or appointed. The donor need not have any educational expertise or interest. The only criteria is that the MEC must be satisfied that such declaration is “in the interests of education at the school”.

80. Once that is so, donor representatives are entitled to be voting members on the SGB, and may, without more, comprise 50 per cent of members on the SGB. In addition, provision is made for the MEC to declare a donor *majority* representation on the SGB.

81. Below we set out our legal and policy-based concerns regarding the introduction of these two new forms of schools.

No criteria guiding discretion of MEC to declare collaboration and donor-funded public schools

82. It is concerning that the MEC may declare a school as a collaboration school or donor-funded public school guided only by their subjective satisfaction that such declaration is “*in the interests of education at the school*”. Of course, such a

declaration would be reviewable and, at minimum, would have to be rational and lawful. Nevertheless, the absence of any guidance as to the circumstances in which a public school can be so declared is impermissibly vague, and imbues the MEC with an impermissibly wide discretion.

83. Reference is made to the consideration of reports, but again, no guidance is provided regarding who investigates or drafts the reports or what, apart from information regarding a school's performance, their content must be. This exceptionally broad and subjective assessment opens the door to abuse of decision-making powers.
84. In the case of donor-funded public schools, the MEC need not even consider relevant reports. This deepens the potential for abuse and decision making based primarily on a purely subjective assessment.
85. This must be understood in the context of our education jurisprudence, set out in detail below, which emphasises the importance of parent- and teacher-based school governance. We address in the following subsection the unlawfulness of the SGB provisions of the Bill. However, for present purposes, we make only this point: any provision that detracts from the rights of learners, teachers and parents to govern their own school must, at minimum, be carefully circumscribed, and must set out specific criteria in terms of which it will apply.
86. Yet in both the collaboration school and donor-funded school provisions, the Bill offers no guiding criteria to limit the type of public schools which would qualify for such extreme measures as introducing private parties into the schooling environment.
87. The proposed amendments thus fail at the outset to articulate a lawful basis upon which public schools can be declared to fall within these new categories of privately influenced schools.

Proposed composition of SGBs conflicts with national legislation and is unconstitutional

88. Once declared a collaboration school, representatives of the operating partner shall comprise a 50% representation of the members of the SGB (with voting rights), subject to the power of the MEC to declare a deviation.
89. Once declared a donor-funded school, representatives of the donor – merely by virtue of their funding contribution – are entitled to include representatives as

voting members on the SGB up to a maximum of 50 per cent, subject to the power of the MEC to declare a deviation.

90. In respect of the deviation for collaboration schools, the MEC may, on good cause shown, declare that the *"governing body of a particular collaboration school shall comprise more than 50 per cent of the other members of the governing body with voting rights"*. The wording of this provision is unclear. Whilst on the face of it, this suggests that an SGB may comprise less than 50% of operating partner representatives, this interpretation leads to a conflicting position in respect of the position for a deviation in respect of donor-funded schools, discussed in paragraph 86 below.
91. In relation to a deviation for donor-funded schools, the proposed amendments allow for the MEC, "on good cause shown", to declare the donor representation on the SGB to be more than 50%. No clarity is given to this subjective discretion, which allows for abuse and potential take-over of SGBs.
92. The Bill accordingly permits donors and other private actors to buy influence and control over school governing bodies.
93. This is at odds with the fundamental tenets of the provisioning of public education, which is primarily about the best interests of learners and the public good. It is also contrary to our courts' jurisprudence on school governance, as we detail below.
94. Perhaps most significantly, the model conflicts with national legislation, which determines the national framework for SGB composition. It is, in our submission, accordingly unlawful.
95. Section 23 of SASA sets out the composition of SGBs. Section 23(1) of SASA stipulates that SGBs comprise three categories of members, namely the principal (as a representative of the HOD) elected members and co-opted members. Section 23 (2) of SASA details the members which an SGB must comprise, including parents, educators and non-educators and learners who are at least in the eighth grade. To avoid any conflict of interest, section 23(3) of SASA prohibits parents employed at the school from representing parent interests on the SGB.
96. Through section 23(6) of SASA, an SGB is entitled to co-opt members. Subject to one exception, co-opted members are not, in terms of section 23(8) of SASA, entitled to vote.
97. Under the proposed amendments, an operating partner in the case of collaboration schools, and a donor in the case of donor-funded schools would not

be elected. They would be appointed to the SGB by the donor and the Western Cape Education Department, respectively. An operating partner would accordingly not fall within the categories in section 23(2) of SASA. Should an operating partner be co-opted on to the SGB, they would, in terms of prevailing national legislation, not have voting rights.

98. Section 23(9) of SASA creates a strict requirement that parents must constitute the majority on the SGB. If the number of parents drops below majority representation, then the SGB must, in terms of section 23(10) of SASA temporarily co-opt parent(s) who will have voting rights. Where members are no longer learners, parents of learners, or staff at the school they cease to be a representative on the SGB.

99. Section 23 of SASA reads:

“(1) Subject to this Act, the membership of the governing body of an ordinary public school comprises—

(a) elected members;

(b) the principal, in his or her official capacity; (c) co-opted members.

(2) Elected members of the governing body shall comprise a member or members of each of the following categories:

(a) Parents of learners at the school;

(b) educators at the school;

(c) members of staff at the school who are not educators; and (d) learners in the eighth grade or higher at the school.

(3) A parent who is employed at the school may not represent parents on the governing body in terms of subsection (2) (a).

(4) The representative council of learners referred to in section 11(1) must elect the learner or learners referred to in subsection (2) (d).

(5) The governing body of an ordinary public school which provides education to learners with special needs must, where practically possible, co-opt a person or persons with expertise regarding the special education needs of such learners.

(6) A governing body may co-opt a member or members of the community to assist it in discharging its functions.

(7) The governing body of a public school contemplated in section 14 may co-opt the owner of the property occupied by the school or the nominated representative of such owner.

- (8) *Subject to subsection (10), co-opted members do not have voting rights on the governing body.*
- (9) *The number of parent members must comprise one more than the combined total of other members of a governing body who have voting rights.*
- (10) *If the number of parents at any stage is not more than the combined total of other members with voting rights, the governing body must temporarily co-opt parents with voting rights.*
- (11) *If a parent is co-opted with voting rights as contemplated in subsection (10), the co-option ceases when the vacancy has been filled through a by-election which must be held according to a procedure determined in terms of section 28 (d) within 90 days after the vacancy has occurred.*
- (12) *If a person elected as a member of a governing body as contemplated in subsection (2) ceases to fall within the category referred to in that subsection in respect of which he or she was elected as a member, he or she ceases to be a member of the governing body.”*
100. Nothing in the provisions of section 23 of SASA permits a third-party entity to control a SGB. In fact, no person who is not a parent, educator, learner or member of staff may vote in matters to be determined by the SGB.
101. Section 28 of SASA deals with election processes. This provision gives provincial MECs the power, by notice in the Government Gazette, to determine the following:
- “(a) the term of office of members and office-bearers of a governing body; [though subject to the maximum terms contained in section 31 of SASA]*
- (b) the designation of an officer to conduct the process for the nomination and election of members of the governing body;*
- (c) the procedure for the disqualification or removal of a member of the governing body or the dissolution of a governing body, for sufficient reason in each case;*
- (d) the procedure for the filling of a vacancy on the governing body;*
- (e) guidelines for the achievement of the highest practicable level of representivity of members of the governing body;*
- (f) a formula or formulae for the calculation of the number of members of the governing body to be elected in each of the categories referred to in section 23 (2), but such formula or formulae must provide reasonable representation for each category and must be capable of application to the different sizes and circumstances of public schools; and*
- (g) any other matters necessary for the election, appointment or assumption of office of members of the governing body.”*
102. SASA therefore sets out a detailed national framework in respect of the composition of school governing structures. Provincial legislation may regulate

the practicalities of election processes without resulting in a conflict with SASA. But to the extent that it alters the fundamental composition of SGBs, as the Bill seeks to do, it comes into direct conflict with SASA.

