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**CALL FOR SUBMISSIONS ON THE CHILDREN'S ACT, 2005 DRAFT
AMENDMENT REGULATION REGARDING CHILDREN NO. 3608, 27 JUNE
2023**

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A. INTRODUCTION

1. SECTION27 (Incorporating the Aids Law Project) and the Teddy Bear Foundation welcome the opportunity to make submissions on the Department of Social Development's Draft Amendment Regulations Regarding Children, No. 3608, dated 27 June 2023 ("Draft Amendment").
2. SECTION27 is a public interest law clinic that works to influence, develop, and use the law to further the rights to health and basic education in South Africa through research, advocacy, and litigation.
3. The Teddy Bear Foundation is a non-profit organisation offering victim support services to abused children. It provides a holistic and integrated approach to children and their families.
4. We have perused the Draft Amendment to the Regulations and only respond to Clause 5, which relates to the proposed inclusion of Regulation 46B in Chapter 7 of the Regulations to the Children's Act 38 of 2005.
5. We commend the Director-General for proposing the Draft Amendment to the Regulations as empowered by section 142 of the Children's Act 38 of 2005 ("the Children's Act").
6. SECTION27 and the Teddy Bear Foundation have been working in the realm of the rights to basic education and the rights of the child. The upholding of the rights to basic education and children can be achieved through ensuring the efficacy of the National Child Protection Register ("the CPR"). It is through our experiences in enforcing accountability and the efficacy of the CPR that we make these submissions.

B. CLAUSE 5 OF THE DRAFT AMENDMENT – PROPOSED NEW SECTION 46B AND THE NATIONAL REGISTER FOR SEX OFFENDERS

7. We welcome the proposed inclusion of section 46B, as outlined in Clause 5 of the Draft Amendment. The Draft Amendment to the Regulations provides for a Registrar, as the central person who will be responsible for the updating of information and all matters relating to the CPR.
8. The Draft Amendment incorporates the power, duties, and responsibilities of the Registrar. This development seeks to align with the National Register for Sex Offenders (“NRSO”), which is regulated in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“SoRMA”). Section 42 of the SoRMA regulates the Registrar of the NRSO. The Registrar of the NRSO holds similar roles and responsibilities.
9. The Department of Justice is the custodian of the NRSO. The Registrar of the NRSO has to update the NRSO as soon as the Courts provide the names of perpetrators convicted of sexual misconduct. SoRMA sets out the process from once the perpetrator is found guilty and the process that should be followed to get the perpetrator on the NRSO. Section 50 (3) of SoRMA states that the Registrar of the Magistrates Court or High Court should forward the court order to the Registrar of the NRSO to be placed on the NRSO. It further states that the Registrar should be made aware of any appeal processes.
10. Persons to be included on NRSO are included in section 50(1)(a) of SoRMA. These categories include persons, “i) who has been convicted of a sexual offence; (ii) a person who is alleged to have committed a sexual offence in respect of whom a court, has made a finding and given a direction in terms of section 77 (6) or 78

(6) of the Criminal Procedure Act, 1977; (iii) is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence; or (iv) has a previous conviction for a sexual offence or who has not served a sentence of imprisonment for such offence.”

11. Further, SoRMA makes provision for accessibility of the NRSO to the National South African Police Services, for buccal sampling in an investigation.¹ SoRMA also sets out obligations on the Department of Home Affairs to report to the Registrar, in writing, of a change in the identity of any person on the NRSO. It further sets out an obligation on employees to report a sexual offence conviction to their employers,² and employers are obligated to request certificates from the Registrar when appointing persons.³ Reporting obligations and applications for clearance must also be sought by licencing authorities for a business or trade, where the scope of the business involves the care of vulnerable persons.⁴ Finally, persons who seek to apply for foster care, caregiving, kinship, or curatorship must obtain clearance.⁵

12. The Draft Amendment outlines the roles and responsibilities of the Registrar of the CPR. These responsibilities include that the Registrar must ensure:
 - a. that only authorised persons are provided access to the CPR;
 - b. access to the CPR is for official purposes only;

¹ Section 44B of SoRMA.

² Section 46 of SoRMA.

³ Section 45 of SoRMA.

⁴ Section 47 of SoRMA.

