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SECTION27 SUBMISSION

Draft Basic Education Laws

Amendment Bill

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THE INTEREST OF SECTION27 IN MAKING THIS SUBMISSION

1. SECTION27 is a public interest law centre that has a reputation for defending and advancing human rights in South Africa. In particular, SECTION27 is one of a small number of public interest organisations in South Africa that works to draw attention to, and pursues legal remedies to address the poor quality of education in the majority of South Africa's public schools.[1]

2. Thus, much of the advocacy and litigation that SECTION27 has been involved in has been directed at ensuring improved access to a quality education for South Africa's poorest learners in terms of Section 29(1)(a) of the South African Constitution.

THE HYBRID NATURE OF PUBLIC SCHOOLING AND THE NECESSITY FOR TRANSFORMATION

3. Some of South Africa's foremost education researchers have referred to the South Africa public schooling system as a 'fundamentally bifurcated' or 'hybrid' education system[2]. In terms of which there are two different systems of schooling. The first being the well-resourced schools which are the wealthy, former white or model-C schools (the 'historically advantaged schools'). The second schooling system catering for poor, predominantly African learners and being the majority of public

[1] The most notable intervention by SECTION27 in this regard has been the litigation to ensure the textbook delivery to all schools in the Limpopo Province of South Africa. See *Section 27 and Others v Minister of Education Another; Basic Education for All and Others v Minister of Basic Education and Others* 2014 (4) SA 274 (GP) and culminating in the case of *Minister of Basic Education and Others v Basic Education for All and Others ('BEFA')* [2016] 1 All SA 369 (SCA). See too other interventions such as: *Komape and Others v Minister of Basic Education and Others* Case No: 1416/2015; *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart and Others* 2017 (6) SA 129 (GJ) and *Solidariteit Helpende Hand NPC and Another v Minister of Basic Education and Another* case no: 58189/2015 (8 November 2015).

[2] See N Spaull 'Poverty and privilege: Primary school inequality in South Africa' (2013) 33 *International Journal of Educational Development* 436; G Bloch *The toxic mix: What's wrong with South Africa's schools and how to fix it* (2009); B Fleisch *Primary education in crisis: Why South African schoolchildren underachieve in reading and mathematics* (2009) and S van der Berg, C Burger, R Burger, M De Vos, G Du Brand, M Gustaffson, E Moses, D Shephered, N Spaull, S Taylor, H van Broekhuizen and D von Fintel 'Low quality education as a poverty trap' Stellenbosch University (2011).

schools existing in varying degrees of under-resourcing and dysfunctionality (the 'historically disadvantaged schools') .[3]

4. These education researchers highlight too that learners attending historically disadvantaged schools perform far below their counterparts attending historically advantaged and better resourced schools, with many learners struggling to move beyond basic literacy and numeracy skills.

5. Thus, the 2011 Diagnostic Report of the National Planning Commission (NPC) notes:[4]

   'Education is perhaps where the apartheid legacy casts the longest shadow, because the performance of schools and the quality of learning are influenced by several historical factors.'

6. The Constitutional Court has also on more than one occasion seized the opportunity to comment on the ongoing impact of these historical disparities. In *Governing Body of the Juma Musjid Primary School and Another v Ahmed Asruff Essay NO and Others* (*Juma Musjid)* for example the Court noted:[5]

   'The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.'

[3] According to Brahm Fleisch this would constitute between 70 per cent - 80 per cent of school children. B Fleisch *Primary education in crisis: Why South African schoolchildren underachieve in reading and mathematics* (2009) v.
[4] National Planning Commission Human Conditions Diagnostics Document (2011) 23.
[5] 2011(8) BCLR 761 (CC) para 42.

7. It is therefore imperative that within the context of this duality in public schooling, the gap between the quality of basic education for rich and poor learners be closed and that each learner is able to access a quality education. This can only occur if, firstly, there is unimpeded access for all learners to historically advantaged schools and, secondly, if there is improved provisioning at under-resourced, historically disadvantaged schools.

8. Within this context of SECTION27's welcomes the opportunity to comment on the draft Basic Education Laws Amendment Bill ('BELA'). SECTION27 further commends the Department of Education ('DBE') in taking this pro-active step in seeking to align the legal framework for basic education, as set out in the South African Schools Act, 1996 ('SASA') and the Employment of Educators Act, 1998 ('EEA') with developments, specifically jurisprudential developments, to ensure the transformation of basic education to improve access to learners who struggle to gain access to a quality education.

9. There have been significant jurisprudential developments in distinct waves since 1994 under the new constitutional dispensation.

10. One such wave may be described as the school governance cases that address the ongoing power struggles between provincial education departments and the school governing bodies ('SGB's) of historically advantaged schools. In most of these cases, SGBs have sought to use their powers in a manner that entrenches historical patterns of privilege. The judgments in these cases have accrued a substantial jurisprudence and have established clear principles that must guide school governance.

11. Thus, the core amendments in BELA are aimed at school governance, in particular, in ensuring that SGBs do not act solely to protect narrow interests but are obliged to be cognisant of broader needs of communities in ensuring that every learner has

access to a quality basic education. SECTION27 supports this principle unequivocally and therefore the necessity for reform of the existing legal framework. We note however that the manner in which this occurs must not undermine any of the underlying constitutional principles that have been established within the school governance jurisprudence. Thus, the main principles established in the jurisprudence and which ought to inform reforms to the legal framework are set out below.

12. Another wave of litigation includes the education provisioning cases that have been initiated by civil society groupings to address the poor quality of educational inputs in the majority of South African schools that have been historically disadvantaged and where learning and teaching continues to occur under sub-optimal conditions.