103. We turn now to explain why, in terms of the Constitution, it is the national legislation that prevails in this case.

National legislation on composition of SGBs prevails

104. The Constitution provides that the national and provincial legislature have concurrent competence to legislate on matters concerning education.³²

105. Section 146 of the Constitution deals with conflicts in respect of matters of concurrent competence. In terms of subsection (2), national legislation that applies uniformly across South Africa (like SASA) will prevail over provincial legislation if:

“(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing— (i) norms and standards; (ii) frameworks; or (iii) national policies.

(c) The national legislation is necessary for—

(i) . . .

(v) the promotion of equal opportunity or equal access to government services ...”

106. It is only if section 146(2) does not apply that, in terms of section 146(5), provincial legislation prevails.

107. An examination of the Preamble to SASA indicates that the Act was introduced because it was:

“necessary to set uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa”.

³² Republic of South Africa. (1996). Schedule 4. *The Constitution of the Republic of South Africa, Act No. 108 of 1996*. Pretoria: Government Printers.

108. Parliament therefore expressly envisaged SASA as legislation that would set uniform norms and standards for education delivery in public schools across the country, including the manner in which schools were to be governed.
109. Parliament was right to do so. As the preamble recognises, South Africa “requires a new *national system for schools which will redress past injustices in educational provision*”. In other words, the setting of uniform, national norms and standards, frameworks and policies was necessary to break from a past characterised by segregationist schooling and widespread disparity and fragmentation and towards a more equitable model.
110. This is especially so in respect of school governance, in which learners, parents and educators at all schools accept “*responsibility for the organisation, governance and funding of schools*”³³ in partnership with the State.
111. Various scholars have understood the achievement of uniform parent involvement in school governance as one of SASA’s key and laudable purposes.
112. For example, as a professor of education explained when discussing the policy environment surrounding the enactment of SASA:

*“in rethinking school governance and management, the Ministry of Education sought to create a united and integrated system of school governance and one that facilitated extensive participation in schools, particularly by parents. The key implication of the policy surrounding school governance and organisation was the need to devolve educational control to the schools through the statutory recognition of school governing bodies that were, in the main, composed of parents.”*³⁴

113. This is echoed by another eminent South African education professor:

“the 17 odd racialised education departments in the country were dissolved into a single national education department which assumed responsibility for developing a set of signature policies of which the most important was the South African Schools Act (SASA) of 1996 (Department of Education 1996). In terms of this Act, the schooling system was redefined as a single non-racial and equitable system. Significantly, also, the SASA made an attempt to bring disaffected parents back into the schooling system through

³³ Republic of South Africa (RSA). (1996). Preamble. *South African Schools Act No. 84 of 1996*. Pretoria: Government Printer.

³⁴ Yusuf Sayed. (2001) *Changing patterns of education management development in South Africa - Implementing education policies: The SA experience*. Cape Town: UCT Press. 191.

*the establishment of school governing bodies which gave parents considerable power over how their children's schools were to function*³⁵

114. Importantly, this has been further confirmed by legal commentators in their analysis of legislation and jurisprudence regulating school governance:

*"In order to democratize school governance and transform schools into democratic institutions, membership of SGBs comprises democratically elected parents, educators, non-teaching staff and learners in the case of all mainstream secondary schools. This composition of SGBs, as representatives of the community, provides, as per the Supreme Court of Appeal in the matter of Hoërskool Ermelo, for the broad participation in decision-making processes with emphasis on the contributions by parents. Governance is, as such, based on the core democratic values of representation, participation, openness, tolerance, rational discussion, collective decision-making and accountability which, accordingly are paramount in the quest for the realization of the best interests of schools and the provision of quality education."*³⁶

115. The upshot is that the involvement of parents, educators, non-teaching staff and learners in school governance is key to notions of democracy, representation, participation and accountability. By corollary, the replacement of parents, educators, non-teaching staff and learners on SGBs with unelected, private third parties directly undermines these democratic ideals.

116. Cognisant of this, SASA was intended to inculcate a spirit of community participation and ownership in the running of schools. A cornerstone of this legislation is the introduction of a governance structure that brought together all the main stakeholders: parents, learners and teachers. As the *White Paper on Education and Training*, published in 1995, explains:

*"the principle of ownership of the school by the community it serves is therefore a foundation for the successful implementation of the policy and the provision of quality basic general education for all."*³⁷

117. The *White Paper on the Organisation, Governance and Funding of Schools* (White Paper 2), released just nine months before the enactment of SASA, explains that a new "*national pattern*" for schooling was "*absolutely necessary*" to move beyond the apartheid-inherited education system:

³⁵ Soudien, Crain. (2006) *'Enhancing our Freedoms': Education and Citizenship in South Africa*. UCT. 8-9.

³⁶ Serfontein, E. (2010). Liability of school governing bodies: a legislative and case law analysis. *TD The Journal for Transdisciplinary Research in Southern Africa*, 6(1), 93 - 112.

³⁷ Department of Education. (1995b). *White Paper on Education and Training*, Notice 196. Pretoria: Government Printers.

"The new structure of the school system must deal squarely with the inheritance of inequality and ensure an equitable, efficient, qualitatively sound and financially sustainable system for all its learners. A coherent national pattern of school organisation, governance and funding is therefore absolutely necessary in order to overcome the divisions and injustices which have disfigured school provision throughout South Africa's history."³⁸

118. White Paper 2 reveals SASA's purpose of ensuring a national, uniform and cohesive framework for education delivery in the country. Describing the principles underlying this new framework, White Paper 2 states:

"The new structure of school organisation should create the conditions for developing a coherent, integrated, flexible national system which advances redress, the equitable use of public resources, an improvement in educational quality across the system, democratic governance, and school-based decision making within provincial guidelines. The new structure must be brought about through a well-managed process of negotiated change, based on the understanding that each public school should embody a partnership between the provincial education authorities and a local community."³⁹

119. White Paper 2 further places significant emphasis on parental rights in respect of children's education and shows the value which the legislature placed on parent involvement in school governance.

"1.10 The Ministry of Education has strongly endorsed parental rights in their children's education:

"Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by the state authorities with respect to the form that education should take and to take part in its governance. Parents have the inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling, whether provided by the state or not, subject to reasonable safeguards which may be required by law. The parents' right to choose includes choice of the language, cultural or religious basis of the child's education, with due regard to the rights of others and the rights of choice of the growing child." (Education White Paper 1, p. 21).

1.11 The Ministry's proposals include a major role for parents in school governance, to be exercised in the spirit of a partnership between the provincial education department and a local community."⁴⁰

³⁸ Department of Education. (1996). The Organisation, Governance and Funding of Schools. White Paper 2. *Government Gazette*, 169(16987). 10.

³⁹ Ibid. Principles Underlying a New Framework. 10.

⁴⁰ Ibid. Parental Rights. 12.

120. SGBs form part of a three-pronged system of checks, balances and accountability mechanisms in the running of public schools. As the Constitutional Court explained in *Ermelo*:

“An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the SGB which exercises defined autonomy over some of the domestic affairs of the school.”⁴¹

121. Within this delineated system, parents are considered best placed to have majority representation on school governing bodies, not only because the stakes are highest for them, but also because they best understand the educational and social needs of their children. The Constitutional Court has thus characterised the SGB structure designed by SASA as a “*beacon of grassroots democracy*”:

“It accords well with the design of the legislation that, in partnership with the state, parents and educators assume responsibility for the governance of schooling institutions. A governing body is democratically composed and is intended to function in a democratic manner. Its primary function is to look after the interest of the school and its learners. It is meant to be a beacon of grassroots democracy in the local affairs of the school.”⁴²

122. The Constitutional Court has also described school governing bodies as “*vital lifeblood*” to a wholesome education. The Court reasoned that parents “*must be meaningfully engaged in the teaching and learning of their children*” and the presence of parent representatives on SGBs would ordinarily work to “*advance the legitimate interests of learners at a school.*”

“It remains important to recognise that school governing bodies are a vital lifeblood to proper and fulsome learning and teaching. Parents must be meaningfully engaged in the teaching and learning of their children. The Schools Act carves out an important role for parents and other stakeholders in the governance of public schools. School governing bodies are made up

⁴¹ *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* at para 56.