⁵ Section 48 of SoRMA.

- c. the application for removal of a person from the CPR must be finalised within 15 days of receiving the application;
 - d. written quarterly reports on Part A and Part B are furnished to the Director-General; and
 - e. the Director-General is informed of any changes to the CPR.
13. The Registrar must, subject to the Children’s Act and SoRMA:
- a. Investigate any allegation regarding the entries made to the CPR;
 - b. Update the database quarterly;
 - c. Establish the relevant human and financial resources required to administer the CPR;
 - d. Inform the Director-General of any changes that are required to be made to the CPR.
14. In light of the above, we propose that the Regulations provide a detailed outline of reporting obligations and vetting of employees in the education sector. Our justification for this proposal is discussed below.

C. STRUCTURE OF SUBMISSIONS

15. In response to the proposed Draft Amendment, the submissions are structured as follows:

15.1 Section D sets out the Background to the submissions, with specific insight into SECTION 27’s and Teddy Bear Foundation’s interest and work in the area.

15.2 Section E discusses the relationship between DSD and the Department of Basic Education, provincial education departments, Educator’s Labour Relations Council, and the South African Council of Educators in the process of reporting and vetting.

15.3 Section F provides the role of private schools and their obligations to protect the rights of children.

15.4 Section G lists a summary of the recommendations; and

15.5 Finally, Section H contains the conclusion.

D. BACKGROUND AND SECTION 27’S AND TEDDY BEAR FOUNDATION’S INTEREST

16. Gender-based violence (“GBV”) is endemic in South Africa. According to media reports, the 2022 statistics on GBV in South African schools reflect that 452 cases of sexual misconduct were reported to the South African Council of Educators (SACE) during the preceding three years, with a drastic increase from 92 in 2019/20 to 169 in 2020/21 and 191 in 2021/22.⁶ Furthermore, the 2022 crime statistics indicate that 294 reported rapes occurred on the premises of educational institutions, and the official opposition party in parliament has expressed concern

⁶ Ntombi Nkosi “The increase in sexual offences in South African schools, a concern” 4 April 2023 <https://www.iol.co.za/the-star/news/the-increase-in-sexual-offences-in-south-african-schools-a-concern-76ca8d00-bb08-4d01-9d5b-c6d74e250127> (Accessed on 12 May 2023); Desiree Van Der Walt. “191 cases of sexual misconduct reported to SACE”. *Politicsweb*, 27 March 2023. <https://www.politicsweb.co.za/politics/191-cases-of-sexual-misconduct-reported-to-sace--d> (accessed 17 May 2023)

that SACE instituted only 23 disciplinary proceedings during 2022, representing a mere 12% of reported cases.⁷

17. The increase in GBV in schools could be attributed to the systemic failures of education authorities to address GBV in the schooling environment. The failure of educational authorities to enforce legal frameworks and hold perpetrators accountable is in breach of various constitutional obligations to respect, protect, promote, and fulfil learners' constitutional rights.⁸ The focus of SECTION27's work in respect of sexual violence is therefore to ensure that the legal frameworks to hold perpetrators accountable are enforced.

18. SECTION27 has been involved in a few cases of sexual violence. One case involved the rape of a 12-year-old girl by a caretaker at a school in the North-West in 2015. A year later, the caretaker, sexually assaulted her sister. The Principal, School Governing Body ("SGB") and the North-West Department of Education ("NWDoE") had failed to take any steps in holding the perpetrator to account. In 2021, SECTION27 instituted a court application to compel the NWDoE, the Principal and the SGB to take the necessary steps in ensuring that the perpetrator was held to account. On 24 March 2022, SECTION27 obtained a court order mandating the Principal, SGB and NWDoE to comply with its constitutional and statutory obligations.

⁷ Id.

⁸ The education authorities' constitutional obligations are espoused in sections 9, 10, 12, 29(1)(a) and 28 of the Constitution of the Republic of South Africa, 1996. These rights include the right to equality, the right to inherent dignity, the right to freedom and security, the right to access basic education, and the best interests of the child respectively.

