SECTION27 MEMORANDUM TO THE DEPARTMENT OF BASIC EDUCATION IN RESPECT OF THE DRAFT “PROTOCOL ON THE ELIMINATION OF CORPORAL PUNISHMENT IN SOUTH AFRICAN SCHOOLS” (DECEMBER 2016)
INTRODUCTION

1. Section27 has agreed to comment on the Department of Basic Education’s (DBE’s) draft “Protocol on the Elimination of Corporal Punishment in South African Schools” (the “Protocol”).

2. Section27 has dealt with several complaints of corporal punishment in schools. In 2014, the South African Human Rights Commission developed a report recommending a protocol to enforce the ban against corporal punishment. The report is titled, “Promoting Effective Enforcement of the Prohibition Against Corporal Punishment in South African Schools” (the “SAHRC report”). The author of the SAHRC report is Faranaaz Veriava who currently is based at Section27. It is within the context of this experience that Section27 has agreed to assist the DBE by providing comment on the current draft.

3. Accordingly, this memorandum makes a few general comments in respect of the Protocol. It then provides commentary on each of the different sections of the Protocol. Finally, it makes a few concluding recommendations for revising the Protocol.

GENERAL COMMENTS

4. The Protocol is well-intentioned but in its current form, it is incoherent and confused as to its purpose. It does not serve as a protocol but instead appears to be a broad policy document in respect of the Department’s overall approach to corporal punishment.

5. A protocol is defined in the dictionary as a “system of rules that explain the correct conduct and procedures to be followed in formal situations”. As such the Protocol should serve in establishing procedures for the enforcement of the ban against corporal punishment in terms of Section 10 of the South African Schools Act (SASA).
6. Any programmatic work relating to public education and awareness should ideally not be included in the Protocol. This could be part of a policy document setting out the DBE’s approach to addressing corporal punishment in schools.

7. Thus, while some general framework principles may be useful in an introduction to the Protocol, the focus of the Protocol ought to be the following:
   - Defining what constitutes corporal punishment.
   - Specifying coherently, the roles and obligations of the different role-players where a learner has been corporally punished.
   - Establishing a procedure for incidents of corporal punishment to be reported by the victim or by a third party.
   - Establishing a framework for a 3-pronged process for sanctioning perpetrators of corporal punishment. This is to the (1) Labour Relations Directorate, (2) South African Police Services (“SAPS”) and (3) South Africa Council of Educators (“SACE”). The reporting mechanism to the Labour Relations Directorate is discussed in chapter four, albeit inadequately. The other two are neglected in the Protocol.

8. As a national framework, the Protocol must contain a provision to ensure that provincial laws/protocols are in accordance with this framework. The current draft fails to do this.

9. The Protocol should also make explicit that it also applies to independent schools. The current draft fails to do this.

10. There is a lack of consistency in the use of terminology throughout the Protocol. The Protocol also has several typos and has not been edited properly.

11. While the Protocol has utilised certain sections of the SAHRC report, it fails to adopt many of the recommendations set out in the SAHRC report. For example:
   - It makes no provision for a national data-base of corporal punishment complaints.
- It does not provide for the three-pronged mechanism for sanctioning perpetrators of corporal punishment.

BACKGROUND/PROBLEM STATEMENT/INTRODUCTION/ PURPOSE

12. It is not clear what purpose is served by these multiple introductory sections. The information in these sections is also somewhat repetitive and superfluous. Instead it is recommended that the Protocol be restructured to include only the following introductory sections:

- A “Purpose” section
- A “General Principles” section. These principles set out in this section should underpin and inform the content of the Protocol.

13. The “Purpose” section of the Protocol should do the following as succinctly as possible:

- It should state clearly that corporal punishment in schools is illegal and that the purpose of the protocol is create a “national framework” to enforce the section 10 ban in the SASA.