⁴² *Head of Department of Education: Mpumalanga v Hoerskool Ermelo (“Ermelo”)* [2009] ZACC 32 at para 57.

*in a democratic and participatory manner and ordinarily would advance the legitimate interests of learners at a school.*⁴³

123. As to the democratic and participatory nature of SGBs, the Constitutional Court has described SGBs as being “*akin to a legislative authority*” in the system of checks and balances:

*“To my mind, therefore, a governing body is akin to a legislative authority within the public-school setting, being responsible for the formulation of certain policies and regulations, in order to guide the daily management of the school and to ensure an appropriate environment for the realisation of the right to education.”*⁴⁴

...

Second, the interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by the Act.

...

*Parliament has elected to legislate on this issue in a fair amount of detail in order to ensure the democratic and equitable realisation of the right to education. That detail must be respected by the Executive and the Judiciary.*⁴⁵

124. In the Pillay case the Constitutional Court stressed that collective ownership of a school by parents, teachers and learners was a necessity if schools are to prosper:

*“It needs to be emphasised however, that the strength of our schools will be enhanced only if parents, learners and teachers accept that we all own our public schools and that we should all take responsibility for their continued growth and success.”*⁴⁶

125. The proposed amendments threaten to undo all of this.

- 125.1. First, they threaten the checks and balances inherent in the running of public schools, by fundamentally altering the composition of SGBs. Instead of being elected by, and consisting of, the school community alone, and thereby providing a counterbalance to provincial and national

⁴³ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) at para 47.

⁴⁴ *Head of Department, Free State Province v Welkom High School and Another; Harmony High*

School and Another (“Welkom”) [2013] ZACC 25 at para 63. See also *Ermelo*, above: *School governing bodies are a vital part of the democratic governance envisioned by the Schools Act. The effective power to run schools is indeed placed in the hands of the parents and guardians of learners through the school governing body.*”

⁴⁵ *Welkom*, above at para 49.

⁴⁶ *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 185.

governmental spheres of control, their composition can be determined by provincial government itself – one of the very spheres against which SGBs have been a counterweight.

- 125.2. Secondly, they undermine the essential features of accountable and grassroots governance within the national public education system, by allowing for the control of Western Cape public schools by private actors who form no part of school communities.
126. This extreme revision to the nature, purpose and composition of SGBs will not withstand constitutional scrutiny. The national legislative framework is clearly necessary for establishing uniformity. It must accordingly prevail.

Forced conversion to collaboration schools

127. The 2016 draft Bill included a clause which amounted to granting the MEC powers to force the conversion of a school to a collaboration school without the agreement or consent of the SGB or school management. This clause undermined the essential feature of community participation and grassroots governance in schools.
128. The current Bill has excluded this clause. However, the proposed amendments do not speak to details of a process of consultation with the SGBs prior to any agreement concluded and declaration of a collaboration school or a donor-funded school. In fact, it does not impose any obligation on the MEC to consult with the SGB or parent body before declaring a school a collaboration school.
129. Furthermore, the proposed amendments make it possible for the MEC to establish a “new collaboration school” without agreement of an SGB (Section 12C(3)). Whilst it is not entirely clear, we assume that this provision is directed toward newly-built schools. The circumvention of engagement with an interim SGB before conversion to a collaboration school is concerning and, again, sits uncomfortably with the ethos of democratic governance envisaged in SASA.
130. Significantly, in its project proposal for the introduction of a collaboration schools pilot programme, the WCED identified voluntary participation as a fundamental principle, saying “[b]uy-in to the concept as one of multiple improvement strategies is critical”. It is not clear why buy-in would be considered critical in the pilot phase but not when the actual programme is rolled-out.
131. Research also makes it clear that buy-in on a school level is necessary for any improvement plan to have effect. Fullan identifies stakeholder motivation as the

most important aspect of educational change.⁴⁷ McLaughlin maintains that policies cannot “mandate what matters” in the classroom.⁴⁸ She points out that the successful implementation of policies depends on both the capacity and will of teachers. While building capacity is hard, it is even more difficult and unlikely to influence implementers’ wills, beliefs and motivations through policy intervention. These are often a reflection of implementers’ perspective of the value or suitability of the intervention. It is therefore imperative to get the buy-in from teachers and SGBs as it seems unlikely that they will be motivated to bring about change without buying into the project.

132. Both mandatory conversion to collaboration schools and the private takeover of school governing bodies go directly against the democratic role that SASA envisaged for SGBs.

Teacher appointment processes in collaboration schools conflict with national legislation

133. Proposed section 12C(12) of the draft Bill permits the Western Cape Education Department to “transfer” payments to a collaboration school equivalent to the amounts required for the funding of posts which become vacant; and for the filling of vacant posts and the allocation of new ones. The SGBs of these schools are empowered to appoint educators and non-educators to fill these posts (section 12C(13)).
134. Operating partners are therefore given the authority to make public teacher appointments on behalf of government and with public funds. No other school governing bodies in the country have this kind of power, yet collaboration schools transfer such power to governing bodies where private partners have the majority say.
135. This also conflicts with sections 20(1)(i) and (j) of SASA. These sections merely allow SGBs to recommend the appointment of educators and non-educators to the HOD respectively. These sections read:

20. (1) Subject to this Act, the governing body of a public school must-

- (i) recommend to the Head of Department the appointment of educators at the school, subject to the Educators Employment Act, 1994 (Proclamation No. 10 138 of 1994), and the Labour Relations Act, 1995 (Act No. 66 of 1995);*

⁴⁷ Fullan, M. (2006). Change theory. A force for school improvement. *Centre for Strategic Education Seminar Series Paper No. 157, November 2006*. 8.

⁴⁸ McLaughlin, M. W. (1986). Learning From Experience: Lessons From Policy Implementation. *Education Evaluation and Policy Analysis*, 9(2), 171–78.

(j) recommend to the Head of Department the appointment of non-educator staff at the school, subject to the Public Service Act, 1994 (Proclamation No. 103 of 1994), and the Labour Relations Act, 1995 (Act No. 66 of 1995)

136. This process is further affirmed by section 6 of the Employment of Educators Act, 1998.
137. The collaboration school model introduced by the Western Cape Bill clearly conflicts with SASA and related national legislation insofar as it creates a skewed process of teacher appointments in “privately-run” public schools.
138. The proposed amendment contained in section 12C(16) attempts to absolve the State from liability for any act or omission by a collaboration school relating to its contractual responsibility as the employer. This is in direct violation of section 60 of SASA which explicitly details the delictual and contractual liability of the State in terms of both SASA and the State Liability Act.

No minimum requirements and obligations

139. The proposed amendments are noticeably thin on any minimum requirements that agreements regarding collaboration schools and donor-funded public schools would need to contain.
140. The proposed amendments provide no guidance and criteria to key questions, such as:
- 140.1. What are the respective obligations of the donor and operating partner in a collaboration school?
 - 140.2. What type of donors will be identified or accepted?
 - 140.3. Are there limits to the type of contributions that donors may make to schools?
 - 140.4. Will admission criteria in collaboration schools and donor-funded public schools be selective?
 - 140.5. Will operating partners or donors be entitled to levy fees on learners?
 - 140.6. Will collaboration schools and donor-funded schools be subject to regular monitoring and assessment?
 - 140.7. Who will ultimately be responsible for maintaining oversight and accountability over donors and operating partners?
 - 140.8. Where there is a deadlock in a SGB vote and the decision is referred to a general meeting of parents for a deciding vote; will quorum be required at these meetings and who is going to monitor this?

