



**JOINT SUBMISSION BY**

**EQUAL EDUCATION AND EQUAL EDUCATION LAW CENTRE**

**ON**

**THE BASIC EDUCATION LAWS AMENDMENT BILL – 2022**

**(GG No. 45601 of 6 December 2021)**

**Submitted 15 June 2022**

Prepared jointly by

The Equal Education Law Centre and Equal Education

Please contact [jane@equaleducation.org.za](mailto:jane@equaleducation.org.za) or [gertrude@eelawcentre.org.za](mailto:gertrude@eelawcentre.org.za)

## TABLE OF CONTENTS

<b>A. INTRODUCTION</b>	<b>3</b>
<b>B. EXECUTIVE SUMMARY</b>	<b>4</b>
<b>C. GENERAL COMMENTS</b>	<b>17</b>
SECTION 20(I) OF SASA - TEACHER APPOINTMENTS	17
SUSPENSION AND EXPULSION	18
<b>D. CLAUSES:</b>	<b>19</b>
<b>CLAUSE 1 - DEFINITION OF CORPORAL PUNISHMENT</b>	<b>19</b>
<b>CLAUSE 2(B) - RESPONSIBILITY OF THE PARENT (AMENDING S3(6) OF SASA)</b>	<b>20</b>
I. Parental Responsibility under 3(6)(a)	22
a. Inappropriate use of SASA	22
b. Criminalising parents is harsh, unfair and ineffective	22
c. A holistic solution	25
d. The excessiveness of the proposed amendment to the penalty	26
II. Prevention by any other person under section 3(6)(b)	28
<b>CLAUSE 2(C) - WILFUL DISRUPTION, INTERRUPTION, HINDERING AND OBSTRUCTION OF SCHOOL ACTIVITIES (AMENDING S3(7) OF SASA)</b>	<b>29</b>
I. The Constitutional right to protest	29
II. Causes and effect of social protest on education	30
III. Equal Education's experience	31
IV. The effect on teachers	31
V. Existing remedies for unlawful conduct	32
<b>CLAUSE 3 - RESPONSIBILITY OF SCHOOLS (AMENDING S4A OF SASA)</b>	<b>32</b>
<b>CLAUSE 4 &amp; 1 - REQUIRED DOCUMENTS (AMENDING S5 OF SASA)</b>	<b>33</b>
I. The term "required documents"	34
III. The required documents do not align with other education laws and policies	37
IV. Establishment of National Intergovernmental Committee and Provincial Intergovernmental Committee and learner referrals to these committees	37
V. Lack of clarity that undocumented learners must be admitted regardless of their undocumented status	39
VI. Confusion in section 4(1F)	39
VII. Criminalisation of parents and caregivers for refusal to cooperate	39
<b>CLAUSE 5 - LANGUAGE POLICY OF PUBLIC SCHOOLS (AMENDING S6 OF SASA)</b>	<b>40</b>
I. Factors an HOD must consider when evaluating a school's language policy	41
II. Factors an HOD must consider when determining whether it is practicable for a school to have more than one language of instruction	42

III. The need to guard against language policies being used for preserving privilege and/or as a proxy for racist practices	43
<b>CLAUSE 6 - POWER OF THE MINISTER TO DETERMINE CURRICULUM AND ASSESSMENT (AMENDING S6A OF SASA)</b>	<b>44</b>
<b>CLAUSE 7 - CODES OF CONDUCT (AMENDING S8 OF SASA)</b>	<b>45</b>
I. The exemption process	45
II. Procedural Guarantees	46
<b>CLAUSE 8 - SALE OF ALCOHOL ON SCHOOL PREMISES (AMENDING S8A OF SASA)</b>	<b>47</b>
I. Lack of clarity on application and permission process	49
II. Scope of events where alcohol is allowed is too broad	49
III. Weak criteria to consider	50
IV. Lack of clarity on duration of permission	50
V. Lack of public consultation	50
<b>CLAUSE 9 - SUSPENSION OF LEARNERS FOR SERIOUS MISCONDUCT (AMENDING S9 OF SASA)</b>	<b>52</b>
I. The definition of serious misconduct	53
II. Disrupting school activities or the imminent threat of doing so	53
<b>CLAUSE 10 - PROHIBITION OF CORPORAL PUNISHMENT (AMENDING S10 OF SASA)</b>	<b>54</b>
<b>CLAUSE 13 &amp; 27 -SCHOOL MERGERS AND CLOSURES (AMENDING S12A &amp; S33 OF SASA)</b>	<b>55</b>
I. Additional factors to consider when merging and closing a school	55
II. Introduction of more detailed timeframes	56
<b>CLAUSE 14 - DISCLOSURE OF SGB FINANCIAL INTERESTS (AMENDING S18A OF SASA)</b>	<b>57</b>
<b>CLAUSE 19 - MEMBERSHIP OF SGB FOR LSEN (AMENDING S24 OF SASA)</b>	<b>58</b>
<b>CLAUSE 32 - FEE EXEMPTION APPLICATION (AMENDING S41 OF SASA)</b>	<b>59</b>
I. Limiting the type of documentation that can be required from parents in the application process.	59
II. Special provision for certain single parents.	60
<b>CLAUSE 38 - SUBMISSION OF FALSE OR MISLEADING INFORMATION WHEN APPLYING FOR ADMISSION OR FEE EXEMPTION (AMENDING S59 OF SASA)</b>	<b>62</b>
I. Contextual understanding & discriminatory Impact	63
II. Contrary to the best interests of affected children	65
III. Stigmatisation on the basis of race and class and the vulnerabilities of foreign migrant parents	66
<b>CLAUSE 41 - REGULATIONS (AMENDING S61 OF SASA)</b>	<b>68</b>
I. The Minister’s power to make regulations on the organisation, roles and responsibilities of education districts	69
II. Empowering the Minister to create an offence for a violation of regulations	70
III. Regulating private actor involvement in the basic education sector	70
IV. Regulating the distribution of non-teaching school support staff	71

## A. INTRODUCTION

1. This is a joint submission made by Equal Education (EE) and Equal Education Law Centre (EELC) in response to the Draft Basic Education Laws Amendment Bill, which was published for public comment in Government Gazette 45601 of 6 December 2021 ("**2022 Draft Bill**").
2. EE is a movement of learners, post-school youth, parents and community members, advocating for quality and equality in the South African education system. Our campaigns are informed by the experiences of EE members, policy analysis and research.
3. The EELC is a public interest law centre specialising in education law. EELC works closely with EE in pursuit of their mutual goals of an equal education system and quality education for all.
4. EE and EELC welcome the process of legislative reform. Our submissions are accordingly detailed and comprehensive. For ease of reference, we set out an executive summary of our recommendations on the proposed amendments.

## B. EXECUTIVE SUMMARY

EXECUTIVE SUMMARY OF SUBMISSION IN RESPECT OF THE DRAFT BASIC EDUCATION LAWS AMENDMENT BILL, 2022			
Clause reference in the 2022 Draft Bill	Amended section in the South African Schools Act 84 of 1996 and topic	EE/EELC comments	EE/EELC recommendations
<b>General Comments</b>			
S20(i) of SASA - Teacher appointments		<p>The 2017 Draft Basic Education Laws Amendment (BELA) Bill (“<b>2017 Draft Bill</b>”) introduced an amendment to section 20(i) of the South African Schools Act (SASA), which empowers SGBs to submit recommendations to the HOD on the appointment of educators. The 2017 Draft Bill sought to limit school governing bodies’ (SGB) powers to submit recommendations to post level 1 appointments only. The reasons behind the amendment included the need for transformation and strong school management; post levels 2-4 appointments require knowledgeable persons to undertake interviews; and the concern that SGBs could be unduly influenced by unions, circuit and district officials, and educators in political parties through ‘cadre deployments’. Equal Education (EE) and the Equal Education Law Centre (EELC) were concerned that the proposed amendment would not remedy these challenges. The 2022 Draft Bill does not contain any amendment to Section 20(i). We welcome the move to</p>	<p>We recommend that further amendments to section 20(i) are implemented to fully address the issues identified by the Department of Basic Education regarding teacher appointments.</p>

		reverse the decision to limit SGB's input in teacher appointments. While the current procedure has its shortcomings, and can potentially be subverted, it has the distinct advantage of including departments of education, unions, and SGBs. In this interplay of different actors, there seems to be potential for greater fairness, correctness and accountability. However, we are concerned that, in the absence of any further amendments, the 2022 Draft Bill does not satisfactorily resolve the problems it originally sought to address.	
Suspension and expulsion		The 2022 Draft Bill contains very few amendments in relation to suspension and expulsion of learners, despite there being significant gaps in section 9 of SASA. In addition, too much of the disciplinary process is left up to provinces to regulate, resulting in wide discrepancies.	The EELC and EE recommend that some of these gaps should be catered for. Alternatively, because of the risk of over legislating, we submit that the National Minister is empowered by section 3(4)(n) of the National Education Policy Act 27 of 1996 to create national policy in respect of the control and discipline of learners at education institutions. We submit that the Minister should use this power to create a national and binding framework for the regulation of school disciplinary procedures and the rights and responsibilities of all parties. There is too big a disjuncture between the way provinces are regulating school discipline.
<b>Specific Comments</b>			
1	1	EE and EELC welcome the inclusion of a definition for corporal punishment in section 1 of the BELA Bill, which provides for, <u>“any deliberate act against a child that inflicts pain or physical discomfort, however light, to punish or contain the child...”</u> This definition broadly aligns with the definition of corporal punishment provided for by the UN Committee on the Rights of the Child in General Comment 8. However, in its definition, the Committee also refers to,	We recommend that the current definition of corporal punishment in the BELA Bill also include other non-physical forms of punishment, which includes the threat of force.

		<p>“other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention”.</p>	
1 and 4	5	<p>These sections read together state that learners must provide “required” documents during the application for admission, that the Minister must set up various committees to whom schools must report learners who have not provided the required documents and that any parent, guardian or caregiver who refuses to cooperate in securing the “required documentation” is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.</p> <p>We note seven issues in respect of these sections. First, that any documents are ‘required’ (as opposed to, for example, ‘requested’). Second, the list of required documents itself. Third, the fact that the list does not align with other laws such as the Admission Policy (both the current Admission Policy as well as the incoming amendments). Fourth, that an NIC and PIC are established at all and that learners are reported to them if they fail to obtain the documents. Fifth, that it is not clear that learners must be admitted regardless of their documented or undocumented status. Sixth, that the wording in section 4(1F) is unclear. Last, that the section includes criminalisation of parents and caregivers who “refuse to cooperate in securing the required documentation.</p>	<p>The EELC and EE recommend that the “required” documents content in the definitions section (section 1) and sections 4(1A) to (1G) of the 2022 Draft Bill be removed in its entirety. The Admissions Policy read with the Centre for Child Law judgement sufficiently regulates the admission of children to school. In order to adequately protect undocumented learners’ right to education, there should be explicit mention within the 2022 Draft Bill that undocumented learners are unequivocally ensured access to education.</p> <p><i>Alternatively</i>, in the event that the DBE persists with the regulation of documentation as proposed in BELA, the DBE should at the very least do away with additional burdensome documentation requirements which are unnecessary for school and education administration. Where certain documents are requested within the legislation (such as birth certificates or permits), it must be absolutely clear that the failure to produce those documents does not in any way prevent children from accessing school. <i>Last, in the event that the DBE persists with establishing National and Provincial Intergovernmental Committees to do the work of the Department of Home Affairs</i>, then there must be a balance that is struck to ensure that the risks associated with referral to the Committees are explained. The risks include arrest and deportation, loss of employment and so on (in the event that those considerations apply), potential criminalisation, imprisonment and/or imposition of a fine, if construed as failing to cooperate with the Committees. In light of those risks, consent should be obtained and only then should one be referred to the Committees.</p>

2(b)	3(6)(a)	<p>The 2017 Draft Bill proposed that the penalty for parents who fail to take their children of compulsory school-going age to school, or people who prevent such learners from attending school, be increased considerably from six months to six years. In the 2022 Draft Bill the six-month penalty currently contained in SASA is increased to 12 months and allows for the imposition of <i>both</i> a sentence and a fine. Despite lowering the penalty from what was proposed in the 2017 Draft Bill, we remain concerned that this amendment harshly and unfairly punishes parents. It leaves parents vulnerable to prosecution should they, out of fear for their children’s safety because of protest or unsafe school conditions, decide to keep their children away from school. It primarily targets female caretakers and ignores the potential negative effects of parents' incarceration on learners’ lives. EE and EELC are also of the view that there exist other laws more suited to the purpose of ensuring learners attend school.</p>	<p>EE and EELC recommend that section 3(6)(a) of SASA be amended to remove the prospect of criminalisation and that section 3(6)(a) of SASA be amended to make provision for a more cooperative social interventionist approach aimed at securing learner attendance during the compulsory schooling phase.</p> <p><i>If the unfortunate decision is taken not to remove criminalisation altogether, the following recommendations are made in the alternative and as a means to ameliorate the impact of criminalisation of parents.</i> The proposed increase to the penalties in section 3(6)(a) should be abandoned. Section 3(6)(a) should require a court to be satisfied that a parent is capable of paying the fine imposed. Section 3 should make provision for a parent, upon receipt of notice from the HOD, to make representations. A non-exhaustive list of valid defences should be legislated, and section 3 should be amended to include further procedural safeguards and supportive mechanisms to secure learner attendance.</p>
2(b)	3(6)(b)	<p>Currently, 3(6)(b) provides that any other person who, without just cause, prevents a learner subject to compulsory attendance from attending school commits an offence and is liable to fine or imprisonment not exceeding 6 months. Clause 2(b) of the 2022 Draft Bill proposes an increase to the maximum imprisonment from 6 months to 12 months and allows for the imposition of both a fine and a sentence. EE and EELC are of the view that there exist other laws more suited for the purpose of</p>	<p>We recommend that section 3(6)(b) be deleted in its entirety. Should the decision be taken not to remove the section in its entirety, we alternatively propose that the increase to the penalties contained in the section be abandoned.</p>



		criminalisation to ensure the prosecution of persons whose conduct may fall under this section.	
2(c)	3(7)	<p>This amendment pertains to penalties for any person who “unlawfully and intentionally” interrupts, disturbs or hinders a school activity or hinders or obstructs any school in the performance of its activities. We are encouraged that the 2022 Draft Bill narrows the application of this provision to <i>unlawful</i> activities; however, this provision remains worrying to EE and EELC as there are sufficient existing laws pertaining to criminal conduct and violent protests, and SASA should not be the legislative tool where such activities are dealt with.</p> <p>The amendment which increases the penalty from 6 to 12 months, and allows for both the imposition of a fine and a sentence is also of concern.</p>	EE and EELC strongly urge that the offence created by this amendment be removed.
3	4A	This section is on the duty of educators, principals and governing bodies to promote school attendance. The EELC and EE welcome this amendment, but note that the extent of the principal’s role in ensuring school attendance is not sufficiently clear.	The EELC and EE recommend that the principal’s role in ensuring school attendance and the extent of their responsibility, as well as the role of district officials and provincial government to support them, must be clarified.
5	6	The 2022 Draft Bill has made some welcomed changes and additions to the version of the amendment contained in the 2017 Draft Bill. However, EE and EELC remain concerned that they do not provide sufficient safeguards against language policies being used to preserve privilege, as a proxy for racist and exclusionary practices and in a way that obstructs effective and efficient	EE and EELC recommend that with respect to the new proposed section 6(7) of SASA, the factors listed be inserted into clause 5(c): the extent of excess capacity in the case of a single medium school and the trends in this regard; and the availability of and accessibility to other similarly resourced public schools, for learners who are language barred from attending the single medium school. We recommend that, with reference to the proposed section 6(10) of

		planning and management of the education system.	SASA, the factors listed below be inserted into clause 5(c): the extent of excess capacity in the case of a single medium school and the trends in this regard; the demand for conversion to dual-medium of a single medium school; the availability of and accessibility to other similarly resourced public schools, for learners who are language barred from attending the single medium school; the geographical areas that learners attending the single medium school come from; and the curriculum options offered. We recommend that a clause be inserted which makes it clear that it is not for the SGB itself to apply the school's language policy directly in the admission of entry phase learners. In particular, it should be made clear that schools should not be permitted to refuse to accept applications from learners whose choice of LOLT differs from a school's language of tuition; or to refuse to include these learners on admissions waiting lists for consideration by the Department. We further recommend that a clause be inserted that clarifies that school language policies be applied by the Department when it places entry-phase learners at public schools, subject to the HOD's proposed power to alter a school's language policy.
6	6A	This section is on the power of the Minister to determine curriculum and assessment and authorises the Minister to appoint persons or an organisation that would potentially influence the direction or strategy for curriculum and assessment.	The EELC and EE recommend that the process to appoint such persons must be transparent. Transparency includes making the names of such persons publicly available.
7	8	EE and EELC welcome legislative reforms aimed at ensuring school codes of conduct do not discriminate against learners and undermine their right to basic education. Clause 7(c) of the 2022 Draft Bill sets out a	EE and EELC recommend that clause 7(c) of the 2022 Draft Bill set out a standard according to which exemptions should be granted. This standard must take into consideration, <i>inter alia</i> , the best interests of the child; the child's right to be treated fairly and

		<p>process by which a learner obtains an exemption from a school's code of conduct. We believe this would be strengthened through the inclusion of a standard according to which exemptions should be granted. Further, section 8(6) of SASA makes some provision for preserving the interests of learners implicated in school disciplinary processes. We believe that section 8 should be amended to include further safeguards.</p>	<p>equitably; the child's right not to be unfairly discriminated against; and the inherent dignity of the child. Further, we recommend that section 8 of SASA be amended to require that a learner and a parent of a learner subject to disciplinary proceedings must be notified timeously and in writing of the need for them to attend a disciplinary hearing. A minimum period for notification must be stipulated. Alternatively, it must be required that notice be given to the parent and learner concerned within a reasonable period. Last, notification must state the time, date and venue of the disciplinary hearing, as well as the nature of the allegation(s) made against the learner. Notification should also note the learner's right to be accompanied by a parent or a person assigned by a parent.</p>
8	8A	<p>The proposed amendment empowers governing bodies to allow the possession, consumption or sale of liquor during school activities, both on and off school premises, provided this does not happen during school hours. We, and our learner members, are deeply concerned that this proposal will harm learners and that it will not be implemented and monitored properly. This provision threatens the best interests of the child and is in direct contradiction to various national and provincial policies and safety guidelines that repeatedly emphasise the need to keep schools as alcohol and drug-free zones. EE and EELC submit that, through the introduction of the proposed amendment to section 8A of SASA, the Department of Basic Education is not only failing in its obligation to prevent alcohol abuse in schools but is proactively assisting with the promotion and</p>	<p>EE and EELC strongly urge that this clause be removed in its entirety. EE and EELC remain firmly of the view that the possession, consumption and sale of alcohol should not be allowed on school premises or during school activities. <i>Alternatively</i>, it should at the very least not be consumed or sold at activities where school learners are present.</p> <p><i>The following recommendations, however, are made as a means to ameliorate the impact of the presence of alcohol at schools, should the decision be taken not to remove this section.</i> Clause 8 should be amended to provide clear guiding principles or criteria that an HOD must consider in determining whether an SGB is given permission to sell alcohol at a school activity or not. Among others, these should include: the ability and capacity of the school to adequately monitor the consumption of alcohol at the proposed activity; the presence of learners at the proposed activity; and the plan submitted by the</p>

		<p>reinforcement of the drug/alcohol problem in South Africa.</p>	<p>school to ensure the safe management of alcohol at the proposed activity, such as safe storage of alcohol and designated sales areas. Clause 8(c)(ii) must be amended to require that SGBs must obtain permission from the HOD, before allowing an individual to sell alcohol at the school or during a school activity; and clause 8 should be amended to stipulate a clear process for obtaining permission to sell alcohol, either from the HOD or from the SGB. The process should include the submission of an application that sets out: the details of the particular event being planned; the number of people expected at the event; whether learners will be present; how alcohol will be stored at the event; whether there will be a designated area for the sale of alcohol and how access to this area will be controlled; how many staff or individuals will be responsible for monitoring the consumption of alcohol at the event; what processes will be put in place to ensure that alcohol is not consumed by or sold to children; and a clear undertaking that no alcohol will be sold to children.</p> <p>Clause 8(c)(i) and 8(c)(ii) should be amended to clarify that permission will be granted per activity, as this will allow the HOD or SGB to consider the particularities of a specific event and the measures in place to safeguard children. Should schools want alcohol to be consumed or sold at another school activity, function or event, they must be required to re-apply for permission. The clause must prohibit the automatic renewal of permission between events. The clause must be amended to require the HOD or SGB, to invite input from parents, guardians, learners and teachers on the decision to allow the sale of alcohol at an event or activity taking place on school grounds.</p>
--	--	---	--

