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SECTION27 SUBMISSION

Basic Education Laws

Amendment Bill

[B2-2022]

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SUMMARY OF RECOMMENDATIONS

Compulsory Schooling

1. The introduction of compulsory Grade R through the Basic Education Amendment Bill is generally welcomed by the ECD sector.
2. However, the proposed provision for compulsory age of entry into Grade R is unclear and needs to be amended to ensure clarity of the position that the Bill seeks to introduce. Transitional provisions are also required to phase-in the requirement of compulsory Grade R attendance.
3. Moreover, it is essential that compulsory Grade R is accompanied by measurable improvement in quality provisioning. This requires appropriate resourcing and learning support and qualified teachers who can implement play-based learning programmes. Specifically, we recommend that the norms and standards be amended to include reference to age-appropriate play material and equipment.
4. SECTION27 welcomes the clarification that basic education extends to Grade 12, which is in line with the recent Constitutional Court judgment of *Moko v Acting Principal of Malusi Secondary School and Others.*[1]

Corporal punishment

5. SECTION27 welcomes the move to define corporal punishment and to clarify that it is abolished within the full schooling environment. However, we believe that the abolishment of corporal punishment should be extended to include any punishment that is cruel or degrading, including verbal and emotional abuse.
6. Therefore, **clause 10** should be revised to extend the abolishment of corporal punishment to include the abolishment of any form of punishment that is cruel and degrading.
7. To provide clarity on this, **clause 1** should also be revised to introduce a definition of "any form of punishment that is cruel and degrading," which would include "...punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares

[1] *Moko v Acting Principal of Malusi Secondary School and Others* 2021 (3) SA 323 (CC).

or ridicules the child."[2] This would therefore encompass non-physical forms of cruel and degrading punishment, such as name-calling or threatening learners.

Learner dropouts

8. While we believe learners dropouts is a crucial issue that needs to be addressed, we submit it will not be effective to make individual schools solely responsible for tracking learners and providing further interventions for learners. We therefore recommend that **clause 3** of 2022 BELA should be revised to include a provision obliging government to form intergovernmental committees on the provincial and national level to address the issue. The committees could consist of representatives from the Department of Basic Education (DBE), the Department of Social Development, the Department of Statistics South Africa, and National Treasury.

The admission of undocumented learners

9. The majority of the documentation required in **clause 1** of the 2022 BELA is unnecessary, irrational, and likely to serve as an obstruction to learners' access to education. Much of the documentation required in the clause is not required in terms of the Admissions Policy for Ordinary Public Schools or the recently published Draft Admissions Policy for Ordinary Public Schools. Further, in the 2019 case of *Centre for Child Law v Minister of Basic Education* ("*CCL v Minister of Basic Education*"),[3] the High Court (Eastern Cape Division) ruled that for the admission of learners to schools and for schools to continue to serve their educational needs, learners need only supply their birth certificates or where they do not have a birth certificate, any other proof of identity, such as an affidavit.[4] The clause should thus be altered to state that the only "required documents" from learners are, where available, a birth certificate, and where a birth certificate is not available, any alternative form of identification, such as "...an affidavit or sworn statement

[2] General Comment No. 8 (2006) "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)" accessed from https://www.refworld.org/docid/460bc7772.html para 11.
[3] *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG).
[4] Ibid, para 135.

deposed to by the parent, care-giver or guardian of the learner wherein the learner is fully identified."[5]

10. The intergovernmental committees proposed under **clause 4** to assist schools with acquiring documents for learners should be abandoned in their entirety. Such committees have the strong potential for serving as a means for the enforcement of immigration laws, which may have the potential of disincentivising some parents from sending their children to school. This would be against Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 22 (2017) of the Committee on the Rights of the Child (CRC) on the general principles regarding the human rights of children in the context of international migration.[6] Such a committee would also likely violate the Protection of Personal Information Act through sharing the personal information of children between governmental departments without the consent of such children. Finally, the formation of such intergovernmental committees would be a violation of the rights of children and their parents to privacy and would not be in the best interests of the child.

Policy-making functions of school governing bodies (SGBs)

11. The policies of some schools, particularly in terms of admissions and language, have had the effect of excluding learners and perpetuating historical patterns of discrimination. We thus believe that the policies of schools should be reviewed by the Head of Department (HoD). However, in order to ensure that the HoD has enough capacity to review the policies of all schools effectively and within the limited time frame provided, we submit that an office, specialising in reviewing schools' policies, should be established.
12. Further, an individual complaints mechanism to the HoD should be established for persons to challenge individual school policies that they believe are exclusionary, unlawful or unconstitutional outside of the review periods.

[5] Ibid para 135.

[6] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) "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 (16 November 2017) CMW/C/GC/3-CRC/C/GC/22, available at: https://www.refworld.org/docid/5a1293a24.html.

13. In terms of the requirement for schools to have an exemption clause in their codes of conduct, we believe **clause 7** should provide guidance to SGBs as to what "just cause" would be in granting or refusing an application for an exemption. This would be to ensure that SGBs take cognisance of certain factors and their duty to reasonably accommodate learners.
14. We further submit that the BELA should include a clause amending section 7 of the South African Schools Act ("SASA") to add that while public schools may conduct religious observances (subject to the conditions set out in the section), they may not endorse one religion over all others. A procedure should be inserted into the BELA for the HoD to review the religious policies of public schools to ensure that single religion policies are not being pursued.
15. Finally, to address the ongoing instances of discrimination against learners who are pregnant, there needs to be a clear and express provision in the BELA stating that direct or indirect discrimination against learners on the basis of pregnancy is prohibited.

School governance checks and balances

16. We recognise that there are circumstances in which the HoD should be empowered to dissolve an SGB. However, we submit that guidance needs to be provided as to what reasonable grounds would be for the HoD to be empowered to dissolve an SGB.
17. Additionally, while inserting provisions into the SASA to ensure greater accountability on the part of SGBs is to be welcomed, SGBs are not adequately trained in how to perform their functions. Therefore, there needs to be more effective programmes run by government to build the capacity of SGBs, provide them with all necessary information, and to address the power imbalance between school staff and SGBs.

School closures and mergers

18. We submit that **clause 13** should be revised to place an obligation on the MEC, when it is deciding whether to merge a school, to ascertain whether there will be adequate infrastructure to accommodate all the learners in the potential new, merged school. Further, the MEC should be required to ensure that transportation

arrangements are put in place and that any challenges involving school uniforms are addressed before the commencement of the merger.

Meaningful engagement

19. **Clause 39** of the 2022 BELA seeks to introduce procedural steps for dealing with a dispute between the HoD or Member of the Executive Council (MEC) and SGBs. However, because the clause fails to provide for any normative criteria as to how these parties should deal with a dispute, it fails to incorporate meaningful engagement as a remedy in resolving disputes.

20. We thus submit that normative criteria to guide the resolution of disputes should be added to the BELA to promote meaningful engagement between the parties. Normative criteria guiding the process of meaningful engagement could include fairness, transparency, flexibility, practicality,[7] as well as the best interests of the child principle.[8]

The central procurement of learning and teaching support material (LTSM)

21. **Clause 16** simply allows for the centralisation of the procurement of LTSM on the provincial level. However, as was evident in *Khula Development Project v Head of Department: Eastern Cape Department of Education*,[9] the centralisation of the procurement of LTSM will not necessarily solve the issues regarding procurement. Therefore, the DBE must urgently finalise norms and standards on the procurement of LTSM in terms of section 5A(1)(c) of the SASA. Further, clause 16 must reiterate that the procurement of LTSM must occur in line with the good governance principles set out in section 195 of the Constitution.

The penalisation of parents who fail to cause their children to attend school

22. The criminalisation of parents who fail to cause their children to attend school as a measure to increase school attendance is ineffective, against the best interests of

[7] Gustav Muller, "Conceptualizing Meaningful Engagement as a Deliberative Democratic Partnership," Stellenbosch Law Review 22, no. 3 (2011): 742-758, page 756. Muller discusses the benefits of meaningful engagement in the context of evictions.
[8] *Rivonia* para 2.
[9] *Khula Community Development Project v The Head of Department, Eastern Cape Department of Education and Others* (Eastern Cape Division of the High Court, Makhanda) (unreported, case number 611/2022).

children, and has the potential to disproportionately prejudice mothers. Therefore, 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.

23. If the criminal sanctions on parents are maintained, these must be made subject to certain considerations to protect the best interests of the child.

The penalisation of persons and protests that obstruct or disrupt schooling

24. SECTION27 appreciates the need to prevent protest action that disrupts school activities and jeopardises the right to basic education and that participation in such protests should be penalised. However, we submit that the creation of a new penalty for such in **clause 2**, is too broad and may negatively affect the constitutional rights of people to assemble, demonstrate, picket, and present petitions;[10] to freedom of expression;[11] and to freedom of association.[12] The existing criminal law provisions penalising persons participating in protests that lead to violence or the destruction of property need to be better enforced to deter participation in such protests in future. We therefore recommend that this amendment be removed in its entirety.

Random searches of learners

25. Schools need further guidance on how to practice their discretion to search learners beyond what is set out in section 8A of the SASA. We submit that guidelines are necessary regarding the searching of learners and that the Minister of Basic Education should be granted the power to make regulations on searches.
26. Further, we recommend that rules regarding the search of learners should be provided for in every school's code of conduct.