141. Filling these fundamental gaps cannot be delegated in an open-ended way to determination in regulations without sufficient guidelines. Furthermore, the vagueness of the proposed amendments undermines the rationality of the introduction of these types of schools, as the very nature and purpose of the proposed schools is left open-ended.
142. EE is particularly concerned about the potential for selective admission criteria to become accepted features of the collaboration school model.
143. During presentations about the pilot collaboration schools project, one of the key aspects repeatedly highlighted was that there would be no selective admissions to these schools. Selective admissions would not only ruin any chance to make claims about the effect of these schools but will also lead to serious equity concerns as these privately run and publicly funded schools will exhibit a bias in favour of the top students in their areas.
144. Despite numerous assurances that no new admissions criteria would be implemented at collaboration schools involved in the pilot project, this significant feature and requirement has not been specifically included in the proposed amendments.
145. Research on academies – the UK school model that seems to have inspired the collaboration school model – emphasises the important role of central government to ensure that “the selection of sponsors is open, fair and rigorous, and supported by clear criteria”.⁴⁹ The silence of the proposed amendments on this is concerning and susceptible to legal challenge.

Undermining democratic accountability and introducing market principles into education

146. EE welcomes the amendment in the current version of the Bill, which, in response to pressure from EE and other civil society organisations, limits operating partners to non-profit organisations. However, collaboration schools are likely to introduce other well-known aspects of privatisation: undermining democratic school governance and introducing market principles into education.
147. One of the core aspects of the model is how it restructures SGBs. Since its launch, those behind the initiative have failed to satisfactorily explain why a model of private donations and non-profit support cannot be established without undermining the democratic nature of SGBs. Arguably, the pilot could have included schools where operating partners are co-opted on to SGBs without

⁴⁹ Academies Commission. (2013). Unleashing Greatness: Getting the Best from an Academised System. *The Report of the Academies Commission*. 12.

voting rights, a model which would be lawful in terms of SASA (as discussed in paragraph 91 above).

148. By shifting power from democratically-elected public representatives to private organisations, this model hands over power to entities that have no public mandate. Rather than effectively handing-over the powers of SGBs to private actors, it is suggested that an effort be made to capacitate elected members, as required by SASA.
149. Importantly, privatisation is not only about who has decision-making power, but also the logic that governs schooling. Experience with Charter Schools shows that even where schools are run as non-profits, they may still act like for-profit companies. For instance, in 2007, BASIS School Inc, a network of non-profit Charter Schools, paid the married couple running the network \$315 000 a year, plus nearly \$39 000 in benefits. At that time, an ordinary public school principal would be paid around \$86 000.
150. Another trend in the effort to privatise schooling which has emerged is the assumption that generic management skills, rather than an intricate understanding of learning, are required to transform schools. This trend fails to recognise that most important management decisions in a school involve educational considerations. That is, deciding how and whether teacher performance should be measured, determining what constitutes an underperforming teacher, procuring textbooks, managing discipline, and even deciding which “external experts” to consult when there is a gap in internal educational knowledge.
151. Given that a large number of those running the collaboration schools project have business or management backgrounds (there are also a few educationists involved and some operating partners have more education experience than others), the project is at risk of falling into the same trap. As an illustration, a Johannesburg-based company that conducts teacher training in collaboration schools recently advertised a position in Cape Town to develop teacher-training curricula and to monitor and evaluate teachers. As EE understands it, an email distributing the advertisement to potential applicants stipulated that “*no particular education experience [was] required*” for the role.
152. Where school managers and teacher trainers lack education experience, they can easily be swayed by market logic. In other parts of the world, the long-term consequences of this has been a narrower understanding of education, with an overemphasis on test results and performance-based accountability.

Lack of evidence that the proposed models will result in better educational outcomes

153. In light of the vagueness and ambiguity concerning the relationship between the purpose and mechanics of collaboration and donor-funded schools, it is difficult to glean any basis upon which these proposed models are expected to improve educational outcomes.
154. Significantly, research on similar school models in other parts of the world, most notably academies in the UK, and Charter schools in the US and Swedish friskolor, shows that the evidence on the effect of such models is, at best, mixed.⁵⁰
155. According to the Academies Commission, a UK commission established to consider the impact of the academies school programme, evidence available “*does not suggest that improvement across all academies has been strong enough to transform the life chances of children from the poorest families*”.⁵¹ The Commission emphasises that “academy status alone is not a panacea for improvement” and while there are inspiring individual cases, almost half of all sponsored academies were judged by the school inspectorate, Ofsted, as being inadequate or requiring improvement.
156. Analyses⁵² of school outcomes have shown that although underperforming schools in disadvantaged areas that became Academies did show some improvement in outcomes, these improvements did not differ from the improvement shown by similar schools that did not embark on the same route. The Sutton Trust further warns that “[f]ar from providing a solution to disadvantage, a few chains may be exacerbating it.”⁵³
157. It bears emphasis that EE is not dogmatically opposed to developing and testing alternative models, to achieve better educational outcomes for learners, particularly in disadvantaged schools. However, legislative amendments that seek to introduce such models can only be rationally defended if there is a proven basis for achieving those aims. In the case of the ambiguous and poorly defined collaboration and donor-funded schools, there does not appear to be any justifiable link between the introduction of these schools and the improved educational outcomes envisioned.

⁵⁰ House of Commons Education Committee. (2015). *Academies and free schools*. London: The Stationery Office Limited.

National Foundation for Educational Research (NFER). (2015). *A Guide to the Evidence on Academies*. Slough: NFER. Wiborg, S. (2010). Swedish Free Schools: Do they work? *LLAKES Research Paper*. 18.

⁵¹ Academies Commission. (2013). 4.

⁵² Stewart, H. (2012). Non-academies do just as well as academies. *LeftFootForward*.

Retrieved from www.leftfootforward.org/2012/04/non-academies-do-just-as-well-as-academies/

⁵³ Hutchings, M., Francis, B., & Vries, R. De. (2014). *Chain Effects*. The Sutton Trust. 54.

158. Significantly, the introduction of donor-funded schools is entirely new, and as far as EE is aware, with only one school currently participating in piloting this model. It is worth noting that what has been disclosed to EE is that this current donor funded school was previously a collaboration school had experienced challenges and was converted seemingly at the insistence of the operating partner. The questions and concerns arising from this have previously been raised by EE with the WCED, but to date, we have received no answer.
159. EE notes that it has raised concerns regarding the methodology and lawfulness of the pilot programme itself, which was purportedly introduced as an experiment through which the collaboration school model could be tested and valuable insights can be gained about its feasibility, scalability and impact. EE has pointed out that it is unclear how the impact of this project will be measured and that outcomes cannot be viewed as scaleable. To date, no monitoring or evaluation reports, reflecting the success or failure of either collaboration schools or donor-funded schools, have been made public despite repeated requests from EE.
160. Further, there are important and unexplained differences between commitments in the pilot project and the proposed amendments. For instance, and as described earlier, the requirement that schools participate voluntarily in the pilot project is ousted in the proposed amendment. Differences between how the pilot project has been formulated and how the project will eventually materialise, cast serious doubts over the aims of the proposed amendments.
161. In two known instances the project was met with resistance from pilot schools and had to be suspended at least temporarily. A news report from March 2016 about the project suspension at one school quoted a former SGB chairman as saying, "As a community we feel that we have not been suitably informed about the collaboration programme."⁵⁴ The resistance in both schools led to the withdrawal of the operating partner, which removed the equipment and assistants it had paid for as it left.⁵⁵
162. The withdrawal of operating partners highlights the potential risks of introducing private entities into public schooling. A private group's responsibility to learners ends when their contract does. Further, their short-term contracts may not provide an incentive to lay down the foundations for long term success which schools need.
163. The experiences at these two schools also shows that forced conversions to collaboration schools are likely to be met with resistance. They, further,

⁵⁴ Du Preez, Yolande. (2016) *School partner uproar*. Sentinel News.