13. The jurisprudence in these cases have established the 'immediate realisation' principle in respect of the right to basic education. Furthermore, in each of these cases, the courts have identified a particular entitlement as being 'essential' to the fulfilment of the right. So far, these entitlements include textbooks[6]; furniture such as desks and chairs[7]; the provision of scholar transport for poor learners who travel long distances and who cannot afford transport[8] and teaching and non-teaching posts in schools.[9] There have also been cases dealing with school infrastructure that have been settled in favour of applicants that suggest that adequate school infrastructure constitutes a further component of the right. [10]

[6] See the *BEFA* case above.
[7] *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).
[8] *Tripartite Steering Committee and another v Minister of Basic Education* 2015 (5) SA 107 (ECG).
[9] See *Centre for Child Law and Others v Minister of Basic Education and Others* [2012] 4 All SA 35 (ECG). See too *Linkside and Others v Minister of Basic and Others ('Linkside')* (3844/2013) [2015] ZAECGHC (26 January 2015).
[10] *Centre for Child Law and Seven Others v Government of the Eastern Cape Province and Others* Eastern Cape High Court, Bhisho Case, Case No 504/10 of 2011, *Equal Education and Others v Minister of Basic Education and Others* Eastern Cape High Court, Bhisho Case, Case No 81/2012.

14. The implication of the education provisioning jurisprudence is that where the courts have determined that a particular input is necessary for the right to basic education, our government must take all necessary steps to immediately provide that particular input. SECTION27 submits that this line of cases should also necessitate appropriate law reform. However, a similar alignment of the legal framework with the education provisioning jurisprudence that BELA seeks to introduce in respect of the school governance jurisprudence appears not to have occurred.

15. As noted, the core amendments that BELA seeks to introduce are in respect of school governance. There are also a range of other proposed amendments addressing a variety of issues in SASA and the EEA. The submission does not traverse each and every proposed amendment. SECTION27 has focussed its submissions on those proposed amendments where it is able to take an informed view. This includes, firstly, commenting on whether or not there is a proper alignment with established constitutional principles and secondly, on amendments that have the potential to impact on the clients and communities that SECTION27 serves. Thus, the main amendments we intend to comment on include proposed amendments:

    - In respect of the policy making functions of SGBs, in particular, in respect of language, admissions and religion;
    - That seek greater checks and balances on the management and administration of school governance;
    - Relating to the central procurement of learner, teacher support material ('LTSM');
    - That seek to provide clarity as to documentation required for school fee exemptions;
    - That seek to penalise persons and protests that obstruct or disrupt schooling; and
    - That seek to provide for random searches of learners.

16. SECTION27 would further like to endorse and align ourselves with specific sections of the submissions of partner organisations. Thus, SECTION27 fully endorses and aligns itself with submissions of Equal Education ('EE') and the Equal Education Law Centre ('EELC') in respect of:
    - **Clause 10** that addresses teacher appointments;
    - **Clauses 8 and 18** that addresses school mergers and closures.

17. SECTION27 further endorses and aligns itself with the submission made by the Centre for Child Law ('CCL') in paras 11 -12 in respect of **Clause 2** that addresses amendments in respect of the penalty provisions where persons hinder access to schools**.** This is elaborated on further below.

SCHOOL GOVERNANCE

18. As stated, BELA seeks to introduce a broad range of school governance reforms. It is noted that while the reforms apply equally to both categories of public schools described above, some of the reforms appear to be targeted interventions to address the different governance challenges experienced at each of the two categories of schools discussed. The first relates to the ongoing school governance power struggles between provincial education departments and SGBs of historically white and advantaged schools. The second relates to the majority of South African schools that are historically Black and disadvantaged and that struggle to function both financially and administratively. Under this section of the submission, we set out the school governance jurisprudence and the principles established within this jurisprudence. We then comment on the various amendments impacting on school governance.

School governance jurisprudence

19. A series of cases have addressed issues of school governance disputes at a Constitutional Court level and which appear to inform the reforms in respect of BELA.

20. The first case is *Head of Department, Mpumalanga Education Department and Another v Hoerskool Ermelo and Another ('Ermelo')*[11]. In this case the Constitutional Court had to decide whether or not a Head of Department (HOD) of a provincial department of education had the power to override the SGB's power to determine the language policy of its school. The Court held that an HOD could only do this on 'reasonable grounds and in order to pursue a legitimate purpose,' and in accordance with specified due process provisions, which were not followed in this instance. Despite this finding, the Court nevertheless directed the school to review its language policy to accommodate English-speaking learners that could not be accommodated elsewhere because other schools in the area were already full.

21. The second case is the *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School and Another ('Welkom High School')* [12]. The Constitutional Court addressed the legality of an instruction from HOD of the Department of Education in the Free State to two school principals to ignore the pregnancy policies developed by their respective SGB's. The principals at both schools had in terms of their SGB policies prohibited two learners from returning to school in the year they had given birth. The HOD in both cases instructed the principals to readmit the learners immediately. The Court held that SGBs have the power to develop the pregnancy policies at their schools, even though the policies, in these instances undermined the rights of pregnant learners. The HOD therefore couldn't just override these policies but had to follow the processes set out in the SASA. The Court nevertheless ordered the two schools implicated to review their respective pregnancy policies that were deemed by the Court to be 'constitutionally questionable'.

[11] 2010 (2) SA 415 (CC).
[12] 2013 (9) BCLR 989 (CC).