- After clearly stating the ban of corporal punishment, it would be useful to include statistics here of the prevalence of corporal punishment. It would be useful to incorporate statistics from the General Household Survey, SACE and reports from the Department of Basic Education. Currently there is only a reference to the National School Violence Study.

- It should state that the purpose of the Protocol is to comply with the relevant obligations under the Constitution, international conventions and regional charters, the SASA, the Employment of Educators Act (“EEA”) and the case of Christian Education SA v Minister of Education (Christian Education) 2000 (4) SA 757 (CC). Currently, there is an emphasis on South Africa’s international obligations (sometimes superfluously so), but insufficient discussion of South Africa’s constitutional obligations in respect of protecting learners from corporal punishment.
• It should state that the purpose of the protocol is to establish: (1) a step-by-step mechanism for the reporting incidents of corporal punishment and (2) to establish a three-pronged process for sanctioning perpetrators of corporal punishment.

14. The “General Principles” section could contain the following:
   • A commitment to reduce the incidence of corporal punishment through better enforcement of the ban.
   • A commitment to specific constitutional values to protect learners from corporal punishment.
   • A commitment to positive discipline.
   • A succinct enunciation of the positive effects of positive discipline, together with a discussion of the adverse effects of corporal punishment such as the contribution to a violent society and the psycho-social and developmental consequences for learners.

15. Note the reference to gender-based violence on p 6. This is very confusing and does not make sense. Increasing this confusion is that in the same paragraph, there is a discussion of parent support for “mild forms” of corporal punishment. The objective of this paragraph is therefore not clear.

16. The discussion on gender-based violence could be contextualised in a broader discussion on violence in the “General Principles” section. Somewhat related to this point, it should also be noted that corporal punishment is not only used as a way to discipline learners, it is also used to assert power and control. At Section 27 we have had a lot of complaints about the use of corporal punishment. It is used as a method of teaching. It is being used in conjunction with sexual violence against learners and as a way of intimidating learners. Understanding it just as a method to discipline unruly learners can change how it should be addressed through the Protocol.

17. On p6, the Protocol purports to also promote the “Positive Behaviour Intervention Systems Programmes.” This is not defined. It is also not clear from a reading of the
Protocol that it fulfils this function. As noted earlier, the Protocol should be clear on its purpose and the content should be informed by this purpose.

**DEFINITIONS**

18. The definition is good. Minor suggestions would include:

- Changing the “implement” to “object” and incorporating broomsticks and hosepipes, as well as noting other forms of corporal punishment for example, denying meals and restricting access to bathrooms could be used.
- It could also include threats of physical violence as well as physical violence.
- Also, the Protocol could link the references to assault etc in the EEA, to the definition of corporal punishment.

19. It would be useful to define “positive discipline”.

**LEGISLATIVE FRAMEWORK**

20. *International law:* The international law section is adequate and includes all relevant sections. The typos and language should be corrected. There is also a concern with the referencing of the quote “children do not lose their rights by virtue of passing through the school gates”. It is taken from paragraph 8 of General Comment No. 1: The Aims of Education (article 29) (2001) (*Adopted by the Committee on the Rights of the Child at the Twenty-sixth Session, CRC/GC/2001/1, 17 April 2001*).

21. *African Charter:* This section covers sufficient content but also requires edits.

22. *National Legislation*

- Constitution: Relevant sections are covered, would recommend putting section 12 in full, as well as including section 28 (1)(d).
- National Education Policy Act: This part is sufficient.
- SASA: The Protocol covers the important aspects of SASA.
- Children’s Act: Further explanation should be given to the National Child Protection Register. A list of the types of cases that would justify an educator being placed on Part B of the National Protection Register would be useful. Very importantly, the obligation in section 110(1) needs to be included in this section, it can be repeated.
again under the responsibilities section, but it is important to explain the mandatory reporting and provide the exact wording of the Act.

- The EEA and the South African Council for Educators Act need to be included. The relevant sections are set out in the SAHRC report.