			<p>If the Bill is amended to allow for approval to be provided for a specific period of time - EE and EELC advise against this - then the clause should require a meeting of parents, guardians, learners and teachers to give input on whether or not permission should be granted. This meeting should meet a stipulated quorum. The number of votes required before an application can be made must be stipulated and should allow for at least a simple majority vote of the parent body.</p>
9	9	<p>Clause 9 of the 2022 Draft Bill deals with the suspension of a learner for serious misconduct. EE and EELC are concerned that the definition of serious misconduct is too broad as well as unclear. This could allow for actions to fall into the category of serious misconduct that should not rightfully be labelled as such. For example, will a girl who has a nude photo of herself on her phone be considered to be in possession of pornography? Can a child be suspended for forging a parent's signature on their homework as this constitutes fraud? Do severe instances of bullying need to be repeated to be considered serious misconduct?</p>	<p>EELC and EE submit that section 9(1)(b)(xi) of SASA be amended to say “engaging in consensual sexual activity on school premises” and that section 9(1)(b)(iv) of SASA be amended to say “the illegal possession, distribution or consumption of a drug or liquor”. The definition of “sexual activity” must be clarified. “Disrupting school activities or the imminent threat of doing so” must be removed. Each instance of serious misconduct must be judged on a case by case basis to determine the severity of the misconduct, whether the conduct is serious enough to be labelled ‘serious misconduct’ and the appropriate sanction.</p>
10	10	<p>This clause is on the Prohibition of Corporal Punishment. EE and the EELC welcome the additions to sections 10(1) and 10(2) of the 2022 Draft Bill which now states that corporal punishment is abolished, and no person may <u>inflict or impose</u> corporal punishment on a learner. However, provision is not made for alternative discipline.</p>	<p>We thus recommend that an obligation is placed on Provincial Education Departments to support schools with alternative discipline programmes aimed at upskilling educators on alternative discipline strategies, and such strategies must incorporate a restorative justice approach, in line with our new constitutional dispensation.</p>

13 & 27	12A and 33	<p>Clause 13 (school mergers) and 27 (school closures) in the 2022 Draft Bill have provided more detail on the process for ensuring notification and participation of school stakeholders and the broader community where mergers and closures are being considered. These amendments are welcome. However, the clauses would be strengthened by the introduction of factors to consider when deciding whether to merge a school as well as specific timeframes to ensure the process is efficient and timeous.</p>	<p>Section 33 of SASA should be amended to insert an additional section requiring the MEC to make regulations on the rationalisation of small schools (as defined in accordance with the Uniform Minimum Norms and Standards for Public School Infrastructure). For Clause 13, EE and EELC recommend that an additional subsection be inserted into section 12 of SASA which cross-references to section 33 and states that the regulations published by the MEC must also speak to the mergers of small schools as defined in that section. A subsection should be inserted requiring that the regulations in question mandate and elaborate on the factors which must inform an MEC's decision on the closure of a small school. These factors are to include population demographic and economic trends in the area the school(s) are located; learner enrolment trends in relevant schools; levels of education offered by the relevant schools; curriculum considerations; the availability of resources such as school infrastructure, learner transport, hostel accommodation, school nutrition, and school furniture; and current and potential school overcrowding. Last, clauses 13 and 27 must stipulate timeframes within which each step of the closure and merger process is to occur. Timeframes must ensure minimum disruption of education at affected schools.</p>
14	18A	<p>This clause seeks to strengthen accountability of SGBs by stating that SGBs' codes of conduct must provide for mandatory disclosure of financial interests by SGB members as it relates to a family member. EE and the EELC</p>	<p>EE and EELC recommend that a subsection be inserted in section 18A(4A) requiring the disclosure of any existing and known</p>

		welcome this amendment as it aims to provide a safeguard against corruption, which is missing in the current Bill. However, we feel that section 18A will have reduced efficacy in stopping corrupt activities if there is no means to ensure that SGB members are not enriching themselves through dealings with individuals outside of their immediate family.	relationships between an applicant in a tender or procurement application and any SGB members.
19	24	Clause 19 of the 2022 Draft Bill transfers functions currently ascribed to MECs to the Minister. As such, the 2022 Draft Bill obliges the Minister to make various determinations regarding the appointment of governing body members in public schools, including public schools for learners with special education needs. The EELC and EE welcome this provision, as far as it seeks good governance and reduces the risk that the state would be held accountable for acts or omissions on the part of public schools. Section 36 of SASA requires the SGB to seek approval from MEC (Member of the Executive Council) to enter into lease agreements on behalf of public schools. Furthermore, the SGB must obtain written permission from the MEC to lease school property for purposes of supplementing school funds, unless such lease is regarding an immovable property and does not exceed a period of 12 months.	We recommend that additional provision must be made for instances where written permission cannot be sought from the MEC, where time is of the essence and the SGB cannot seek written permission from the MEC, or where there is an inordinate delay from the MEC in providing approval.
26	32	This clause requires the SGB to seek approval from the MEC to enter into lease agreements on behalf of public schools, as well as obtain written permission from the MEC to lease school property for purposes of	The EELC and EE thus recommend that additional provision must be made for instances where written permission cannot be sought from the MEC, where time is of the essence and the SGB cannot seek

		supplementing school funds, unless such lease is regarding an immovable property and does not exceed a period of 12 months.	written permission from the MEC, or where there is an inordinate delay from the MEC in providing approval.
32	41	This section is on the removal of the list of requirements for fee exemption application and requires the custodial parent to get a high court order or confirmatory affidavit from a social worker to prove that the non-custodial parent is untraceable, unwilling to provide, failed to provide, or provided inaccurate or incomplete particulars.	The EELC and EE strongly recommend that such a requirement must be removed completely as an affidavit from the custodial parent should suffice and a court order or confirmatory affidavit from the social worker might burden the custodial parent.
38	59	This section creates a criminal offence in respect of parents (or other persons responsible for the learner) who knowingly submit false information, misleading information, a forged document or a document which is declared to be a true copy of the original when it is in fact not a true copy. Parents or other persons are guilty of an offence and if convicted, liable to a fine or imprisonment not exceeding 12 months or both a fine and imprisonment.	<p>We recommend that this clause be removed in its entirety. The EELC and EE submit that the proposed amendment to jail parents for supplying false information, harshly penalises often desperate and invariably black and poor parents seeking to obtain a better education for their children and/or to shelter their children from social ills like gangsterism and drug abuse plaguing their communities and neighbourhood schools. It also harshly penalises non-nationals who despite their numerous attempts to regularise their stay in South Africa, simply cannot due to vast backlogs at the Department of Home Affairs as well as extreme ill-treatment thereby forcing them to obtain documents illegally. Moreover, successful prosecution under this proposed reform is likely to have devastating consequences for those children whose parents are imprisoned.</p> <p>We strongly recommend that the government should rather focus on the improvement of the quality of education at underperforming and poorly resourced schools to ensure that all children, regardless</p>



			<p>of geographical and socio-economic circumstance, are able to receive an adequate basic education in a safe learning environment. Attention must be placed on dismantling the legacy of apartheid inequality in education which restricts the poorest families to the worst-off schools in terms of education quality and safety – and forces them to seek better education opportunities elsewhere by any means possible.</p>
41	61	<p>Clause 41 of the 2022 Draft Bill seeks to amend section 61 of SASA by giving the Minister specific powers to make regulations on, amongst others, the organisation, roles and responsibilities of education districts. EE and the EELC welcome this addition. However, clause 41(b) empowers the Minister to create an offence for a violation of regulations. This clause is vague and overly extensive. The aims of such a wide-ranging discretion is unclear and susceptible to constitutional challenge.</p>	<p>EE and EELC recommend that clause 41 be amended to make it compulsory for the Minister to enact regulations on the organisation, roles and responsibilities of education districts. We recommend that the Minister should also be required to make regulations for children with barriers to learning, including disabilities and allergies; regulations regarding corporal punishment; regulations to hold private actors in education accountable to human rights standards; and regulations regarding the distribution of non-teaching school support staff. EE and EELC recommend that clause 41(b) should be removed completely.</p>

## C. GENERAL COMMENTS

### SCHOOL GOVERNING BODIES

5. The 2022 BELA Bill includes important changes related to the powers of school governing bodies (SGBs) on admissions and language policies. EE and EELC recognise that rather than being new, these changes bring the law in alignment with what the courts have already confirmed about the relationship between SGBs and provincial education departments. The changes proposed by the Bill provide greater opportunity to pick up and prevent discriminatory practices at schools, while keeping important input by SGBs in these processes.
6. On admissions, the Bill clarifies that the HOD of the provincial education department has the final authority to admit a learner to a public school. The 2022 Draft Bill has added a welcome amendment which requires the HOD to consult with the SGB before making such a decision, as well as giving the SGB the right to appeal. We also welcome the additional factors that the HOD must take into account when considering the admissions policy of a school, such as the efficient and effective use of state resources, as well as the shortening of the time period in which a decision must be made during the appeal process.
7. We make more specific comments in relation to the role of SGBs in teacher appointments below and on language policies at para 110.

### SECTION 20(I) OF SASA - TEACHER APPOINTMENTS

8. The 2017 draft version of the Basic Education Law Amendment Bill ("**2017 Draft Bill**") introduced an amendment to section 20(i) of the South African School Act 84 of 1996 (SASA), which empowers SGBs to submit recommendations to the Head of Department (HOD) on the appointment of educators. The 2017 Draft Bill sought to limit school governing bodies' (SGBs) powers to submit recommendations to post level 1 appointments only. In the accompanying explanatory memorandum to the Bill, the Department of Basic Education (DBE) cited the need for transformation and strong school management as reasons for the amendment. It also argued that post levels 2-4 appointments require knowledgeable persons to undertake interviews, with the necessary skills to identify suitable candidates. There is also a concern that SGBs have often been unduly influenced by unions, circuit and district officials, and educators in political parties through 'cadre deployments' to recommend appointments of educators.<sup>1</sup>
9. At the time, EE and the EELC were concerned that the proposed amendment would not remedy these challenges. We noted that the amendment did not consider the existing limitations in

---

<sup>1</sup> Department Of Basic Education (DBE), *Report Of The Ministerial Task Team Appointed By Minister Angie Motshekga To Investigate Allegations Into The Selling Of Posts Of Educators By Members Of Teachers Unions And Departmental Officials In Provincial Education Departments*, DBE: Pretoria, 2016.

administrative capacity at provincial education departments, watered down public oversight over teacher appointments, would remove the contextual insight to appointments that SGB input provides, and could lead to worsened corrupt practices at provincial level. We also noted that the existing legislation already empowered the HOD to overturn the decision of an SGB or to re-advertise a post if they wished to. EE and the EELC motivated that SGB input in these appointments should be retained in some form.<sup>2</sup>

10. The 2022 Draft Bill does not contain any amendment to Section 20(i). EE and EELC welcome the move to reverse the decision to limit SGB's input to post level 1 positions. While the current procedure has its shortcomings, and can be subverted, it has the distinct advantage of including departments of education, unions, and SGBs. In this interplay of different actors, there seems to be potential for greater fairness, correctness and accountability. However, we are concerned that, in the absence of any further amendments, the current version of the Amendment Bill does not satisfactorily resolve the problems it originally sought to address.

**Recommendation:**

11. We recommend that the Department considers alternative amendments to section 20(i) to fully address the issues originally identified by the Department of Basic Education regarding teacher appointments. This could include strengthening the accountability process in cases of wrongdoing, introducing consequences for officials who fail to take steps against known perpetrators, introducing dedicated avenues for reporting malpractice, introducing stronger whistleblower protection measures, and addressing the cases of weak provincial and district oversight over appointment processes.

**SUSPENSION AND EXPULSION**

12. Currently, the 2022 Draft Bill contains very few amendments in relation to suspension and expulsion despite there being significant gaps in section 9 in SASA. In addition, too much of the disciplinary process is left up to provinces to regulate resulting in wide discrepancies.
13. For example, there is no avenue to appeal a decision made by a school governing body in relation to either suspension or other sanction contemplated in the school code of conduct. This is important because some hearings are procedurally unfair, biased, prejudiced and/or significantly influenced by school management and the school principal. SASA provides that a learner may appeal against the HODs decision to expel a learner. However, unlike the HOD, who has 14 days to decide on whether to expel a learner, there are no timeframes within which the MEC must decide on the appeal. Parents and learners could therefore be forced to wait for months to receive an outcome on their appeal.

---

<sup>2</sup> See EE and the EELC's full submission on the 2017 version of BELA here:  
<https://equaleducation.org.za/wp-content/uploads/2022/01/EE-EELC-joint-BELA-submission-2018-1.pdf>

14. Currently, SASA states that if a learner who is subject to compulsory attendance is expelled from school, the HOD must make an alternative arrangement for the learner's placement at a public school. Whilst this is a good provision to have, it excludes learners who fall outside of the compulsory school-going age. We would like to draw specific attention to the constitutional court judgement of *Moko v Acting Principal of Malusi Secondary School* 2021 (3) SA 323 (CC) wherein the court held that grade 12 or the National Senior Certificate examinations form part of the right to basic education. By implication, the right to basic education encompasses grades 10, 11 and 12. Often learners expelled in the FET phase struggle to find placement because of this limitation in SASA.
15. Lastly, the provision of evidence is a crucial part of a fair process. As such, it should not be left to individual provinces to regulate. Rather, the inclusion of a provision dealing with evidence in the 2022 Draft Bill should provide that, where possible, the learner must be provided with evidence in relation to the charges, without the parent having to request it, unless such evidence is at risk of being contaminated. We note that, in some cases, it will not be possible to provide the learner with the original evidence. For example, a learner cannot be provided with evidence in the form of drugs or a drug test. However, even if it is not possible to give the original evidence to the learner, the learner should be informed about the nature of the evidence. Where there are witness statements, the learner should be given copies of these. If there are witnesses who may be called to give oral evidence, the learner should be informed of this prior to the hearing. Otherwise, the learner's ability to put up a defence will be seriously impaired.

**Recommendation:**

16. We recommend that some of these gaps should be catered for. Alternatively, because of the risk of over legislating, we submit that the National Minister is empowered by section 3(4)(n) of the National Education Policy Act 27 of 1996 to create national policy in respect of the control and discipline of learners at education institutions. We submit that the Minister should use this power to create a national and binding framework for the regulation of school disciplinary procedures and the rights and responsibilities of all parties. There is too big a disjuncture between the way provinces are regulating school discipline.

**D. CLAUSES:**

**CLAUSE 1 -DEFINITION OF CORPORAL PUNISHMENT**

17. EE/EELC welcomes the inclusion of a definition for corporal punishment in section 1 of the 2022 Draft Bill which provides for, "any deliberate act against a child that inflicts pain or physical discomfort, however light, to punish or contain the child..."

18. This definition broadly aligns with the definition of corporal punishment provided for by the UN Committee on the Rights of the Child (CRoC) in General Comment 8.<sup>3</sup> However, in its definition the Committee also refers to, “other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.” (**Our emphasis**)

**Recommendation:**

19. We recommend that the aforesaid definition of corporal punishment in the 2022 Draft Bill also include other non-physical forms of punishment, which includes the threat of force.
20. The United Nations Committee on the Rights of the Child has listed the following as non-physical forms of punishment that are cruel and degrading “punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child”. We therefore recommend further that the current definition of corporal punishment be amended to include other non-physical forms of punishment as stipulated by the CRoC in their General Comment No. 8.
21. The EELC and EE support the submission made by SECTION 27 on the same issue.

**CLAUSE 2(B) - RESPONSIBILITY OF THE PARENT (AMENDING S3(6) OF SASA)**

22. Currently, section 3 of SASA creates a category of learners for whom it is compulsory to attend school. A failure by a parent, without just cause, to cause a learner subject to compulsory attendance to attend school, after receiving written notice by the HOD, is an offence under section 3(6)(a). A parent found liable under this section can, on conviction, face a fine or imprisonment not exceeding six months. Under section 3(6)(b), any other person who, in the absence of just cause, prevents a learner falling within the compulsory attendance bracket from attending school also commits a crime and if found guilty would be liable to the same penalty as would be attached to a parent.
23. **Clause 2(b)** of the 2022 Draft Bill proposes an amendment to sections 3(6)(a) and (b) of SASA by firstly increasing the maximum prison sentence which can attach to these crimes from six

---

<sup>3</sup> General Comment No. 8, ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’, by the Committee on the Rights of the Child, Forty-second session, Geneva (15 May-2 June 2006), paragraph 11. Corporal punishment – The Committee defines “corporal” or “physical” punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting (“smacking”, “slapping”, “spanking”) children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children’s mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.

months to **twelve months**, and secondly by allowing for the imposition of **both** a fine and a sentence.

24. The Socio-Economic Impact Assessment System Report (SEIAS Report)<sup>4</sup> accompanying the 2022 Draft Bill explains the amendments as being ‘necessitated by incidents, in several provinces, in which communities, or portions of communities, prevented learners from attending school in an attempt at making a political or other point.’ The suggestion that section 3 of SASA could serve as a “deterrent against those who seek to disrupt the delivery of education” is put forward by the South African Human Rights Commission in its hearing report on the impact of protest-related action on the right to basic education in South Africa (SAHRC Report).<sup>5</sup> The SAHRC recommends that a National Response Team be established to investigate the efficacy of section 3 as it relates to prosecuting people involved in protest action that denies learners access to education and, “[s]hould it be determined by the National Response Team that amendments to SASA are necessary; the DBE should initiate the process to bring about the necessary amendments to the legislation”.<sup>6</sup>
25. The SEIAS Report makes no mention of whether a task team was established, nonetheless the 2022 Draft Bill pushes ahead with suggested legislative reforms aimed at increasing the penalties contained in section 3 of SASA with no gauge as to the need for this. No mention is made in the SEIAS Report on the considered deficiencies or inadequacies of the current criminal penalty provided for under sections 3(6)(a) and (b) of SASA and why increasing a possible imprisonment sentence to 12 months would be more effective in punishing the mischief this section was aimed at addressing. This is likely because, as highlighted by the SAHRC Report, “*the DBE and SAPS rarely initiate the use of these criminal provisions in SASA*”.<sup>7</sup> Therefore an investigation into the efficacy of section 3(6) by a National Response team, considering the rarity of prosecutions thereunder, would be of little benefit. Given the lack of prosecution under this section, an increase in the current penalties can hardly be justified.
26. For the reasons set out below, EE and EELC are of the view that, despite the SAHRC recommendations in this regard, it would be undesirable and misdirected to use sections 3(6)(a) and (b) of SASA for purposes of prosecuting persons who partake in protest activity that frustrates or denies learners their right to a basic education.

---

<sup>4</sup>The Socio-Economic Impact Assessment System Report, 2021 available: [https://static.pmg.org.za/SEIAS\\_Final\\_Assessment.pdf](https://static.pmg.org.za/SEIAS_Final_Assessment.pdf)

<sup>5</sup>The South African Human Rights Commission Report: *National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa* (2017) at page 13, available: <https://www.sahrc.org.za/home/21/files/WEBSITE%20Impact%20of%20protest%20on%20edu.pdf>

<sup>6</sup>SAHRC Report, above note 1 at v.

<sup>7</sup>SAHRC Report, above note 1 at 13.