22. The third case is that of the *MEC for Education in Gauteng and Others v Governing Body of Rivonia Primary and Others ('Rivonia')*[13]. The dispute between Rivonia Primary, a former 'model C' school, and the Gauteng Department of Education (GDE) arose in 2010 when a learner was refused a place in grade one at the school for the 2011 academic year. The school's reason for its refusal was that it had reached its capacity in terms of its admission policy determined by the SGB. The HOD overturned the school's refusal of the application and issued an instruction to the principal to admit the learner. The school thereafter approached the courts for a determination of whether the HOD had the power to override the SGB's admission policy, specifically, its capacity determination, and thereby direct the school to admit the learner to the school. The Constitutional Court held that while SGBs do have the power to determine admission policy in terms of SASA that power is never final but is subject to provincial confirmation.

23. The final is the *Federation of Governing Bodies for South Africa v MEC for Education, Gauteng and Another ('FEDSAS')* case[14] . In this case the Federation of Governing Bodies for South African Schools ('FEDSAS') brought an application challenging the validity of specific provisions of the Gauteng regulations to the admission of learners to public schools. The most contentious was a provision that until such a time that the MEC has determined a feeder zone for schools, parents must enrol their children in schools within a 5km radius of their homes or place of work. FEDSAS argued that the provision entitling the MEC to declare school feeder zones undermines the powers of SGBs to formulate their own policies. The Court held that the regulations, including the power of the MEC to declare feeder zones were valid but simultaneously held that such feeder zones had to be finalised within one year from the judgment, thus ensuring that the default interim provision not exist indefinitely.

[13] 2013 (6) SA 582 (CC).
[14] 2016 (4) SA 546 (CC).

24. The BELA also appears to seek to align with Constitutional Court's jurisprudence in the case of *MEC for Education: KwaZulu – Natal v Pillay ('Pillay')*[15] that dealt with the religious rights of a learner. This case dealt with a learner who sought an exemption from her school's code of conduct developed by the SGB which prohibited the wearing of nose-rings on the basis that the wearing of the nose-ring was part of the practice of her religion and culture as a Hindu girl. The Constitutional Court found that the prohibition unfairly discriminated against the learner on religious and cultural grounds.

25. Another case that must be noted in the context of suggested amendments is the high court case of *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart and Others* ('*OGOD*') [16]. The organisation OGOD instituted an action against six public schools. It challenged the Christian only religious practices at these schools on the basis that these practices violated the National Policy on Religion and Education[17] (the 'religion policy') and that furthermore these practices violated various constitutional rights of learners. The judgment of the Court confirmed that public schools are not permitted to promote or allow their staff to promote only one or predominantly one religion to the exclusion of others.[18]

26. These cases have established clear principles regulating school governance and which must underpin the law reform process. Accordingly, these principles are set out below.

The principles established in the school governance jurisprudence

[15] 2008(1) SA 474 (CC).
[16] Note 1 above.
[17] (GG 25459 of September 2003)
[18] The Court did not however grant OGOD's interdict against the specific practices being conducted at each of the respondent schools. The Court held that in bringing the court challenge, OGOD did not have regard to the principle of subsidiarity. Thus, it would need to be show that either the schools' practices are in breach of the policy adopted by the SGB, or that the policies themselves, which authorise such conduct, violate the Constitution.

27. A significant aspect of some of the judgments referred to above is the Constitutional Court's acknowledgement of the impact of apartheid education in perpetuating inequality and the necessity to redress this. This was noted in utterances made in *Ermelo*[19], *Rivonia*[20] and *Pillay*[21]. In *Ermelo* the court said:

'It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.'

28. The acknowledgement of the apartheid legacy has shaped the approach of the courts in the school governance disputes. In *Ermelo,* for example, the Court held that the powers of SGBs at individual schools cannot be exercised in isolation of the broader systemic issues in education, but must be understood within the context of the broader constitutional scheme and the imperative to redress the legacy of apartheid education. Thus the Court stated:[22]

'It is correct, as counsel for the school emphasised, that section 20(1) compels a governing body to promote the best interests of the school and of all learners at the school. Counsel also emphasised, rightly, that the statute places the governing body in a fiduciary relation to the school. However, a school cannot be seen as a static and

[19] *Ermelo* para 46.
[20] *Rivonia* para 2.
[21] *Pillay* paras 121 – 124 O' Regan J acknowledged that the, 'pattern of disadvantage engraved in an education system by apartheid has not been erased', and that this has largely reinforced race and class inequalities in schools.
[22] para 80. See too *Rivonia* para 70 and *FEDSAS* para 44.

insular entity. Good leaders recognise that institutions must adapt and develop. Their fiduciary duty, then, is to the institution as a dynamic part of an evolving society. *The governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time but also in the interests of the broader community* in which the school is located and in the light of the values of our Constitution.' (Own emphasis.)

29. The Court has also repeatedly chosen to use the broader education jurisprudence to discuss the <u>significance of the right to basic education as an empowerment right</u>. Most recently, in the *FEDSAS* case, the Court held[23]:

'So education's formative goodness to the body, intellect and soul has been beyond question from antiquity. And its collective usefulness to communities has been recognised from prehistoric times to now… Despite these obvious ancient virtues, access to teaching and learning has not been freely and widely accessible to all people at all times. All forms of human oppression and exclusion are premised, in varying degrees, on a denial of access to education and training. The uneven power relations that marked slavery, colonialism, the industrial age and the information economy are girded, in great part, by inadequate access to quality teaching and learning.'

30. The Constitutional Court has also in the cases noted <u>the importance of cooperative governance which must include participative or local and grassroots decision making</u>. In *Ermelo* the Court stated:[24]

'An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education

[23] *FEDSAS* paras 1-3.
[24] Para 56.

whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school.'

31. In discussing the role of SGBs, the Court when on to note:[25]

'Its primary function is to look after the interest of the school and its learners. *It is meant to be a beacon of grassroots democracy* in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that come with it.' (Own emphasis.)