CHAPTER 2: KEY ELEMENTS OF IMPLEMENTING AND ENFORCING PROHIBITION OF CORPORAL PUNISHMENT IN SCHOOLS

23. This placement of this chapter in the Protocol should be reconsidered. It appears to be largely a policy statement for future programmatic work for raising public awareness in respect of the ban and for promoting positive discipline. The function of a protocol was discussed earlier.

24. To the extent that chapter two remains in the Protocol in some form, the following should be noted:
   - It should include educating, empowering, and informing not only educators, but learners, parents and communities.
   - It should mention the need to strengthen responses to, and support for learners who have been subjected to corporal punishment.
   - It could also discuss the need for psychosocial support in schools, both to assist learners who are “acting out” and also to provide support to learners who have experienced corporal punishment.
   - Many of the steps laid out are vague, poorly worded and some of them are confusing. The section therefore needs to be more clearly thought through.

25. The following sections in chapter two also need to be reconsidered:
   - (f) on p12 refers to making “compliance with the prohibition a condition of employment and the breaching of the prohibition is punishable as misconduct”. Sanction of educators should be dealt with in a different section. Its location here is confusing. It is also superfluous in the context of the definition of misconduct in the EEA that must be included in the legislative section.
   - (h) on p 13 refers to the establishment of an independent complaints procedure. What is meant by an “independent” complaints procedure is unclear. Then at 3.9 on p 21 there is a reporting mechanism under the heading “Reporting Obligations.”
This relation between the proposed independent complaints procedure and this section is very confusing and should be clarified.

- A framework for a complaints procedure should also ideally be located in the chapter setting out the different procedures.

CHAPTER 3: ROLES AND RESPONSIBILITIES

26. This section is a very important section but it needs to be streamlined and revised in accordance with the function and purpose of the Protocol.

27. While many of the relevant stakeholders have been included, it seems that there is not a clear understanding of who is responsible for what. There does not seem to be a clear division between the different departments, in particular, there is a lot of overlap between the national and provincial education departments, and between parents and SGBs.

28. SACE should be listed as one of the stakeholders and its role clarified.

29. There is also nothing about the police (where appropriate) and medical and psychosocial interventions, where needed, in this section.

30. DBE responsibilities:
   - Responsibility of the DBE should include the monitoring and evaluation mechanism of a national data base of incidences of corporal punishment as suggested by the SAHRC report.
   - 3.3.1 notes that the DBE must provide “guidelines, protocols etc”. This is the protocol and should fulfil its function that is set out above.

31. PDE’s: responsibilities
   - The circulars are a good idea but could be made into one point.
   - There should be an obligation on PDEs to align provincial legislation with the Protocol.
   - It is unclear how the provincial mechanism in 3.2.3 on p 14 relates to an “independent complaints procedure”. It is suggested that one mechanism be
outlined in this Protocol and provinces must align their provincial laws/policies/circulars with this.

32. District responsibilities:
   - Much that is in this section is about programmatic work rather than the enforcement of the ban. This needs to be rethought.
   - A mechanism for monitoring compliance, recording and reporting by districts should be in this section.
   - There is nothing about the obligation to investigate complaints under this section, yet the section detailing the “Reporting Obligations” places that responsibility on the district.

33. Schools’ responsibilities:
   - The Protocol needs to be consistent with terminology throughout. On p 17, there is inconsistency with terminology. The meaning of the use of “attention-seeking learners” is unclear. Also, the term “non-violent discipline” should be replaced with positive discipline.
   - Also, as noted, the establishment of an independent complaints procedure by the principal is very concerning. The purpose of the protocol should be to develop the complaints procedure.
   - It is not clear what the “Use of system wide level consequences and interagency support programmes with learners who do not respond to class and school consequence” means.
   - This section needs to include the section 110(1) mandatory reporting.