## ***I. Parental Responsibility under 3(6)(a)***

### ***a. Inappropriate use of SASA***

27. From the memorandum accompanying the SASA Bill which led to the enactment of SASA, it is clear that section 3(6)(a) was intended to compel parents to ensure that their children attend school for the duration of the compulsory school-going period as set out in this section. In other words, it was intended to ensure that parents fulfil their parental duty and not simply provide their children with the choice to play truant or drop out before the conclusion of this period.<sup>8</sup>
28. This stated purpose behind section 3(6)(a) also accords with the understanding of “*compulsory schooling*” as set out in General Comment 11 to the International Convention on Economic Social and Cultural Rights:

*“[t]he element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education.”<sup>9</sup>*

29. Section 3(6)(a) is therefore an attempt to fulfil South Africa’s national and international obligations guaranteeing that schooling be compulsory for a defined minimum period.<sup>10</sup>
30. EE and EELC thus agree that there exist other laws more suited to achieve the stated purpose of the amendment and we share the Centre for Child Law’s concern that the amendments could render parents vulnerable to prosecution should they, out of fear for their children’s safety because of social protest related action, decide to keep their children away from school.<sup>11</sup>

### ***b. Criminalising parents is harsh, unfair and ineffective***

31. EE and EELC recognise that the purpose underlying the right to basic education is multifold. Amongst others, it allows the recipient to achieve their right to human dignity and lead fulfilling lives. It also fosters democratic participation and contributes to the economic well-being of society. In South Africa particularly, it has enormous transformative potential especially in terms of correcting the racial inequalities which continue to exist. We thus acknowledge that society has a vested interest in ensuring that children receive an adequate basic education and that both the State and parents have an important role to play in this regard.

---

<sup>8</sup> Memorandum on the Objects of the South African Schools Bill, GGN 17385 of 22 August 1996 at page 48.

<sup>9</sup> Article 14 of the *CESCR General Comment No. 11: Plans of Action for Primary Education*, commenting on article 13(2)(a) of the International Covenant on Economic, Social and Cultural Rights which requires primary education to be compulsory.

<sup>10</sup> South Africa’s obligation to provide compulsory schooling is also set out in international and regional conventions such as article 28(1)(a) of the Convention on the Rights on the Child which requires that primary education be made compulsory and article 11(3) of the African Charter on the Rights and Welfare of the Child which requires compulsory basic education. South Africa has ratified both these instruments. Article 4(a) of the Convention against Discrimination in Education also requires that primary education be compulsory and article 26(1) of the Universal Declaration of Human Rights requires compulsory elementary education.

<sup>11</sup> Centre for Child Law Submission on the Basic Education Laws Amendment Bill [B-2015] submitted to the DBE in November 2017 at page 3, para 8.

32. We therefore do not condone the conduct of parents who fail to ensure that their children receive a basic education. We are, however, of the view that the prosecution of these parents represents an ill-advised attempt to impose an easy answer on an intricate issue. Opting for the incarceration of parents assumes that a parents' conduct serves as the sole cause for chronic absenteeism during the period of compulsory schooling and that parents possess complete control and must accept all blame in this regard.
33. The National Policy on Learner Attendance, however, recognises otherwise, identifying poverty in the South African context as more often the "root cause of irregular school attendance":

*"Learners stay away from school for many reasons, but in many communities poverty is the root cause of irregular school attendance. Irregular attendance may be the result of parents' inability to pay school fees or buy uniforms; lack of transport to school; parents or children's chronic illness, including HIV/AIDS and tuberculosis; poor nutrition or hunger, child labour, unstable or dysfunctional family and gang violence."*<sup>12</sup>

34. In addition, there have been instances in which parents have prevented their children from attending school for their own safety due to unsafe or inappropriate school infrastructure.<sup>13</sup> The SAHRC Report indicates that the State's poor provision of resources, which can create safety hazards for learners, is another reason that parents may keep their children away from school. While noting that in some instances the prosecution of parents may be warranted, the Report states: *"In some instances there are genuine reasons why caregivers may hinder a child's attendance at school, for example, due to lack of water or proper sanitation facilities or for reasons of insecurity and absence of learner transportation."*<sup>14</sup>
35. In its 2017/2018 Global Monitoring Report on Accountability in Education ('Global Monitoring Report'), UNESCO conducts an analysis of 34 countries with truancy laws, including South Africa, and concludes that no substantial evidence exists that a punitive approach to learner absenteeism works. What is proven is that applying this approach impacts harshly on poor families:

*"There is no substantial evidence to suggest that truancy laws reduce chronic absenteeism (Atkinson, 2016). Moreover, socio-economic factors influence truancy patterns, with disadvantaged or low income students consistently at greater risk (Hutchinson et al., 2011; UK Department for Education, 2017). Research suggests that punitive measures can impose harsh and undue burdens on disadvantaged families and students. In England and Wales (United Kingdom), severe sanctions disproportionately affected low income families and women, who head most singleparent households*

---

<sup>12</sup> Department of Basic Education: Policy on Learner Attendance, GGN 33150 of 4 May 2010 at pages 8 and 9.

<sup>13</sup> IOL 'Teachers at a Soweto high school working in parked cars as staff room is too small' 12 May 2022 available at <https://www.iol.co.za/news/south-africa/gauteng/teachers-at-a-soweto-high-school-working-in-parked-cars-as-staffroom-is-too-small-says-sgb-cfa0cc14-557d-497e-82fd-ce059aab5837>; Sowetan Live 'Enraged parents protest over at schools' 2 March 2022 available at <https://www.sowetanlive.co.za/news/south-africa/2022-03-02-enraged-parents-protest-at-overcrowding-in-school/>

<sup>14</sup> SAHRC Report, above note 1 at page 34



*(Donoghue, 2011). Until 2013, fines of US\$250 could be compounded by court fees of up to US\$1,000 in Los Angeles, United States, leading to crushing debt for poor families. The fines actually increased truancy from 5% to 28%, suggesting that some students skipped school to avoid interacting with law enforcement (Ahmad and Miller, 2015).<sup>15</sup>*

36. Penalising parents for learner absenteeism therefore equates to penalising poverty, and, in particular, penalising poor single mothers. As shown in the UK, single mothers who are imprisoned for their children's truancy suffer further stigma and are susceptible to being drawn into a life of crime.<sup>16</sup> Their children "*may experience ostracism and alienation within their neighbourhoods*" and have "*feelings of abandonment*" leading to "*a 'profound sense of loss', depression, 'difficulty sleeping and concentrating'*", and other symptoms closely linked to post-traumatic stress disorder.<sup>17</sup>
37. In South Africa, as the Constitutional Court has recognised, "[m]any women rear children single-handedly with no help, financial or otherwise, from the fathers of the children".<sup>18</sup> Imprisoning these mothers for up to 12 months for their children's absenteeism from school would devastate their families and is eminently contrary to the best interests of their children. Children, whether the truant child or others in the household, will be left without a parent to ensure their health and well-being. A zero-tolerance approach will likely result in these children becoming disengaged, isolated and alienated.<sup>19</sup> Convicted mothers, upon release, may battle to find employment given their criminal records, thus further compounding their family struggles. Incarceration may thus function to exacerbate the problem of irregular attendance and early dropouts.
38. EE and EELC are of the view that ensuring that all South African learners subject to compulsory attendance actually do attend school requires a holistic and welfare-based interventionist approach grounded in the spirit of constructive engagement and cooperativeness between parents and schools, as required by SASA.<sup>20</sup>

---

<sup>15</sup> United Nations Educational Scientific and Cultural Organisation, *Accountability in Education – Meeting Our Commitments Global Monitoring Report 2017/2018* UNESCO, (2017) at pages 88 and 89. (UNESCO Global Monitoring Report).

<sup>16</sup> Jane Donoghue, *Truancy and the Prosecution of Parents – an Unfair Burden on Mothers?* at pages 234 and 235. On the adverse consequences of the prosecution of UK single mothers for their child's truancy see also Stephen Jones, *A Last Resort? The Prosecution of Parents for their Child's Truancy*, 26 *Child & Fam. L. Q.* 322 (2014)

<sup>17</sup> Jane Donoghue, above note 10 at page 235.

<sup>18</sup> *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 at para 110.

<sup>19</sup> Susan Coetzee and Rienie Venter, *South African Law and Policy Regulating Learner Absenteeism at public schools: Supporting an Ecosystemic Management Approach* (2016) 36 *SA Journal of Education* at page 6.

<sup>20</sup> *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) at paras 137-147 ( '*Harmony and Welkom*').

c. A holistic solution

39. Of the 34 countries analysed in UNESCO's Global Monitoring Report, almost one-third of laws stipulate jail time as a solution to learner absenteeism.<sup>21</sup> The Global Monitoring Report, however, stresses the importance of a supportive approach to effectively combat truancy:

*“While truancy laws can provide a legal framework, they need to be accompanied with a supporting structure for prevention. Improving parental accountability starts by understanding and improving the school-parent relationship. In an educationally disadvantaged area of Paris, France a programme offered parents information on how schools functioned and advice on supporting and monitoring their children's schoolwork. By the end of the school year, the proportion of parents actively engaged in the parents' association was 37% for classes who participated in the intervention, compared to 25% of those that did not. The programme led to about a 25% decrease in unexcused absences in participating classes. In Queensland, Australia, a small randomised trial that expanded initial teacher-parent meetings to include students, police and support service representatives led to significant reductions in absenteeism amongst students aged 10-16.”<sup>22</sup>*

40. Queensland, Australia does not imprison parents for failing to ensure that their children are enrolled and attending school during the compulsory phase.<sup>23</sup> Whilst fines are a possibility,<sup>24</sup> before the parent of a truant may be prosecuted for an offence, various notice and meeting provisions are required by law.<sup>25</sup> A parent may be required to attend a meeting to discuss the truancy.<sup>26</sup> Where a meeting of this nature is scheduled an authorised officer must take “reasonable steps” to ensure the parents' attendance.<sup>27</sup> The focus in Queensland is therefore firstly on working with parents to impart to them the importance of their children obtaining an education as a means to ensure future compliance.
41. Further, the Queensland Department of Education and Training has put in place policies, informed by the legislation, which provide parents with further opportunities for support before possible prosecution. These policies stress prosecution as a last resort used only for persistent absenteeism with either no or unsatisfactory reasons provided and only ‘after the failure of informal and personal approaches with student and parent’. In 2008, the Queensland Department launched its ‘Every Day Counts’ initiative designed to alter parent, community and student attitudes to school attendance. The initiative's success is premised on parent and community support. Programmes include the appointment of ‘truancy officers’ to trace children,

---

<sup>21</sup> UNESCO Global Monitoring Report, above note 9 at pages 88 and 89.

<sup>22</sup> UNESCO Global Monitoring Report, above note 9 at pages 89 and 90.

<sup>23</sup> Section 176 of the Queensland Education (General Provisions) Act 2006. (The Queensland Act).

<sup>24</sup> Section 176(1) of the Queensland Act states that the maximum penalty for a first offence and one higher penalty for all subsequent offence(s) according to ‘penalty units’.

<sup>25</sup> Section 179 read with section 178 of the Queensland Act.

<sup>26</sup> Section 178(3) of the Queensland Act.

<sup>27</sup> Section 178(4) of the Queensland Act.

breakfast clubs and reward vouchers.<sup>28</sup> In Queensland, school absenteeism is therefore characterised *also* as a community problem requiring a broader response by the community if it is to be solved.

42. In Finland, parents convicted of truancy may be fined but not imprisoned.<sup>29</sup> Education providers are obliged to inform caregivers of any unauthorised absences. Finnish schools each have a multi-professional student welfare team consisting of, amongst others, the principal and vice, teacher representatives, a counsellor and school nurse. The social services agency is also represented on the welfare team.
43. EE and EELC are of the view that South Africa should follow the example set by these and other jurisdictions which have elected to steer clear of imprisonment as a means of tackling truancy in schools. Given the significance of education and the special role it plays in society, parents who fail to send their children to school should be educated on the need for their children to attend and the adverse consequences of a failure to ensure that they are there. There should be a more solution-oriented approach to learner absenteeism in which parents and their children are constructively and meaningfully engaged. Ensuring that all learners attend school and are able to realise their right to a basic education should be viewed as a welfare-based issue rather than characterised as a criminal one.

*d. The excessiveness of the proposed amendment to the penalty*

44. We remain firmly of the view that criminalisation of parents for failing to ensure that their children are in school is an inappropriate and undesirable approach to the problem of learner absenteeism and early dropouts, and that the penalty of imprisonment ought to be deleted from SASA. However, in the event of the Department proposing to maintain this punitive approach, we are deeply concerned about the increase in the penalties proposed in clause 2(a) of the 2022 Draft Bill. Increasing a possible sentence of imprisonment from 6 months to 12 months for parents is not only highly inappropriate, but is also a draconian response to the challenge of ensuring all learners subject to compulsory attendance are in schools.
45. A comparison of the maximum prison sentences which can potentially be imposed on parents for their children’s truancy in other jurisdictions underscores the excessiveness of the proposal that South African parents could face up to 12 months behind bars if successfully prosecuted:

<b>Pennsylvania</b>	3 days where failure to comply with penalty of court <sup>30</sup>
---------------------	--

<sup>28</sup> Elizabeth Dickson and Terry Hutchinson, ‘Truancy and the Law in Australia: The Queensland Example’ (2010) The International Journal of Law and Education, 15(2) at page 87. Accessible at <https://eprints.qut.edu.au/42106/3/42106.pdf>

<sup>29</sup> Sections 26 and 45 of the Basic Education Act 628 of 1998.

<sup>30</sup> Public School Code of 1949 – Omnibus Amendments Act of Nov. 3 of 2016, P.L. 1061, No 138 (Act 138 of 2016). (Amended in 2016, previously a maximum of 5 days).

<b>Jamaica</b>	3 <sup>rd</sup> or subsequent conviction – 14 days <sup>31</sup>
<b>Bahamas</b>	3 <sup>rd</sup> or subsequent conviction - 1 month <sup>32</sup>
<b>Nigeria</b>	2 <sup>nd</sup> conviction - 1 month Subsequent convictions - 2 months <sup>33</sup>
<b>Malaysia</b>	6 months <sup>34</sup>
<b>California</b>	'chronic truancy' – deferred entry of judgment - 12 months <sup>35</sup>
<b>Singapore</b>	12 months <sup>36</sup>
<b>England and Wales</b>	3 months and/or a fine <sup>37</sup>

46. Even within the jurisdictions tabled, some offer supportive steps as a possible sentence. Supportive measures include appearing before a *'school attendance improvement conference'* and undertaking improvement or mediation programmes, parenting classes or substance abuse treatment. Referrals to mental and physical health services and periodic meetings with school district representatives are also possibilities mentioned. These reflect an acknowledgment that a criminal approach divorced from social realities is an ineffective way to combat truancy.
47. In Pennsylvania and Nigeria offending parents can be sentenced to community service and in many of the jurisdictions tabled there are detailed prior steps required or valid defences specifically legislated, or provision made for a process of exemption. Imprisonment may not necessarily be a permissible sentence for a first offence.
48. Section 3(6)(a) of SASA, however, contains very little in the way of a supportive framework or procedural safeguards.

**Recommendation:**

49. In light of the above, EE and EELC recommend the following:
- 49.1. That section 3(6)(a) of SASA be amended to remove the prospect of criminalisation.

<sup>31</sup> Section 21(5) of the Education Act 8 of 1965. (19 of 1980).

<sup>32</sup> Section 26(1) of the Education Act (Chapter 46) No. 15 of 1962.

<sup>33</sup> Section 2(4) of the Compulsory, Free Universal Basic Education Act 2004, A 113 and Section 15(6) of the Child's Right Act 2003.

<sup>34</sup> Section 29A. (4) of the Education Act of 1996, Act 550.

<sup>35</sup> California Penal Code 270.1. and Senate Bill 1317. Prosecution is also possible under Penal Code 272.

<sup>36</sup> Section 7 of the Compulsory Education Act 27 of 2000 (Chapter 51).

<sup>37</sup> Section 444(1A) of the Education Act 1996.

49.2. That section 3(6)(a) of SASA be amended to make provision for a more cooperative social interventionist approach aimed at securing learner attendance during the compulsory schooling phase.

**Alternative recommendation:**

50. EE and EELC remain firmly of the view that the criminalisation of parents for failing to ensure that their children attend school is an inappropriate way to secure learner attendance. *The following recommendations, however, are made in the alternative and as a means to ameliorate the impact of criminalisation on parents, should the decision be taken not to remove this section:*

50.1. That the proposed increase to the penalties contained in sections 3(6)(a) be abandoned.

50.2. That section 3(6)(a) of SASA be amended to require a court to satisfy itself that a parent is capable of paying any fine imposed.

50.3. That clause 3 be amended to make provision for a parent, upon receiving notice from the HOD, to make representations setting out their reasons for failing to cause a child to attend school.

50.4. That a non-exhaustive list of valid defences be legislated.

50.5. That section 3 of SASA be amended to include further procedural safeguards and supportive mechanisms to secure a learner's attendance at school.

51. The EELC and EE align themselves to the views of Section 27 on the same issue.

***II. Prevention by any other person under section 3(6)(b)***

52. Currently, Section 3(6)(b) of SASA states that any other person who, without just cause, prevents a learner subject to compulsory attendance from attending school, commits an offence and is liable to a fine or imprisonment not exceeding 6 months. Clause 2(b) of the 2022 Draft Bill proposes an increase to the maximum imprisonment from 6 months to 12 months and allows for the imposition of both a fine and a sentence.

53. EE and EELC are of the view that there exist other laws more suited to ensure the prosecution of persons whose conduct may fall under this section. To the extent that persons engage in unlawful activities which prevent learners from accessing education, then existing common law crimes or statutory crimes better suited for the purpose of criminalisation will apply.

**Recommendation:**

54. In light of the above, EE and EELC recommend that section 3(6)(b) be deleted in its entirety.

**Alternative Recommendation:**

55. Alternatively, that the proposed increase to the penalties contained in sections 3(6)(b) of SASA be abandoned.
56. The EELC and EE align themselves to the views of Section 27 on aspects of their submission which state that instead of increasing the potential sanctions that may be meted out against parents, the BELA should be revised so as to fully remove the criminal penalties in the SASA for parents who fail to cause their children to attend school.

**CLAUSE 2(C) - WILFUL DISRUPTION, INTERRUPTION, HINDERING AND OBSTRUCTION OF SCHOOL ACTIVITIES (AMENDING S3(7) OF SASA)**

57. Clause 2(c) of the 2022 Draft Bill seeks to insert an extraordinarily wide provision into SASA creating a new statutory crime for unlawful and intentional interruption, disturbance or hindrance of any school activity, or the hindrance or obstruction of a school in the performance of its activities. The penalty for this new criminal offence would be a fine or imprisonment not exceeding 12 months, or both.
58. We are encouraged that the revised 2022 Draft Bill narrows the application of this provision to *unlawful* activities. However, this provision is still too broad and would potentially include a range of activities that notionally “interrupt”, “disturb”, “hinder” or “obstruct” school activities, but which are justified by compelling reasons or in the course of the exercise of other constitutionally protected rights, including the right to protest.
59. Further, this provision remains concerning to EE and EELC as there are sufficient existing laws pertaining to criminal conduct and violent protests, and SASA should not be the legislative tool where such activities are dealt with. EE and EELC believe that it would be undesirable and misdirected to use education legislation for purposes of prosecuting persons who partake in protest activity. The amendment which increases the penalty from 6 to 12 months is also a concern.

***I. The Constitutional right to protest***

60. In the context of education in South Africa, the right to protest has a long history. The most iconic example of public protest in support of equality in education is the 1976 Soweto Uprisings where students organised, mobilised and demonstrated demanding the abolition of inferior quality education for black children as part of the broader liberation struggle. Since then, the Constitution has enshrined the ‘right to protest’ in a basket of rights including section 17, which grants everyone the right to peacefully assemble, demonstrate and present petitions; section 16, which grants everyone freedom of expression; and section 18, which provides everyone with the freedom of association.