Alcohol

27. The most effective way to protect children from being exposed to or consuming alcohol at school is to have a blanket ban on the presence of alcohol on school grounds or during school activities, except for educational purposes. We thus

[10] The Constitution of the Republic of South Africa, 1996, section 17.
[11] Ibid section 16(1).
[12] Ibid section 18.

submit **clause 8** should be revised to remove the possibility of the HoD or SGBs granting exemptions to the rule that alcohol on school premises or during school activities is prohibited.

Changes to the preamble of the SASA.

28. **Clause 42** of the BELA should be rephrased to encompass the full extent of the obligations imposed by section 7(2) of Constitution on government by the right to basic education. It should therefore state that South Africa's new national system for schools will ".....facilitate the education of children through respecting, protecting, promoting, and fulfilling the right to basic education..."

INTRODUCTION

The interest of SECTION27 in making this submission

29. SECTION27 is a public interest law organisation that works to influence, develop, and use the law to further the constitutional rights of people in South Africa. Specifically, SECTION27 uses research, advocacy, and litigation to further access to the rights to healthcare and basic education.

30. In 2017 SECTION27 made a submission on the Draft Basic Education Laws Amendment Bill, 2017 (2017 Draft BELA) in which we commented on the extent to which the 2017 Draft BELA promoted improvement in access to the right to basic education and effectively aligned legislation with the principles developed in the courts' jurisprudence.

31. SECTION27 now welcomes the opportunity to comment on the 2022 BELA. The 2022 BELA proposes to amend multiple areas of the SASA and the Employment of Educators Act 76 of 1998 (EEA).

32. SECTION27 notes and welcomes that the 2022 BELA seeks to align the SASA and the EEA with jurisprudential development and appears to be a concerted attempt to address systemic issues in our schooling system such as learner drop-out and the exclusion of undocumented learners. Furthermore, we note that the 2022 BELA represents a marked improvement over the 2017 Draft BELA. However, we believe that there are still significant issues with the 2022 BELA that need to be addressed before it aligns sufficiently with jurisprudential developments and government's constitutional obligations in respect of various rights such as the rights to basic education, equality, dignity, and the principle of the best interest of the child.

33. In this regard, SECTION27's submissions on the 2022 BELA will comment on the areas of the Bill relating to:
    a. The ages at which schooling is compulsory;
    b. Corporal punishment;
    c. The prevention of learner dropouts and recovery of learners;

d. The admission of undocumented learners in terms of the "required documents", the formation of the Intergovernmental Committees;
e. The policy-making functions of SGBs, in particular, in respect of language, admissions and codes of conduct;
f. The checks and balances on the management and administration of school governance;
g. School closures and mergers.
h. The central procurement of LTSM;
i. The penalisation of parents that fail to cause their children to attend school;
j. The sentences proposed for persons and protests that obstruct or disrupt schooling;
k. Random searches of learners;
l. The rules regarding alcohol at school or at school functions; and
m. Changes to the preamble of the SASA.

AGES AT WHICH SCHOOL IS COMPULSORY

34. **Clause 1** of the 2022 BELA clarifies that basic education comprises of Grade R to Grade 12. Grade R is also defined as the reception grade.

35. **Clause 2** makes school attendance compulsory from Grade R in the year a learner turns six until a learner has completed Grade 9 or has turned 15, whichever occurs first.

36. **Clause 4** states that the admission age for Grade R is "four turning five by 30 June in the year of admission." However, schools must give preference to learners that are subject to compulsory school attendance where schools have constrained capacity.

37. We welcome the proposal to make Grade R compulsory for all children. Early childhood development (ECD) programmes have been found to be beneficial for the school-readiness of children, their long-term educational outcomes, as well their general health (through the provision of school feeding schemes and immunisation

programmes in ECD centres).[13] Supporting young children in their early years is also crucial to reducing poverty and inequality, but also a "fundamental and universal human right".

38. We further welcome the clarification that basic education extends to Grade 12, which is in line with the recent Constitutional Court judgment of *Moko v Acting Principal of Malusi Secondary School and Others*, in which the Court confirmed that basic education extends to Grade 12 and encompasses access for learners to their final Matric examinations.[14] In the case the Constitutional Court held –[15]

"To limit basic education under section 29(1)(a) either to only primary school education or education up until Grade 9 or the age of 15 is, in my view, an unduly narrow interpretation of the term that would fail to give effect to the transformative purpose and historical context of the right."

39. While we generally support the amendment of Section 3 of the SASA that will require compulsory grade R attendance for children, the final sentence of the proposed section 3(a) is unclear. The final sentence currently reads "provided that a learner who will turn six after 30 June must start attending grade R the following year" For convenience, we refer to this part of the proposed section 3(a) as "the proviso".

40. On its face, the proviso appears to mean that a child turning 6 years of age after 30 June in a given year *may only* attend Grade R the following year. This conflicts with the Bill's proposed section 4 which makes it possible for a child aged 4 turning 5 before 30 June to be admitted to Grade R. In order to eliminate any ambiguity and potential for internal conflict within the Act, the proviso has to be amended. As it

[13] See Sneha Elango, Jorge Luis García, James J. Heckman, Andrés Hojman "Early Childhood Education" in *Economics of Means-Tested Transfer Programs in the United States* Robert A. Moffitt (ed) (2016) volume 2 accessed from https://www.nber.org/books-and-chapters/economics-means-tested-transfer-programs-united-states-volume-2/early-childhood-education; Arthur J. Reynolds "A Multicomponent, Preschool to Third Grade Preventive Intervention and Educational Attainment at 35 Years of Age" (2018) *JAMA Pediatrics* accessed from https://jamanetwork.com/journals/jamapediatrics/fullarticle/2668645;

[14] *Moko v Acting Principal of Malusi Secondary School and Others* 2021 (3) SA 323 (CC) paras 31-33.

[15] Ibid para 32.

stands, the purpose or intention animating the proviso is unclear. We accordingly consider two options for how section 3(a) may be formulated.

Option 1:

- The first option is to only make it compulsory for children turning 6 before 30 June to attend Grade R. This approach could be motivated by a concern over compelling young children who may not be school-ready to attend formal schooling.

- If this is the objective sought to be achieved, then the proviso should be amended for clarity as follows:

"...provided that a learner who will turn six after 30 June may ~~[must]~~ start attending grade R the following year" (Our emphasis)

- We note that a significant consequence of this approach would be that a child may be admitted to Grade R who is due to turn 7 in the year of admission. This, in turn, creates the possibility of a child turning 8 in Grade 1. This is a departure from the current scheme under SASA which sets the compulsory school-going age for Grade 1 at a minimum of 7 years (regardless of when the child turns 7 years old).

Option 2:

- The second option is to make it compulsory for any child turning 6 in the year of admission to attend Grade R (regardless of when the child turns 6 years old). This would align with the existing approach adopted in SASA in respect of Grade 1 compulsory attendance.

- If this approach is adopted, then the proviso should be deleted as follows:

"...~~[provided that a learner who will turn six after 30 June must start attending grade R the following year.]~~"

41. In our view, either of these options is viable. But it must be ensured that a consistent and well-motivated approach is followed.

42. Good quality Grade R is important for child development and valuable preparation for Grade 1. Currently an estimated 70% of children enroll in Grade R.[16] However, a 2013 evaluation found that Grade R had virtually no effect on the outcomes of children in the poorest quintiles.[17] The evaluation found that children in Grade R received a third of the resources that children in ordinary public-schools received in the basic education system.[18]

43. Our support for compulsory Grade R is therefore on condition that: Grade R is appropriately resourced; emphasises play-based learning; and that there is adequate training and wages for practitioners in the Grade R sector.

44. An important component of quality early childhood development is play-based learning. As the UN Committee on the Rights of the Child ('UN Committee') has cautioned, there is a risk of overemphasising "formal learning" and academic achievement for young children "at the expense of participation in play".[19]

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[16] Grade R enrolment compared to grade 2 enrolment: calculations based on https://www.education.gov.za/Portals/0/Documents/Reports/School%20Realities%202021.pdf?ver=2022-02-07-094832-243

[17] https://resep.sun.ac.za/wp-content/uploads/2014/06/Grade-R-Evaluation-1-3-25-Final-Unpublished-Report-13-06-17.pdf

[18] Own calculation based off the cost per public ordinary school learner (excluding Grade R) in 2011/12 compared to cost for Grade R enrollment. https://resep.sun.ac.za/wp-content/uploads/2014/06/Grade-R-Evaluation-1-3-25-Final-Unpublished-Report-13-06-17.pdf

[19] General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31) at para 41.

45. Significantly, Article 31 of the UN Convention on the Rights of the Child, which South Africa has ratified, protects children's rights to play and recreation. In its General Comment No 17,[20] the UN Committee has emphasised the link between children's right to play and their educational development, particularly in their early years, as follows:

"[I]nclusive education and inclusive play are mutually reinforcing and should be facilitated during the course of every day throughout early childhood education and care (preschool) as well as primary and secondary school. While relevant and necessary for children of all ages, **play is particularly significant in the early years of schooling.** Research has shown that **play is an important means through which children learn**." (Our emphasis).

46. School (including pre-school) therefore plays a significant role in facilitating children's right to play. As such, the UN Committee indicates that state parties should aim to ensure, amongst others, adequate indoor and outdoor space, as well as safe equipment to facilitate play, including for children with disabilities.

47. While SASA does currently refer to the determination of norms and standards for "sport and recreational facilities", we believe that more specific emphasis on ***age-appropriate play material and equipment*** is needed, particularly with the introduction of compulsory Grade R.

48. We accordingly recommend that SASA be amended so as to specifically require that minimum norms and standards (determined by the Minister in respect of learning and teaching support material) include play material and equipment.

[20] Ibid.