19. It was only after SECTION27's intervention that the Principal, SGB, and the NWDoE held a disciplinary hearing against the caretaker. The Disciplinary Committee ("DC") held that the caretaker was guilty of rape and sexual assault. The DC further recommended that the perpetrator be dismissed.
20. Once again, SECTION27 intervened to secure the dismissal of the caretaker. SECTION27 requested that the NWDoE report the caretaker to the Department of Social Development ("DSD") to have the caretaker's name placed on Part B of the CPR, regulated in terms of section 111 of the Children's Act. The NWDoE had failed to do so. SECTION27 approached the DSD directly and it was only in March 2023, that the caretaker's name was placed on the CPR.
21. The Teddy Bear Foundation has also raised concerns about the inclusion of perpetrators in the CPR. They have assisted children in criminal matters, where the perpetrators were found guilty. However, they have not received any confirmation that the perpetrators' names were included in the CPR.
22. As a result of our experience in the North-West case and our collaboration with the Teddy Bear Foundation, we realised the need to interrogate the compliance and implementation of the CPR. SECTION27, acting on behalf of the Teddy Bear Foundation, addressed several letters to the Department of Education ("DBE"), provincial education departments ("PEDs"), the Educators Labour Relations Council ("ELRC"), and the South African Council of Educators ("SACE") to obtain insight into the extent of their compliance with the Children's Act and the Regulations.

E. THE RELATIONSHIP BETWEEN DSD, PEDS, THE ELRC AND SACE

23. Section 125(2) of the Children’s Act⁹ makes specific provisions for officials of PEDs, designated by the Head of Department, to have access to Part B of the CPR to ensure that persons whose names appear on the CPR are not employed by the Department of Basic Education.
24. While the Register is not publicly available, the PEDs have access to the CPR. We recommend that Registrar ensure that the CPR be better utilised by PEDs for vetting prospective employees at schools and to report all perpetrators found guilty of sexual misconduct in the PED processes, to the DSD for placement on the CPR.
- i. Vetting of educators and school staff*
25. The sexual violence scourge is apparent at schools. Vetting employees and prospective employees at schools should be mandatory. PEDs and SACE must have access to the CPR for vetting processes.
26. In the case of *CS v Swanepoel*¹⁰ the MEC of the Western Cape Department of Education was held delictually liable for failing to vet an educator who allegedly

⁹ Section 125 (2) of the Children’s Act states:

“(2) The Director-General may, on such conditions as the Director-General may determine, allow officials of a provincial education department designated by the head of that department access to Part B of the CPR for the purpose of implementing section 123 in relation to schools under the jurisdiction of that department.”

¹⁰ *CS and Another v Swanepoel and Others* [2022] 2 All SA 810 (WCC);

sexually assaulted a girl learner. The Court held that the Department was negligent for failing to vet the educator. The Court concluded that:

“93. In my view, as an employer, the Department was under a legal duty to vet the 1st defendant before accepting him as its employee, to ensure not only that he was formally qualified to teach children, but also that he was a suitable and fit person to work with them, and would not constitute a possible danger to them. The Department failed to discharge that duty.

94. In failing to do so the Department was negligent. In this regard, Wyngaardt conceded that the problem of the sexual molestation of children was a longstanding one, and the Department was well aware of it well before 2018. A reasonable employer in its position would have [foreseen] the possibility that children would be at risk of being sexually exploited or assaulted by educators such as the 1st defendant, who had a previous conviction for the sexual assault of a minor, if it employed them, and would have taken reasonable steps to guard against such harm eventuating by properly screening and vetting applicant educators.”¹¹

27. The matter of *CS* is indicative of the failures of the PEDs in ensuring that staff are vetted before their appointment into permanent positions. It is therefore crucial that PEDs are provided with access to the CPR for vetting of its employees.
28. SACE, another important role player to ensure that educators are vetted, should have access to the CPR when appointing and vetting educators. In terms of section 5(a) of the South African Council of Educators Act 31 of 2000 (“SACE Act”), SACE has the duty to keep a register of educators. Section 5(c) read with section 23 of the SACE Act provides that SACE has the responsibility to remove educators when the educator is held in breach of professional ethics. SACE should conduct vetting of educators before placing the educators on their educator’s

¹¹ Ibid at paras 93-94.

register. It is for this reason that we recommend that Registrar ensures that SACE be provided with access to the CPR and engages with the CPR.