⁵⁵ Zille, Helen. (2016) *How self interest can scupper school reform*. Inside Government

undermine the proposition that collaboration schools will necessarily be beneficial. It is not clear that the pilot warrants an extension of the model.

164. The WCED has not waited for the evaluation of the outcomes of the collaboration schools project to be completed. Instead, in the midst of the pilot project, it seeks an extensive and invasive overhaul of core features of public schools through an enabling statutory framework. This is counterintuitive and irrational.

Operating partner powers to conduct monitoring and support of curriculum delivery

165. Clause 9A of the Bill seeks to empower “*an authorised representative of an operating partner*” to conduct monitoring and support of curriculum delivery by an educator (Clause 9A(1)) or by a principal of a public school (Clause 9A(2)).
166. The clause empowers operating partners to exercise the same power as a HOD, District Director or principal in relation to monitoring and support of curriculum delivery by an educator in a school (and the same as the HOD and District Director in relation to a principal). There is no justification offered for the extent of the powers being afforded to operating partners in this regard, particularly as the school principal and provincial department officials will have the same power in respect of schools. It is notable that the clause does not give the same power to school governing bodies, which are the democratic structures of governance within schools. There is also no requirement that the operating partner representative have any educational experience.
167. Furthermore, clause 9A(2) does not specify whether the power to conduct monitoring and support of curriculum delivery by a principal concerns only collaboration schools. On its current wording, the operating partner is able to exercise such powers in respect of any public school. There is no reasonable or lawful basis upon which such powers could be granted.

Conclusion

168. By allowing private operating partners or donors to have voting rights on SGBs of collaboration schools, the proposed amendments run directly contrary to SASA, and compromise democratic school governance. National legislation must prevail over provincial in cases such as this: SASA is a key legislative instrument through which uniformity in education can be achieved following years of racially segregated education administrations. It is similarly important for equality and redress. Significantly, the parental role in school governance is well established in jurisprudence.

169. Further, collaboration schools do not present a systemic solution to improve education outcomes. Notwithstanding individual successes, the overall effects of this kind of school model internationally are decidedly mixed.
170. Unanswered questions remain about the form both collaboration schools and donor-funded schools will take, as well as the vetting and oversight of the donors, and the broad grounds on which a school can be compelled to become part of this project.
171. This is compounded by the fact that the amendments differ from the pilot project in several key aspects, including SGB buy-in and admissions. Several of the assurances and safeguards present in the pilot are not present in the Amendment Bill.
172. Whilst this scheme is described as an innovative plan to improve the worst-off schools, it will likely have the effect of undermining poor and working-class parents' say over their children's education.

E. Intervention facility

Description of the proposed amendments

173. Section 11 of the Bill proposes an amendment to the principal Act, including the insertion of the proposed section 12E, which aims to establish an “intervention facility” for learners who are found guilty of serious misconduct.

174. This proposed section reads:

- (1) Subject to the available resources of the Western Cape Education Department, the Provincial Minister may establish an intervention facility for learners who have been found guilty of serious misconduct.*
- (2) An intervention facility shall provide for therapeutic programmes and intervention strategies, in addition to curriculum delivery, in order to address the serious misconduct.*
- (3) A learner who has been referred to an intervention facility shall be given access to education in the manner determined by the Provincial Minister.'*

175. There is certainly a need to ensure adequate support for pupils who experience disciplinary issues at schools, as well as their teachers. This is undoubtedly challenging, particularly in resource-constrained environments.

176. Equal Education has sympathy for attempts at striking a balance between the interests of individual pupils with behavioural or disciplinary difficulties, their classmates and their teachers. But the introduction of “intervention facilities” in the vague manner proposed in this Bill, fails to strike the balance.

Background and Context

177. The creation of intervention facilities seems to echo the past establishment of ‘reform schools’.

178. Historically, reform schools cared for students with serious disciplinary problems and students in trouble with the law. In terms of the Children’s Protection Act of 1913, reform schools were orientated towards ‘reforming’ destitute and neglected white children prone to crime, as well as the ‘immorality’ associated with mixing with other races in urban slums.⁵⁶ The objective of these schools was to ‘resocialise’ students into accepting the social and cultural norms of the dominant society.

⁵⁶ Badroodien, N. (2001) *A History of the Ottery School of Industries in Cape Town: Issues of Race, Welfare and Social Order in the period 1937 to 1968*. Faculty of Education, UWC. 19.

179. The few reform schools that were in existence for black children functioned very differently from those for white children, with the former existing alongside the prison system as a means to control movement and labour, and the latter existing alongside the school system as a means of re-socialisation.⁵⁷
180. Although reform schools ultimately became racially integrated, the apartheid legacy remained apparent in the stark difference in the quality of infrastructure, style of care, the quality of care afforded, the experience level and race of the educators, and the predominance of Afrikaans as the language of instruction.⁵⁸
181. In 1995, an Inter-Ministerial Committee (IMC) was set up to investigate the availability and suitability of places of safety, schools of industry and reform schools.⁵⁹ The committee discovered serious human rights abuses including the widespread use of isolation,⁶⁰ as well as sexual, physical and emotional abuse.⁶¹ It concluded that, *“too many children were going into residential care and recommended that the system facilitate the provision of services at an earlier stage to allow more children to stay with their families.”*⁶²
182. The IMC noted that many of the problems it unearthed arose from a lack of intersectoral planning. It recommended the transfer of the management of the facilities to the Department of Social Development, but emphasised the importance of inter-sectoral cooperation.⁶³
183. The interim policy recommendations to come out of that investigation, as well as recommendations emanating from a South African Law Commission (SALC) review of the Child Care Act, prioritised *“corrections within the community as is evidenced by developments elsewhere in the world”*⁶⁴ and cautioned that residential facilities, *“should be the last resort in children’s matters.”*⁶⁵ It stated that, not only does residential care expose the child to others *“who may exhibit even worse antisocial behaviour than the child himself or herself”*, but it also

⁵⁷ Chisholm, L. (1989). *Reformatories and Industrial Schools in South Africa: A Study in Class, Colour and Gender in the period 1882 to 1939*. Johannesburg, University of the Witwatersrand: unpublished doctoral thesis. 25.

⁵⁸ Gast, M. (2001). *Education and the South African Juvenile Justice System*. CYC-Net.

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⁵⁹ South African Law Commission ed. *Juvenile Justice*. Pretoria: South African Law Commission, 1999. Print. Discussion Paper / South African Law Commission. 79. 21.

⁶⁰ Ibid.

⁶¹ Tadesse, A. (1997). Reforming Juvenile Justice Legislation and Administration in South Africa: A Case Study. *Paper presented at the International Seminar on Juvenile Justice at the UNICEF International Child Development Centre, Florence, Italy*.

⁶² Courtney, Mark E., & Iwaniec, Dorota, eds. (2009). *Residential Care of Children: Comparative Perspectives*. New York, US: Oxford University Press. 11.

⁶³ Ibid. 35.

⁶⁴ South African Law Commission.(2002). *Project 110: Review of the Childcare Act*. 242.

⁶⁵ Ibid. 242.

requires removing the child from his/her home community, “*which impedes family contact and reintegration of the child back into the community.*”⁶⁶

184. The IMC and SALC’s focus on prevention and early intervention at the school and community level, their commitment to “*keeping children in the community as far as possible*”⁶⁷ and their designation of residential facilities as “*the last resort*”⁶⁸ is in line with international best practices for supporting youth at risk.⁶⁹
185. These policy recommendations were brought into being by the Child Care Amendment Act of 1996 and later by the South African Children’s Act of 2005 (“**Children’s Act**”).⁷⁰
186. Beginning in 2000, the Western Cape government closed all former “reform schools” and “schools of industries”, but re-established three of these schools as “public special schools”, allowing them to continue to perform the same function until 2013, when the remaining centres were repurposed into schools for children with special education needs.⁷¹
187. On 1 April 2010, the Children’s Act came into force. Under the Children’s Act, former reform schools and schools of industries were renamed and transferred to the authority of the Department of Social Development.
188. The Children’s Act allows for the establishment of Child and Youth Care Centres (CYCCs), which are facilities providing residential care to children outside of the family environment. Establishments which are maintained “mainly for the tuition and training of children” are generally excluded from the scope of CYCCs. However, all children in CYCCs must be given access to education.