34. SGBs’ responsibilities:
   - Once again there is a lack of consistency with terminology and “corrective action” is introduced. Corrective action is a term used in the Employment of Educators Act for the discipline of educators. It is not appropriate wording in relation to discipline of learners, and is suggestive of punitive action.
   - The Protocol should state more clearly that a code of conduct that allows for corporal punishment will be invalid. It is not just preferable to use non-violent means to teach and discipline children – it is compulsory.
• It would also be useful to have guidelines under this section as to “Positive Discipline” alternatives that could be included in a code of conduct. This must align with the DBE’s published guidelines in respect of schools’ codes of conduct.

35. Educators’ responsibilities:
• On 3.6.3 on p19, we are not sure that it is correct that boys are disproportionately affected by corporal punishment, is this backed up by research? Also, this paragraph does not make sense.
• At 3.6.5. the points dealing with “problem solving and social skills” are very vague. Again, this is more a policy statement than relevant to the function of a protocol.
• This section needs to include the section 110(1) mandatory reporting.

36. Learners’ responsibilities: It is suggested that learners should be encouraged to report incidences of corporal punishment.

37. Parents’ responsibilities: It is suggested that parents should be encouraged to work with the school and the SGB.

38. Reporting obligations:
• This section should be titled “Reporting procedures”.
• This section should contain the process for reporting of incidents of corporal punishment by the victim herself/himself or by third parties.
• This section should also incorporate the three-pronged process for the sanction of perpetrators recommended in the SAHRC report that includes (1) DBE (2) SAPS and (3)SACE.

CHAPTER 4: DISCIPLINARY CASES
39. We have suggested that this be included under chapter three.

40. Moreover, much of what is contained here seems to have been a “cut and paste” from existing processes. It needs to be revised to effectively address disciplinary processes for
educators found to have administered corporal punishment. The following needs to be considered for example:

- On p 22, at 4.1.2 its says that no provision is made for learner representation at disciplinary proceedings. This should be reworked to make clear that learners are entitled to their own legal representation and other support, to promote their best interests, even if those people are not physically allowed into the room at the hearing. This was a recommendation in the SAHRC report. In its current form, the Protocol prioritises the interests of the accused educator, rather than the child.
- The principles applicable to precautionary suspension are already set out in the Employment of Educators Act. The content of the Protocol must align with this.
- On p 21 at para 4.7.1 the Protocol requires that the educator, if suspended, still be available to the department for the investigation. It needs to be clarified that this must not be on the school grounds.
- The Protocol must, where the educator is found guilty, require the provincial department report the matter to SACE so that they can take appropriate action.
- It needs to be determined if the role of unions be included in the Protocol.

CHAPTER 5: SUPPORT AND INTERVENTIONS

41. This section too needs to be revised in accordance with the three-pronged process. Thus, this section could be incorporated in chapter three. It should develop reporting processes to SACE and SAPS. The following format may be reworked for each of the three processes.

- Reporting
- Investigation procedures
- Hearing / trial processes
- Process of consequences

NON-GOVERMENTAL ORGANISATIONS

42. The function of this section needs to be clear. It could for instance instead take the form of a “contacts” section (could be an annexure) and should include the contacts of the following:

- DBE
- PDE
  - HODs, District managers (could be made to be circulated per province)
There are Chapter 9 institutions listed in this section, they should be under their own heading, and not repeated (SAHRC).

There are several other NGOs that could be included.

Other annexures could include the different forms that need to be filled out, or relevant sections of the Act.

**CONCLUSIONS**

43. The current draft Protocol does not serve the function of a protocol and should be completely revised.

44. Any revision must look closely at the recommendations of the SAHRC report which should be included and addressed in the Protocol.

45. A revised draft of the Protocol could be accompanied by a general policy document developed by the DBE stating its position in respect of corporal punishment and setting out its objectives for programmatic work in respect of education and awareness of S10 of SASA more generally.