ii. Reporting to DSD

29. We note that the proposed Draft Amendment makes provision for updating the CPR regularly. The disciplinary process for educators accused of misconduct is a parallel process, of which one is led by the PEDs responsible through the ELRC¹² and the second, by SACE. The PEDs, the ELRC, and SACE have constitutional obligations to protect and promote the rights of children.¹³ These organisations have a responsibility to report names of persons found guilty of sexual misconduct to the DSD in terms of the Children's Act.
30. In an article published on 13 July 2023 in *Timeslive*, it was reported that arbitrators of the ELRC did not find it necessary to report the guilty finding for sexual misconduct of an educator to DSD.¹⁴ However, in a letter to SECTION27, the ELRC confirmed that they provide the DSD with all names of educators found guilty of sexual misconduct.
31. Subsequent to the ELRC's letter, SECTION27 and the Teddy Bear Foundation met with officials from the ELRC. It came to light that there is a lack of information on the SACE process on whether educators, who are found guilty of sexual misconduct, are being reported to the DSD. The uncertainty of SACE's

¹² The Educators Labour Relations Council is a body that ensures fair labour practice and policy development in labour practice at both national and provincial levels with oversight from DBE and PEDs.

¹³ See note 4 above.

¹⁴ <https://www.timeslive.co.za/sunday-times-daily/news/2023-07-13-two-sex-pest-teachers-evade-the-child-protection-register/> last accessed on 1 August 2023.

processes opens the risk of educators being transferred between provinces and even educators transitioning from public to private schools.

32. In the circumstances, we recommend that the Registrar is tasked with ensuring that the SACE educators' register and the CPR are aligned and that no name, which appears on the CPR appears on the educators' register. We recommend that this is done on a quarterly basis.
33. Furthermore, in addition to PEDs the ELRC and SACE forward the names of persons found guilty of sexual misconduct, we recommend that the newly appointed Registrar requests quarterly reports from ELRC, SACE, and PEDs, which includes consolidated lists of persons found guilty of sexual misconduct to the DSD. In doing so, it will ensure that no person is omitted from being included in the CPR.

F. PRIVATE SCHOOLS

34. Section 8(2) of the Constitution provides for the horizontal application of the Constitution. Section 8 (2) of the Constitution provides that "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".
35. In *Governing Body of the Juma Masjid Primary School v Essay N.O.*¹⁵ the court found that one can impose the duty of protecting rights to private parties and not

¹⁵ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* (2011) 8 BCLR 761 (CC) ("Juma Masjid").

only to the state¹⁶ but that such a duty should only be negative in its application.¹⁷ The majority judgment in *AB v Pridwin Preparatory School*¹⁸ emphasised that our Constitution aims to be transformative, and this must be applied in our interpretation of rights. Therefore, because independent and private schools have the potential to violate the right to basic education, they must be subjected to a constitutional obligation to protect it.¹⁹ Just because the State is required to further the right to basic education does not mean that other parties cannot be expected to do the same.²⁰

36. *Juma Masjid* and *Pridwin* illustrate that private schools have a negative duty to protect children's right to an education. Such a duty is fundamental to our constitutional order. The point made in the conclusion of the concurring judgment of *Pridwin* is of significance, as it entails that the dignity of children is implicated when we don't impose duties on private parties to respect the right to access basic education.
37. We note that the Children's Act and the Regulations do not explicitly grant private schools access to the CPR. However, educators in private schools are not absolved from their constitutional obligations to protect the right to basic education. Therefore, educators in the private sector should be vetted and private schools should be mandated to report educators guilty of sexual misconduct to the newly proposed Registrar.

¹⁶ Ibid at para 60.

¹⁷ Ibid at para 58.

¹⁸ *AB and Another v Pridwin Preparatory School and Others* (2020) (5) SA 327 (CC) ("*Pridwin*").

¹⁹ Ibid at para 131.

²⁰ Ibid at para 178.