61. In *Satawu v Garvas*,<sup>38</sup> the Constitutional Court stated:

*“The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights.”*

## **II. Causes and effect of social protest on education**

62. The SAHRC [report](#) acknowledges that South Africa experiences over 13 500 incidents of public protest annually, the majority of which are non-violent, and that only some affect the right to a basic education.<sup>39</sup> In those incidents that do affect the right to basic education, it is further acknowledged that they are “largely unrelated to education”<sup>40</sup> and tend to primarily relate to government service delivery.<sup>41</sup>
63. The SAHRC report also notes that protests may be due to young people’s frustration with poverty, unemployment, and a lack of change in their material conditions; while also noting the cause to be parents’ apathy, despair and frustration with education’s failure to remove their children from a vicious cycle of poverty.<sup>42</sup> Due to all of these problems, the SAHRC finds that the disruption of education is seen as an easy target by protestors to elicit government action. Therefore, in its recommendations, the SAHRC identifies an obligation resting on the Department of Basic Education to use the instruments available to it to ensure that disruptions of education caused by public protests are minimised. Specifically, the SAHRC recommends that amendments to SASA are affected to ensure the criminal prosecution of any persons engaged in public protests who deny learners access to education.<sup>43</sup>
64. It is clear from the above that, while the SAHRC identifies some groups of persons who may be responsible for disruption of schooling, the amendment it recommends the DBE make to SASA is intended to apply as a blanket measure against all persons who cause disruptions regardless of the circumstances. This might apply to a wide array of people, including ordinary members of

---

<sup>38</sup> *South African Transport and Allied Workers Union and Another v Garvas and Others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae* 2013 (1) SA 83 (CC) at para 61 (*SATAWU v Garvas*).

<sup>39</sup> SAHRC Report, above note 1 at pages 4 and 30

<sup>40</sup> SAHRC Report, above note 1 at page 3.

<sup>41</sup> SAHRC Report, above note 1 at page 31. The examples cited include demarcation disputes in Vuwani, Limpopo; access to water in Zeerust, North West; mass evictions in Hammanskraal, Gauteng; and the construction of a road in Kuruman, Northern Cape.

<sup>42</sup> SAHRC Report, above note 1 at page 31.

<sup>43</sup> SAHRC Report, above note 1, Recommendation 4, at page 40.

the community surrounding a school; learners, teachers and other staff inside the school; or other groups, individuals or organisations who might seek to stage a protest at or near the school, which will cause a disruption to schooling. Therefore, an amendment couched in terms as wide as the proposed section 3(7) is likely to have unintended consequences that undermine constitutional rights such as the right to protest, freedom of association and even the constitutional right to strike, in the case of teachers.

### ***III. Equal Education's experience***

65. EE learner members (called Equalisers) use campaigning, mass mobilisation, demonstrations and protest as key tools to advocate for the improvement of the quality of education in mainly township and rural schools.
66. Indeed, Equalisers have run several national campaigns on issues such as school infrastructure, scholar transport and school sanitation. Equalisers use peaceful protest as a means to self-advocate for their right to basic education and the realisation of the Constitution's vision.
67. Learners such as Equalisers may sometimes undertake protest actions at school. By definition, protest action may entail some element of "interruption" or "disruption" even if only minimally so (for example, a silent protest in a classroom against teacher abuse). The effect of the proposed amendment would be to place these children at risk of criminalisation merely for exercising their constitutionally protected rights to protest and freedom of expression.
68. Similar effects of criminalisation are likely to arise in the case of parents, community members or any other individual who engages in peaceful protest which may cause some "disruption" to school activities. For example, in [March 2022](#), parents from Sediba sa Thuto Primary School protested the poor and unsafe infrastructure of their childrens' school, where at least 70 pupils are in one classroom and "infrastructure is so poor that the 36 mobile classrooms have started to crumble and the toilets do not work, forcing children to relieve themselves on floors of the two unused and dilapidated classrooms". In doing so, parents blocked the entrance of the school. One should not and cannot criminalise parents for not allowing their children to be in a school environment that poses a threat to their physical safety and infringes so severely upon their dignity. Such criminalisation will not withstand constitutional scrutiny.

### ***IV. The effect on teachers***

69. Like learners, teachers are directly affected by the education system as internal stakeholders. However, they are in the unique position of also being employees within education, and therefore also hold labour rights which are constitutionally protected. These are the right to freedom of trade, occupation and profession in section 22; and others such as the right to fair labour practices, the right to form and join a trade union, and the right to strike, all protected in section 23 of the Constitution.



70. Similar to the students of 1976, teachers and teachers' unions have been at the forefront of the struggle against inferior quality education for black students provided by the apartheid government. The Transvaal African Teachers' Association organised numerous strikes as a sign of opposition to Bantu education, saying that it was used to 'produce ignorant...cheap labour...of an oppressed people'.<sup>44</sup> In a mass march organised in 2017, teacher unions in the Western Cape joined EE in campaigning for safer schools.<sup>45</sup> In May 2020, teachers again joined parents and learners from across five provinces in a plea for cohesive and detailed implementation plans from basic education authorities, following Basic Education Minister Motshekga's revision of the date for Grade 7 and Grade 12 learners to return to school after the nationwide lockdown. Through this action, educators were given a platform to speak extensively about their concerns for the health and safety of their students, highlighting issues including overcrowding in classrooms; the poor state of school toilets; lack of water; and feeling unsafe at school given the number of burglaries.<sup>46</sup> Therefore, teachers have used the right to strike to advocate for not only the improvement of their working conditions as employees, but also in advance of the right to education.

#### ***V. Existing remedies for unlawful conduct***

71. EE and EELC do not condone unlawful conduct that materially compromises the right to education and best interests of children. However, to the extent that persons are responsible for such conduct, there already exist several laws that may be used to deter such conduct. This includes, for example, penalties under the Regulation of Gatherings Act.

#### **Recommendation:**

72. In light of the above, EE and EELC recommend that clause 2(b) be abandoned in its entirety.
73. The EELC and EE align themselves to the views of Section27 and Legal Resources Centre on the same issue.

#### **CLAUSE 3 - RESPONSIBILITY OF SCHOOLS (AMENDING S4A OF SASA)**

74. This amendment introduces a duty on educators, principals and governing bodies to promote and monitor the attendance of learners at school by creating a code of conduct to promote

---

<sup>44</sup> J Hyslop, 'Teacher Resistance in African Education from the 1940s to the 1980s' in M. Nkomo (ed) *Pedagogy of Domination Toward a Democratic Education in South Africa* (1990) at page 101.

<sup>45</sup> BusinessLive 'Equal Education Leads March for Safety At Western Cape Schools' 28 October 2017 <https://www.businesslive.co.za/bd/national/education/2017-10-28-equal-education-leads-march-for-safety-at-western-cape-schools/>

<sup>46</sup> Statement: Testimonies Of Equal Education Members (Learners, Teachers, Parents) Demand Cohesive and Detailed Implementation Plans From Basic Education Authorities 6 May 2020 <https://equaleducation.org.za/2020/05/06/statement-testimonies-of-equal-education-members-learners-teachers-parents-demand-cohesive-and-detailed-implementation-plans-from-basic-education-authorities/>

punctuality in school attendance. Learners who are absent for more than three consecutive days should be reported to the school principal, who would investigate the absence and make a reasonable attempt to contact parents, as well as reporting to the school governing body for further investigation if needed.

75. The EE and EELC welcome measures proposed to promote school attendance and to monitor punctuality. However, we note that measures undertaken to promote regular school attendance and to ensure punctuality should not be punitive in nature. We also welcome the role of the principal to monitor and investigate learner attendance. However, the current clause does not make provision for the extent of the principal's responsibility to monitor and investigate learner attendance. The clause is also silent on the obligations of district officials and the provincial government to support the school in monitoring, investigating and addressing absenteeism.

**Recommendation:**

76. We therefore recommend that the principal's role of investigating a learner's absence and making a reasonable attempt to contact the parents of the absent learner, be clarified. The extent of this responsibility must be clearly stated and other necessary measures must also be considered. The role and obligation of district officials and the provincial government to support the school and principal in this regard must also be clarified.
77. The EELC and EE align themselves to the views of Zero Dropout on the same issue.

**CLAUSE 4 & 1 - REQUIRED DOCUMENTS (AMENDING S5 OF SASA)**

78. We make comments on sections 1 and 4 simultaneously as the sections are read together. Accordingly, our submission, as contained immediately below, is on all sections simultaneously.
79. In clause 1, the 2022 Draft Bill introduces a definition for "required documents". The definition lists documents for certain categories of learners. For example, in the case of a South African learner the required documents are an unabridged birth certificate, immunisation certificate and South African identity documents for the learner's parents (or death certificates where applicable). The definition also lists the required documents for non-national learners who hold permanent or temporary residence, learners who are refugees and asylum seekers, and lastly, documents for learners who are in alternative care.
80. The term "required documents" is used in section 4(1F). It states that learners must produce the "required documents" during the application for admission. If they do not, they will still be allowed to attend school, but the principal must advise the parent of the learner to secure the required documents and must alert the "Provincial Intergovernmental Committee" to the fact that the learner does not have them.

81. Sections 4(1A) and 4(1B) require the Minister to establish a National Intergovernmental Committee (“NIC”) and the respective MECs to establish a Provincial Intergovernmental Committee (“PIC”), both within 12 months of the commencement of the BELA Bill.
82. According to section 4(1C) the function of the NIC and PIC is to provide assistance to public schools that refer cases of learners who have not submitted the required documentation and includes assisting the learner to obtain the missing required documentation.
83. The NIC and PIC include representatives from the Department of Education, the Department of Social Development, the Department of Home Affairs, the Department of Justice and Constitutional Development, South African Police Services, Department of Employment and Labour, Department of International Relations and Cooperative Affairs, Department of Health, National Treasury, and Department of Statistics South Africa (section 4(1D)).
84. Section 4(1G) states that any parent, guardian or caregiver who refuses to cooperate in securing the “required documentation” is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.
85. There are seven major issues in respect of these sections. They are: first, that any documents are “required” at all; second, the list of required documents itself; third, the fact that the list does not align with other laws such as the Admission Policy (both the current Admission Policy as well as the incoming amendments); fourth, that an NIC and PIC are established through the 2022 Draft Bill and that learners are reported to them if they fail to obtain the documents; fifth, that it is not clear that learners must be admitted regardless of their documented or undocumented status; sixth, that the wording in section 4(1F) is unclear and gives rise to confusion; and seventh, the criminalisation of parents and caregivers who “refuse to cooperate in securing the required documentation”.
86. We shall address these concerns in turn.

***I. The term “required documents”***

87. Our first concern is that these documents are “required” at all in light of the *Centre for Child Law and Others v Minister of Basic Education and Others* GHT HC 2480/2017 (Centre for Child Law judgement). The judgement makes it clear that documents are in fact not *required* at all in order to attend school or access their right to basic education. The term “required” documents is thus misleading and gives the impression that they *must* be provided, failing which the child will not be able to attend school.

***II. The list of documents: some of the documents are impossible to obtain, some are not legal requirements, many serve no purpose, and so overall they will create barriers to access***

88. Many of the documents are impossible to obtain / are not legal requirements under other laws:

- 88.1. The 2022 Draft Bill requires South African children to produce their birth certificates to school. However, many children are often unable to obtain their birth certificates due to the requirements set out in the Births and Deaths Registration Act 51 of 1992 (BDRA). For example, a child who is applying for a birth certificate is required to present the identity documents of their parents. Where they cannot present their parents' identity documents, which is often the case as many parents do not have them, the child is then unable to obtain their own birth certificate.
- 88.2. The 2022 Draft Bill requires South African children to produce their parents' South African identity documents or cards. However, as mentioned immediately above, these are not always available as many parents' births were never registered by their own parents.
- 88.3. The 2022 Draft Bill requires permanent or temporary resident children to produce their foreign issued birth certificates, their passport, their study visa or permanent residence permit (depending on if they are a temporary or permanent resident), their parents' passports, and their parents temporary or permanent residence permits (depending on whether they are temporary or permanent residents). However, the list of documents does not make sense as these documents are not always available to all temporary or permanent residents. For example, a permanent resident does not always have a passport or a foreign issued birth certificate – some permanent residents were formerly refugees which means they cannot use their passports, nor obtain foreign issued birth certificates (use of or attempts to obtain these documents places their lives in danger, also known as voluntary re-availment). Other permanent residents were formerly stateless, which means they have never had a passport and also cannot obtain a foreign issued birth certificate.
- 88.4. The 2022 Draft Bill requires asylum seekers to produce a refugee permit or study visa within three years of being admitted to school. However, the Refugees Act does not state that an asylum claim will be determined within three years. It is also not something which is achieved in reality, nor is it something that the applicant for asylum is able to control. Rather, Lawyers for Human Rights reports extreme delays in the processing of asylum claims, with many asylum seekers waiting upwards of five years for a determination on their claim. This requirement is therefore often impossible to achieve and out of the learner's or their parents' control.
- 88.5. The 2022 Draft Bill requires learners in alternative care to provide a court order granting guardianship or custody. However, many children do not have court orders granting guardianship or custody to their caregivers, as they are cared for informally by grandparents or aunts who are unable to navigate costly and expensive court processes (particularly in the case of guardianship which requires a high court order). In some cases, learners are unaccompanied minors or live in child and youth care centres and similarly cannot provide a guardianship or custody order as this requires a caregiver,

which children living in child and youth care centres do not have (they will only have placement orders).

89. Many of the documents do not appear to serve a valid purpose:

89.1. Many of the “required” documents serve no practical purpose to school administration or learning. There does not appear to be a good reason that a school needs an asylum seeker to provide their refugee permit or a long-term study visa within a space of three years specifically, or in the case of a learner on a temporary or permanent residence permit, there does not appear to be a good reason that a school needs both their birth certificate from South Africa and their birth certificate from their country of origin. Rather, “requiring” these documents gives the impression that schools are attempting to verify immigration status as well as attempting to ensure that immigration status is regularised. Immigration control within schools is inappropriate as schools must be safe spaces for children to learn and develop. In addition, it also causes anxiety and stress for parents, caregivers and learners.

89.2. Other unnecessary documents which children are required to provide include the parents' documents or court orders in the case of orphaned or abandoned children. As mentioned above, not only are these difficult to obtain, but they also do not seem to serve a function. The justification that is often used when requiring parents' documents or court orders in the case of children in alternative care is that they are required in order to stem human trafficking. However, our courts have found that turning children away due to the failure to produce their parents' documents is not only an ineffective solution to human trafficking, but renders them more vulnerable in general and not less.<sup>47</sup>

90. In totality the lists act as a barrier:

90.1. In the final analysis, the list of “required” documents creates room for discrimination and rejection. It will invariably give rise to situations in which school officials become confused about admission requirements and demand the production of documents which cannot be obtained and which will often serve no purpose. Unfortunately, this has indeed been the case with respect to the implementation of the Centre for Child Law judgment. Although the judgment clearly established that undocumented learners can attend school, they continue to frequently be turned away on account of lacking documentation.

90.2. It is thus important to ensure that admission to school should be as simple and barrier-free as possible. More detailed recommendations are made below.

---

<sup>47</sup> See *Mubake and Others / Minister of Home Affairs and Others (72342/2012)*.

### ***III. The required documents do not align with other education laws and policies***

91. Another critical issue is that the list of required documents does not align with the current list of documents in the Admission Policy for Ordinary Schools, nor does it align with the list of documents which will be required through the Amended National Admission Policy for Ordinary Public Schools, should those amendments pass. The same is true for the procedures regarding what will happen if the documents are not produced – there are different procedures in the Amended National Admission Policy for Ordinary Public Schools than the ones currently set out in the 2022 Draft Bill. As will be seen below when we detail our recommendations, the “required documents” list must be done away with, but in the event that they remain, they must at the very least align with other laws.

### ***IV. Establishment of National Intergovernmental Committee and Provincial Intergovernmental Committee and learner referrals to these committees***

92. Whilst the establishment of these bodies might possibly be to genuinely assist children, the Department of Education’s preoccupation with documentation requirements is at best misguided, and at worst, unlawful.
93. It is misguided because first, the Department of Education simply does not have the expertise necessary to assist with obtaining documentation for children. Some of the many reasons that children do not have the required documents include extensive technical issues within the Births and Deaths Registration Act 51 of 1992 and unlawful practices at the Department of Home Affairs which prevent both children and adults’ births from being registered (in the case of South African children who are required to provide their birth certificates), impractical and costly obstacles from embassies and consulates (in the case of non-national children who are temporary and permanent residents who are required to provide foreign issued birth certificates), lengthy delays, corruption and unlawful practices at the Department of Home Affairs (in the case of asylum seeker and refugee children who are required to provide their asylum seeker and refugee permits as well as provide them within a period of three years from admission), and the inability to obtain guardianship and custody orders (in the case of children in alternative care). The correct approach to take to resolve documentation issues is to resolve the underlying barriers described above through law reform and practical changes within the Department of Home Affairs. Accordingly, it is an ineffective use of resources by the Department of Education who has much to achieve in the area of education and whose involvement is unfortunately very unlikely to render results if the underlying causes are not resolved.
94. Aside from being misguided, it is unlawful for various reasons including that it creates an impression that it is a means to enforce immigration control.
95. Firstly, it is unlawful to share children’s private data with other state Departments in terms of section 34 of the Promotion of Personal Information Act 4 of 2013. Whilst there are exceptions to this rule, none apply in this instance. It is also important for the Department of Education to take heed of the *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families* and *No. 22 (2017) of the*

*Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration* (“JGC No. 3”). It purposefully and correctly states “[c]hildren’s personal data, especially biometric data, should only be used for child protection purposes, with strict enforcement of appropriate rules on collection, use and retention of, and access to, data. The Committee urges due diligence regarding safeguards in the development and implementation of data systems, and in the sharing of data between authorities and/or countries. **State parties should implement a “firewall” and prohibit the sharing and use for immigration enforcement of the personal data collected for other purposes, such as... access to services. This is necessary to uphold data protection principles and protect the rights of the child as stipulated in the Convention on the Rights of the Child**” (our emphasis). These are protective measures which are taken to ensure that schools do not become sites which are used by other state institutions for immigration enforcement and that they remain safe places and places of learning which children have no fear of attending.

96. As mentioned above, it is also possibly unlawful as the establishment of the National Intergovernmental Committee and Provincial Intergovernmental Committee also creates the impression that they seek to enforce immigration. This impression is derived from:
  - 96.1. the documentation lists. This was described in more detail above, and includes requesting asylum seekers to provide refugee permits within three years of admission and requesting both birth certificates in the case of non-nationals born in South Africa. The former appears to be a means to ensure quick turnover of asylum claims and the latter appears to be a means to ensure that non-nationals register their births in their country of origin;
  - 96.2. the referral of cases to the National Intergovernmental Committee and Provincial Intergovernmental Committee which cannot actually assist them without law reform and other practical changes at the Department of Home Affairs. If the committees cannot assist the majority of learners obtain documents then what purpose does the body serve; and
  - 96.3. the assortment of representatives sitting on the National and Provincial Intergovernmental Committees such as the Department of Labour, Department of Statistics, Department of Justice and Constitutional Development, Treasury and South African Police Services which cannot and do not assist to obtain documentation and whose presence on the NIC and PIC gives an impression of *mala fides*.
97. As mentioned several times, schools must be safe spaces for children to learn and develop. It is inappropriate for schools to be used as sites of immigration control, it deters children from attending school (and so violates the right to a basic education) and creates anxiety.

***V. Lack of clarity that undocumented learners must be admitted regardless of their undocumented status***

98. As mentioned above, the Centre for Child Law judgment has clearly established that undocumented learners can attend school. However, in the quagmire of the required documentation lists, this fact is clouded and casts doubt on the entitlement. It therefore needs to be made abundantly clear.

***VI. Confusion in section 4(1F)***

99. In addition to the fact that section 4(1F) is not clear that all learners can attend school regardless of their documentation status, the section is confusing.
100. It states that if learners do not have the “required documents” (as defined in the definitions in section 1), they will still be admitted to school, but the school principal must advise the parent or learner to secure the required documentation and alert the Provincial Intergovernmental Committee thereof.
101. This section is confusing. The definition of “required documents” sets out certain strict categories of children and the documents that are required for them. The categories of children contained in the “required documents” section are: South African children, permanent residents, temporary residents, refugees, and asylum seekers.
102. However, many other groups of children are not covered by this: children whose parents are economic migrants who are here irregularly, children whose parents are here irregularly for other reasons (not economic), children whose parents are Zimbabwean Special Permit holders, children whose parents are Lesotho Special Permit holders (you may say that the children of Zimbabwean and Lesotho Special Permit holders are permanent residents, but they are unable to produce the same documentation as that which other permanent residents are required to under section 1, such as a study visa or permanent resident permit as a dependent), and unaccompanied minor children.
103. Accordingly, when section 4(1)(F) states that a child who is unable to produce the “required documents” shall nonetheless be admitted to school, it is by implication silent on the status of all the other children listed above. This aligns with our earlier view regarding the problematic lack of clarity within the 2022 Draft Bill that all learners and not only those that fit into the categories singled out in the 2022 Draft Bill, can attend school regardless of their documented or undocumented status.