32. In the *Welkom High School* case the Constitutional Court in affirming *Ermelo* noted[26]:

'Under the Schools Act, two things are perspicuous. First, public schools are run by a partnership involving the state, parents of learners and members of the community in which the school is located. Each partner represents a particular set of relevant interests and bears corresponding rights and obligations in the provision of education services to learners. Second, the interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by the Act.'

33. The *Rivonia* judgment also imported the doctrine of 'meaningful engagement' from the Constitutional Court's housing evictions jurisprudence into its school governance

[25] *Ermelo* para 57.
[26] *Ermelo para 49*

jurisprudence. Thus, the Court emphasised that in terms of the 'partnership model', provincial education departments and SGBs are legally obliged to negotiate with each other in good faith and in 'best interests of the learners' before resorting to litigation.[27]

34. Thus, the imperative towards apartheid redress to ensure a quality education for all South Africa's learners must be balanced against the principles of cooperative governance between the different tiers of school governance, including at a local level which is done by SGBs. Furthermore, where there are disputes between the different tiers of school governance, these structures are legally obliged to, in good faith, negotiate with each other.

35. Having set out the jurisprudence and the principles established within this jurisprudence, we now turn to comment on the amendments in light of the jurisprudence.

Policy making functions of SGB

36. **Clause 3** seeks to amend section 5 of SASA. It provides for the submission of admission policies to the HOD for approval. In considering the admission policy the HOD must be guided by various factors such as the best interests of the learner; the principle of equality; the availability of resources and accessibility to a school within the community by learners.

37. **Clause 4** seeks to amend section 6 of SASA. It provides for the submission of language policies to the HOD for approval. In considering the language policy the HOD must be guided by various factors such as the best interests of the learner; the principle of equality; the dwindling number of learners that speak the language of learning; the effective use of the school's resources and the language needs of the broader community. The amendment also seeks to empower the HOD to direct a

[27] *Rivonia para 78.*

public school to adopt more than one language of instruction after following a prescribed procedure.

38. **Clause 6** seeks to amend the powers of SGBs in section 8 of SASA to determine the codes of conduct at their schools by requiring SGBs to exempt learners from specific school rules if such rules impact on the cultural or religious beliefs of these learners.

39. In 2013, SECTION27 represented 54 parents against the SGB of Hoërskool Fochville, a public school that adopted an Afrikaans language policy which excluded English-speaking learners.[28] This resulted in hundreds of learners from Fochville and nearby Kokosi township having to travel 25km to attend English medium schools. Additionally, Fochville SGB's refusal to become a dual medium school was said to discriminate against learners on the grounds of their race as the excluded learners were Black. The GDE attempted to instruct the school to admit English-speaking learners and offered the resources necessary to operate as a parallel-medium school. The school refused and the matter proceed to court where it was eventually settled and the school became a dual medium school.

40. This case demonstrates the SGB's failure to consider the communities broader interests and which necessitated intervention by the provincial department of education. We therefore support the necessity for amendments to the current legal framework, however, we are concerned about the implications of some of the amendments which appear to undermine the principles of cooperate governance at the level of local governance. There are also the practicalities in implementation of the amendments which are discussed further below.

41. Thus, while there are cogent and rationale reasons for the amendments to the SGBs' policy making functions which seek to prevent some SGBs' from using their powers

[28] The affected children in this case were represented by the Centre for Child Law. See the case of *Centre for Child Law v The Governing Body of Hoerskool Fochville* 2016 2 SA 121 (SCA) where the issue of the discovery of the anonymous affidavits of learners was considered.

in a manner that entrenches historical patterns of privilege and which prevent government from ensuring equal access to quality education, the manner in which the legal framework is amended must not undermine the other established principles discussed above which seek to enhance a participatory democracy.

42. Bearing in mind the important role that an SGB plays, it is important for the DBE to ensure that the amendment does not undermine the purpose for which SGBs were created but rather to find ways to ensure transformation and effective governance in a manner that seeks to ***balance*** the interests of the broader society against that of individual school communities and the principle of grassroots democracy.

43. We submit that this is possible through the development of binding principles or minimum standards for SGBs in the creation of their various policies. These principles or minimum standards can also provide a mechanism whereby parents or interested groups may challenge SGB policies if they fail to abide by these principles. Indeed, it was noted with regret in the *Rivonia* judgment the difficulties that have arisen because of the absence of these norms. The Court held:[29]

"At a national level, the Minister of Basic Education may prescribe minimum uniform norms and standards for the 'capacity of a school in respect of the number of learners a school can admit', including norms and standards relating to class size, the number of teachers, and utilisation of available classrooms. Those norms and standards have to date not been prescribed and, regrettably, this case demonstrates the difficulties that may arise in their absence."

44. Thus, creating norms in these key areas of policy making would ensure that SGBs are guided by a principle-centred approach to policy making. It would also balance the broader commitment to redress and transformation against that of ensuring local participation in school governance. There are for example guidelines to assist SGBs

[29] *Rivonia* para 38.

in developing their codes of conduct. These are however not binding.[30]

45. Another concern with the amendments to the policy making functions of SGBs is that requiring the approval of the HOD in each and every language or admission policy is also likely to open the floodgates of litigation, subjecting HOD decisions to reviews either in terms of the Promotion of Administration of Justice Act, 2000 ('PAJA') or in terms of the principle of legality.

46. The amendments also raise issues around the practicability of the approval of policies residing with HODs. As a functionary, the HOD already has a number of duties. To add the review and approval of SGB policies to this position may therefore create numerous challenges. In particular, there may be backlogs for approvals causing policy uncertainty in schools.