38. Private schools are not immune from sexual misconduct allegations. In 2020, there were various news reports of allegations of a St Andrews educator, David Mackenzie. The case shows the flaws in the current system for dealing with sexual misconduct. When the offences took place back in 2018, MacKenzie was suspended pending a disciplinary hearing. However, David resigned before the hearing took place, meaning he was never found guilty and therefore never reported.²¹
39. In other reports, Mark Evans, an educator and water polo coach at the Diocesan School for Girls, allegedly sexually abused some of the learners of the school. Mr Evans was suspended. In this case, the school also reported the matter to SACE. Commenting on this matter SACE’s Manager of Legal Affairs said the following: *“It is extremely wrong of a principal or any other educator to try and manage the process from within [the school]. It is unacceptable, and we owe it to learners to protect them. In the event a school principal attempts to keep things under wraps, unfortunately, the consequences are unpleasant.”*²²
40. Most recently, in August 2023, it was reported that an educator sexually assaulted a 7-year-old boy at St Andrews College in the Eastern Cape. The Educator was vetted twice but was cleared in the vetting process. The educator is yet to plead in court.²³ this report raises concerns about the process. Such occurrences could be

²¹ Sheena Swemmer ‘David Mackenzie - what it reveals about the complexities disciplining teachers’ 28 September 2021 <https://www.news24.com/news24/opinions/analysis/analysis-sheena-swemmer-david-mackenzie-what-it-reveals-about-the-complexities-disciplining-teachers-20210928> (Accessed on 2 August 2023).

²² Sesona Ngqakamba ‘Another water polo coach suspended at top school amid News24/My Only Story Investigation’ 21 October 2021 <https://www.news24.com/news24/southafrica/news/exclusive-another-water-polo-coach-suspended-at-top-school-amid-news24my-only-story-investigation-20211021> (Accessed on 2 August 2023).

²³ <https://www.news24.com/news24/southafrica/news/the-st-andrews-staffer-accused-of-raping-a-7-year-old-was-vetted-and-cleared-twice-in-four-years-20230803> (Accessed on 4 August 2023).

attributed to failures to report names of perpetrators, guilty of sexual misconduct, to the DSD to be placed on the CPR.

41. It is against this backdrop that we submit that there is a need for oversight over the affairs of private schools. The current lack of oversight of sexual misconduct matters impedes the rights to basic education,²⁴ safety,²⁵ and the best interests of children²⁶ attending private schools. To circumvent sexual assault in private schools, the reporting and vetting obligations should be made mandatory for private institutions.
42. We, therefore, recommend that the Registrar envisaged in the proposed Draft Amendment should receive reports from private schools and make the CPR accessible to regulatory bodies and management of private schools for vetting of all its employees and prospective employees.

G. RECOMMENDATIONS

43. In summary, we recommend the Registrar responsible for the CPR must ensure that the obligation of the Registrar is aligned with the Registrar of the NRSO in that reporting and vetting obligations are elaborated upon. We recommend that:
 - 43.1. The Registrar ensures that PEDs, the ELRC and SACE are provided with access to the CPR and that they consult the CPR for vetting of all prospective employees.

²⁴ Section 29(1)(a) of the Constitution.

²⁵ Section 12(1) of the Constitution.

²⁶ Section 28(2) of the Constitution.

- 43.2. The Registrar PEDs, the ELRC, and SACE report the names of all persons found guilty to DSD, timeously and specifically to the Registrar, for updating the CPR.
- 43.3. The PEDs, ELRC and SACE furnish quarterly reports to the Registrar, including a list of all persons that have been found guilty of sexual misconduct.
- 43.4. The Registrar ensures that SACE's educators register, and the CPR are compared with each other on a quarterly basis.
- 43.5. That the Registrar makes the CPR available to private schools and their regulatory bodies.

H. CONCLUSION

- 44. We welcome the steps taken in respect of the Registrar with specific roles and functions. The gist of our submissions however is to ensure that the Registrar has the responsibility for ensuring that specific government entities are fulfilling their duties in respect of the protection of children. The DSD, PEDs, ELRC, and SACE have a responsibility to realise the right to basic education and to act in the best interests of the children in terms of the Constitution. The Draft Amendment calls for tighter oversight of the CPR through the Registrar, which we submit would ensure that the PEDs, ELRC, SACE, and private schools are provided with access to the CPR for vetting purposes, and to ensure daily reporting of educators found guilty of sexual misconduct, to the DSD.

SECTION27

TEDDY BEAR FOUNDATION

07 August 2023