***VII. Criminalisation of parents and caregivers for refusal to cooperate***

104. This section states that any parent, caregiver or guardian who refuses to cooperate in securing the required documents for learners is guilty of an offence and if convicted could be given a fine or imprisoned for up to 12 months, or both a fine and imprisonment. The penalty could have the effect of imprisoning or fining parents and caregivers who cannot meet impossible requirements. Further, as mentioned numerous times now, it also does not resolve the core



reasons that children do not have documentation, it would leave children without caregivers or parents, or in the case of a fine, dispossess persons of income. It is overly harsh and punitive and does not take into account children's best interests.

**Recommendation:**

105. We recommend that the "required" documents content in the definitions section (section 1) and section 4(1A) to (1G) of the 2022 Draft Bill be removed in its entirety. The Admissions Policy read with the Centre for Child Law judgement sufficiently regulates the admission of children to school.
106. It is important to ensure that the *rights* related to admission (for example the right to be admitted to school free of discrimination and regardless of documentation status) are contained in legislation so that they are adequately protected, but that the finer details surrounding the admission of children to school are regulated through policy. This ensures flexibility. In line with this, and in order to adequately protect undocumented learners' right to education, there should be confirmation within the 2022 Draft Bill that undocumented learners are unequivocally ensured access to education.
107. In the event that the DBE persists with the regulation of documentation as proposed in BELA, at the very least the DBE ought to do away with additional burdensome documentation requirements which are unnecessary for school and education administration. Careful consideration ought to be given to which documents are helpful and which are for the purpose of immigration control. Where certain documents are requested within the legislation (such as birth certificates or permits), it must be absolutely clear that the failure to produce those documents does not in any way prevent children from accessing school.
108. Lastly, in the event that the DBE persists with establishing National and Provincial Intergovernmental Committees to do the work of the Department of Home Affairs, then there must be a balance that is struck to ensure that the risks associated with referral to the Committees are explained. The risks include arrest and deportation, loss of employment etcetera (in the event that those considerations apply), and potential criminalisation, imprisonment and/or imposition of a fine, if construed as failing to cooperate with the Committees. In light of those risks, consent should be obtained in line with the Protection of Personal Information Act and only then should one be referred to the Committees.
109. The EELC and EE align themselves to the views of the Legal Resources Centre on the same issue.

**CLAUSE 5 - LANGUAGE POLICY OF PUBLIC SCHOOLS (AMENDING S6 OF SASA)**

110. The 2022 Draft Bill has made some welcomed changes and additions to the version of the amendment contained in the 2017 Draft Bill. However, EE and EELC remain concerned that they do not provide sufficient safeguards against language policies being used to preserve privilege,

as a proxy for racist and exclusionary practices and in a way that obstructs effective and efficient planning and management of the education system.

***I. Factors an HOD must consider when evaluating a school's language policy***

111. SASA currently empowers SGBs to determine their own language policy, subject to the Constitution and provincial laws. Clause 5(c) of the 2022 Draft Bill requires SGBs to submit their language policies to the HOD for approval, and the HOD may approve the policy or return it back to the SGB with recommendations.
112. Before signing off on a school's language policy, the HOD must be satisfied that the policy considers the best interest of the child (with emphasis on equality and equity), the changing number of learners who speak the language of learning and teaching (LOLT), the effective use of resources and classroom space, the enrolment trends of the public school, and the broader language needs of the community where the school is located. Lastly, the SGB must review language policies every three years, or when circumstances necessitate a change in a school's language policy or at the request of the HOD. This is to ensure that language policies remain in line with the Constitution and provincial law.
113. EE and EELC welcome the introduction of these amendments as they will empower the HOD to oversee language policies/amendments thereto to ensure that these policies are constitutionally compliant. The proposed screening process could help safeguard against schools using their language policies in a way that is contrary to the interests of the community it serves and undermines the effective use of public resources within the public education system.
114. We also welcome the introduction of factors which are to guide the HOD in his or her decision making on whether to approve a policy or refer it back to an SGB with recommendations. We are, however, of the view that the insertion of certain additional factors will further aid the HOD in deciding whether to approve a language policy.

**Recommendation:**

115. EE and EELC make the following recommendation:
  - 115.1. With respect to the new proposed section 6(7) of SASA, that the factors listed below be inserted into clause 5(c):
    - 115.1.1. The extent of excess capacity in the case of a single medium school and the trends in this regard; and
    - 115.1.2. The availability of and accessibility to other similarly resourced public schools, for learners who are language barred from attending the single medium school.

## **II. Factors an HOD must consider when determining whether it is practicable for a school to have more than one language of instruction**

116. Under clause 5(c) of the 2022 Draft Bill, the HOD is empowered to direct a public school to adopt more than one language of instruction where this is practicable. The HOD must take into account the best interests of the child with emphasis on equality and equity, the dwindling number of learners who speak the LOLT, the need for effective use of classroom space and resources of the public school and the language needs of the broader community in which the school is located.
117. EE and EELC welcome these amendments as they will provide the necessary statutory muscle for the State to fulfil its constitutional duty under section 29(2) of the Constitution to provide everyone with a right to an education in an official language of their choice where this is reasonably practicable. Empowering the HOD in the manner proposed by the 2022 Draft Bill will help guard against the possibility of single medium language policies of historically privileged schools operating in a way that keeps enrolment levels low and those schools undersubscribed, and which invariably makes it impossible for black learners to attend those schools.
118. Indeed, the Constitutional Court in *AfriForum and Another v University of the Free State* has stated that:

*“It would be unreasonable to slavishly hold on to a language policy that has proved to be the practical antithesis of fairness, feasibility, inclusivity and the remedial action necessary to shake racism and its tendencies out of their comfort zone. Section 29 of the Constitution. . . is fundamentally about . . . the impermissibility of racial discrimination, intended or otherwise, in all our educational institutions.”<sup>48</sup>*

119. In this same matter the Constitutional Court goes on to explain that intrinsic to the decision-making process under section 29(2) is the “critical need . . . to undo the damage caused by racial discrimination”.<sup>49</sup> What is reasonable must be considered in light of “the need to cure the ills of our shameful apartheid past”.<sup>50</sup> The Court recognised the challenges posed “where scarce resources are deployed to cater for a negligible number of students, affording them close, personal and very advantageous attention while other students are crowded into lecture rooms.”<sup>51</sup>
120. We are of the view that the insertion of certain additional factors under clause 5(c) (as listed below) will further aid the HOD in ensuring that determinations under section 29(2) are made, as required by the Constitutional Court, in a way that serves to dismantle racial privilege within education institutions as opposed to further entrenching the status quo.

### **Recommendation:**

---

<sup>48</sup> *AfriForum and Another v University of the Free State* [2017] ZACC 48, 29 December 2017, at page 20, para 46. (*AfriForum v UFS*)

<sup>49</sup> *AfriForum v UFS* at page 22, para 50.

<sup>50</sup> *AfriForum v UFS* at page 23 para 53.

<sup>51</sup> *AfriForum v UFS* at page 23, para 52.

121. EE and EELC therefore recommend that with reference to the proposed section 6(10) of SASA, that the factors listed below be inserted into clause 5(c):
- 121.1. The extent of excess capacity in the case of a single medium school and the trends in this regard;
  - 121.2. The demand for conversion to dual medium of a single medium school;
  - 121.3. The availability of and accessibility to other similarly resourced public schools, for learners who are language barred from attending the single medium school;
  - 121.4. The geographical areas that learners attending the single medium school come from; and
  - 121.5. The curriculum options offered.

***III. The need to guard against language policies being used for preserving privilege and/or as a proxy for racist practices***

122. Notwithstanding all the positive suggested reforms, there remains in practice the danger of schools continuing to utilise language policies as a barrier to equitable access to education by simply turning potential applicants away on the basis that they seek tuition in a different language. This is despite the possible under-utilisation of resources at that school and a significant amount of overcrowding in neighbouring schools.
123. There is evidence, at least in Gauteng, that language policies have been used as a proxy for racist practices and actions by Afrikaans single medium schools. These schools have employed their policies as a basis for barring black learners living within the geographical surrounds from applying to them.<sup>52</sup> The Federation of Governing Bodies of South African Schools (FEDSAS) has in fact acknowledged, in litigation initiated by it, that there are schools that have used their language policies as a “*mechanism for screening applications in a manner that suggests that the screening occurs with racist intent.*”<sup>53</sup>
124. Where schools can simply show potential applicants, particularly those seeking to be enrolled at entry-phase level, the door through reliance on its language policy, the HOD’s ability to effectively gauge the language make-up and needs of the implicated schools and areas will be significantly compromised.
125. This would, in turn, adversely impact the HOD’s ability (as contemplated in the 2022 Draft Bill) to reach an informed conclusion, on whether a school’s language policy accords with the broader community needs for learning and teaching and ought to be approved. It would similarly hinder

---

<sup>52</sup> *FEDSAS v MEC Department of Education, Gauteng and Another*, Gauteng Local Division 18246/15. Answering affidavit of Edward Mosuwe (DDG, Curriculum Management, Gauteng Department of Education) dated 15 September 2015 at pages 457 to 460, para 112 and page 468 at para 119.7.

<sup>53</sup> FEDSAS, above note 55 Replying Affidavit of Paul Colditz (FEDSAS, CEO) dated 20 October 2015 at page 581, para 40.1, page 581.

an HOD's ability to properly determine if they should invoke their proposed power, under clause 5(c) to direct a school, where practicable, to have more than one language of instruction.

126. EE and EELC are of the view that an amendment is needed which makes it clear that schools are obliged to accept all applications regardless of the LOLT needs of the applicant and to feed this information to the Department who must then apply the school's language policy in finalising admissions to that school. This will help ensure that the Department has the information needed to aid its understanding of why some single medium schools are not filled to capacity, whether single medium schools are favouring learners from outside of the school's feeder zone over learners within the feeder zone, and what the demand for the school would otherwise be if parallel/dual medium is offered.
127. We submit that the suggested amendments would help the DBE dismantle the perpetuation of historical inequities within the basic education system where single medium better resourced schools are sealed off from black learners wishing to access them in the context of overwhelmingly poorly resourced and overcrowded public schools.

**Recommendation:**

128. EE and EELC thus recommend that a clause be inserted which makes it clear that it is not for the SGB itself to apply the school's language policy directly in the admission of entry phase learners. In particular, it should be made clear that schools should not be permitted to:
  - 128.1. Refuse to accept applications from learners whose choice of LOLT differs from a school's language of tuition; and
  - 128.2. Refuse to include these learners on admissions waiting lists for consideration by the Department.
129. We further recommend that a clause be inserted that clarifies that school language policies be applied by the Department when it places entry-phase learners at public schools, subject to the HOD's proposed power to alter a school's language policy.

**CLAUSE 6 - POWER OF THE MINISTER TO DETERMINE CURRICULUM AND ASSESSMENT (AMENDING S6A OF SASA)**

130. This section empowers the Minister to appoint a person(s) or an organisation to advise him or her to determine a national curriculum statement indicating the minimum outcomes and standards and a national process and procedures for the assessment of learner achievement.
131. The EE and EELC note that this section authorises the Minister to appoint persons or an organisation that would potentially influence the direction or strategy for curriculum and assessment. We recognise that this is an important role.

**Recommendation:**

132. We recommend that the process of appointing such person(s) or organisation to advise the Minister in determining a national curriculum statement indicating the minimum outcomes or standards and a national process and procedures for the assessment of learner achievement must be transparent. Measures to ensure transparency can include making the names of such appointed persons or organisations publicly available.

**CLAUSE 7 - CODES OF CONDUCT (AMENDING S8 OF SASA)**

133. During the course of our work, EE and EELC have engaged with the Department of Education and the provincial education departments in various ways on matters relating to schools' codes of conduct and their negative impact on learners' rights. EE and EELC have remediated various instances of discrimination against learners based on schools' codes of conduct, including Rastafarian learners in the Western Cape who were unlawfully excluded from or denied admission to their schools on the basis that their dreadlocks were a violation of the schools' codes of conduct. However, in most cases, settlements are only reached after some weeks of negotiation, and usually after the threat of litigation.
134. In the case of Lerato Radebe, the EELC successfully acted on behalf of a Rastafarian learner in the Free State who was unlawfully excluded from class for refusing to cut her dreadlocks, as required by her school's code of conduct.<sup>54</sup> And in the Constitutional Court, EELC represented EE as a 'friend of the court' in a matter concerning two pregnant learners who were excluded from their respective schools under codes of conduct. EE made submissions before the Constitutional Court on the discriminatory impact of these codes of conduct on pregnant learners.<sup>55</sup>
135. We therefore welcome, in principle, legislative reforms aimed at ensuring that school codes of conduct do not operate in a manner which discriminates against learners and undermines their right to a basic education.

***I. The exemption process***

136. Clause 7(b) of the 2022 Draft Bill seeks to amend section 8(2) of SASA, the section which addresses the adoption of schools' codes of conduct and the disciplinary procedures related thereto. The suggested amendments in clause 7(b) would require that school codes of conduct

---

<sup>54</sup> *Radebe and Others v Principal of Leseding Technical School and Others* (1821/2013) [2013] ZAFSHC 111 (30 May 2013).

<sup>55</sup> The *Harmony and Welkom* judgment. The EELC has also assisted pregnant learners to return to school where schools, acting in terms of their codes of conduct, have excluded these learners on the basis of their pregnancy. In this regard, EELC has engaged with SGBs, district officials and provincial officials in the Western Cape, Gauteng and KwaZulu-Natal, as well as officials in the DBE.

consider “the diverse cultural beliefs, religious observances and medical circumstances of the learners at the school.” EE and EELC welcome the inclusion of this amendment as this will provide some surety that SGBs are sensitive towards and give due consideration to cultural beliefs, religious observances and medical circumstances when devising school codes of conduct.

137. Clause 7(c) of the 2022 Draft Bill sets out a process for a learner to obtain an exemption from a school’s code of conduct. We applaud the introduction of an exemption process as this will help ensure that learners learn in a diverse environment, characterised by understanding, tolerance of difference and mutual respect for constitutional rights. However, we believe that this clause would be strengthened through the inclusion of a standard according to which exemptions should be granted.

**Recommendation:**

138. In light of the above, EE and EELC recommend that clause 7(c) of the 2022 Draft Bill set out a standard according to which exemptions should be granted. This standard must take into consideration, *inter alia*:
- 138.1. The best interests of the child;
  - 138.2. The child’s right to be treated fairly and equitably;
  - 138.3. The child’s right not to be unfairly discriminated against; and
  - 138.4. The inherent dignity of the child.
  - 138.5. The EELC and EE align themselves to the views of the Legal Resources Centre on the same issue.

***II. Procedural Guarantees***

139. Section 8(6) of SASA makes provision, to a certain extent, for preserving the interests of the implicated learner during school disciplinary processes. However, we are of the view that section 8 could be amended to include further procedural safeguards aimed at protecting the best interests of the learner subject to the disciplinary process.

**Recommendation:**

140. EE and EELC recommend that:
- 140.1. Section 8 of SASA be amended to require that a learner and a parent of a learner subject to disciplinary proceedings must be notified timeously and in writing of the need for them to attend a disciplinary hearing.
  - 140.2. A minimum period for notification be stipulated, alternatively that it be required that notice be given to the parent and learner concerned within a reasonable period.

- 140.3. Notification must state the time, date and venue of the disciplinary hearing, as well as the nature of the allegation(s) made against the learner. That notification should also note the learner's right to be accompanied by a parent or a person assigned by a parent.

#### **CLAUSE 8 - SALE OF ALCOHOL ON SCHOOL PREMISES (AMENDING S8A of SASA)**

141. The proposed amendment empowers governing bodies to allow the possession, consumption or sale of liquor during school activities, both on and off the school premises, provided this does not happen during school hours. Even though this will be regulated, we are deeply concerned that this proposal will harm learners and that it will not be properly implemented and monitored. EE's learner members have noted that it will be very difficult to ensure their safety at school functions where alcohol is consumed, and that it is unlikely that schools will be able to monitor whether learners access alcohol at such functions. Drug and alcohol abuse has devastating effects on communities and families in South Africa.
142. The Constitution compels the DBE, PEDs and the government as a whole to accord paramountcy to the best interest of children when deciding on any matter that affects them, including a decision on whether to allow the use/sale of alcohol on school premises. National and provincial policies and safety guidelines also consistently and repeatedly emphasise the need to keep schools as alcohol and drug-free zones, to take proactive steps to promote healthy behaviour and lifestyles, and prevent alcohol and drug abuse. Key policies and guidelines include:
- 142.1. The Department of Basic Education ("DBE") and UNICEF Guide to Drug Testing in South African Schools, which highlights the adverse impact that drugs (inclusive of alcohol) can have on learners 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"*<sup>56</sup>

- 142.2. The National Strategy for the Prevention and Management of Alcohol and Drug Use Amongst Learners in Schools,<sup>57</sup> which is part of a national interdepartmental coordinated response which highlights alcohol and drug abuse in the country and its impact on all sectors of society, requires that South African schools remain safe and alcohol and

---

<sup>56</sup> Department of Basic Education (2013). Guide to Drug Testing in South African Schools. Pretoria: Government Printer. 7.

<sup>57</sup>Department of Basic Education. 2013. National strategy for the prevention and management of alcohol and drug use amongst learners in schools. Available at:  
[https://www.education.gov.za/Portals/0/Documents/Publications/Drug%20National%20Strategy\\_UNICEF\\_PRINT\\_READY.pdf?ver=2014-07-18-150102-000](https://www.education.gov.za/Portals/0/Documents/Publications/Drug%20National%20Strategy_UNICEF_PRINT_READY.pdf?ver=2014-07-18-150102-000)



drug-free zones.

- 142.3. Section 4(4) of the Regulations for the Safety Measures at Public Schools forbids educators, parents or learners or anyone else from possessing or consuming alcohol during a school activity.<sup>58</sup> And section 4(2)(e) states that no inebriated person may enter school premises.
- 142.4. The DBE's National School Safety Framework - the department's primary strategic intervention for managing safety at schools - recognises access to alcohol as one of the social level risk factors for violence in schools.<sup>59</sup>
143. Ease of access to alcohol and drugs exacerbates violence at school, and those schools located in poor and disadvantaged areas are already at particular risk due to the socio-economic conditions in their communities. In a 2020 study published in the *Psychology and Education Journal*, Kebogile Mokwena, head of the Department of Public Health at Sefako Makgatho Health Sciences University, and Phumzile Sindane affirm that many young learners are dropping out due to alcohol and substance abuse.<sup>60</sup> Research presented by the Criminological and Victimological Society of Southern Africa reveals that alcohol is one of the most abused substances by South African adolescents at a high rate of 25%-40% (male: 24%; female: 27%).<sup>61</sup> An additional report published in 2021 by Mark Hunter and Dr Robert Morrell of the University of Cape Town gives details of the disruptive behaviours of South African high school learners who use dangerous weapons to threaten other learners and teachers, or resort to vandalism, theft, and other crimes while under the influence of drugs and alcohol. Considering the recurrence of these findings, it comes as no surprise that research published in the *Journal of Psychology Research and Behaviour Management* in 2017 concurs that misbehaviour or negative behaviour of learners who abuse substances includes lack of concentration, disrespect for school authority, vandalism, physical violence, rejection, theft, and verbal abuse.<sup>62</sup> Principals and safety officers at schools in the Western Cape have told EE that the prevalence of drugs and alcohol in their schools pose significant threats to safety in the schooling environment.
144. The experience of learners, parents and teachers in schools, as well as the DBE's own research and experience provide compelling insight as to why the amendments contemplated, while purporting to be in support of schools, could have detrimental consequences for learners in

---

<sup>58</sup> Department of Education. 2006. South African Schools Act 84 Of 1996 Amendment: Regulations For Safety Measures At Public Schools. Government Gazette. (Vol. 497 No. 29376 ) Available at:

[https://www.gov.za/sites/default/files/gcis\\_document/201409/29376.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/29376.pdf)

<sup>59</sup> Department of Basic Education. 2015. The National School Safety Framework. Available at:

<https://www.education.gov.za/Portals/0/Documents/Publications/School%20Safety%20Framework%202016.pdf>

<sup>60</sup> Mokwena, Kebogile E., and Nomkanka J. Setshego. 2021. "Substance Abuse among High School Learners in a Rural Education District in the Free State Province, South Africa." *Psychology and Education Journal*, vol. 63 Available at:

<http://www.psychologyandeducation.net/pae/index.php/pae/article/view/83/79>

<sup>61</sup> Nemati, Z., & Matlabi, H. 2017. Assessing behavioural patterns of Internet addiction and drug abuse among high school students. *Psychology research and behaviour management*, 10, 39–45. <https://doi.org/10.2147/PRBM.S123224>. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5279833/>

<sup>62</sup> Burton, P & Leoschut, L. 2013. School Violence in South Africa: Results of the 2012 National School Violence Study. Available at: [https://www.saferspaces.org.za/uploads/files/Monograph12-School-violence-in-South\\_Africa.pdf](https://www.saferspaces.org.za/uploads/files/Monograph12-School-violence-in-South_Africa.pdf).

schools.