Ambiguity on the role and nature of the intervention facilities

⁶⁶ Ibid. 245.

⁶⁷ Courtney, Mark E., and Iwaniec, Dorota, eds. 115.

⁶⁸ Ibid.

⁶⁹ See, for example, Bemak, F., Keys, S. (2000). *Violent and Aggressive Youth: Intervention and Prevention Strategies for Changing Times*. Thousand Oaks, Calif: Corwin Press. Print. Practical Skills for Counselors Series.

Greene, M. B. (1993). *Chronic Exposure to Violence and Poverty: Interventions That Work for Youth*. *Crime & Delinquency* 39.1: 106–124.

Ungar, M., Teram, E., Picketts, J. (2001). *Young Offenders and Their Communities: Reframing the Institution as an Extension of the Community*. *Canadian Journal of Community Mental Health = Revue Canadienne De Santé Mentale Communautaire* 20.2. 29–42.

Bazemore, G., Terry, W.C. (1997). Developing delinquent youths: A reintegrative model for rehabilitation and a new role for the juvenile justice system. *Child Welfare*, 76 (5). 665 - 716

⁷⁰ Courtney, Mark E., & Iwaniec, Dorota, eds. 111.

⁷¹ Villette, F. (2015) *Move 'infringes on kids' rights'*. Cape Times. 2 September 2015.

189. According to the proposed section 12E(3), the intervention facilities will provide students with “*therapeutic programmes and intervention strategies, in addition to curriculum delivery, in order to address the serious misconduct.*” Learners in the intervention facilities will be given access to education “*in the manner determined by the Provincial Minister.*”
190. These provisions are vague and fail to provide adequate guidance on the nature of the contemplated role that intervention facilities will play. The nature of the intervention that will address the learner’s misconduct remains unclear. A press release, explaining the proposed amendments originally contained in the Draft Bill, spoke only of “*various appropriate interventions for [the] situation.*”⁷²
191. Some questions that arise in relation to the contemplated nature of the interventions are:
- 191.1. What model of care will be used to rehabilitate/discipline students?
 - 191.2. Will the intervention facilities be residential?
 - 191.3. What will the quality assurance process be?
 - 191.4. Will there be a pilot programme for these institutions first?
192. As currently formulated, the proposed amendment is entirely unclear as to whether the primary purpose of the intervention facilities will be to offer therapeutic programmes for children with behavioural difficulties, or whether the primary purpose will be the provision of education and training.
193. This distinction is significant, as the Department of Social Development is tasked with ensuring the provision of child support services and, in the case of residential programmes, CYCCs. Furthermore, to the extent that the intervention facility is primarily aimed at the provision of education, the question arises as to whether the MEC is lawfully empowered to establish education provisioning in such facilities at all.
194. At present, the nature, extent and criteria for the provisioning of education at the proposed intervention facilities is left entirely unclear. Rather, it is envisioned that the provision of education will take place in “*a manner determined by the Provincial Minister*”. This lack of clarity and wide discretion is wholly unsatisfactory.

Prolonged disciplinary interventions in conflict with national legislation

195. The establishment of intervention facilities must be read in conjunction with proposed amendments to section 45 of the principal Act.

⁷²Western Cape Government. Department of Education. (2016).

196. These proposed amendments ultimately empower the Head of Department to refer a learner who is found guilty of serious misconduct to an intervention facility for a specified period (not exceeding 12 months). A parent must consent to the referral. At the lapse of the specified period, the learner must be admitted to the same public school he or she attended prior to referral.
197. Section 9 of SASA regulates the suspension and expulsion of learners from public schools. In terms of SASA, a learner who has been found guilty of serious misconduct during disciplinary proceedings may either be (a) suspended for a period not longer than 7 days; or (b) expelled. Where a learner who is of compulsory school-going age has been expelled from a public school, the HOD must make an alternative arrangement for his or her placement at a public school.
198. SASA thus limits the period of suspension of a learner to a maximum of 7 days, or expulsion, subject to a duty on the HOD to ensure the learner's placement at another public school.
199. The diversion of learners to intervention facilities contemplated in the proposed amendments conflict with this framework by establishing, in effect:
- 199.1. A period of *de facto* suspension that can extend to a period of up to 12 months (as opposed to a mere 7 days); and
 - 199.2. *De facto* expulsion of a learner without ensuring immediate access to an alternative public school.
200. If the proposed amendments are to avoid contravening SASA, the intervention facilities must be considered a type of public school. However, there is no clarity on this in the Bill. At no stage in the Bill are they even referred to as "schools".
201. In addition to the proposed amendments being in conflict with national legislation, the discriminatory effect of having learners in the Western Cape subject to prolonged disciplinary interventions which vary from that of other learners across the country will also be subject to potential challenge.

Exclusion and isolation of learners is ineffective as a rehabilitative mechanism

202. There is established research confirming that punitive and exclusionary discipline is not effective.⁷³ Interventions that segregate students with poor

⁷³ Osher, D. et al. (2010). How Can We Improve School Discipline? *Educational Researcher* 39(1). 48– 58.; Mayer, G. R. (1995). Preventing antisocial behavior in the schools. *Journal of Applied Behavior Analysis*. 28. 467–478.; Skiba, R. J., Peterson, R. L., & Williams, T. (1997).

disciplinary histories have been linked to worse behavioural outcomes.⁷⁴ These unintended consequences arise from affiliation with delinquent peers, identification with deviancy, and changing attitudes toward anti-social behaviour.⁷⁵ One review of the literature on juvenile delinquency concludes that “*the greater the number of adolescents with the same type of problems who are grouped in the same place, the higher the likelihood that their undesirable behavioural patterns will be reinforced.*”⁷⁶

203. Significantly, the Bill does not provide clarity as to whether the approach of intervention facilities would be punitive or supportive. A punitive approach will certainly have negatively impact learners sent to these facilities.
204. EE is of the view that establishing a separate external facility for the rehabilitation of perceived “deviant learners” is concerning and requires very careful consideration.
205. Notably, there currently exist programmes precisely to ensure that learners in psychological need, including learners with behavioural problems, receive the necessary assistance.
206. For instance, the *Integrated School Health Policy* (the “ISHP”)⁷⁷ must ensure the implementation of intervention programmes to promote a learner’s lifelong health and well-being, including mental health, which in turn includes alcohol and drug abuse (conditions associated with ‘serious misconduct’). However, the ISHP must operate in an environment where potential barriers include staff shortages, a lack of transport and insufficient public-sector psychologists to provide follow up services.⁷⁸ Unless absolutely necessary, it makes little sense to expend resources to create an entirely new system for managing learners

Office referrals and suspension: Disciplinary intervention in middle schools. *Education and Treatment of Children*.20. 1–21.

⁷⁴ Gottfredson, G., Gottfredson, D., Payne, A., & Gottfredson, N. (2005). School climate predictors of school disorder: Results from a national study of delinquency prevention in schools. *Journal of Research in Crime and Delinquency*, 42, 412–444.; Mayer, G. R., & Butterworth, T. (1995). A preventive approach to school violence and vandalism: An experimental study. *Personnel and Guidance Journal*. 57(9). 436–441.