49. This can be achieved by the insertion of the following underlined subsection under section 5A:

"5A Norms and standards for basic infrastructure and capacity in public schools

…

(c) in respect of provision of learning and teaching support material, the availability of—

…

(vii) age-appropriate play material and equipment."

CORPORAL PUNISHMENT AND INITIATION

50. Corporal punishment is given a definition in **clause 1**, which is:

"'corporal punishment' means any deliberate act against a child that inflicts pain or physical discomfort, however light, to punish or contain the child, which includes, but is not limited to—

hitting, smacking, slapping, pinching or scratching with the hand or any object;

kicking, shaking, throwing, throwing objects at, burning, scalding, biting, pulling hair, boxing ears, pulling or pushing children; and

forcing children to stay in uncomfortable positions, forced ingestion, washing children's mouths out with soap, denying meals, heat and shelter, forcing a child to do exercise or denying or restricting a child's use of the toilet;"

51. **Clause 10** states that corporal punishment "is abolished" and extends the prohibition of corporal punishment to during school activities or in hostels.

52. We welcome the move to define corporal punishment and to clarify that it is abolished within the full schooling environment. However, we believe that the abolishment of corporal punishment should be extended to include any punishment that is cruel or degrading, which would include non-physical forms of punishment.

A report looking into the enforcement of the corporal punishment ban that was commissioned by the Centre for Child Law in 2014 also recommended that a definition should be wide enough to encompass verbal abuse.[21]

53. Abolishing any form of punishment that is cruel and degrading would be in line with numerous constitutional provisions, including the right to dignity (section 10); the right to freedom and security of the person which includes the right not to be treated or punished in a way that is degrading, cruel, or inhuman (section 12(1)(e)); the right of every child to appropriate alternative care when outside the family environment (section 28(1)(b)); the right of every child to be protected from "maltreatment, neglect, abuse or degradation" (section 28(1)(d)); the right of every child to have their best interests be considered as paramount in all matters concerning them (section 28(2)); and the right to basic education (section 29(1)(a)).

54. In circumstances where educators are prohibited from meting out physical punishment against children but are not willing or properly equipped to use positive forms of discipline, it has been observed that such educators will resort to using non-physical, but nevertheless damaging, forms of punishment.[22]

55. Non-physical punishment from educators that is cruel and degrading is linked to negative developmental outcomes in children, and may lead to psychological, emotional, and behavioural problems.[23] Verbal abuse against children, which is often used as a form of punishment, includes the consistent "...use of sarcasm, ridicule or denigrating statements, yelling, name-calling, insulting, mocking a student's appearance or disabilities and making negative comments about a child's

[21] Faranaaz Veriava *Promoting effective enforcement of the prohibition against corporal punishment in South African schools* (2014) at 20, available at http://www.ci.uct.ac.za/violence-schools/reports/promoting-effective-enforcement-of-the-prohibition-against-corporal-punishment-in-SA-schools.

[22] See Carol Bower "Prohibition of Corporal and Humiliating Punishment in the Home" (2013) *PAN: Children* accessed from https://www.childlinesa.org.za/wp-content/uploads/prohibition-of-corporal-and-humiliating-punishment-at-home.pdf.

[23] See Finiki Nearchou "Resilience following emotional abuse by teachers: Insights from a cross-sectional study with Greek students" (2018) 78 *Child Abuse & Neglect* accessed from https://www.sciencedirect.com/science/article/pii/S0145213417304064.

family."[24] Non-verbal emotional abuse can include persistent patterns of "...neglect such as ignoring the student and behaviours such as assigning homework to impose discipline and using punishment for not responding correctly to an exercise/question."[25]

56. Cruel and degrading non-physical punishment from educators weakens the bond between a learner and their educators as well as their school environment.[26] This can lead to increased disengagement, worsened academic performance, and even increased instances of learners dropping out of school.[27] Because of the harmful impact of cruel and degrading punishment, as well as it being in clear disregard of the humanity of learners, its continued use by educators is a violation of the constitutional rights of learners.

57. In General Comment No. 8 (2006), the Committee on the Rights of the Child's (CRC) clarified that any form of punishment that is cruel and degrading, including "...punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child", is incompatible with the Convention on the Rights of the Child,[28] a Convention which South Africa has signed and ratified. The CRC stated:[29]

> *"Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them."* (Own emphasis).

58. We therefore submit, in line with the CRC's General Comment No. 8 and South Africa's international human rights and constitutional obligations, that any form of punishment that is cruel and degrading – whether it is physical or otherwise – should

[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] General Comment No. 8 (2006) "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)" accessed from https://www.refworld.org/docid/460bc7772.html para 11.
[29] Ibid para 18.

be abolished, alongside corporal punishment. To clarify the abolishment of "any form of punishment that is cruel and degrading," a definition of such should be provided in the BELA in line with the CRC's General Comment 8. Such a definition would thus include verbal and non-verbal "...punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child."[30]

PREVENTION OF LEARNER DROPOUTS

59. **Clause 3** of the 2022 BELA proposes to insert a section in SASA that would place the duty of monitoring and encouraging school attendance on educators, school principals, and SGBs. The purpose of the provision is to promote learner attendance and reduce dropout rates.
    a. The role of educators would be to report the absence of a learner to the principal if a learner is not at school for more than three days.
    b. The role of principals would be to investigate the matter within 24 hours of receiving a notification of a learners' absence from an educator by making a "reasonable effort" to contact the parents "by whatever means are suitable for the circumstances of the school and the family concerned." Further, the principal would also report the matter to the SGB for "further intervention".
    c. The role of SGBs would be to include rules dealing with punctuality and school attendance in their codes of conduct. Further, the SGB would presumably be responsible for "further intervention" after the absence of a learner has been reported to them and the principal has made a reasonable effort to contact the learner's parent.

60. The scale of the problem of learners dropping out of school in South Africa is enormous and has only been compounded by the COVID-19 pandemic and the associated National State of Disaster. Even prior to the COVID-19 pandemic it was reported that 40% of learners dropped out before reaching Grade 12.[31] In a presentation given by the Minister of Basic Education Angie Motshekga in February

[30] Ibid para 11.
[31] Zero Dropout Campaign 'Learning Brief: School Dropout Prevention Strategies' (July 2020) Volume 1, accessed from https://zerodropout.co.za/learning-brief-school-dropout-prevention-strategies/ at 4.

2022, it was stated that 158 888 learners in seven provinces did not return to school this year.[32] Other sources outside of the DBE are still using figures related to 2021 NIDS-CRAM dropout figures – that between March 2020 and July 2021, 750 000 learners aged 7-17 were estimated to have dropped out of school.[33]

61. As has been noted by the Zero Dropout Campaign, there are many factors leading to what is termed "disengagement," which is the phenomenon that leads to learners dropping out of school.[34] These factors include school-related factors such as poor academic performance, failure and grade repetition. However, factors outside of school, such as poverty and inequality, domestic violence, and substance abuse, are also relevant.[35]

62. On 31 August 2021, SECTION27, the Zero Dropout Campaign, Equal Education, Equal Education Law Centre, Associate Professor Ursula Hoadley, Professor Ann Skelton, and Associate Professor Nic Spaull published an open letter to the Minister of Basic Education regarding the issue of learner dropouts, particularly in the context of the COVID-19 pandemic and steps that could be taken to develop a plan to prevent further dropouts and recover learners.[36] In this, we stated:
    a. Collecting data on learner dropouts is vital to developing a plan to prevent learner dropouts and recovering learners. In order for a comprehensive set of data to be produced, there must be uniform national attendance monitoring systems, lasting up until and including Grade 12.
    b. The curriculum needed to be altered in light of the significant lost learning time learners suffered due to the COVID-19 pandemic;

[32] Prega Govender 'Shocking school stats revealed: Almost 160,000 pupils did not return to public schools this year' (27 February 2022) *Sowetan Live*, accessed from https://www.sowetanlive.co.za/news/south-africa/2022-02-27-shocking-school-stats-revealed-almost-160000-pupils-did-not-return-to-public-schools-this-year/.
[33] Debra Shepherd & Nompumelelo Mohohlwane 'The impact of COVID-19 in education - more than a year of disruption' (8 July 2021), accessed from https://cramsurvey.org/reports/#wave-5 at 38.
[34] Zero Dropout Campaign 'Policy Brief' (18 June 2020) accessed from https://zerodropout.co.za/zero-dropout-policy-brief-2020/ at 2.
[35] Zero Dropout Campaign (n 13) at 4.
[36] Zukiswa Pikoli "Urgent call for school dropout prevention plan" (31 August 2021) Maverick Citizen, accessed from https://www.dailymaverick.co.za/article/2021-08-31-urgent-call-for-school-dropout-prevention-plan/.

c. Community involvement to track and trace learners should be promoted. This can be done through schools, religious facilities, and street committees;
d. A national plan must be developed to reach learners who have dropped out and offer them psychosocial support and assistance in re-enrolling in school;
e. At the provincial and national level, there should be regular discussions on how to best support learners who are at risk of dropping out;
f. A learnership should be established to capacitate school staff on how to institutionalise data collection and the necessary human resources and infrastructure for data collection needs to be in place for this;
g. Finally, we stated that the education system should have dropout prevention as an explicit goal. It should be a performance indicator for provincial departments and the Minister of Basic Education should set targets for the reduction of dropouts.

63. We received no meaningful response from the DBE to our letter.

64. A collective effort between all stakeholders, including local, provincial and national government, is required to promote learner attendance and reduce dropout rates. Educators, principals and SGBs cannot be given the sole responsibility of tracking and tracing learners, particularly when they have not been given the necessary training and resources to develop a comprehensive system to report absences and trace learners.