47. SECTION27 therefore proposes the establishment of a separate, specialised office within the provincial education departments established specifically to guide the various policy making functions of SGBs. This office must review SGB policies and *recommend* changes to policies that are inconsistent with developed norms. It should also address complaints in respect of individual schools that are submitted to it. Where an individual school nevertheless continues to fail to adhere to the norms, an HOD after attempting to negotiate with a school may then withdraw the policy making function of the school, or challenge an individual school policy in court.

48. The amendments in respect of exemptions from the code of conduct on religious and cultural grounds is to be welcomed. It seeks to ensure that SGBs act in accordance with the judgment in *Pillay* in promoting and respecting cultural and religious diversity in the school environment. This is necessary in a context where

[30] Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners" (the Guidelines GN 776 in GG18900 of 1998-05-15).

learners have been victimised for their adherence to specific religious beliefs. There have for example been numerous incidents over the years of Muslim girl-learners being sanctioned in terms of an individual school's code of conduct for wearing a headscarf.

49. The recent high court judgment in the case of *OGOD* was discussed above. The case is an example of SGBs - as with language and admission policies - utilising their powers to determine the school ethos and religion policy to establish single religion schools. Section 9 of SASA makes provision for the adoption of a school's religion policy by the SGB.

50. Subsequent to the *OGOD* case, SECTION27 has received complaints from parents that schools continue to flagrantly disobey the judgment and persist in maintaining single religion practices and policies that disrespect the different religious or secular beliefs of other learners. SECTION27 therefore recommends that the process that is recommended in respect of admission and language policies similarly be adopted in respect of religion policies.

Functioning and administration of SGBS in historically disadvantaged schools

51. **Clause 14** seeks to prevent members of SGBs or their families from materially benefitting from their relationship to the school. **Clause 15** seeks to prevent SGB members from receiving any form of remuneration from the school. **Clause 16** seeks to ensure that only a parent who is not an employee at a school may serve as the chairperson of the financial committee. **Clause 19** seeks to introduces measures requiring the approval of the Member of the Executive Council where schools enter into loan or lease agreements. **Clause 21** seeks to introduce new oversight measures where a budget is adapted during a financial year or where a quorum cannot be reached for an annual general meeting. **Clause 23** seeks to provide greater financial oversight measures into the financial affairs of the schools.

52. These measures, jointly, seek to promote good governance at a local level and minimise the opportunity for corruption. As such these measures are to be welcomed. At the same time, there must be an acknowledgement of the systemic issues that beleaguer many SGBs in historically disadvantaged schools and which impact on their capacity to function. Thus, broader changes and programmes to address the skills and knowledge base of SGB members in historically disadvantaged schools must also be introduced.

53. SECTION27 accordingly notes some of the systemic issues raised by SECTION27 fieldworkers working with parents and SGBs in schools in the Limpopo Province in respect of the constraints faced by these SGBs and which limit their effective participation in school governance.

54. The first is the lack of skills to meaningfully engage in school governance. It is the experience of SECTION27 that parents are entrusted with the huge responsibility of running the schools. They often do this without the necessary skills and training. They therefore struggle to execute the functions mandated by SASA including determining the extra-mural curriculum of the school, the choice of subjects to be taught at a school, purchasing of textbooks and educational materials among other functions. Many of these functions are skills-based. Where SGB members do not have the requisite skills, this leads to school staff often assuming responsibility for these functions.

55. The second is the lack of knowledge and confidence amongst SGB members as to their duties. SGBs are often reluctant to take decisions for their school because they lack confidence and knowledge and therefore often defer to the school principal's authority. An illustration of this, is that in 2016, an SGB at a school in Limpopo took a decision to contribute information in respect of a school infrastructure case wherein the organisation, Better Education for All (BEFA) represented by SECTION27 has intervened as an *amicus curiae*. The SGB was instructed by the principal to

reverse this decision without any reasons and the SGB did so because they were uncertain as to their powers in this regard.

56. There is also a lack of collaboration and information sharing between the schools principals and SGB members which impedes the proper functioning of SGBs. As an illustration of this, during the textbook cases noted above and the monitoring of textbook delivery[31], principals were the main decision makers in deciding whether or not SGB members could provide information regarding textbook shortages and delivery. If principals had a different view regarding the release of information, SGBs would have no access to this information and therefore could not assist in the monitoring of textbook delivery.

57. The power dynamic between the school staff and SGBs is also influenced by the low levels of education of some SGBs members. SGB members note that when they raise issues, principals and educators remind them of their lack of education as a mechanism for keeping SGB members out of decision making processes.

58. Thus, systemic concerns in respect of the functions of SGBs can only be addressed if the broader issues of building the capacity of SGBs and the power dynamics between school staff and SGB members are addressed.

Withdrawal of the functions of SGBs

59. **Clause 13** seeks to amend section 25 of SASA. It provides that an HOD on 'reasonable grounds' may completely dissolve or withdraw the functions of an SGB and replace an SGB for a period of three months but which period may be extended for up to a year.

[31] See footnote 1 above.

60. Again, while there may be cogent reasons for dissolving an SGB or withdrawing its functions, this must occur in a manner that is both procedurally and substantively fair and must not undermine the principles of local governance.

61. The broad meaning of the phrase 'reasonable grounds' is subject to arbitrary abuse of power by individuals. As with the recommendations in respect of the policy making functions of SGBs, there should be guidelines which would provide some direction as to the circumstances under which an SGB may be dissolved.

Meaningful Engagement

62. **Clause 27** inserts a new provision in SASA to provide for dispute resolution mechanisms in the event of any dispute between the HOD and an SGB. It provides that the parties must meaningfully engage each other to resolve the dispute.