145. We, therefore, submit that, through the introduction of the proposed amendment to section 8A of SASA, the Department of Basic Education is not only failing in its obligation to prevent alcohol abuse in schools but is proactively assisting with the promotion and reinforcement of the drug/alcohol problem in South Africa. Schools should thus be alcohol and drug-free zones and should take proactive steps to promote healthy behaviour and lifestyles and prevent alcohol and drug abuse. It is against this backdrop, that the EE and EELC provide comment on this clause.
146. It is important to be clear that, for the reasons outlined above, EE and the EELC object in the strongest terms to the allowance of any alcohol on school premises or at any school activity, even under the current circumstances contemplated in clause 8 of the Bill. By engaging with and providing comments on the proposed amendment, we do not deviate from this position. Should the unfortunate decision be taken to keep the amendment, it is imperative that it be strengthened to address key problems.

#### ***I. Lack of clarity on application and permission process***

147. Section 8(c)(i) provides that the HOD may grant an SGB permission to allow the possession, consumption or sale of alcohol at *any* school activity. No clarity is provided on the process to be followed or specific information that the HOD must consider in making this determination. While 8(e) compels the governing body, in consultation with the HOD, to consider the factors listed, it does not directly place the same obligation on the HOD, when taking the decision contemplated in 8(c)(i). As a result, the amendment gives no guidance to the HOD in making a decision on whether or not to allow the consumption, possession and sale of alcohol at a school activity. This is impermissibly vague, and imbues the HOD with impermissibly wide discretion, especially in the context where the best interest of learners is so directly affected by the contemplated decision.
148. Clause 8(c)(ii) empowers an SGB to grant *any* individual permission to possess, consume and sell alcohol at a school activity or on the school premises. While the section makes provision for consultation with the HOD, it does not clarify whether, before granting such permission, the SGB would have first had to obtain the permission contemplated in 8(c)(i). The consequence of this vague formulation is that an SGB is by default, without having to meet any specific criteria, empowered to make decisions on which individuals (and under what circumstances) can consume, possess or sell alcohol on the school premises or at a school activity. In addition, no clarity is provided on the application process or the information that would need to be supplied to assist the SGB in considering the factors listed in 8(e) and 8(f).

#### ***II. Scope of events where alcohol is allowed is too broad***

149. The permission contemplated in 8(c)(i), is extremely broad, allowing the HOD to grant permission for the possession, consumption or sale of alcohol at *any* school event. Clause 8(d) seeks to limit the possession, consumption and sale of alcohol to specific activities, including

fund-raising activities of the school by the governing body; the letting of the school's premises to members of the community for private functions; church services; functions held for the staff of the school; and instances where staff members live on school premises. This attempt at restriction is not very successful as a wide scope of activities, including ones where learners and other children could be present, could fall within this list of activities. These include activities such as sports days, culture evenings, market days, parent evenings and many similar regular school activities. One could argue that even a tuck shop selling goods after school hours while learners participate in extra murals could fall within this broad scope.

150. In line with the mandate provided in 8(f), to consider the best interest of learners, EE and the EELC propose that this section be amended to exclude any activities where learners are present from the list of activities where alcohol can be sold.

### ***III. Weak criteria to consider***

151. Clause 8(e) requires an SGB, when deciding whether to grant permission to possess, consume and sell alcohol to an individual, to consider whether the school will be able to provide someone to monitor the function, whether children will be present at the function; and whether the organisers are willing to give a written undertaking to ensure that liquor will not be available to children. Clause 8(f) requires that additionally, the best interest of the child be considered.
152. EE and EELC submit that these sections require rephrasing. The presence of children and the best interest of children are important factors to consider, but the rest should be crafted as criteria that must be met, not just 'considerations'. Additional criteria should be added, including that a plan must be in place to store alcohol securely at the event, to set up a designated area where alcohol will be sold, to monitor the responsible consumption of alcohol and, should the amendment retain the allowance of selling alcohol at functions where learners are present, to ensure that no alcohol is sold to children.

### ***IV. Lack of clarity on duration of permission***

153. It is entirely unclear from the formulation of 8(c)(i) and 8(c)(ii) whether the permission contemplated relates to specific activities or is granted as blanket permission to host multiple activities. This is particularly concerning. It will not be possible to consider the best interests of learners and other key factors, such as those contemplated in 8(e), without specific information related to a specific event. Factors such as whether children will be present and whether a person will be delegated to monitor the consumption of alcohol at the event will change from event to event. It is therefore imperative that the amendments clearly state that permission will be granted per activity and that re-application for each activity where alcohol is to be sold will be required.

### ***V. Lack of public consultation***

154. Neither clause 8(c)(i) nor clause 8 (c)(ii) provides for the HOD or SGB to consider input from

learners, teachers or parents as to whether permission should be granted to possess, consume or sell alcohol at a school activity or on the school premises. Learners, parents and teachers have a direct interest in such permission being granted and are well placed to provide crucial contextual information on the potential harm that can be caused by such a decision and on the ability of the individual or SGB in question to provide the necessary safeguards.

**Recommendation:**

155. EE and EELC strongly urge that this clause be removed in its entirety.

**Alternative recommendation:**

156. EE and EELC remain firmly of the view that the possession, consumption and sale of alcohol should not be allowed on school premises or during school activities. Alternatively, it should at the very least not be consumed or sold at activities where school learners are present.
157. *The following recommendations, however, are made as a means to ameliorate the impact of the presence of alcohol at schools, should the unfortunate decision be taken not to remove this section.*
- 157.1. Clause 8 should be amended to provide clear guiding principles or criteria that an HOD must consider in determining whether an SGB is given permission to sell alcohol at a school activity or not. Among others, these should include:
- 157.1.1. The ability and capacity of the school to adequately monitor the consumption of alcohol at the proposed activity.
- 157.1.2. The presence of learners at the proposed activity.
- 157.1.3. The plan submitted by the school to ensure the safe management of alcohol at the proposed activity, such as safe storage of alcohol and designated sales areas.
- 157.2. Clause 8(c)(ii) must be amended to require that SGBs must obtain permission from the HOD, before allowing an individual to sell alcohol at the school or during a school activity.
- 157.3. Clause 8 should be amended to stipulate a clear process for obtaining permission to sell alcohol, either from the HOD or from the SGB. The process should include the submission of an application that sets out:
- 157.3.1. the details of the particular event being planned;
- 157.3.2. the number of people expected at the event;
- 157.3.3. whether learners will be present;

- 157.3.4. how alcohol will be stored at the event;
  - 157.3.5. whether there will be a designated area for the sale of alcohol and how access to this area will be controlled;
  - 157.3.6. how many staff or individuals will be responsible for monitoring the consumption of alcohol at the event;
  - 157.3.7. what processes will be put in place to ensure that alcohol is not consumed by or sold to children; and
  - 157.3.8. A clear undertaking that no alcohol will be sold to children.
- 157.4. Clause 8(c)(i) and 8(c)(ii) should be amended to clarify that permission will be granted per activity, as this will allow the HOD or SGB to consider the particularities of a specific event and the measures in place to safeguard children. Should schools want alcohol to be consumed or sold at another school activity, function or event, they must be required to re-apply for permission. The clause must prohibit automatic renewal of permission between events.
- 157.5. The clause must be amended to require the HOD or SGB to invite input from parents, guardians, learners and teachers on the decision to allow the sale of alcohol at an event or activity taking place on school grounds. If the Bill is amended to allow for approval to be provided for a specific period of time - EE and EELC advise against this - then the clause should require a meeting of parents, guardians, learners and teachers to give input on whether or not permission should be granted. This meeting should meet a stipulated quorum. The number of votes required before an application can be made must be stipulated and should allow for at least a simple majority vote of the parent body.
158. The EELC and EE support the submission of Section27 on the same issue.

#### **CLAUSE 9 - SUSPENSION OF LEARNERS FOR SERIOUS MISCONDUCT (AMENDING S9 OF SASA)**

159. Clause 9 of the 2022 Draft Bill amends section 9 of SASA. Section 9 of SASA deals with the suspension of a learner for serious misconduct. The 2022 Draft Bill defines serious misconduct by a learner as any form of harassment, physical assault with the intention to cause harm, repeated bullying, fraud, possession of drugs or liquor or of a dangerous object, possession and distribution of pornography, disrupting school activities or the imminent threat of doing so, serious transgressions relating to any test, and engaging in sexual activity on school premises or committing an act of sexual assault (or the imminent threat thereof). EE and EELC are concerned that the definition of serious misconduct is too broad as well as unclear. This could allow for

actions to fall into the category of serious misconduct that should not rightfully be labelled as such.

### ***I. The definition of serious misconduct***

160. Clause 9 of the 2022 Draft Bill includes “engaging in sexual activity on school premises” as a form of serious misconduct. EE and EELC are concerned that, in practice, this may have the unintended consequence of learners who are sexually assaulted or harassed being suspended on this ground. Whilst the term ‘sexual activity’ is assumed to only encompasses *consensual* sexual activity, it is important that this is made clear so as to avoid misinterpretation. It is also unclear what actions constitute “sexual activity”. For example, would learners who kiss each other fall into this category and would this action deserve suspension?
161. Some of the other actions that are listed as serious misconduct are too broad and are also likely to have unintended consequences. For example, can a child be suspended for forging a parent’s signature on their homework, as this would constitute fraud? Will a girl who has a nude photo of herself on her phone be considered to be in possession of pornography and be suspended? Should too broad a definition of serious misconduct be adopted, learners may face the most severe reprimand (limiting/removing access to schooling) for actions that do not warrant the label of “serious misconduct” or the consequences that come thereafter.
162. Furthermore, the amendment aims to classify repeated bullying as serious misconduct. EE and EELC are concerned that this does not allow for instances of severe once-off bullying to merit suspension.
163. Last, the clause only provides for the illegal possession of drugs or liquor to be classified as serious misconduct. EE and EELC are of the view that the consumption or distribution of drugs or liquor should also fall under serious misconduct.

### ***II. Disrupting school activities or the imminent threat of doing so***

164. Categorising the disruption of school activities or the imminent threat of doing so as serious misconduct will seriously infringe on a learner’s right to protest. See our submission in relation to clause 2(c) of the Draft Bill with regards to the importance and historical significance of learner protests.

#### **Recommendation:**

165. EELC and EE submit that:
  - 165.1. Section 9(1)(b)(xi) of SASA be amended to say “engaging in consensual sexual activity on school premises”.
  - 165.2. Section 9(1)(b)(iv) of SASA be amended to say “the illegal possession, distribution or consumption of a drug or liquor”.

- 165.3. The definition of “sexual activity” must be clarified.
- 165.4. “Disrupting school activities or the imminent threat of doing so” must be removed.
- 165.5. Each instance of serious misconduct must be judged on a case by case basis to determine the severity of the misconduct, whether the conduct is serious enough to be labelled ‘serious misconduct’ and the appropriate sanction.

#### **CLAUSE 10 - PROHIBITION OF CORPORAL PUNISHMENT (AMENDING S10 OF SASA)**

- 166. EE/EELC welcomes the additions to cl10(1) and 10(2) of the 2017 Draft Bill which now states that corporal punishment is abolished, and no person may inflict or impose corporal punishment on a learner at a school, during a school activity, or in a hostel accommodating learners of a school, and that any persons who do this would be guilty of an offence and liable on conviction to a fine or to imprisonment.
- 167. There is an urgent need for Provincial Education Departments to support schools with alternative discipline programmes aimed at upskilling educators on alternative discipline strategies, and the importance of incorporating these strategies. Alternatives to corporal punishment in schools are proven to work. Evidence-based approaches to classroom behaviour management have been shown to skill educators and equip them with the necessary tools to practice non-violent ways of discipline in the classroom.<sup>63</sup>
- 168. The principles of community and humanity “ubuntu” is a theme in the new constitutional dispensation.<sup>64</sup> Restorative justice “believes that the offender also needs assistance and seeks to identify what needs to change to prevent future re-offending”.<sup>65</sup> In fact, legislation such as the Child Justice Act,<sup>66</sup> which is a crucial piece of legislation pertaining to children in conflict with the law prefers restorative justice to a punitive approach.<sup>67</sup> Positive discipline which includes restorative justice must be incorporated in clause 10 of the current Bill.
- 169. Another promising approach developed and implemented in Jamaica, the IRIE toolbox, is an educator training package that focuses on training teachers to use positive and proactive

<sup>63</sup> DeVries, K. M., Knight, L., Child, J. C., Mirembe, A., Nakuti, J., Jones, R., Sturgess, J., Allen, E., Kyegombe, N., Parkes, J., Wala-kira, E., Elbourne, D., Watts, C., & Naker, D. (2015). The Good School Toolkit for reducing physical violence from school staff to primary school students: A cluster-randomised controlled trial in Uganda. *The Lancet Global Health*, 3, e378–e386.

<sup>64</sup> Ann Skelton “Restorative justice as a framework for juvenile justice reform: A South African perspective” *BRIT.J.CRIMINOL* (2002) 42, 496-513, 496.

<sup>65</sup> <https://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf> Accessed 30 October 2021. In *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at paras 114-5, Sachs J’s concurrence notes that the elements of restorative justice are encounter, reparation, reintegration and participation. The CJA defines restorative justice to mean— “an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation”.

<sup>66</sup> 75 of 2008.

<sup>67</sup> See the Preamble of the Child Justice Act and Section 73 of same which is dedicated to the restorative justice sentences of dealing with a child offender.

strategies to promote children’s positive behaviour, prevent negative behaviour and manage misbehaviour in foundation age children.<sup>68</sup> This programme showed a significant reduction in educators’ use of corporal punishment and an improvement in their emotional support of learners.<sup>69</sup>

**Recommendation:**

170. We thus recommend that an obligation is placed on provincial education departments to support schools with alternative discipline programmes aimed at upskilling educators on alternative discipline strategies, and the importance of incorporating these strategies. We also note the need for alternative approaches to incorporate restorative justice.

**CLAUSE 13 & 27 -SCHOOL MERGERS AND CLOSURES (AMENDING S12A & S33 OF SASA)**

171. Clause 27 of the 2022 Draft Bill seeks, among others, to create a separate process for closing down a public school where enrolment levels at the school are 135 or below, in the case of a primary school, and 200 or below in the case of a secondary school (“small schools”). Clause 13 of the 2022 Draft Bill provides guidance on the process for the merger of schools.
172. Clause 13 and 27 in the 2022 Draft Bill have provided more detail on the process for ensuring notification and participation of school stakeholders and the broader community where mergers and closures are being considered. These amendments are welcome. However, the clauses would be strengthened by the introduction of factors to consider when deciding whether to merge a school as well as specific timeframes to ensure the process is efficient and timeous.

***I. Additional factors to consider when merging and closing a school***

173. The proposed amended section 12A does not list any factors that should be taken into account when determining whether two or more schools should be merged. The listing of such factors will enhance rational and consistent decision-making with regard to school mergers, and will align the proposed amended section 12A with the proposed amended section 33(8) in respect of school closures.

**Recommendation:**

174. We recommend the addition of a sub-section listing factors which the Member of the Executive Council (MEC) should take into account when determining whether two or more schools should be merged. In this regard, we note that the proposed revision of section 33(8) lists certain factors that the MEC must take into account when considering the closure of schools. In addition, we recommend that both section 33(8) and section 12A could include more specific

---

<sup>68</sup> Baker-Henningham, H., Scott, Y., Bowers, M.& Francis, T. 2019. Evaluation of a Violence-Prevention Programme with Jamaican Primary School Teachers: A Cluster Randomised Trial. *Int J Environ Res Public Health*, 16

<sup>69</sup> Baker-Henningham et al, 2019.



factors such as:

- 174.1. population demographic and economic trends in the area the school(s) are located;
- 174.2. learner enrolment trends in relevant schools;
- 174.3. levels of education offered by the relevant schools;
- 174.4. curriculum considerations;
- 174.5. The availability of resources such as school infrastructure, learner transport, hostel accommodation, school nutrition, and school furniture; and
- 174.6. current and potential school overcrowding.

## ***II. Introduction of more detailed timeframes***

175. Save for the fact that stakeholders are given a period of not less than 90 days (in the instance of a merger) and not less than 30 days (in the instance of closure) to make representations, as well as the MEC being given 30 days after representations to take a decision in the instance of a merger, no other time frames have been provided to guide the other steps in the school closure process.
176. The inclusion of specific and reasonable timeframes will ensure that prescribed procedures are effective and that relevant role players, particularly learners and parents, are not subject to unreasonable delays in receiving feedback on critical issues. EE and EELC therefore urge that the provisions of the 2022 Draft Bill be adjusted to ensure that all prescribed procedures contain appropriate timeframes within which relevant role players must act.

### **Recommendation:**

177. In light of this, EE and EELC recommend that:
  - 177.1. Section 33 of SASA be amended so as to insert an additional section requiring the MEC to make regulations on the rationalisation of small schools (as defined in accordance with the Minimum Norms and Standards for School Infrastructure). For Clause 13, EE and EELC recommend that an additional subsection be inserted into section 12 of SASA which cross-references to section 33 and states that the regulations published by the MEC must also speak to the mergers of small schools as defined in that section.
  - 177.2. A subsection is inserted requiring that the regulations in question mandate and elaborate on the factors which must inform an MEC's decision on the closure of a small school. In particular, that it is made a requirement that these factors are to include:
    - 177.2.1. Population demographic and economic trends in the area the school(s) are located;

- 177.2.2. learner enrolment trends in relevant schools;
  - 177.2.3. levels of education offered by the relevant schools;
  - 177.2.4. curriculum considerations;
  - 177.2.5. The availability of resources such as school infrastructure, learner transport, hostel accommodation, school nutrition, and school furniture; and
  - 177.2.6. current and potential school overcrowding.
- 177.3. Clauses 13 and 27 must stipulate timeframes within which each step of the closure and merger process is to occur and that these timeframes are to ensure minimum disruption of education at affected schools.
178. The EELC and EE align themselves to the views of Section 27 on the aspects of their submission which provides that clause 13 should be revised to place an obligation on the MEC to ascertain whether there will be adequate infrastructure to accommodate all the learners in the potential new, merged school, as well as ensuring that transportation arrangements are put in place and that any challenges involving school uniforms are addressed before the commencement of the merger.

#### **CLAUSE 14 - DISCLOSURE OF SGB FINANCIAL INTERESTS (AMENDING S18A OF SASA)**

179. Section 18A of SASA deals with the creation of SGB's codes of conduct. The section currently states that MECs must determine a code of conduct for the members of the governing body of a public school after consultations with associations of governing bodies in that province, if applicable. Clause 14 of the 2022 Draft Bill, through the insertion of section 18(4A) looks to strengthen the accountability of School Governing Bodies by stating that SGBs' code of conduct must provide for mandatory disclosures of financial interests by SGB members. Section 18(4A) states that all members of the SGB disclose their financial interests, and those of their spouse, partner and immediate family members. This disclosure must be done on an annual basis. Section 18(4A) also provides a non-exhaustive list of the types of financial disclosures that must be made.
180. EE and the EELC welcome this amendment as it aims to provide a safeguard against corruption, which is missing in the current Bill. According to Corruption Watch's Report on Corruption in Schools *Loss of Principle* (The Report)<sup>70</sup>, principals are often the main perpetrators of a range of corrupt activities such as financial mismanagement, theft of funds, and tender corruption. This amendment, once properly implemented and monitored, will be a strong accountability and anti-corruption mechanism within SGBs.