65. Therefore, we recommend that BELA should require government to form intergovernmental committees on the national and provincial level to address learner dropouts. The committees could consist of representatives from the DBE, the Department of Social Development, the Department of Statistics South Africa, and National Treasury. On the national level the committee would have the obligation to meet regularly and would have the function of developing an evidence-based national plan to reduce learner dropouts. On the provincial level, committees would have the obligation to meet regularly and could have the function of investigating the scope of the problem of learner dropouts, its causes, and how best

to monitor learner attendance. The provincial intergovernmental committees would further be given an obligation to assist schools with tracking and tracing learners who have been absent for more than three days and to offer such learners any necessary psychosocial support and assistance for them to continue their education.

66. Individual schools should be given the obligation to report to the provincial intergovernmental committee where learners have been absent for three or more days. This will allow government to develop a better monitoring system for school absences and dropouts and will assist government in identifying learners at risk of dropping out.

DOCUMENTATION REQUIRED FOR ADMISSION

67. **Clause 4** of the 2022 BELA states that schools must provide education to, and must serve the educational requirements of, learners for the duration of their school attendance, without any unfair discrimination.

68. The clause further establishes a National Intergovernmental Committee and Provincial Intergovernmental Committee with the function of helping schools in obtaining the "required documentation" for learners who were admitted to schools without such documentation.

69. The intergovernmental committees established by the 2022 BELA would be constituted of representatives from various departments, including:
    a. Department of Basic Education
    b. Department of Social Development
    c. Department of Home Affairs
    d. Department of Justice and Constitutional Development
    e. South African Police Services
    f. Department of Employment and Labour
    g. Department of International Relations and Co-operative Affairs

h. Department of Health
i. National Treasury
j. Department Statistics South Africa

70. "Required documents" for learners is expanded on in **clause 1** and defined as the following:
    a. For learners whose parents are South African citizens, the required documents are the birth certificate of the learner, identity documents of the parents, and (in the case of the death of any parent) the death certificate of the parent.
    b. For learners whose parents are not South African citizens but have permanent residence permits or temporary residence visas, the required documents are the learner's birth certificate, passport, study visa or permanent residence permit, and the parents' passports and permanent residence permits or temporary residence visas.
    c. For learners whose parents are asylum-seekers or refugees, the required documents are the parent and learner's visas and the learner's birth certificate if they were born in South Africa.

71. Any amendment to the SASA pertaining to the documentation learners are required to provide to schools or the Department of Education prior to or after admission into a public school must be aligned with the spirit of the Constitution Court case of CCL v Minister of Basic Education and Circular 1 of 2020. In the case of *CCL v Minister of Basic Education*,[37] the High Court in Makhanda declared Clauses 15 and 21 of the DBE's National Admission Policy for Ordinary Public Schools (Admissions Policy) to be unconstitutional and invalid.
    a. Clause 15 of the Admissions Policy stated that a learner without an official birth certificate could be admitted to a school provisionally, provided that an official birth certificate was provided within three months of the learner's admission.
    b. Clause 21 of the Admissions Policy stated that persons who are "illegal aliens" (phrasing of the Admissions Policy) must provide a school with proof that they

[37] Centre for Child Law v Minister of Basic Education 2020 (3) SA 141 (ECG).

have applied to the Department of Home Affairs to legalise their presence in South Africa when applying for admission to the school for their children or themselves.

72. The High Court ordered that schools are constitutionally obliged to accept learners and continue to serve their education need even in the absence of documentation. The Court stated that the required documentation needed by schools was limited to a birth certificate (where a learner had one) or any other alternative proof of identity, "...such as an affidavit or sworn statement deposed to by the parent, care-giver or guardian of the learner wherein the learner is fully identified."[38]

73. In recognition of the unconstitutionality of Clauses 15 and 21 of the Admissions Policy, the DBE published Circular 1 of 2020, which advised schools across the country that they should unconditionally admit learners without documentation and follow the order set out in *CCL v Minister of Basic Education*. However, some schools in South Africa remain unaware of their obligation to admit undocumented learners and unconditionally provide them with education.

74. This was recognised by the United Nations Committee on Economic, Social and Cultural Rights on 10 November 2021 in their response to South Africa's Follow-up to the Concluding Observations on its Initial Report.[39] In the Committee's response, the Committee found that South Africa has made "insufficient progress" to ensure access to education for undocumented migrant, refugee, or asylum-seeking learners – as is required in terms of South Africa's international obligations under the International Covenant on Economic, Social and Cultural Rights.

75. We submit further that labelling the documentation the government seeks under clause 4 as "required documentation" is a misnomer. The legal position is that documentation is not required for learners to be admitted to a school. In order to

[38] Ibid para 135.
[39] 2021-104/CESCR/FU accessed from https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT_CESCR_FUL_ZAF_47179_E.pdf.

serve the educational needs of learners, all that is required is the birth certificate of the learner or (where a birth certificate is not available) any other form identification (such as a sworn statement or affidavit).

76. The "required documentation" listed in clause 4 of the 2022 BELA is wide-ranging, arbitrary, and not even provided for in the Admissions Policy or the Draft Admissions Policy. For example, it is wholly unclear why the Department of Basic Education would require, in any instance, a parents' passports and permanent residence permits or temporary residence visas.

77. Additionally, while we recognise that it is important for learners to obtain documentation, we believe that the formation of a National Intergovernmental Committee and Provincial Intergovernmental Committee in terms of clause 4 has the potential of obstructing the right to education may lead to the violation of a number of other rights of parents and learners.

78. We believe that the National and Provincial Intergovernmental Committees may, instead of only assisting learners to obtain documentation, act to obtain the personal information of learners or their parents for the purpose of enforcing immigration laws that place learners or their parents or caregivers at risk of punitive measures or the threat of deportation being levied against them. That the Committees may function this way is indicated by the fact that the South African Police Service and the Department of Employment and Labour are part of the Committees.

79. The provision of education is not and cannot be a vehicle under which the government attempts to enforce immigration laws. It is thus concerning that, for example, the South African Police Services and Department of Employment and Labour would be part of the Intergovernmental Committee.

80. The CRC and CMW in their joint comment on the Protection of the Rights of All Migrant Workers and Members of Their Families and on the general principles

regarding the human rights of children in the context of international migration,[40] state that states have the obligation to –

"...implement a "firewall" and prohibit the sharing and use for immigration enforcement of the personal data collected for other purposes, such as protection, remedy, civil registration and 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."[41]

81. This means that when children are accessing basic services, such as education, the data collected from these children in the process of providing services must not be accessible to or shared with other governmental departments responsible for the enforcement of immigration laws. However, this is exactly what the Intergovernmental Committees would permit. As such, it is a violation of the constitutional rights of children and their parents to privacy. Further, it is not in the best interests of children because it may disincentivise parents from allowing their children to access basic education for fear of deportation of themselves and/or their children.

82. We therefore submit that the proposal to form intergovernmental committees for the purpose of obtaining documentation should be abandoned in its entirety.

83. To this end we endorse the submissions of the Legal Resources Centre ("LRC") and that of Equal Education and the Equal Education Law Centre.

SCHOOL GOVERNANCE

Introduction

[40] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) "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 (16 November 2017) CMW/C/GC/3-CRC/C/GC/22, available at: https://www.refworld.org/docid/5a1293a24.html.
[41] Ibid para 17.

84. Both the 2017 and 2022 BELA seek to make amendments regarding two aspects of school governance. First, the Bills seek to make amendments regarding the policy making powers of SGBs. In our 2017 submission, we point out that these are targeted at the power struggles between provincial education departments (PEDs) and historically white and privileged schools. Second, the Bills seek to impose additional checks and balances for the administrative and financial functioning of SGBs. In our 2017 submission, we note that this intervention appears to be targeted at historically Black and disadvantaged schools that struggle financially and administratively.

Admissions policies

85. **Clause 4** of the 2022 BELA states that schools must, without any unfair discrimination, admit, provide an education to learners, and serve learners' educational requirements for the duration of their school attendance.

86. Clause 4 states further that SGBs must determine school's admissions policies. However, the HoD, after consultation with the SGB, has the final authority to admit a learner.

87. Additionally, clause 4 requires that SGBs must submit their admission policies and any amendments to the HoD for approval, regarding which the HoD can approve or send back to the SGB with the necessary recommendations and reasons for such. When considering the admission policy of a school, the HoD must be satisfied that it takes into account the needs of the broader community in the specific education district in which the school is located. The HoD must also consider certain factors, including the best interests of the child, equality as provided for in section 9 of the Constitution, whether there are other schools in the community that are accessible to learners, the efficient and effective use of state resources, and the space available at the school. SGBs must review their admission policies every three years, whenever the factors above have changed or when requested by the HoD.

88. Clause 4 also inserts timelines into the section, which were not present in the 2017 Draft BELA. If there is no response from the HoD within 60 days after receiving the admission policy for approval, the admission policy will be regarded as having been approved. For amendments to their admission policies, the HoD will have 30 days to respond, failing which the amendment will be considered having been approved.

89. Clause 4 further states that learners who have been refused admission to a school can appeal this decision to the MEC. The MEC must consider and decide the appeal within 14 days (this is reduced from 21 days in the 2017 Draft BELA). Additionally, an SGB may also appeal to the MEC if unhappy with a decision of the HoD regarding the approval of an admissions policy.

Language policies

90. **Clause 5** of the 2022 BELA, states that SGBs may develop language policies, subject to the Constitution, the SASA and any applicable provincial law. The language policy of a public school must be limited to one or more of the official languages in the Constitution.