63. This is an important addition to SASA within the context of the jurisprudence on meaningful engagement. It does, however, need to be more clearly integrated in the broader school governance amendments. Thus, for example, it should be a preliminary step to the withdrawal of SGB functions, or should be a mechanism for resolving disputes in respect of the policy making functions of SGBs. The manner in which this should occur in respect of the latter has been set out above.

LTSM PROVISIONING

64. **Clause 11** seeks to amend the powers of the SGBs by enabling an HOD to centrally procure identified LTSM for public schools after consultation with the SGB. The underlying rationale is to ensure 'efficient, effective and economic utilisation of public funds or uniform norms and standards'.

65. In December 2015, the Supreme Court of Appeal ('SCA') in its judgment in the *BEFA* case held that every learner is entitled to a textbook in every subject at the commencement of the academic year. This *BEFA* judgment is the culmination of

litigation that was first initiated by SECTION27 in 2012, in a matter that became widely referred to as the 'Limpopo textbook saga'.

66. Arising from the textbook litigation were three separate investigations into the non-delivery of textbooks, these were; the Metcalfe verification report, the report of Presidential Task Team to investigate the reasons for the delay in the delivery of textbooks and the South African Human Rights Commission report on the delivery of LTSM. These processes have made findings in respect of systemic concerns in respect of LTSM procurement and delivery, and pursuant to these findings, recommendations that, if implemented, have the potential to promote good governance and improve systems for the procurement and delivery of textbooks that would have a national impact. The Presidential Task Team made important recommendations, most notably in respect of lacunas in policy development especially that of education policy. It recommended that the national government must develop a ***national*** policy for the standardisation of the procurement and distribution of LTSM.

67. Section 5A(1)(c) of SASA provides that the Minister of Basic Education may 'prescribe minimum uniform norms and standards for the provision of learning and teaching support material'. A draft LTSM policy was tabled in September 2014 and SECTION27 submitted its comment on 8 October 2014. The draft policy's purported aim is to achieve 'comprehensive access to core material' through essentially a more centralised procurement mechanism and improved systems for the delivery of textbooks to classrooms and the retrieval of textbooks from learners every year. As such this policy initiative aims to establish a standardised national system aimed at improving systems for procurement and delivery of LTSM. SECTION27 was therefore broadly supportive of this policy.

68. Since 2014 however this policy has not been finalised. It is not clear what the relationship between the proposed amendments in clause 11 and the policy will be,

if any. To align the legal framework with the jurisprudence in the *BEFA* case and to give effect to Section 5A(1)(c) of SASA, it is recommended that such norms be finalised urgently. The proposed amendment in clause 11 on its own will not address the myriad and systemic problems that are currently being faced in the procurement and delivery of LTSM.

FEE EXEMPTIONS

69. **Clause 22** intends to amend section 41 of SASA that seeks to clarify what documentation an SGB should consider when deciding on an application by the parent of a learner for the exemption from the payment of school fees. It provides for the submission of additional documentary evidence in the form of an affidavit by a parent in instances where information cannot be obtained from the other parent of the learner. This must be accompanied by a 'confirmatory affidavit from a social worker or another competent authority or court order'.

70. SECTION27 received numerous queries from parents, particularly single parents, struggling to obtain exemptions from school fees. Thus, we view this need for clarity of documentation as necessary in the context where single parents often bear the onerous burden of obtaining documentation from the other parent who may be absent or uncooperative. In these circumstances, individual schools often deny these single parents school fee exemptions because of the absence of the documentation.

71. While we support the need for clarity, we are concerned by the requirement of obtaining a supporting affidavit from a 'social worker, another competent body or court' as this requirement continues to place an onerous burden on the single parent's time and resources.

72. In the case of *Michelle Saffer v HOD Western Cape Education department and Others,*[32] the Court noted that where there is a divorce or a breakdown of a relationship, there is an additional financial burden that unfortunately, largely lies with the mother. The Court said:[33]

'There can be no debate that mothers, historically and presently, ordinarily become custodial parents and have to care for children on divorce or breakdown of other significant relationships. These circumstances as a result, 'places an additional financial burden on them and …[d]ivorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means.'

73. The judgment goes on to say:[34]

'It follows that any custodial parent applying for exemption from school fees is obliged to obtain from the other parent particulars of his or her gross income, in order that the SGB may apply the prescribed formula to his or her application for exemption. I will accept that there may be circumstances where obtaining the prescribed information may be extremely difficult in cases where the parents are estranged from one another.'

74. Within this context, especially the Western Cape High Court's acknowledgment of the unfair burden on single parents who are predominantly women, and who are often struggling, including financially, SECTION27 recommends that the supporting affidavit requested in 41 (2A) should be adequate and the requirement of the confirmatory affidavit from a 'social worker or another competent authority or a court order' should be removed.

[32] Case no: 18775/2013 (15 September 2016). The appeal in this case was heard in the SCA as recently as 24 November 2017. Judgment is reserved.
[33] Para 100.
[34] Para 120.

PENALISING OBSTRUCTING ACCESS TO SCHOOLS

75. **Clause 2** of the Bill seeks to amend section 3(6) of SASA to increase the penalty provision from six months to six years in the case where the parent of a learner, or any other person, prevents a learner who is subject to compulsory school attendance from attending school. There is also the addition of section 3(7) to SASA that seeks to make it an offence for any person to willfully interrupt or disrupt any school activity or to wilfully hinder or obstruct any school in the performance of the school's activities, and a penalty of six years is provided for.

76. SECTION27 wishes to note that that increasing the penalty provision for parents from six months to six years may have unintended negative consequences for the learners whose 'bests interests' ought to be promoted and protected in terms of section 28 (2) of the Constitution. Thus, imprisoning a parent of a learner for an extended period of time may deprive that learner of a caregiver and breadwinner. This may have devastating material and psychological consequences for the life of that learner. Accordingly, the imposition of such a six year penalty in respect of parents should be carefully considered and reviewed.