---

<sup>70</sup> Corruption Watch, Report on Corruption in Schools *Loss of Principle*, 2015

181. Section 18A however stipulates that these financial disclosures by SGB members are only applicable as it relates to an 'immediate' family member. Corruption Watch's Report indicates that in many instances SGB members enrich themselves through corrupt dealings with friends, not just family members. This is recognised in section 18 of the 2021 Draft Procurement Bill which includes 'close associates' in the ambit of financial interest disclosure.<sup>71</sup>
182. We therefore feel that Section 18A will have reduced efficacy in stopping corrupt activities if there is no means to ensure that SGB members are not enriching themselves through dealings with individuals outside of their immediate family. We recommend individuals who apply to do business with a school are required to submit conflict of interest forms with their tender and where a conflict of interest arises, the involved SGB member does not participate in that tender deliberations.

**Recommendation:**

183. In light of this, EE and EELC recommend that:
- 183.1. That a subsection is inserted in Section 18A(4A) requiring the disclosure, by both the individual and the SGB member, of any existing and known relationships between SGB members and individuals associated with a tender or procurement application where the individual/SGB member would be set to benefit.

**CLAUSE 19 - MEMBERSHIP OF SGB FOR LSEN (AMENDING S24 OF SASA)**

184. Clause 19 of the 2022 Draft Bill transfers functions currently ascribed to MECs to the Minister. As such, the 2022 Draft Bill obliges the Minister to make various determinations regarding the appointment of governing body members in public schools, including public schools for learners with special education needs. EE and EELC recognise that this amendment may result in the national standardisation of processes related to the appointment of governing bodies in public schools. This would potentially provide valuable procedural consistency across provinces and is a welcomed revision.
185. Section 36 of the SASA requires the SGB to seek approval from MEC (Member of the Executive Council) to enter into lease agreements on behalf of public schools.
186. This section requires SGBs to seek approval from the MEC before entering into a lease agreement on behalf of a public school. Furthermore, the SGB must obtain written permission from the MEC to lease school property for purposes of supplementing school funds, unless such lease is regarding an immovable property and does not exceed a period of 12 months.

**Recommendation:**

---

<sup>71</sup> 2020 Draft, Public Procurement Bill

187. The EELC and EE welcome this provision, as far as it seeks good governance and reduces the risk that the state would be held accountable for acts or omissions on the part of public schools. However, we recommend that additional provision must be made for instances where written permission cannot be sought from the MEC, where time is of the essence and the SGB cannot seek written permission from the MEC, or where there is an inordinate delay from the MEC in providing approval.

#### **CLAUSE 32 - FEE EXEMPTION APPLICATION (AMENDING S41 OF SASA)**

188. This section purports to remove the list of requirements which parents had to provide when applying for a fee exemption. The list included (a) salary advice of both parents, where applicable; (b) statements of profits received from investments or other forms of business; (c) a divorce agreement or court order, where applicable; (d) an affidavit where the parent is unemployed; and (e) proof of all children registered at a public school.

##### ***I. Limiting the type of documentation that can be required from parents in the application process.***

189. Section 41 of SASA refers to the enforcement of the payment of school fees and provides for school fee exemptions. Clause 22(a) of the 2022 Draft Bill proposes an amendment to section 41(2) of SASA to strictly limit the type of information which an SGB may take into consideration when deliberating on a fee exemption. The memorandum accompanying the 2022 Draft Bill explains that these changes aim to “relieve the administrative burden that some schools have been placing on parents by setting application conditions that are too stringent and demanding unnecessary documentation (such as bank statements, or title deeds of homes).”
190. Under clause 22(a) of the 2022 Draft Bill an SGB “may consider only”:
- 190.1. a salary advice of both parents, where applicable;
  - 190.2. statements of profits received from investments or other forms of business;
  - 190.3. a divorce agreement or court order, where applicable;
  - 190.4. an affidavit where the parent is unemployed; and
  - 190.5. proof of all children registered at a public school.
191. In principle, EE and EELC welcome reforms aimed at curtailing the conduct of schools who place unnecessarily onerous requirements on parents during the fee exemption process and who thus frustrate the ability of deserving parents to access a fee exemption.

## *II. Special provision for certain single parents.*

192. Clause 22(b) of the 2022 Draft Bill proposes an amendment that, despite clause 22(a) (described above), a parent ‘may’ submit to the SGB an affidavit supported with a confirmatory affidavit of a social worker “another competent authority” or a court order which sufficiently shows that the other parent:
- 192.1. is untraceable;
  - 192.2. is unwilling to provide the first-mentioned parent with particulars of his or her total annual gross income;
  - 192.3. has failed to provide the first-mentioned parent with particulars of his or her total annual gross income despite the lapse of a reasonable time after a request by or on behalf of the first-mentioned parent that he or she do so; or
  - 192.4. has provided the first-mentioned parent with incomplete or inaccurate particulars about his or her total annual gross income and has refused to rectify the deficiency or has failed to do so despite the lapse of a reasonable time after a request by or on behalf of the first-mentioned parent that he or she do so.
193. This potential extra step in the fee exemption process, aimed at single or divorced parents, appears to provide a way for these parents to avoid being penalised because of their inability to provide reliable information or any information at all concerning the income of the other parent who is either being obstructive or is untraceable. Despite the seemingly good intent behind these proposals, they remain insufficient to eliminate the practical difficulties faced by single-parent households and may further exacerbate their attempts at accessing a fee exemption for their children.
194. This is because clause 22(b) of the 2022 Draft Bill states that a parent may submit such documentary evidence but does not provide clarity on what the implications will be if a parent fails to submit a confirmatory affidavit of a social worker or “another competent authority”, or a court order evidencing that they are unable to produce the information of a non-custodial partner.
195. There are many legitimate reasons why a single parent may fail to present the confirmatory affidavit contemplated in clause 22(b) of the 2022 Draft Bill, including circumstances which may make it difficult for a parent to access a social worker and the lack of clarity on what would constitute a “competent authority”.
196. Whilst regulation 9(3) of the School Fee Regulations<sup>72</sup> states that “[n]o applicant may be disqualified on the ground that his or her application form is either incomplete or incorrectly completed,” there exists a danger that schools may interpret these amendments, if introduced,

---

<sup>72</sup> Regulations for the Exemption of Parents from the Payment of School Fees, 2005 GN R1052 in GG 29311 of 18 October 2006.

as a means for outright rejecting the fee exemption applications of single parents solely because they are unable to secure a confirmatory affidavit or produce a court order. The HOD of the Western Cape Department of Education has in fact acknowledged, during the course of litigation brought by the EELC, that despite the existence of regulation 9(3), many schools already refuse to consider applications in which the information of a non-custodial parent is missing.<sup>73</sup> Consequently, the HOD has expressly indicated that this refusal by schools to consider these applications should be addressed in the revised regulations. Clause 22 of the 2022 Draft Bill does not address the HOD's concerns and may, instead, be interpreted by schools as empowering them to dismiss these fee exemption applications for lack of a confirmatory affidavit or court order.

**Recommendation:**

197. EE and EELC thus recommend that clause 22(b) be amended so as to clarify that a parent who does not produce the information listed in clause 22(b) will not be disqualified from the exemption process solely because of their failure to do so.
198. The SCA in *Head of Department, Western Cape Education Department and Others v S*,<sup>74</sup> has held that:

*“(a) The governing body of a public school shall grant a conditional exemption from payment of school fees, referred to in Regulation 1 of the Regulations, to a parent who:*

*(i) in his or her application for exemption:*

*(aa) gives particulars for his or her total annual gross income; and*

*(bb) does not give particulars of the total annual gross income of the other parent of the learner concerned because the other parent has refused or failed to provide such particulars to the parent applying for the exemption; and*

*(ii) having regard solely to his or her total annual gross income, would qualify for a total or partial exemption in terms of the Regulations if he or she were the only parent of the learner concerned.*

*(b) A conditional exemption shall be the total exemption or the partial exemption to which the applicant would have been entitled if he or she were the only parent of the learner concerned.*

---

<sup>73</sup> *M S v Head of Department, Western Cape Education Department and Others* [2016] ZAWCHC 119; [2016] 4 All SA 578(WCC); 2017 (4) SA 465(WCC). During its submissions before the court, the Western Cape Head of Department of Education conceded that schools refused fee exemption applications in cases where the information of non-custodial parents were missing.

<sup>74</sup> 2018(2)SA 418(SCA), Para 83.

*(c) When granting such a conditional exemption the governing body shall impose conditions to the effect that the applicant for the exemption:*

*(i) must report to the school forthwith any increase in his or her gross annual income during the school year in question which, had it been his or her income at the time of making the application for exemption, would have disentitled him or her from receiving the total exemption granted to him or her or from receiving any partial exemption granted to him or her;*

*(ii) must, on demand from the governing body, pay on reasonable terms to be determined by the governing body after giving him or her the opportunity to make representations, the school fees or the portion of the school fees for which he or she would have been liable in terms of the Regulations based on his or her increased gross annual income;*

*(iii) shall not be liable to make any such payment unless, during the school year in question, his or her gross annual income increases to such an extent that, had it been his or her income at the time of making the application for exemption, he or she would have been disentitled from receiving the total exemption granted to him or her or from receiving any partial exemption or he or she would have been entitled only to a lesser partial exemption than the one granted to him or her.”<sup>75</sup>*

199. In light of the above judgment, we submit that the custodial parent or the parent who is applying the fee exemption should be allowed to submit an affidavit to the effect that they have tried to contact the non-custodial parent through various means but to no avail. We note that obtaining a court order or an affidavit from a social worker to prove that the non-custodial parent cannot be found or that they have failed to provide the appropriate documentation for the fee exemption application can be onerous on the custodial parent. Moreover, it can be time consuming to obtain a court order and social workers are not easily available. Therefore, we strongly recommend that the requirement of obtaining a court order or an affidavit from a social worker be removed completely and that an affidavit from the custodial parent should suffice.

**CLAUSE 38 - SUBMISSION OF FALSE OR MISLEADING INFORMATION WHEN APPLYING FOR ADMISSION OR FEE EXEMPTION (AMENDING S59 OF SASA)**

200. This section creates a criminal offence in respect of parents (or other persons responsible for the learner) who knowingly submit false information, misleading information, a forged document or a document which is declared to be a true copy of the original when it is in fact not a true copy.

---

<sup>75</sup> Ibid, Para 83.

Parents or other persons are guilty of an offence and, if convicted, liable to a fine or imprisonment not exceeding 12 months or both a fine and imprisonment.

201. Whilst EE and EELC do not condone fraud, we do not believe that creating a statutory offence for this conduct is justified as it belies the complex social context that people live in in South Africa, the history of education segregation in South Africa, and the structural factors that cause parents to resort to such actions. The proposed amendment to imprison parents for supplying false information harshly penalises often desperate and invariably black and poor parents seeking to obtain a better education for their children and/or to shelter their children from social ills like gangsterism and drug abuse which plague their communities and neighbourhood schools. It also harshly penalises non-nationals who, despite their numerous attempts to regularise their stay in South Africa, simply cannot due to vast backlogs at the Department of Home Affairs as well as extreme ill-treatment, thereby forcing them to obtain documents illegally.
202. Successful prosecution under this proposed reform is likely to have devastating consequences for those children whose parents are imprisoned. We are of the view that government should rather focus on the improvement of the quality of education at underperforming and poorly resourced schools to ensure that all children, regardless of geographical and socio-economic circumstance, are able to receive an adequate basic education in a safe learning environment. Attention must be placed on dismantling the legacy of apartheid inequality in education which restricts the poorest families to the worst-off schools in terms of education quality and safety and forces them to seek better education opportunities elsewhere by any means possible.

### ***I. Contextual understanding & discriminatory Impact***

203. South Africa's education system has been described as "a tale of two systems" where, judging from learner performance, a minority of learners (roughly estimated at 25%) possess the 'privilege' of attending functional schools and achieve at acceptable levels on national and international testing whereas the remaining majority (a rough 75%) are doomed to dysfunctional schools and perform abysmally on these same tests.<sup>76</sup> In 2015 nearly all (82%) of the country's best performing schools (those whose pass rates exceeded 80%) were quintile 5 schools (i.e. wealthier schools). Whereas the majority of schools achieving below 30% were classified quintile 1 or 2 (i.e. poor schools).<sup>77</sup>
204. Wealth, or a lack thereof, manifests as deep inequalities within South Africa's schooling system. Good quality schools are still located in select areas, where often only the very wealthy can afford to live.<sup>78</sup> In post-apartheid South Africa, financial constraints are thus intimately intertwined with the historical constraints of apartheid inequality and racialised spatial

---

<sup>76</sup> Nic Spaull, Education in SA, 31 August 2012. Accessible at: <http://www.politicsweb.co.za/news-and-analysis/education-in-sa-a-tale-of-two-systems>

<sup>77</sup> Equal Education's Pre-Matric Media Statement: Matric Results an indicator of primary schooling in Crisis, 4 January 2017. Accessible at: <https://equaleducation.org.za/2017/01/04/matric-results-an-indicator-of-primarieschooling-in-crisi>

<sup>78</sup> F Yamauchi School Quality, Clustering and Government Subsidy in Post-Apartheid South Africa Economics of Education Review (2011) 30: 146–156 at page 150.



segregation. Despite the removal of apartheid restrictions on mobility and settlement, poorer people who are overwhelmingly black, especially those living in informal settlements on the outskirts of cities, are still effectively prevented from living in well-off areas with better educational opportunities for their children. Schools situated in the wealthier areas rely on strict application of self-determined geographical feeder zones to only admit learners who live within the radius of the school.

205. School admissions processes, both formal and informal are one of the primary factors shaping inequality in South Africa.<sup>79</sup> Against the backdrop of South Africa's deeply unequal and lopsided education system, it comes as no surprise that many parents would try all means necessary, including making additional travel arrangements, sending their children to live with relatives, or falsifying residence documents in order to save their children from dysfunctional schools and provide them with an opportunity to receive an adequate education.
206. Also, many black townships are notorious for crime and parents may feel forced to use incorrect and otherwise misleading information to increase their children's chances of admission to schools that might offer their children a safer learning environment. Punishing these parents with 6 months imprisonment for these attempts would be callous, if not cruel.
207. Whilst clause 38(3) is drafted in neutral terms, if inserted into SASA it is destined to have a discriminatory impact on black parents who are far more likely to be prosecuted for falling foul of its terms. Indirect discrimination has been described by Sachs J in *City Council of Pretoria v Walker* as having been developed:

*“precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them.”*<sup>80</sup>
208. In fact, in the Walker judgment, the Constitutional Court stated, *“the effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory”*.<sup>81</sup>
209. More recently in a different constitutional matter EELC, representing EE as an amicus, made submissions on the unconstitutionality of a provincial regulation introduced by the Gauteng MEC for Education which set default feeder zones to operate in the absence of the MEC making use of her or his power to establish feeder zones. The default feeder zones were described largely in spatial terms and relied strongly on the surrounding radius of the relevant school. EE argued that since these default feeder zones are defined spatially through reliance on place of residence and

---

<sup>79</sup> M. Hunter Racial Desegregation and Schooling in South Africa: Contested Geographies of Class Formation Environment and Planning (2010) A 42(11): 2640.

<sup>80</sup> City Council of Pretoria v Walker [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257, para 115. ('Walker')

<sup>81</sup> Walker judgment, at para 32.

place of work and since apartheid residential and workplace lines persist, the impact of the default feeder zones is to further entrench and perpetuate racial exclusion.<sup>82</sup>

210. The Constitutional Court, though deciding not to pronounce on this argument, was of the view that EE's submissions held "traction".<sup>83</sup> Clause 38(3) of the 2022 Draft Bill does not make mention of race or geography in formulating the offence. However, in the absence of legally prescribed feeder zones, some SGBs have formulated their own feeder zones through their admissions policies and processes using geographic proximity to the school. The implications are that although 38(3) is seemingly neutral, its *de facto* effect would be to entrench and intensify existing inequalities through its discriminatory impact on black parents.

## ***II. Contrary to the best interests of affected children***

211. The amendments proposed in clause 38(3) are contrary to the best interests of those children whose parent(s) or caregiver(s) stand to be prosecuted should this clause be made law. In particular, given the possibility of imprisonment, it undermines a child's right to family care or parental care under the Constitution.<sup>84</sup> A right which has been described as "encompassing a loving and stable environment,"<sup>85</sup> and as being important for "the well-being of all children"<sup>86</sup> and for "maintaining the integrity of family care".<sup>87</sup>
212. Clause 38(3) if successfully implemented would compromise the right to family care as incarceration of a parental figure would spell the loss of parental support for the child(ren) under their care. A parent behind bars for a protracted period of 6 months, is a parent unable to fend for their child or assist their child with homework or otherwise support their studies and ensure their well-being. Families provide a sense of belonging and security for a child. They serve as a space within which discipline is instilled and spirituality and values nurtured. This is a sacrosanct space which should not be disrupted easily, especially not as a result of the actions of a parent aimed at the betterment of their children.
213. Whilst clause 38(3) does make provision for a fine being imposed as an alternative, the possibility of a presiding officer opting for jail time persists. There is also the reality of many parents who may struggle to pay a fine and who do not have the funds to mount a strong legal defence, especially as those who would stand to be prosecuted under this amendment will likely be poorer parents with little alternative to secure their children's future. If the 'offending parent' is the head of a single-parent household, the injustices brought on by this proposed amendment are compounded. Experiences borne out in the USA, show that prosecution for what is termed there as 'boundary hopping' - enrolment of a child in a different school education district

---

<sup>82</sup> 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 38. ('FEDSAS v MEC Gauteng')

<sup>83</sup> FEDSAS v MEC Gauteng at para 39.

<sup>84</sup> Section 28(1)(b) of the Constitution.

<sup>85</sup> Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae) [2002] ZACC 20; 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC) at para 22. ('Du Toit' judgment)

<sup>86</sup> Du Toit judgement, above note 104 at para 18.

<sup>87</sup> S v M ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 38.

through the use of a false address – have repeatedly involved “non-traditional family groupings, including single parents (usually mothers), divorced parents, and multi-generational or grandparents”.<sup>88</sup>

214. This has been ascribed to, in part:

*“the struggles of single parents to juggle the demands of work and parenting. When work schedules are not in sync with school schedules, low-income parents are faced with the difficulties of finding safe and affordable after-school care and transportation for their Children.”*

215. Several of the cases suggest that the parents were trying to resolve these problems by placing their children in out-of-district schools.<sup>89</sup>

216. The proposed amendments may thus lead single parents to be more susceptible to prosecution thereunder and would definitely leave their children more vulnerable to the adverse consequences flowing from a loss of their parent’s support, should they be placed behind bars. An incriminated parent, upon release, must also contend with a criminal conviction which may negatively colour any attempts that she/he may make at securing gainful employment. Thus, further compromising the well-being of their child(ren).<sup>90</sup>

### **III. Stigmatisation on the basis of race and class and the vulnerabilities of foreign migrant parents**

217. In the USA, a handful of states have elected to criminalise the actions of parents who resort to the use of fake residence addresses when enrolling their children in schools.<sup>91</sup> The US example has shown that ‘[p]arents of color and/or low income parents are being disproportionately

---

<sup>88</sup> Leah Faw, Huriya Jabbar, Poor Choices: The Sociopolitical Context of “Grand Theft Education”, Urban Education First Published June 9, 2016 at page 17. Accessible <https://doi.org/10.1177/0042085916651322>.