91. Clause 5 further states that SGBs must submit their language policies or any amendments to the HoD for approval, in terms of which the HoD may approve the policy or send it back to the SGB with recommendations and reasons for such recommendations.

92. When approving a policy, the HoD must be satisfied that it takes into account the language needs of the broader community in the education district in which the school is located. Further, the HoD must consider factors including the best interests of the child, equality as provided for in section 9 of the Constitution, the changing number of learners who speak the language of learning or teaching in the school, and the need for effective use of resources and classroom space. Additionally,

clause 5 of the 2021 BELA adds that the HoD must consider section 6(2) of the Constitution, section 29(2) of the Constitution, and the school's enrolment trends.

93. Timeframes in which the HoD must respond to the submission of schools' language policy have been added in the 2022 BELA. The HoD has 60 days to respond, failing which the policy is considered as having been approved. For amendments to language policies, the HoD has 30 days to respond to the SGB, failing which the amendment will be considered as having been approved.

94. The HoD is empowered to direct a school to adopt more than one language of instruction after following specified procedural requirements. In using this power, the HoD must consider factors including the best interests of the child, section 9 of the Constitution and equity, the changing numbers of learners at a school who speak a certain language, the effective use of classroom space and resources at the school, and the language needs of the broader community in the education district in which the school is located.

95. The 2022 BELA further adds that when a school has been directed to adopt a language of instruction, the HoD must, before the implementation of the directive, ensure that the school has all the necessary resources to provide adequate tuition in the required language. This includes ensuring there are adequate educators and LTSM.

96. Further, the 2022 BELA provides for an appeal procedure for the SGB regarding the decision of the HoD in terms of the approval of a language policy or the directing of a school to adopt a language of instruction to the MEC.

Codes of conduct

97. **Clause 7** of BELA 2022 makes the power of an SGB to adopt a code of conduct subject to provincial laws, the SASA and the Constitution, after consultation with the learners, parents, and educators of a school. Clause 7 states that a code of

conduct must take into account the diverse cultural beliefs and religious observances of the learners at the school. Clause 7 of the 2021 BELA further adds that a code of conduct must take into account the diverse medical circumstances in the school.

98. Codes of conduct must contain an exemption clause, allowing parents and learners to apply to the SGB, on just cause shown, to be exempt from complying with certain rules. Learners or parents would be given the chance to appeal the SGBs decision to the HoD. In the 2022 BELA, prescribed timeframes for the HoD to respond to such an appeal are provided – the HoD has 14 days to decide on the appeal and must give reasons for its decision.

99. **Clause 41** of the 2022 BELA grants the Minister of Basic Education the power to make regulations on the management of learner pregnancy.

100. **Clause 7** of the 2022 BELA provides that disciplinary proceedings should be age-appropriate, comply with the best interest of the child principle and adhere to the principles of justice, fairness and reasonableness prescribed by the Constitution.

Recommendations regarding the potential amendments to the policy making functions of SGBs

101. The changes made to BELA from the 2017 to 2022 version regarding enhanced participation and procedural fairness between SGBs and the HoD and MEC are welcomed.

102. One of SECTION27's main concerns with the 2017 Draft Bill was that it had the potential to erode the policy making functions of SGBs and undermine the cooperative governance model that the public schooling system is based on. Although SGBs in historically advantaged schools have sometimes used their policy making powers to uphold patterns of inequality, SGBs play an important role in promoting grassroots democracy and are often the bodies best suited to cater to

the needs of a particular school and community in which the school is located. Therefore, although SGBs must be prevented from upholding patterns of inequality through language and admissions policies and codes of conduct, the policy making powers of SGB's should not be made completely insignificant.

103. The Constitutional Court in *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* ("*Hoërskool Ermelo"*),[42] elaborated on the ideal functioning and nature of an SGB:[43]

"[A governing body] 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."

104. The 2022 Draft Bill now alleviates our concerns regarding the erosion of the policy making functions of SGBs by including amendments regarding the language and admissions policies that place measures of due process in the use of the HoD's power over SGBs. This is because, whereas the 2017 Draft BELA did not provide for appeal mechanisms for SGBs where the HoD overrides SGBs' policies, the 2022 BELA does. Time-frames have also been inserted for the submission and approval of policies. SGBs maintain their roles as the primary policy-making bodies of schools, while the HoD is able to confirm such policies as constitutionally compliant.

105. Further, in terms of the power of the HoD to direct a school to adopt more than one language of instruction specifically, we believe that the 2022 BELA better aligns with the jurisprudence of the courts.

106. In *Hoërskool Ermelo*, the Constitutional Court stated that the HoD would be able to override an SGB's language policy, but only after due process and on reasonable grounds when pursuing a legitimate purpose.[44]

[42] *Head of Department: Mpumalanga Department of Education v Hoerskool Ermelo* 2010 (2) SA 415 (CC).
[43] Ibid para 57.
[44] Ibid para 73.

107. The 2022 BELA directly aligns the SASA with the *Hoërskool Ermelo* judgment by allowing the HoD to issue a directive to public schools to adopt more than one language of instruction, subject to the HoD:

a. Being required to consider a number of normative factors – ensuring that there is reasonable cause for such a directive, and
b. Following substantial procedural steps.

108. Additionally, before such a directive is implemented, the HOD must ensure that the school has the necessary materials and capacity to fulfil the directive, which ensures that the directive is actually meaningful in that it is capable of fulfilment. The SGB may also appeal the decision of the HoD to the MEC.

109. However, the 2022 BELA does not address another concern raised by SECTION27 in its 2017 Submission, which is that, because of capacity constraints, it is likely that the HOD will not be able to substantively engage with the policies of schools within the time frames provided for in the 2019 Draft Bill.

110. In circumstances where the HoD has not given approval or sent a policy back to a SGB with recommendations, the policy of the school is regarded as having been approved. We submit that this, combined with the short timeframes for the HoD to review schools' policies, may result in unlawful or unconstitutional admissions and language policies falling through the cracks and being approved without the consideration of the HoD.

111. Particularly at the commencement of BELA, where all SGBs will need to submit their language and admissions policies to the HoD, the HoD is given only 60 days to review the policy and either approve the policy or return the policy with recommendations. If the HoD is unable to do this, then the policy would be "regarded as having been approved."

112. We believe that a period of 60 days is too short a time for the HoD to consider the language and admissions policies of all the SGBs in their respective provinces. As an organisation, we commonly encounter instances of discriminatory policies enacted and maintained by SGBs, which negatively impact the rights of learners at public schools in South Africa. It is thus vital that the HoD adequately considers each and every one timeously and scrupulously.

113. In order to ensure the policies of SGBs are subject to scrutiny regarding their constitutionality, we make two recommendations to capacitate the HoD:

a. For an office, specialising in reviewing school policies, to be established in terms of BELA under the auspices of the HoD. This will allow for a more effective system to review school policies within the limited time frame.
b. For a well-functioning individual complaints mechanism to be established for interested parties to challenge school policies that they believe are exclusionary, unlawful or unconstitutional. This will ensure that interested parties – such as learners, parents, educators, or community members – are able to assist the HoD in utilising its power to review school policies. This will also ensure that any school policies that are unlawful are brought to the attention of the HoD outside of the review periods.

114. An example of where a complaints mechanism may be well-suited to vindicate the rights of people would be a complaint received by our advice office regarding a public school located in the North West province. Despite the community surrounding the relevant school predominantly speaking Tswana, the relevant school only offers English as a first language and Afrikaans as a second language. A parent in the community feels that such a policy deprives him and his children of their cultural heritage and right to learn in their language of choice. If an individual complaints mechanism was established, the parent would be able to make their complaint directly to the HoD or office responsible for reviewing policies. The HoD would then be able to exercise their power to review the policy of the SGB, and, if

appropriate, to issue a directive for the SGB to adopt another language in their policy.

115. With regards to the exemptions clause in codes of conduct, we submit that BELA should expand on the determining factors that would inform the meaning of "just cause", which a learner or parent must comply with in order to acquire an exemption from the code of conduct. Expanding on the determining factors that may assist SGBs to apply the exemption clauses in line with what SGBs consider to be "just cause" is unlikely to be monolithic and should thus be guided by certain uniform factors. Suggested factors could be:

a. the rights of learners to enjoy their culture and practice their religion;[45]
b. the duty of schools to accommodate the diverse religious and cultural beliefs and religious observances of learners;[46]
c. The ability of the school to reasonably accommodate the learner;[47]
d. the medical circumstances of the learner; and
e. the best interests of the learner.

116. We further submit, in line with the judgment of *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart* ("*OGOD*"),[48] that BELA include a section stating that single religion policies are prohibited in public schools.

117. Section 15(1) of the Constitution provides that every person has the right to freedom of conscience, religion, thought belief, and opinion. Section 15(2) further provides that religious observances can be conducted at state institutions or state-aided institutions, so long as these "follow rules made by the appropriate public authorities", are "conducted on an equitable basis", and "attendance to them is free and voluntary."

[45] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (2) BCLR 99 (CC) para 65-66.
[46] Ibid para 114.
[47] Ibid para 78; 95.
[48] *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart* 2017 (6) SA 129 (GJ). See paragraph 102 where the High Court (Gauteng Local Division) declared that it is illegal, in terms of section 7 of SASA, for a school or staff to promote one religion to the exclusion of others. Also see paragraph 96 where the court stated that SGB's rules must "…provide equitably for all faiths."