77. The rationale for the additional proposed addition of section 3(7) of SASA relating to the disruption of school activities is as noted in Clause 2 'necessitated by recent 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.' Examples of this would include the Vuwani protest action in the Limpopo Province or the Kuruman protests in the Northern Cape where protestors sought to deliberately and unintentionally prevent learning and teaching from proceeding in schools .

78. SECTION27 has been consistently and publically vocal in its criticism of this form of protest action. In the Vuwani protests, action over demarcation issues resulted in

forced school closures and the destruction of schools. Last year, over twenty-five schools were damaged and schooling was disrupted. In September 2017, similar protests occurred. In 2016, SECTION27 helped raise funds to assist affected learners catch up, in partnership with the DBE, the National Education Collaboration Trust (NECT), BEFA and the Kagiso Trust. We therefore do not condone protest action that forces the closure of schools and which prevents the continuation of learning and teaching.

79. While we are critical of protest action that seeks to obstruct access to schools, we are concerned that the proposed amendment is drafted so broadly that it may affect unintended groups, alternatively, groups who should not, under the Constitution, be prevented from protesting.

80. Section 17 of the Constitution protects the right of everyone to peacefully assemble, demonstrate and present petitions. Section 17 is further related to freedom of expression (section 16) and freedom of association (section 18). As such the exercise of these fundamental freedoms must not be unduly undermined.[35]

81. In a time of increasing overzealous policing of protests, there is a risk that the provision may be construed to punish organisations, trade unions or even political parties protesting along major traffic routes.[36] Finally, the clause, in its current form, may also be read in a way where even learners seeking to protest the denial of their

[35] In the *South African Transport and Allied Workers Union v Garvas* 2012 (8) BCLR 840 (CC) para 63 the Constitutional Court held: "So the lessons of our history, which inform the right to peaceful assembly and demonstration in the Constitution, are at least twofold. First, they remind us that ours is a 'never again' Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away. Second, they tell us something about the inherent power and value of freedom of assembly and demonstration, as a tool of democracy often used by people who do not necessarily have other means of making their democratic rights count. Both these historical considerations emphasise the importance of the right."

[36] See for example the consequences of the recent taxi strike: https://randburgsun.co.za/332763/taxi-strike-leaves-commuters-matrics-stranded/.

right to a basic education, or broader issues facing children, through a boycott or stayaway may be impacted.[37]

82. Arguably then, the constitutional standard is that a protest which does not threaten public safety should not be interfered with.[38] In addition, where a protest crosses this line through violence and/or through the intimidation of learners and teachers from attending schools, there are common law crimes which allow prosecution, for example, malicious injury to property, arson and public violence.

83. Within these parametres then, SECTION27 recommends that the current wording of section 3(7) be carefully reviewed and narrowed to ensure that sanctions be imposed only on those protests that are unlawful and which intentionally seek to disrupt teaching and learning and, which have as their main objective obstructing the core functions of a school.

84. Finally, as noted above, SECTION27 wishes to endorse the CCL recommendation that, to the extent that the increase in penalty from six months to six years prevails, a clause along the following lines be inserted:[39]

" Any court sentencing a person in relation to a conviction mentioned in [section 3 (6) or 3 (7)] must consider the effects of such any period of imprisonment being contemplated on the child or children concerned, keeping in mind the need to protect persons below the age of 18 from detention, except as a measure of last resort, and where the person being sentenced is a caregiver, the importance of alternatives to imprisonment in order to prevent the separation of children and parents."

[37] See for example a recent protest in Alice where learners blocked a road to protest poor school infrastructure: https://www.groundup.org.za/article/school-holds-classes-middle-road-protest/.
[38] An exception to this is the controversial Regulation of Gatherings Act 205 of 1993 which allows even a peaceful protest to be stopped when permission has not been granted for it to take place.
[39] CCL submission, para 12.

THE PROHIBITION OF LIQUOR AND PROHIBITED SUBSTANCES AND RANDOM SEARCHES

85. **Clause 7** seeks to amend section 8A of SASA by extending the provisions to include the prohibition of liquor and prohibited substances. It also extends the right to search not only a group of learners but also an individual learner.

86. The introduction of section 8A in 2007 was aimed at safeguarding the interests of learners with regard to their right to a basic education which must take place in an environment free of drugs and dangerous objects[40]. The prohibition of liquor and prohibited substances is further in line with national legislation namely the Liquor Act, 59 of 2003 and the South African Institute for Drug-Free Sport Act, 14 of 1997. Thus, while we broadly support the prohibition we wish to make some cautionary remarks in respect of the search and seizure provisions of learners.

87. Extending the search to an individual learner is a reasonable practice as not all searches need be at a group level and incidents may arise where an individual learner has been suspected of carrying prohibited substances/objects. Searches of individuals or groups must however occur with due regard to the other various rights of the individual learners such as their rights to: dignity (section 10); freedom and security of person (section 12) and privacy (section 14).