<sup>89</sup> Gustafson, Kaaryn, Degradation Ceremonies and the Criminalization of Low-Income Women (April 19, 2013). 3 U.C. Irvine Law Review, Vol. 3, No. 2, 2013; UC Irvine School of Law Research Paper No. 2014-42 at p 327. Available at SSRN:

<https://ssrn.com/abstract=2254054> Leah Faw, Huriya Jabbar at pages 17 and 18: “It is important to note that, in every case reported here, except that of a White family in the CopleyFairlawn District (where Williams-Bolar’s case also took place), the criminalized hoppers are people of color (in largely White districts) and/or members of non-traditional families, with either single- or divorced-parent heads. This reality points to district hopping not as a racialized act—anecdotal evidence finds families from all racial and ethnic backgrounds engage in hopping—but as one racially coded as criminal. Although all types of families may hop, racial minorities in White districts are especially subject to suspicion; thus, the criminalization of hopping is used to penalize and control these families.” “The repeated instance of non-traditional family groupings, including single parents (usually mothers), divorced parents, and multi-generational or grandparents draws our attention to the fact that the criminalization of district hopping is being used as an added punitive measure against families that do not fit the nuclear, two parent family model assumed in district enrolment policies. Families that do not fit this mold are, as these cases show, systematically excluded from access to higher quality districts. Together, these complex dynamics influence district hopping and districts’ responses to it, providing context for the anecdotal tales of district hopping reported in the media.

<sup>90</sup> On the severe impact on a single parent’s ability to sustain themselves and their children in the wake of the stigmatisation and employment limitations that accompany a criminal conviction for residency fraud see: Anderson, C, Caught On the Wrong Side of the Property Line: An Analysis of the “Akron Mom” case, Urbana, Illinois 2012, at page 44.

<sup>91</sup> Orlando, J Criminal Penalties for Falsely Claiming Residency Within a School District (ORL Research Report 2011-R-0214), 5 May 2011. Accessible at <https://www.cga.ct.gov/2011/rpt/2011-R-0214.htm>

targeted for enforcement of school residency laws.”<sup>92</sup> In fact, some US schools are overtly engaging in racial profiling when identifying instances of potential violations of ‘residency laws’ through the targeting of African American, Latino and special education students.<sup>93</sup> Residency verification forms by US schools for purposes of vetting have also been described as a “scare tactic to weed out [undocumented immigrants] and their children.”<sup>94</sup>

218. There are claims that US schools have made use of ‘school residency verification programs’, (which some schools have employed in their efforts against residency enrolment fraud) to “regulate and/or control the influx of people of colour entering their schools.”<sup>95</sup> Invasive practices aimed at parents that schools suspect of falsifying records include the hiring of private investigators to conduct in-depth surveillance of the suspected families who then trail children to bus stops and/or home, follow parents, run property records checks and trace parents’ licence plates in an attempt to ‘catch them out’. The use of residency fraud hotlines and the offer of ‘bounties’ have also been employed.<sup>96</sup> In Long Island, New York there has been a growth of, what is termed, the “border patrol industry,” as all-white school boards have attempted to reverse the increasing trend of New York City students enrolling in ‘their’ schools. “Boarder patrollers” engage in school “home visits” and all-white school boards provide on-going support for these initiatives.<sup>97</sup>
219. People from minority groups who have been pursued through these invasive practices have recorded feeling intimidated, frightened and that their privacy was under attack.<sup>98</sup> Public outcry about racial profiling in the prosecution of parents of minority groups eventually resulted in Connecticut repealing a law which criminalised ‘school boundary hopping’ in 2013.<sup>99</sup> The repeal occurred against the backdrop of a court case attacking the constitutionality of this law.<sup>100</sup>

---

<sup>92</sup> Testimony of Gwendolyn Samuel, Founder of Connecticut’s Parent’s Union before the Judiciary Committee Connecticut General Assembly Public Hearing Raised H.B. 6695: An Act Concerning Misrepresentation of Town Residency with Respect to Schools Accommodations, 15 April 2013 at page 2. Chettiar, I and Mc Cray, R Sending Your Kid to the Wrong School Could Land You Five Years Behind Bars, ACLU Criminal Law Reform Project, 28 January 2011. 112 Gustafson, Kaaryn, above note 108 at pages 328 and 329 and; Leah Faw et al. above note 107 at page 13 and; Testimony of Gwendolyn Samuel, above note 111 at page 4. On subtle racial profiling, see Anderson, C above note 109 at page 43.

<sup>93</sup> Gustafson, Kaaryn, above note 108 at pages 328 and 329 and; Leah Faw et al. above note 107 at page 13 and; Testimony of Gwendolyn Samuel, above note 111 at page 4. On subtle racial profiling, see Anderson, C above note 109 at page 43.

<sup>94</sup> Mayra Turchiano Resisting Educational Apartheid: Low-Income Latino Parents’ Experiences with School Residency Policies, California State University thesis (6 May 2016) at page 20.

<sup>95</sup> Turchiano, above note 113 at pages 16-17 and 71.

<sup>96</sup> Eller, R and Rooks N, Cutting School: Privatization, Segregation, and the End of Public Education, 26 September 2017; Turchiano, above note 113 at page 10 and Spencer K, Can you steal an education? Wealthy school districts are cracking down on ‘education thieves’, Hechinger Report, 18 May 2015. Accessible at: <http://hechingerreport.org/can-you-steal-an-education/>

<sup>97</sup> Tate IV, WF (ed) Research on Schools Neighbourhoods and Communities: Towards Civic Responsibility, Duran J; Grzesikowski KH; Roda A; Ready D; Warner M; Wells AS; White T, Chapter 7 - Still Separate, Still Unequal, But Not Always “So Suburban”: The Changing Nature of Suburban School Districts in the New York Metropolitan Area, Rowan and Littlefield Publishers, inc 2012 at page 145. Published for the American Education Research Association

<sup>98</sup> Turchiano, above note 113 at pages 65 and 66.

<sup>99</sup> Dugas, CM New Legislation Decriminalizes Theft of School Accommodations for Non-Residency, Berchem Moses, Attorneys and Counsellors, 14 August 2013.

<sup>100</sup> Marie Menard v Stratford Board of Education, 18 July 2011, Complaint accessible at: <http://webcache.googleusercontent.com/searchq=cache:PHnwQMU3otcJ:rishawnbiddle.org/outsidereports/ME-NARDCOMPLAINT.pdf+&cd=1&hl=en&ct=clnk&gl=za>

220. It is easy to see how the prosecution of offences proposed by clause 38(3) of the 2022 Draft Bill is likely to play itself out in South Africa with the possibility of more stringent attention paid and accusations made against children of a certain race or class who seek admission to a school or more audits of admissions materials or requests for additional documentation from parents who seek fee waivers versus those able to pay school fees. Should the proposed offence in clause 26(3) be enacted, the US experience shows that the likelihood of black and poor families being profiled, harassed and stigmatised is substantial.
221. More affluent schools in South Africa are already able to use their ability to set catchment areas as ways to exclude poor and working-class children from their schools. The effect of clause 38(3) being made law would be to further embolden these schools through arming them with the ability to hang, even the implicit threat of prosecution over parent's heads as a way to further intimidate them into not applying. Indeed, in the US school residency laws have been described as an "instrument of the relatively privileged to maintain their privilege":

*"black parents are being sentenced to jail because of their desire for a quality education for their children. In a broken economy, Black people are finding ways in the informal economy to live out valuable and dignified lives, and are being punished [for this]."*<sup>101</sup>

222. Clause 38(3) if enacted will therefore reinforce structural racism and shield privilege. The introduction of clause 38(3) may also deter undocumented migrants in South Africa, many of whom live under transitory or informal arrangements, from enrolling their children for fear of being 'discovered' and prosecuted or even deported. Foreign migrant parents in South Africa already face many barriers to ensuring their children's access to education.<sup>102</sup> Clause 38(3), if made law, will significantly compound these obstacles.

**Recommendation:**

223. EE and EELC therefore recommend that clause 38(3) be removed in its entirety.

**CLAUSE 41 - REGULATIONS (AMENDING S61 OF SASA)**

224. Section 61 of SASA provides for the Minister to make regulations on the issues listed therein as well as for the residual power for them to make regulations on any matter which may be necessary or expedient to regulate to achieve the objectives of SASA. Clause 41 of the 2022 Draft Bill seeks to amend section 61 by giving the Minister specific powers to make regulations on,

---

<sup>101</sup> Radtalks: What could be possible if the law really stood for black lives? The City University of New York (CUNY) Law Review Vol 19.91, 7 March 2016 at page 128. A Series of Talks Delivered at the Law for Black Lives Convening, Organized by the Bertha Justice Institute at the Center for Constitutional Rights. On school residency laws as an instrument of the privileged, see also Turchiano, above note 113 at page 71.

<sup>102</sup> South African Alternate Report Coalition, Alternate Report to the UN Committee on the Rights of the Child in respect of SA's Combined 2nd, 3rd and 4th Periodic Country Report on the UN Convention on the Rights of the Child, dated October 2015 at section 13.5 Education For Foreign Migrant Children, paras 268 and 269, page 34.

amongst other issues, the organisation, roles and responsibilities of education districts. EE and the EELC welcome this addition.

225. EE and EELC are of the view that the Minister should also be required to make regulations for children with barriers to learning, including disabilities and allergies, regulations concerning corporal punishment, regulations for private actor involvement in the basic education sector, and regulations for the equitable distribution of non-teaching school support staff.

***I. The Minister's power to make regulations on the organisation, roles and responsibilities of education districts***

226. EE and EELC welcome that the proposed amendments will empower the Minister to introduce regulations on education districts. However, we are of the view that this ought not to be a discretionary power. This is because (as noted in the [Policy on the Organisation Roles and Responsibilities of Education Districts, 2013](#)), education districts play a pivotal role<sup>103</sup> in the provision of quality education and are critically situated to do so. In fact, Minister Motshekga has recognised that education districts serve at the *"coal face of delivery, closer to the centre of our operation, the classroom"*.<sup>104</sup> Yet education districts continue to operate in a legislative vacuum with the existence of these institutions not established in terms of or even referred to by SASA.
227. The serious need for cohesive national regulations on education districts is indisputable given the essential role that education districts perform as the nexus between national and provincial governments, the schools and public that they serve.
228. EE has often encountered ineffective responses and lengthy delays associated with obtaining feedback from district officials where EE has lodged complaints of a serious nature on behalf of learners and their parents. Of even greater concern is that learners and parents who approach EE for assistance have often made repeated attempts at engaging with district officials personally, and report being disillusioned and frustrated at the lack of support on offer by district officials in addressing serious complaints requiring urgent intervention.
229. Moreover, parents and learners often express their dismay at what they perceive as a lack of decisiveness at district level and the unwillingness of district officials to act against educators even when clear violations of the law and policy have taken place. From EE's observations, this indecisiveness may be attributed to a lack of a binding national regulatory framework clearly setting out the legal obligations and responsibilities of district directors and other district officials.

**Recommendation:**

---

<sup>103</sup> Districts Policy 2013 at p 7.

<sup>104</sup> Opening Address at the meeting with District Directors by Ms Angie Motshekga, Minister of Basic Education, Sol Plaatjie House: 19 April 2012. Accessible at the following link:  
<http://www.education.gov.za/Newsroom/Speeches/tabid/298/ctl/Details/mid/1929/ItemID/3327/Default.aspx>

230. EE and EELC recommend that clause 41 be amended to make it compulsory for the Minister to enact regulations on the organisation, roles and responsibilities of education districts

## ***II. Empowering the Minister to create an offence for a violation of regulations***

231. Clause 41(b) proposes the insertion of an additional clause into SASA stating:

“The regulations contemplated in subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and liable, on conviction, to a fine or to imprisonment for a period not exceeding six months, or to both such fine and such imprisonment.”

232. Clause 41(b) is vague and overly extensive. It confers on the Minister the broad and sweeping power to legislate offences for the contravention of *any provision* within *any regulations* that she may enact regardless of what that provision may be and the consequences flowing from its violation. The aims of such a wide-ranging discretion are unclear and susceptible to constitutional challenge.

### **Recommendation:**

233. EE and EELC recommend that Clause 41(b) should be removed completely.

## ***III. Regulating private actor involvement in the basic education sector***

234. South Africa’s education system allows for the involvement of private actors in education in various capacities – primarily in the establishment and running of private (independent) schools. However, the regulatory framework for such involvement is not, in our view, sufficiently robust. EELC, through its walk-in clinic, has encountered several parents who have raised, what amounts to be, abuse by private schools especially in the enforcement of school-fee payment<sup>105</sup> and disciplinary issues.<sup>106</sup> Such abuses can be curbed by strengthening the regulatory framework to prioritise the rights of learners to education and the importance of the child’s best interests principle.
235. In recent times, the involvement of private actors in education has also extended to the governance and management of public schools. EE and EELC note that the Western Cape Province is undertaking a project, called “collaboration” schools, which introduces private actors into schools as donors and operating partners. The private actors would be entitled to direct parts of the curriculum; the hiring and firing of certain teachers; and the management of the financial and other affairs of the school.
236. The model runs contrary to the national laws in South Africa, which place the governance of a public school in the hands of a majority of parents and the school community itself.

---

<sup>105</sup> See for example: Sunday Tribune ‘Pupil placed in solitary over unpaid fees’ (17 October 2017) <https://www.iol.co.za/sunday-tribune/news/pupil-placed-in-solitary-over-unpaid-fees-11245762>.

<sup>106</sup> See for example: GroundUp ‘Girls expelled from school for kissing’ (14 August 2018) <https://www.groundup.org.za/article/girls-expelled-school-kissing/>



Furthermore, national legislation only allows for external parties to be co-opted without voting rights. Our view is that “collaboration” schools constitute a conflict with national law and are unconstitutional.

237. While initially framed as a “pilot project”, we note that the Western Cape government has enacted provincial legislation<sup>107</sup> to allow for the provincial education Minister to declare schools “collaboration” schools at their discretion. Legislation of this type of school not only undermines national legislation, but is also not based on adequate evidence to establish the efficacy of this model of public-private partnerships in schools.
238. The legislation also introduces an additional type of school into the Western Cape Province, called “donor-funded” schools, in which a private donor provides funding to a public school and may have majority voting representation on the school’s governing body. The empowering legislation provides no criteria that these donors must meet and does not preclude for-profit donors from participating.
239. The legislation provides little guidance on the roles and responsibilities of the private actors involved in collaboration and donor-funded schools. It is also silent on admission criteria and does not require schools to maintain their no-fee status.<sup>108</sup>
240. EE and the EELC are concerned that there is currently no legislation that regulates private actor involvement in public education, that ensures private actor accountability and adequately guards against abuses by private actors. We shared these concerns in our 2018 submission to the United Nations Committee on Economic, Social and Cultural Rights (CESCR) on its consideration of South Africa’s Initial State Party Report.<sup>109</sup> The Committee, in turn, recommended that the South African government, ‘Improve the regulatory framework to define the roles and responsibilities of private sector actors, and monitor the education provided by such actors.’<sup>110</sup>

#### ***IV. Regulating the distribution of non-teaching school support staff***

241. Sections 29 and 30 of the National Norms and Standards for School Funding state:

---

<sup>107</sup> The Western Cape Provincial School Education Amendment Act is available at: [https://www.wcpp.gov.za/sites/default/files/Western%20Cape%20Provincial%20School%20Education%20Amendment%20Act%20of%202018%20assent\\_scan.pdf](https://www.wcpp.gov.za/sites/default/files/Western%20Cape%20Provincial%20School%20Education%20Amendment%20Act%20of%202018%20assent_scan.pdf) (last retrieved on 25 May 2022)

<sup>108</sup> EE and the EELC’s comprehensive submission on the relevant provisions of the legislation is available here: <https://equaleducation.org.za/wp-content/uploads/2018/06/EEs-Submissions-on-the-WCProvincial-School-Education-Amendment-Bill-20180411.pdf> at paras 67 to 167

<sup>109</sup> Joint Parallel report by Equal Education and Equal Education Law Centre to the United Nations Committee on Economic, Social and Cultural Rights for its Consideration of South Africa’s Initial State Party Report is available here: <https://equaleducation.org.za/wp-content/uploads/2018/09/EE-and-EELC-Joint-Parallel-Report-to-the-Committee-on-Economic-Social-and-Cultural-Rights-31.08.2018.pdf>

<sup>110</sup> Committee on Economic, Social and Cultural Rights: Concluding observations on the initial report of South Africa is available here: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4sIQ6QSmIBEDzFEovLCuW4b1%2F0yvDxdY793DPZphW1eQyWAQHUGxGUSewW5PpFu5gemJWNSQSD8fGzepU%2BbhFg3jQA%2Bt0mhFvZlmZTnRcslb3bg%2BPK%2BMo0nuRvnX0FEES>



*“29. The allocation of non-teaching staff to schools, including administrative and support staff, is extremely uneven. The provision of such personnel has been severely lacking in historically disadvantaged and small schools. Inequalities in the provision of such staff members is almost certainly associated with major inefficiencies in schools which serve poor communities.*

*30. The Minister of Education is responsible for determining norms for the provision of non-educator personnel, including non-teaching personnel at school level.”*

242. Inequitable distribution of non-teaching school support staff places an extra burden on already overworked teachers at low-resourced schools. [Equal Education’s research on overcrowding](#) in Gauteng schools found that when there is not enough support staff, teachers end up having to spend a lot of their time doing tasks such as photocopying and dealing with sick or injured learners, which takes them away from their classes during valuable teaching time.
243. The School Funding Norms try to ensure that schools have an adequate number of support staff by stating that provincial education departments (PEDs) should aim to spend 15% of their personnel budget on non-teaching support staff. However, this is not binding and does not address the inequitable distribution of such staff.
244. Despite sections 29 and 30 of the School Funding Norms acknowledging the inequalities of non-teaching staff distribution and urging the Minister to make norms for non-teaching staff, 16 years later no such norms exist. Without these norms and standards, we see PEDs frequently spend less than the 15% target. There is no tool that is equivalent to the Post Provisioning Norms (PPN) that determines how non-teaching staff should be allocated and spread between schools and how many non-teaching staff members each school must have (for example, 1 non-teaching staff member per x number of learners). The consequence is a severe shortage as well as the inequitable distribution of non-teaching staff.
245. Furthermore, the non-teaching staff that are hired are, for the most part, placed outside of schools in office-based positions at provincial level. This has been a growing trend, and with no reporting requirements, the public is unable to hold PEDs accountable for moving more and more non-teaching staff away from school-based positions and into office-based ones. For example, EE’s overcrowding [report](#) states, “In 2020, the GDE (Gauteng Department of Education) increased its office-based non-teaching posts by 24, bringing its total of 2322 office-based educators to more than double the average of 822 posts across all provinces. At the same time, it decreased its school-based non-teaching posts by 120”.
246. The absence of Norms and Standards for non-teaching staff also means that there is no requirement that non-teaching staff members be adequately qualified and trained to perform their duties. Equal Education’s [report](#) on sanitation in Gauteng’s schools shows that both a lack of non-teaching support staff as well as a lack of qualified and adequately trained support staff negatively impacts a school’s ability to maintain its already existing infrastructure. The report states:

*“Measures should be put in place to ensure that either individuals with maintenance expertise are appointed to take care of school maintenance or sufficient training is provided to those responsible for school maintenance. Policy documents should provide clarity about who should take responsibility for such training. Ideally, national norms and standards for non-teaching personnel should be published by the Minister of Education to provide guidance on this matter.”<sup>111</sup>*

247. There is an urgent need for the Minister to make regulations regarding non-teaching support staff. Such regulations should ensure the equitable distribution of non-teaching staff, prioritising placing staff members in *school-based* positions and in schools that are under-resourced and overcrowded. Furthermore, the regulations should set a binding minimum standard for how many non-teaching staff are required in a school, taking into account *inter alia* how many learners the school caters for, the size of the school building and school grounds, and how many classrooms and bathroom facilities a school has.

**Recommendation:**

248. EE and EELC recommend that:
- 248.1. That the Minister be required to make regulations for children with barriers to learning, including disabilities and allergies;
  - 248.2. That the Minister be required to make regulations regarding corporal punishment;
  - 248.3. That the Minister be required to make regulations that guard against the unjustified handing over of the governance of public schools to private entities, and to hold private actors in education accountable to human rights standards; and
  - 248.4. That the Minister be required to make regulations regarding the distribution of non-teaching school support staff.

---

<sup>111</sup> Equal Education, [“Breaking the Cycle: Uncovering Persistent Sanitation Challenges in Gauteng Schools”](#) (2018)