118. Section 7 of the SASA provides that religious observances may be conducted at public schools, provided that these are in line with the Constitution and any applicable provincial laws. Further, such observances must be conducted on an equitable basis and participation must be free and voluntary.

119. The National Policy on Religion in Education, 2003, clarified that "religious instruction" (which is teaching a learner to follow a particular religion) is inappropriate in public schools. On the other hand, "religious education" (teaching learners about different religions in a way that promotes acceptance and understanding of diversity) and "religious observances" (having morning prayers, making accommodations for diverse dietary requirements) are permissible and desirable in public schools, as long as they are conducted equitably and participation in them is free and voluntary.

120. However, the phrase "free and voluntary" is more complicated than schools simply not directly forcing learners to participate in religious observances. A school's explicit endorsement of one religion over others would amount to indirect coercion for learners to partake in the religious observances of one religion. As stated by O'Regan J in the Constitutional Court case of *S v Lawrence*:[49]

"The explicit endorsement of one religion over others would not be permitted in our new constitutional order. It would not be permitted, first, because it would result in the indirect coercion that Black J adverted to in Engel v Vitale. And secondly because such public endorsement of one religion over another is in itself a threat to the free exercise of religion, particularly in a society in which there is a wide diversity of religions. Accordingly, it is not sufficient for us to be satisfied in a particular case that there is no direct coercion of religious belief. We will also have to be satisfied that there has been no inequitable or unfair preference of one religion over others."

[49] *S v Lawrence , S v Negal ; S v Solberg* 1997 (4) SA 1176 para 123.

121. In order to prevent such indirect coercion, we submit that an amendment to SASA clarifying that single religion schools are not permissible is imperative. In the *OGOD* judgment, the court set forth the following reasons as to why single religion schools are both undesirable and antithetical to the constitutional project:

a. The feeder zones of different communities change over time – becoming more diverse in terms of religion and race. This should be encouraged in our historical context, which has resulted in an "...unnatural residential demographic configuration."[50]

b. Where learners who are not religious, or participate in minority religions, attend single religion public schools, due to circumstances beyond their control, this may impart a "...sense of inferior differentness."[51] This is possible even where religious observances are not compulsory per se.

c. SGBs are under an obligation to ensure all faiths are provided for, which it cannot lawfully do by subscribing the school to a single religion, as this ultimately promotes one religion to the exclusion of others.[52]

122. Further in *S v Lawrence*, the Constitutional Court stated in relevant part:[53]

"Compulsory attendance at school prayers would infringe freedom of religion. In the context of a school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favoured religion."

123. In line with the above jurisprudence, section 7 of the SASA should be amended to add that while public schools may conduct religious observances (subject to the conditions set out in the section), public schools may not endorse one religion over all others.

[50] *OGOD* para 92.
[51] *OGOD* para 93.
[52] *OGOD* paras 96 and 101.
[53] *S v Lawrence* para 103.

124. To ensure that public schools desist from identifying themselves as a single-religion school or promoting one religion over others, we further recommend a procedure in BELA for the HoD to review the religious policies of schools to ensure that single religion policies are not being pursued or promoted in public schools.

125. With regards to schools' policies concerning learner pregnancies, section 9(3) of the Constitution prohibits discrimination on the basis of pregnancy, and section 5(1) of SASA prohibits schools from discriminating against learners in any way. However, it is evident that instances of discrimination against learners based on their pregnancy status are still occurring.[54] This has serious implications for learners' right to education, equality, and dignity.

126. We recognise the publishing of the Policy on the Prevention and Management of Learner Pregnancy in Schools (2021). However, this Policy is not legally binding. Therefore, we submit that there must be a clear and express provision in the SASA stating that direct or indirect discrimination against learners on the basis of pregnancy is prohibited.

127. Finally, concerning the disciplinary proceedings for learners, clause 7 is more specific than what was stated in the 2017 Draft BELA, which was that disciplinary hearings must "...not be rigid and adhere to the principles of justice, fairness and reasonableness prescribed by the Constitution." We welcome the addition that disciplinary proceedings must be age-appropriate and comply with the best interest of the child principle.

FUNCTIONING AND ADMINISTRATION OF SGBS IN HISTORICALLY DISADVANTAGED SCHOOLS

[54] See, for instance, a recent article in News24 regarding the exclusion of four learners from a school in the Eastern Cape based on their pregnancy status. Malibongwe Dayimani "Eastern Cape education dept probes allegations that a school told 4 pregnant girls to stay home" (14 March 2022) accessed from https://www.news24.com/news24/SouthAfrica/News/eastern-cape-education-dept-probes-allegations-that-a-school-told-4-pregnant-girls-to-stay-home-20220314.

128. The 2022 BELA also has the broad purpose of promoting good governance and minimising opportunities for corruption. **Clause 14** stipulates that SGB members are given a new duty to annually disclose their financial interests. **Clause 18** of the 2022 BELA provides that SGB members may co-opt members from within the community, as well as from outside the community, to assist the SGB in discharging its functions. **Clause 22** states that SGB members need to report on "...any direct or indirect personal interest". **Clause 23** of the 2022 BELA states that SGB members may not be remunerated for performing their duties or attending school activities and SGB meetings. **Clause 25** states that the chairperson of the finance committee must be a parent member who is not employed at the school, subject to the proviso that this is only a requirement where it is "reasonably practicable." **Clause 28** states that an SGB must seek the approval of the MEC to enter into lease agreements for any purpose, except where the lease is of the immovable property of the school for less than a year. **Clause 30** of the 2022 BELA provides that the budget of a school must be presented at a general meeting and a document giving explanations regarding the budget or deviations thereof must be provided to parents. Further, clause 30 states that parents must be notified of a deviation in the budget of 10% or more. **Clause 31** extends the provision regarding state employees being paid any additional remuneration by stating that SGBs must provide the full details and reasons behind any benefit. **Clause 33** of the 2022 BELA concerns the duty of SGBs to keep detailed records regarding schools' financial affairs and draw up an annual statement, which must be presented to a general meeting of parents. **Clause 34** of the 2022 BELA empowers the HoD to authorise an investigation into the financial affairs of a school and to request the Auditor-General to audit the financial records and statements of a school or to appoint financial auditors or financial investigators to do this. Further, the clause states that an SGB must provide the HoD with quarterly reports on all income and expenditure.

129. In our 2017 submission, we noted that significant obstacles faced by SGBs in historically disadvantaged schools were systemic in nature. In our work, we had found that the necessary training for SGBs was not being provided in circumstances where many of the functions of SGBs are skills-based, which had led to school staff

taking on the SGB's functions or SGB's functioning inadequately. We noted that SGBs were often unaware of their duties or lacked the confidence to make decisions for the school. In particular, we have observed that in some circumstances only the leading five SGB members are given training and the content of the training is vague and does not cover the full scope of their responsibilities. This disempowers SGBs and prevents them from performing their duties. School principals and SGBs demonstrated a lack of collaboration and information sharing, impeding the ability of SGBs to perform their functions. Further, differing levels of education influenced the power dynamics between school staff and SGBs.

130. While we welcome measures for accountability and good governance we note that the systemic problems SGBs faced were not addressed in the 2017 Draft BELA and are still not addressed in the 2022 BELA. The obstacles the SGBs at historically disadvantaged schools face can only be addressed through measures to facilitate the capacity building of SGBs, and through addressing the power dynamics between school staff and SGBs. This means giving comprehensive training to all members of SGBs on their responsibilities after every election.

Withdrawal of the functions of SGBs and dissolving an SGB

131. Section 22 of SASA currently states that the HOD can withdraw a function of an SGB on reasonable grounds.

132. In our 2017 submission, we noted that while SGBs may need at times to be dissolved or to have their functions withdrawn, this must be done in a manner that does not undermine the principles of local governance and participatory democracy, and thus that there should be guidelines as to when the HoD should utilise its power.

133. We therefore objected to the fact that the 2017 Draft BELA stated that the HoD was empowered to withdraw an SGB's functions, or dissolve an SGB, purely on

"reasonable grounds", without any guidance as to when this would be or how procedural or substantive fairness would be ensured.

134. **Clause 17** of 2022 BELA empowers the HoD to withdraw one or more functions of an SGB. This must be done on reasonable grounds and after fulfilling certain requirements. There is a consultation process the HoD must first follow, and the HoD must give due consideration to any representations given by the SGB. In the case of urgency, the HoD can withdraw the functions of an SGB on an interim basis without prior communication with the SGB. After this occurs, the HoD must immediately give the SGB written reasons for its actions and grant the SGB an opportunity to make representations before making a final decision. Provision is made for the appointment of qualified persons for a certain amount of time to perform the functions of the SGB and build the capacity of the SGB. Clause 17 further provides for an appeal process to the MEC.

135. **Clause 21** of the 2022 BELA empowers the HoD to dissolve an SGB, on reasonable grounds, where an SGB has ceased to perform the functions allocated to it in terms of the SASA. There is a consultation process the HoD must follow and an appeal process to the MEC is provided.

136. We welcome the addition of an appeal process and public participation requirements for the withdrawal of the functions and dissolving of an SGB, both of which were not present in the 2017 Draft BELA. This allows for a greater amount of procedural fairness and accountability for the decisions of the HoD.

137. However, we note that there is still no guidance for the HoD as to what reasonable grounds would be to dissolve or withdraw the functions of an SGB. Without guidance on what reasonable grounds constitute, the power to withdraw the functions of SGBs or to dissolve them could be exercised arbitrarily. For the purposes of greater certainty, therefore, we submit that guidance as to when the HoD would be empowered to exercise these powers must be included in the BELA.