88. In 2007, the South African Human Rights Commission ('SAHRC') made a submission on to the 2007 Basic Education Law Amendment Bill which first sought to introduce the section 8A provision on "random search and seizure and drug testing at schools". Also, in 2013, a journal article[41] noted important provisos in relation to the search

[40] R Joubert, J Sughure and D Alexander *Search and seizure of learners in schools in a constitutional democracy: A comparative analysis between South Africa and the United states* (2013 De Jure).
[41] See 40 above.

and seizure provisions. Some of the concerns of the SAHRC and in the journal article are worth repeating:[42]

- Any limitation of the rights of learners highlighted above should seek to have rehabilitative rather than punitive effect;
- Any detention, search, or seizure must be done with the intent of maintaining proper order and discipline in the school. Any such action cannot be done for the purpose of enforcing the criminal law;
- The use of the word 'random' in the section heading is misleading as it only applies to searches conducted after a reasonable suspicion;
- The manner of the search is to be reasonable and proportionate. Thus, it must be based on credible information and carried out in a sensitive and reasonable manner taking into consideration the age and gender of the learner. Strip searching an entire class of learners when money is missing from a locker or school bag, for example, would hardly meet this test;
- There is potential that the designated educator may perform the searches in a discriminatory fashion;
- There is no empirical research to demonstrate whether random drug testing would act as a deterrent or whether there may be other unintended consequences that may flow from the knowledge of random drug testing;
- It would be preferable for appropriate authorities to be called in to conduct the searches or administer the drug test; and
- Courts have noted that school principals can practice discretion. There is no general duty to report to police, for example, every time a learner is involved in a fist fight. The seriousness of every situation must be weighed, and it is wise to be very familiar with Departmental policy on these matters.

89. SECTION27 therefore recommends that guidelines be developed that serve to guide schools and that set out the circumstances under which both group and individual searches can occur and which seek to ensure that rights of learners may not be

[42] SAHRC Comments, Draft Education Laws Amendment Bill, 2007 (May 2007).

arbitrarily violated. The rules governing search and seizure should ideally also be set out in an individual school's code of conduct so that learners and parents are aware under what circumstances searches may occur.

SUMMARY OF RECOMMENDATIONS

90. While SECTION27 welcomes the DBE's efforts to align the legal framework for basic education with jurisprudential developments so as to ensure access to a quality education for all, such alignment must accord with the principles established in respect of the jurisprudence.

91. Thus, in respect of the alignment of provisions regulating the powers and functions of SGBs, while the DBE is obliged to ensure access to a quality education for all, achieving this must occur within the established principles of cooperative governance outlined. Furthermore where there are disputes between the different tiers of school governance these structures are legally obliged to, in good faith, negotiate with each other.

92. Therefore, in respect of the policy making functions of SGBs in respect of language, admissions and we suggest, even religion, we recommend the following procedure:

- Binding norms be established in all areas of SGB policy-making so as to guide SGB policy making processes. The norms must be consistent with the principles which underpin the jurisprudence in respect of school governance. SGB policies, in turn, must be consistent with these norms.
- All SGB policies must be sent to an office within the provincial department of education established specifically for this purpose.
- This office must also address complaints against individual school policies that are inconsistent with norms.
- Such an office must make <u>recommendations</u> to the SGB where a policy is inconsistent with a norm.

- Where SGBs persist in failing to comply with a norm, the provincial department and the SGB must attempt to resolve the dispute through meaningful engagement.
- Where this process fails, an HOD may withdraw the policy making function of the SGB in terms of section 25 of SASA or approach a court to review the SGB policy.

93. SECTION27 welcomes the numerous measures to improve good governance and accountability in school governance so as to minimise the potential for corruption. We note however that systemic concerns in respect of the functioning of SGBs. Especially in poorer schools, these concerns can only be addressed if the broader issues of building the skills and capacity of SGBs and, the power dynamics between school staff and SGB members are addressed. We therefore recommend a greater commitment to policy and programmatic initiatives to address this.

94. The provision for the withdrawal of the powers of SGBs has the potential to be abused. SECTION27 therefore recommends guidelines or norms which would provide guidance as to the circumstances under which an SGB may be dissolved.

95. SECTION27 welcomes the provision that seeks to provide for dispute resolution mechanisms in the event of any dispute between the HOD and an SGB. We note however that this needs to be more clearly integrated in the broader school governance amendments. Thus, for example, it should be a preliminary step to the withdrawal of SGB functions, or should be a mechanism for resolving disputes in respect of the policy making functions of SGBs.

96. In respect of LTSM, it is not clear what the relationship between the proposed amendments in clause 11 and the draft LTSM policy will be, if any. To align the legal framework with the jurisprudence in the *BEFA* case and to give effect to Section 5A(1)(c) of SASA, SECTION27 recommends that the draft policy be finalised urgently.

97. SECTION27 further recommends that a similar alignment of the legal framework as has occurred in respect of the school governance jurisprudence, also occur in respect of the education provisioning jurisprudence highlighted.

98. In respect of the clarification of the documentation required for fee exemptions, SECTION27 recommends that within the context of the acknowledgment of the unfair burden on single parents who are predominantly women, and who are often struggling, including financially, the supporting affidavit requested in 41 (2A) should be adequate and the requirement of the confirmatory affidavit from a social worker or another competent authority of a court order should be removed.

99. In respect of the provisions that seek to increase the penalty provision from six months to six years in a case where a learner who is subject to compulsory attendance is prevented from attending school, SECTION27 notes that imprisoning a parent of a learner for an extended period of time may deprive that learner of a caregiver and breadwinner. This may have devastating consequences for the life of that learner. Accordingly, the imposition of the six year penalty in respect of parents should be carefully considered and reviewed.

100. In respect of the provisions that seek to penalise persons that disrupt school activities, SECTION27 recommends that the current wording of section 3(7) be carefully reviewed and narrowed to ensure that sanctions be imposed only on those protests that are unlawful and which intentionally seek to disrupt teaching and learning and, which have as their main objective obstructing the core functions of a school.

101. In respect of the search and seizure provisions of learners, SECTION27 recommends that guidelines be developed that set out the circumstances under which both, group and individual searches may occur and which seek to ensure that

rights of learners may not be indiscriminately violated. We recommend further that the rules governing search and seizure should ideally also be set out in an individual school's code of conduct so that learners and parents are aware under what circumstances searches may occur.