⁷⁵ Arnold, Margery E.& Hughes, Jan N. (1999) First Do No Harm: Adverse Effects of Grouping Deviant Youth for Skills Training. *Journal of School Psychology*. 37 (1). 99 - 115.; Elliott, D. S., Huizinga, D., & Ageton, S. S. (1985). *Explaining delinquency and drug use*. Beverly Hills, CA: Sage Publications.; Romig, D. A. (1978). *Justice for Our Children: An Examination of Juvenile Delinquent Rehabilitation Programs*. Lexington, Mass: Lexington Books.

⁷⁶ Cécile, M., & Born, M. (2009). Intervention in juvenile delinquency: Danger of iatrogenic effects? *Children and Youth Services Review*. 31(12). 1217–1221.

⁷⁷ Department of Basic Education & the Department of Health. (2012). *Integrated School Health Policy*.

⁷⁸ Proudlock, P., Lake, L., Jamieson, L., & Draga, L. (2013). Part one: Children and Law Reform. Legislative and Policy Developments 2012/2013. In L. Berry, L. Biersteker, H. Dawes, L. Lake, & C. Smith (Eds.), *South African Child Gauge 2013*. Cape Town: Children’s Institute, University of Cape Town.

with behavioural problems when existing programmes are struggling and in need of funds.

207. In addition, programmes such as the ISHP have the potential to reach a far wider number of learners than a system that focuses solely on a core group of learners.
208. EE is concerned that intervention facilities will serve as 'halfway houses' and essentially amount to reintroducing the old reform schools, albeit under a different name. This would be a regressive step and goes against the establishment of a proper functioning inclusive education system. Removing learners from the formal public school system and placing them in a separate facility where they will be surrounded by other 'deviant learners' away from the positive influence of many of their schooling peers is a drastic intervention.
209. Sending learners away to intervention facilities may also have the effect of ostracising learners and pushing them to the periphery of society as they may be perceived as 'juvenile delinquents'. This is contrary to the best interest of learners and would violate their constitutional rights in a myriad of ways.
210. These learners are subsequently treated as unwanted outcasts in the education system and unfairly discriminated against when applying for admissions to schools. This reality was recently acknowledged by the Constitutional Court in *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another* 2016 (4) SA 546 (CC).⁷⁹ As the court noted, "[s]chools that are told in advance of admission that a learner has learning or remedial difficulties or is troublesome, tend to refuse that learner's admission. Schools would rather have higher achieving learners and better results."⁷⁹
211. Whilst the proposed amendments require that learners be re-admitted to their original public school (a point we return to below), the effect of being removed and treated as an outcast will inevitably result in ostracisation.

Serious Misconduct is overly broad

212. It is particularly concerning that the proposed section 12E(1) allows for the diversion of learners found guilty of "serious misconduct" to these intervention facilities without providing any further criteria in terms of the degree of "serious misconduct" concerned.

⁷⁹ Para 32.

213. The Regulations Relating to Serious Misconduct of Learners at a Public School⁸⁰ define serious misconduct to include a broad range of conduct, including conduct which in the opinion of the SGB is “*disgraceful, improper or unbecoming*”.
214. It is EE’s experience that learners are often recommended for expulsion for minor infractions deemed to be serious misconduct by overzealous SGBs. In 2017, a wave of student protests around racist policies and codes of conduct at schools, resulting in black learners being disciplined for, amongst other reasons, wearing their hair naturally.
215. The proposed amendments are not limited to specific types of offences which are particularly serious in nature, but can include any range of “serious misconduct”. This is an overly broad provision and reveals the lack of clarity and coherent planning on the role and purpose of intervention facilities.

No discretion to account for best interests of the child

216. It is an established constitutional principle that the best interests of the child should be paramount in all matters concerning children. This requires decision makers to apply discretion when determining what the best interests of the child requires in any particular situation.
217. The current wording of the proposed amendment to section 45 of the principal Act states that:

“A learner who has been referred to an intervention facility in terms of subsection (60)(a) or (14A) shall, after the lapse of the specified period contemplated in those subsections, be admitted to the same public school that he or she attended prior to the referral.”

218. The use of the word “shall” indicates that learners will have to return to their former school in all cases. However, there are many possible cases when this would not be to the best benefit of the learner or the school community he/she left behind. For instance, the learner may face a hostile school body ready to victimise and exact retribution for their misconduct. In cases where the learner was removed for perpetrating bullying on another learner, this provision may require a victim to come into contact with the person who intimidated and bullied them.

⁸⁰ Western Cape Education Department. (1997). Regulations Relating To Serious Misconduct Of Learners At Public Schools (Excluding Public Schools For Learners Sent Or Transferred Thereto In Terms Of The Child Care Act, 1983 (Act 74 Of 1983), and/or The Criminal Procedure Act, 1977 (Act 51 Of 1977)) In The Province Of The Western Cape And The Disciplinary Procedures That Must Be Followed In Such Cases, *Western Cape Provincial Gazette*. (Vol. 5190). 2-4.

219. The failure of the proposed amendments to afford due discretion to the best interests of the child render it susceptible to constitutional challenge.

Conclusion

220. Given the vague description of the nature and role of the proposed intervention facilities, there remains a risk that such facilities will:

220.1. contravene the suggestions of the IMC and SALC by diverting the focus on preventative and community-centred care for youth at risk to a model of isolated and exclusionary care that has been proved ineffective;

220.2. stigmatise youth that are sent to such facilities;

220.3. violate national legislation relating to schools suspension and expulsion; and

220.4. unfairly submit Western Cape learners to prolonged disciplinary interventions that their peers in the rest of the country do not have to face.

221. Given the lengthy process of transforming the highly problematic system of reform schools of the apartheid era, EE is concerned that the introduction of intervention facilities would be a regressive step. Ideally, resources should instead be spent on ensuring the establishment of a proper functioning inclusive education system that supports all learners without having to isolate and exclude learners at risk from their families and communities, or to deny them the opportunity to have a normal schooling experience.

222. Although innovative solutions are needed, we should be sure that these are not vague and open-ended, but are rather clear in scope and purpose. Most importantly, they must uphold the best interests of children and avoid the potential of compounding exclusion and marginalisation.

F. Allowance of alcohol on school premises

223. In a media statement released following the publication of the Draft Bill in August 2016, MEC Ms Debbie Schaffer explained that one of the purposes of the Bill is to “make it easier for schools” to have “adult functions” where alcohol may be consumed/sold. This notwithstanding her own acknowledgment that alcohol abuse is a “huge problem” in the Western Cape:

“I am obviously acutely aware of the huge problem we face of alcohol abuse, and this is not to be seen as condoning the abuse of alcohol in any way. However, I do believe that we need to make it easier for schools to be in a position to have adult functions where alcohol may be consumed and/or sold.

The proposed amendment is to allow for the principal or governing body to approve the sale or use of alcohol on school premises, but strictly subject to the provisions of the Western Cape Liquor Act and any conditions set by the governing body or principal. It will be up to the school if they wish to do this or not, and I trust it will be exercised responsibly.”⁸¹

Description of the proposed amendments

224. Proposed section 45B of the principal Act is intended to allow for the use and sale of alcohol on school premises and during school activities (outside of school hours). It provides as follows:
- 224.1. Notwithstanding the prohibition of alcoholic liquor on school premises or during any school activity, the HOD may, on application in writing authorise a governing body, or principal (in the case of a school activity) to permit consumption or sale of alcohol on such school premises or school activity (section 45B(1)).
 - 224.2. When considering the application, the HOD is expected to have regard to the policies of the Western Cape Government regarding alcohol (section 45B(2)).
 - 224.3. The governing body or principal or is granted the authority as contemplated, may permit the consumption or sale of alcohol on the school premises or at a school activity not during school hours (section 45B(3)).
 - 224.4. The consumption or sale of alcohol must comply with the Western Cape Liquor Act, 2008 and any conditions in terms of the Act, and

⁸¹ Western Cape Education Department. (2016) *Proposed Amendments to Western Cape Provincial School Education Act, 1997*. 24 August. 2016.

any other conditions set by the governing body, principal and HOD (section 45B(4)).