Meaningful Engagement

138. **Clause 39** seeks to insert a new Section 59A of SASA. The proposed section is a broad overview of the processes to follow when a dispute arises between the HOD or MEC and the SGB. The clause merely provides procedural steps for dealing with a dispute without providing for any normative criteria as to how parties should deal with a dispute. It is thus our view that the section fails to incorporate meaningful engagement as a remedy in resolving disputes.

139. The Constitutional Court has developed the concept of meaningful engagement in various cases raised in housing jurisprudence[55] and thereafter in the education cases in *Welkom*[56] and *Rivonia*.[57] The courts' guidance paves the way to incorporate meaningful engagement within legislation. BELA should create space to pre-empt the possible disputes and infuse meaningful engagement clauses, which include consultation between SGB's and governmental authorities when a dispute arises in implementation of policy or the discriminatory nature of policy.[58] O'Regan J in a dissenting judgment in *MEC for Education: Kwazulu-Natal and Others v Pillay* stated the importance of engagement when resolving disputes:[59]

"It needs to be emphasised, however, that the strength of our schools will be enhanced only if parents, learners and teachers accept that we all own our public schools and that we should all take responsibility for their continued growth and success. Where possible processes should be available in schools for the resolution of disputes, and all engaged in such conflict should do so with civility and courtesy. By and large school rules should be observed until an exemption has been granted. In this way, schools will model for learners the way in which disputes in our broader society should be resolved, and they will play an important role in realising the vision of the Preamble to our

[55] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* 2011 (7) BCLR 723 (CC).
[56] *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* 2014 (2) SA 228 (CC) ("*Welkom*").
[57] *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC) ("*Rivonia*").
[58] *Welkom* and *Rivonia*.
[59] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 185.

Constitution: a country that is united in its diversity in which all citizens are recognised as being worthy of equal respect."

140. Chenwi and Tissington explain that "meaningful engagement is more democratic, flexible and responsive to the practical concerns that these rights raise. It can promote social change on the ground by creating a voice for the poor and marginalised in South Africa."[60] In so doing the authors propose that the process should:

"be well structured, coordinated, consistent and comprehensive and not be misleading;

take into consideration language preferences; and

enable individuals or communities to be treated as partners in the decision-making process."[61]

141. In the context of education, SGBs should be afforded the opportunity to be meaningfully heard. Fairness and transparency must be catered for in the clause. We are of the view that the clause must be expanded to provide for meaningful engagement processes as pronounced by the courts and stated in the Constitution.

142. We recommend incorporating normative criteria to the clause in terms of which meaningful engagement would take place to allow the process of engagement to go beyond just procedural fairness. Normative criteria guiding the process of meaningful engagement could include transparency, flexibility, practicality,[62] as well as the best interests of the child principle.[63]

[60] L Chenwi and K Tissington Engaging meaningfully with government on socio-economic rights: A focus on the right to housing" p 8 https://docs.escr-net.org/usr_doc/Chenwi_and_Tissington_-_Engaging_meaningfully_with_government_on_socio-economic_rights.pdf.
[61] Ibid at 9.
[62] Gustav Muller, "Conceptualizing Meaningful Engagement as a Deliberative Democratic Partnership," Stellenbosch Law Review 22, no. 3 (2011): 742-758, page 756. Muller discusses the benefits of meaningful engagement in the context of evictions.
[63] *Rivonia* para 2.

MERGERS AND CLOSURES

143. **Clause 13** of the 2022 BELA seeks to amend section 12A of the SASA by expanding on and clarifying what the MEC's obligations are and the procedure to be followed when it is exercising its power to merge two or more schools.

144. SECTION27 periodically receives complaints from SGBs and community members who seek advice and assistance on their schools being merged with other schools. In many cases we find that the SGB and community members are opposed to plans by the department to merge their school with another school. There are multiple reasons why the SGBs and community members oppose school mergers, including communities wanting a school which belongs to that particular community. However, we have also noticed that what exacerbates the tensions and creates animosity between the community and department representatives is the lack of meaningful engagement.

145. We welcome the clarification of the procedure to be followed by the MEC when merging schools. Particularly the added requirement that the school principal must ensure that every learner receives a notice which the learner must give to their caregivers and the additional requirement of communicating the intention to merge through any other forms of communication which ensure that the information is as widely spread as possible. Moreover, the clarification of the process to be followed by the MEC after the submission of representations from interested parties and the SGB as well as the obligation on the MEC to provide reasons for the decision is welcomed.

146. While the amendments speak to the rationalisation or redeployment of the workforce at the "new single public school" we note that the amendment does not speak to ensuring that the new school is able to accommodate all the new learners. From our experience with client communities and SGBs, the issues that are prominent when schools are merged include parent's inability to afford the school

uniform of the new school their child attends, the failure to provide scholar transport to learners to their new school which is sometimes further away from them, as well as inadequate classroom space and insufficient sanitation facilities.

147. In 2021, Makangwane Secondary School, a client school of SECTION27 located in the Capricorn district in Limpopo, was merged with another school in a neighbouring village. The school which Makangwane was merged with, Ramohlakana Secondary School did not have sufficient sanitation infrastructure to accommodate the increased number of learners it would have to accommodate after the merger. The department nevertheless persisted with merging the two schools prior to the construction of the necessary sanitation infrastructure. During February 2022, another Limpopo SGB whose school was merged with another one, approached SECTION27 and amongst their complaints were that transportation had not been provided to transport the learners to the new school. Another one of our parent clients in the Free State whose school had been merged with another approached SECTION27 because the community could not afford the required school uniform at the new schools.

148. We recommend that, when a school is merged with another, the amendments be revised to require the MEC to ascertain whether the new school has the infrastructure to accommodate the increased number of learners at the school. We also recommend that the MEC be required to ensure that transportation arrangements are put in place and that any challenges involving school uniforms are addressed before the commencement of the merger.

LTSM

149. **Clause 16** of the 2022 BELA gives the power to the HoD to centrally procure identified LTSM for schools, in consultation with the SGB and on the basis of efficient, effective, and economic use of public funds or uniform norms and standards.

150. In *Minister of Basic Education v Basic Education for All* (*BEFA*),[64] the Supreme Court of Appeal declared that:[65]

"It is [...] the duty of the State, in terms of s 7(2) of the Constitution, to fulfil the s 29(1)(a) right of every learner by providing him or her with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed."

151. The importance of the provision of a textbook to every learner for every relevant subject before the commencement of teaching cannot be overemphasised. In the *BEFA* judgment, the SCA further stated:[66]

"Clearly, learners who do not have textbooks are adversely affected. Why should they suffer the indignity of having to borrow from neighbouring schools or copy from a blackboard which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks at home and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against."

152. Despite the recognition of the necessity of textbooks as a component of the right to basic education, shortages of textbooks and other LTSM (such as stationery) are commonplace. As recently as March 2022 the Khula Community Development Project was forced to take the government to court for its failure to deliver textbooks and stationery to schools for the 2022 academic year.[67]

153. The High Court, in granting the order sought by the Applicant, noted that the HoD's conduct undermined the "...governance principles of efficiency,

[64] (20793/2014) [2015] ZASCA 198.
[65] Ibid para 53.
[66] Para 49.
[67] Khula Community Development Project v The Head of Department, Eastern Cape Department of Education and Others (Eastern Cape Division of the High Court, Makhanda) (unreported, case number 611/2022).

transparency, responsiveness, equity and accountability."[68] This is because, amongst other reasons including the immediately realisable nature of the right to basic education, the information the HoD had provided in the course of litigation was vague and lacked detail.

154. The *Khula Community Development Project* case is highly concerning, not least for the fact that textbooks and stationery had not been delivered to schools well into the first term, but also because it was the HoD who was responsible for procuring and delivering such textbooks and had failed to do so.[69]

155. Therefore, a centralised system for the procurement of LTSM, as envisaged by clause 16 of the 2022 BELA, was already in place. However, because of alleged "unprecedented budget shortfalls" the HoD had not delivered on its duty to ensure schools had textbooks and stationery.[70]

156. According to section 5A (1)(c) of the SASA the Minister of Basic Education has the obligation to prescribe norms and standards for the provision of LTSM. In 2014, the DBE published the Draft National Policy for the Provision and Management of Learning and Teaching Support Material (2014) (Draft LTSM Policy). As noted in our submission on the 2017 BELA, SECTION27 was largely supportive of the Policy, which we expressed in our comments on the Policy in 2014. However, to this day, a National LTSM Policy still not been finalised.

157. The Draft LTSM Policy aimed to centralise procurement of LTSM at the provincial level. This was to occur in line with the principles set out in the Policy, which also set out clear obligations for SGBs and Education Districts.

158. There is no indication in the 2022 BELA as to how the Policy and clause 16 of the 2022 BELA will operate together. Simply centralising procurement without

[68] Ibid para 60.
[69] Ibid para 11.
[70] Ibid para 11.

putting in place principles to guide governance and checks and balances will not necessarily lead to improved delivery of LTSM, as was evident in the *Khula Community Development Project* case.

159. We believe it is urgent for norms and standards to be passed for the procurement of LTSM. As we noted in our submission on the 2017 BELA, a clause allowing for centralised procurement of LTSM will not on its own, address the many issues associated with the procurement of LTSM for schools.

160. If clause 16 is to be retained, we recommend, in line with the *Khula Community Development Project* judgment, that alongside the standards of efficient, effective, and economic use of public funds or uniform norms and standards, clause 16 must reiterate that the procurement of LTSM must also occur in line with section 195 of the Constitution, which sets out the principles and values governing public administration including transparency, responsiveness, accountability and equity.