224.5. The HOD has the power to withdraw the approval once granted after informing the governing body or principal, granting a reasonable opportunity to make representations, and considering such representations. Where there is urgency, the HOD may withdraw approval without notice, provided the HOD provides reasons for the decision and allows a reasonable opportunity to make representations (sections 45B (6) – (8)).

224.6. The HOD can, on good cause shown by the school, reverse or suspend his or her decision to withdraw approval (section 45B (9)).

225. The HOD may also issue guidelines to schools for consumption of alcohol on school premises or for school activities and is obliged to issue guidelines to schools regarding the presence of learners when alcohol is consumed in this manner (section 45B (11)).

Permit may be granted for an indefinite period

226. Despite the administrative requirement of a written application to the HOD, the real power and control of the use and sale of alcohol appears to lie with the SGB or the principal, as the case may be. Notably, the proposed section 45B (1) does not limit the validity of the approval to a specific event or number of days, and suggests that once granted, the approval is for an indefinite period, unless revoked by the HOD. In addition, no other specific conditions for the consumption or sale of alcohol as contemplated by section 45B has been included.

Amendment contradicts several national, provincial and city policies, strategies and constitutional jurisprudence

227. The Constitution compels the WCED and indeed the Western Cape Government as a whole to accord paramountcy to the best interest of children when making a determination on any matter that affects them including a decision on whether to allow for the use/sale of alcohol on school premises.

228. The Constitutional Court in *S v Lawrence*, when discussing the affidavit of an expert in this area, accepted that “*the control of the availability of alcohol is a*

recognised means of combating the adverse effects of alcohol consumption” and provides a rational basis for doing so.⁸²

229. The adverse impact that drugs (inclusive of alcohol) can have on learners is documented in the DBE and UNICEF Guide to Drug Testing in South African Schools as follows:

“Experimentation is a natural part of development, but unfortunately casual drug use can lead to many problems, not least becoming dependent. In schools, drug use has been linked to academic difficulties, absenteeism, and dropping out, which can have important implications for a learner’s access to quality education. It is also associated with a host of high risk behaviours, such as unprotected sex, crime and violence, traffic accidents, and mental and physical health problems”⁸³

230. The Guide states that South African schools should be “*alcohol and drug free zones*”:

“It is our duty as families, schools and communities to ensure that schools remain safe and alcohol and drug free zones to enable quality teaching and learning. We must build strong health promotion programmes that can prevent learners from using drugs in the first place. This is the best outcome for everyone.”⁸⁴

231. The requirement that South African schools are “*alcohol and drug free zones*” is also reflected in the *National Strategy for the Prevention and Management of Alcohol and Drug Use Amongst Learners in Schools*.⁸⁵
232. Another national policy, the *Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions*,⁸⁶ speaks of the serious need for clear and consistent messaging on the illegality of possessing or using alcohol in South Africa’s schools.
233. The national position of insulating schools from the presence of alcohol is made law in section 4(4)(a) of the *Regulations for the Safety Measures at Public*

⁸² S v Lawrence, S v Negal; S v Solberg [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 at paras 69 and 70.

⁸³ Department of Basic Education. (2013). *Guide to Drug Testing in South African Schools*. Pretoria: Government Printer. 7.

⁸⁴ Ibid. 15.

⁸⁵ Department of Basic Education (2013). *National strategy for the prevention and management of alcohol and drug use amongst learners in schools*. Pretoria. iv.

⁸⁶ Department of Education (2002). *The National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions*. *Government Gazette*. (Vol. 450. No. 24172). 5.

*Schools.*⁸⁷ This section forbids educators, parents or learners or anyone else from possessing or consuming alcohol during a school activity. And section 4(2)(e) states that no inebriated person may enter school premises.

The amendment is particularly concerning in the context of the Western Cape

234. Ensuring that schools remains safe and alcohol-free zones is of particular significance in a province plagued by the adverse consequences of alcohol abuse. In this regard, the *Western Cape Government's Blue Print on the Prevention and Treatment of Harmful Alcohol and Drug Use* states:

*"The strategic importance of addressing harmful alcohol and drug use in the Western Cape is partially illustrated by SAPS statistics showing that the Province has the highest rate of drug-related crime in South Africa (52 000 cases in the 2008/2009 financial year). The ratio per capita is over four times higher than the second nearest Province (1000 per 100 000 in the Western Cape as compared to 235 per 100 000 in KZN), and nearly twice as high in actual numbers. In fact, the Western Cape currently accounts for almost half of all South Africa's drug-related crime on the SAPS records (52 000 out of 117 000 in 2008/2009)."*⁸⁸

235. Data from CrimeStats SA⁸⁹ show that the Western Cape accounted for 33% of drug-related crimes in the country in 2015 and 36% in 2016. Furthermore, the Western Cape Department of Community Safety's 2012/2013 *Annual Report*⁹⁰ emphasises the significance of alcohol abuse in the province's crime statistics:

"Substance abuse, mainly alcohol abuse, has consistently been identified as being at the forefront of causing crime, particularly violent crime, in the Province."

236. Even given the current restrictions, alcohol and drugs are easily accessible to many learners. Of the administrators surveyed in a representative sample of Western Cape secondary schools, 62.3% reported drug or alcohol use by a learner in the past three months.⁹¹ The 2012 National Schools Violence Study

⁸⁷ Department of Education (2001). The Regulations for Safety Measures at Public Schools. *Government Gazette*. (Vol. 436. No. 22754.) Amended by Department of Education (2006). (Vol. 497. No. 8582)

⁸⁸ Western Cape Provincial Government. (2010). *Modernisation Programme: Workstream on the Prevention and Treatment of Harmful Alcohol and Drug Use. (Provincial Blueprint)*. 3 - 4.

⁸⁹ Crime Stats SA. (2016). Retrieved September 21 2016 at <http://www.crimestatssa.com/>.

⁹⁰ The Western Cape Department of Community Safety. (2013). *Annual Report 2012/2013*. 18

⁹¹ Equal Education. (2016). Of "Loose Papers and Vague Allegations" A Social Audit Report on the Safety and Sanitation Crisis in Western Cape Schools. 110.

(NSVS), like the 2008 NSVS, found a link between violence at school and access to alcohol and drugs.⁹²

237. The *City of Cape Town's Alcohol & Other Drug Strategy 2014 – 2017* records the City's obligation to take preventative measures for the combating of alcohol and drug abuse. Prevention is defined as:

*"A pro-active process that empowers individuals and systems to meet the challenges of life's events and transitions by creating and reinforcing conditions that promote healthy behaviour and lifestyles."*⁹³

238. Ensuring the continued existence of alcohol and drug free schools under applicable law and policy is precisely the type of action that would amount to reinforcing positive conditions that would deter children from engaging in alcohol abuse.

239. Through the introduction of proposed section 45B, the Western Cape is not only failing in its obligation to prevent alcohol abuse in schools but is pro-actively assisting with the promotion and reinforcement of the drug/alcohol problem in the Western Cape.

Conclusion

240. Despite the administrative requirement to submit a written application involving the HOD, the real power and control of the use and sale of alcohol appears to lie with the SGB or principal, as the case may be, who, once authorised, may permit the use and sale of alcohol at schools or at school activities for any purpose.

241. Both the DBE and the Western Cape Government have taken heed of statistics that show the devastating effects of drug and alcohol abuse in South Africa, and *especially* in the Western Cape. The relevant policy documents and safety guides repeatedly emphasize the need to keep schools as alcohol and drug free zones, and to take proactive steps to promote healthy behaviour and lifestyles and prevent alcohol and drug abuse.

242. The proposed section 45(B) does not further this mandate and should be removed in its entirety.

⁹² Centre for Justice and Crime Prevention. (2013). *School Violence in South Africa: Results of the 2012 National School Violence Study*. 47 & 58.

⁹³ City of Cape Town. *Alcohol and Other Drugs Strategy 2014 – 2017*. 4.