INCREASE IN PENALTIES FOR PARENTS WHO FAIL TO CAUSE THEIR CHILDREN TO ATTEND SCHOOL

161. **Clause 2** of the 2022 BELA states that any parent who fails to cause their learner to attend compulsory schooling, where there is no "just cause" and the HoD has given written notice, is guilty of an offence and, if convicted, is liable to a fine and/or to a term of imprisonment not longer than 12 months.

162. While the reduction in the proposed period of imprisonment in the 2022 BELA compared to the 2017 Draft BELA – from 6 years to 12 months – seems less draconian, the sentence of 12 months still amounts to double the maximum imprisonment period in SASA currently.

163. It is well known that habitual school absenteeism is harmful to both learners and the wider community, yet criminalising parents who do not ensure the attendance of their children would potentially have the effect of depriving a child of

a breadwinner or caregiver. In particular, the imprisonment of parents would deprive children of their right to parental care.[71] There has been no indication that the prosecution of parents actually improves attendance rates and evidence shows that these measures are often counterproductive.[72]

164. According to section 28(2) of the Constitution, a child's best interests are paramount in every matter concerning the child. It is highly questionable whether imposing a prison sentence or a fine on parents for school absences is in the child's best interest.

165. There are many cases where the absenteeism of a child from school is due to factors beyond a parent's control, including lack of transportation and socio-economic circumstances. Imposing a prison sentence and/or fine on a parent for not causing their child to attend school would be to individualise a systemic problem.[73] Instead of assisting families and learners to prevent school absenteeism with supportive measures, the SASA simply incarcerates and/or fines on individual parents.

166. Imposing such sentences also has the effect of stigmatising parents and learners in their communities. As stated by Donoghue:[74]

"Children may experience ostracism and alienation within their neighbourhoods which may be compounded by community perceptions that prisoner parents are intrinsically bad parents . . . inmate mothers are not only seen to offend against society, but also against their role as mothers'. In addition, children of imprisoned mothers experience feelings of abandonment which can lead to a 'profound sense of loss', depression, 'difficulty sleeping and concentrating', together with other symptoms 'closely associated with post-traumatic stress disorder'."

[71] The Constitution section 28(1)(b).
[72] Jane Donoghue "Truancy and the Prosecution of Parents: An Unfair Burden on Mothers?" *The Modern Law Review* at 244.
[73] Ibid at 219.
[74] Ibid at 235.

167. Finally, the criminalisation of not causing one's child to attend school has the potential to disproportionately affect mothers, who are often seen as the primary actors responsible for a family's well-being and are more likely to be the custodial parent. [75]

168. Therefore, we recommend that BELA removes the criminal penalty on parents who fail to cause their children to attend school in section 3(6)(a) of the SASA. However, if the criminal penalty is to be retained, there should be no increase in the maximum possible sentence for parents who are found guilty. Further, any imposition of a prison sentence or fine on a parent based on the absence of their child from school should be a measure of last resort (if ever utilised) and other methods of securing the attendance of the child – such as support measures for both the learner and their parents – should be promoted.

169. In this regard, if the criminal penalty on parents in section 3(6)(a) of the SASA is to remain, we reiterate our endorsement of the Centre for Child Law's (CCL) recommendation made in 2017 for a section to be added that would SASA state:

"Any court sentencing a person in relation to a conviction mentioned in [section 3 (6) or 3 (7)] must consider the effects of such 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."

PENALTY FOR PERSONS WHO DISRUPT, HINDER, OBSTRUCT OR DISTURB SCHOOL ACTIVITIES

170. **Clause 2** of the 2022 BELA proposes to add a provision to the SASA that would make it an offense, which is punishable by a fine and/or imprisonment for up to

[75] Ibid at 230.

twelve months, for any person to unlawfully and intentionally disrupt, hinder obstruct or disturbs school activities or schools in the performance of their activities.

171. An almost identical clause was provided for in the 2017 Draft BELA, except that clause 2 of the 2022 states that the disruption must be "unlawful and intentional" (rather than just "wilful") and the maximum term of imprisonment was set as six years in the 2017 BELA as opposed to 12 months in the 2022 BELA.

172. In SECTION27's 2017 submission we noted that we are critical of any protest action that disrupts school activities and jeopardises the right to basic education. In the social unrest in Gauteng and KwaZulu-Natal in 2021 the cost of damage to schools was estimated to be over R141 million.[76] This will no doubt negatively impact the right to education for thousands of learners.

173. in 2016, after mass protests in Vhembe District, Limpopo, twenty-four schools were destroyed. With the ailing infrastructure that already exists in Limpopo, the province suffered a further set-back. Government having to reallocate funds to the schools that were destroyed in the protests hindered the progression of building and maintaining school infrastructure.

174. We therefore note the addition of "unlawfully and intentionally" to the proposed provision as we believe that this will exclude the applicability of the provision to those who are protesting lawfully. We believe this narrows the ambit of the provision. SECTION27 does 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 or under criminal. SECTION27 therefore endorses Equal Education and Equal Education Law Centres submissions that clause 2(b) be abandoned in its entirety.

[76] Department of Basic Education "Unrest damage to KZN & Gauteng schools; School reopening readiness; with Minister" (3 August 2021) accessed from https://pmg.org.za/committee-meeting/33334/.

RANDOM SEARCHES

175. **Clause 8** of the 2022 BELA expands the power of the principal of the school or their delegate to search a group of learners to include the power to search an individual learner.

176. Section 8A of the SASA states that searches may occur only after all relevant factors have been taken into account, which include the best interests of learners, the safety and health of the learners being searched and the other learners at the school, reasonable evidence of illegal activity, and all other evidence.

177. We recognise the need, in some instances, for searches of individual learners as opposed to groups of learners to be conducted. However, individual searches, as well searches of groups of learners, must occur in a constitutionally compliant manner that protects the rights of learners.

178. For this to occur, we believe that schools need further guidance on how to practice their discretion to search learners where there is reasonable suspicion in a particular case beyond those set out in section 8A of the SASA.

179. In the South African Human Rights Commission's (SAHRC) submission on the Education Laws Amendment Bill, 2007, the SAHRC identifies a number of problems with section 8A of the SASA.[77] In particular, the legislative framework may allow principals or their delegates to take on "police roles" and does not give guidance as to what extent a principal or their delegate may search learners. The SAHRC states:

"...section 8A(2)(e) states that the body search "must be conducted in a manner that is reasonable and proportional to the suspected illegal activity". This does not indicate whether the body search will include a "patting down", strip-searching or internal cavity searches. The more invasive the search the more concerning the proposed amendments

[77] SAHRC "Comment on the Education Laws Amendment Bill, 2007" accessed from https://www.sahrc.org.za/index.php/sahrc-publications/submission-on-legislation.

become. The Commission would find it difficult to support body searches that include physical contact between educators and learners as the potential for a violation of rights becomes too high."

180. In order to prevent the violation of learners' rights (including their rights to dignity, privacy, and bodily integrity)[78] and to give guidance to principals as to when and how searches may occur, we recommend that guidelines are developed regarding the searching of learners and that the Minister of Basic Education is granted the power to make regulations on the search of individuals and groups of learners. We further recommend that rules regarding the search of learners be provided for in every school's code of conduct.

THE PROHIBITION OF LIQUOR

181. The SASA currently makes no mention of liquor in regulating 'Random search and seizure and drug testing at schools.' Section 8A was limited to dangerous objects and illegal substances. The 2017 Draft Bill proposed to change this to include the prohibition of liquor, prohibited substances, and illegal drugs and provided a blanket ban on liquor on school premises – except for legitimate educational purposes.

182. **Clause 8** of the 2022 BELA provides that no person may bring liquor, have liquor in his or her possession, or consume or sell liquor on public school premises, or during any public school activity. However, clause 8 also allows for exemptions to this rule. For instance, the SGB of a school may apply to the HoD for permission to permit the possession, consumption, or sale of liquor during any school activity to supplement the resources of the school. The SGB of a school may also, subject to certain conditions and in consultation with the HoD, allow the possession, consumption or sale of liquor during any private event held on school grounds.

[78] The Constitution sections 10, 14, and 12.

183. It is important to keep alcohol out of the reach of children. Having alcohol available in schools or during school activities at any time undermines this objective. A blanket ban on the presence of alcohol on school property or during school activities is the best way to ensure that children will not have access to alcohol. We, therefore, recommend that the exemptions to the general rule regarding the ban on liquor (except for educational purposes) at school or during school activities in clause 8 should be removed.

CHANGES TO THE PREAMBLE OF SASA

184. Clause 42 of the 2022 BELA proposes to amend the preamble of the SASA to add that South Africa's new national system for schools will "...facilitate the education of children through the promotion and protection of the right to basic education".

185. We welcome the recognition of the right to basic education in the preamble. However, according to section 7(2) read with section 29(1)(a) of the Constitution, the duty of the state (and by extension public schools) is not only to protect and promote the right to basic education, but also to respect and fulfil the right to basic education.

186. We therefore suggest that the relevant part of the sentence be rephrased to encompass the full extent of the obligations imposed by the right. It should therefore be phrased as –

...facilitate the education of children through respecting, protecting, promoting, and fulfilling the right to basic education.

CONCLUSION

187. These submissions have been endorsed by the Legal Resources Centre, Zero Dropout Campaign.

188. SECTION27 would welcome the opportunity to make oral submissions.

189. Should you require any further information, kindly contact Dr Faranaaz Veriava at veriava@section27.org.za, Mila Harding at harding@section27.org.za or Zeenat Sujee at zeenat@section27.org.za.