



**TO: OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
THE COMMITTEE ON THE RIGHT TO THE CHILD**
By email: ohchr-crc@un.org

**SECTION27 SUBMISSIONS ON THE GENERAL COMMENT ON CHILDREN'S
RIGHTS TO ACCESS TO JUSTICE AND EFFECTIVE REMEDIES**

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A. INTRODUCTION

1. SECTION27 (Incorporating the Aids Law Project) welcomes the opportunity to make submissions to the Office of the High Commissioner for Human Rights - Committee on the Rights of the Child relating to General Comment 27 on Children's Rights to Access to Justice and Effective Remedies.
2. SECTION27 is a public interest law organisation that works to influence, develop, and use the law to further the right to access basic education and the right to access to healthcare in South Africa through research, advocacy, and litigation.
3. The call for submissions requires comments relating to access to justice and effective remedies that ensure the State and private actors are held accountable for injustices against children. SECTION27's submissions focus on effective remedies for children in the realm of the right to access basic education.
4. Having read the concept note and the guiding questions, SECTION27's submissions are structured as follows; 1) Background to the Rights of the Child and the Best Interests of the Child Principle; 2) Issues affecting Children – Barriers and Discrimination; 3) Strategies used to enhance the rights of children; 4) Remedies; 5) Recommendations and 6) Conclusion.

B. BACKGROUND TO THE RIGHTS OF THE CHILD AND THE BEST INTERESTS OF THE CHILD PRINCIPLE

5. The Convention on the Rights of the Child (CRC) provides that the standard of adjudicating matters concerning children should be 'the best interests of the child principle'. Article 3(1) of the CRC provides that

“In all actions concerning children whether, undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

6. The African Charter of the Rights and Welfare of the Child (ACRWC) goes a step further by providing the best interests of the child as the standard for adjudication of matters relating to children. Article 4 of the ACRWC states “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”
7. The Constitution of the Republic of South Africa promotes the rights of the child.¹ Section 28 of the Constitution incorporates explicit rights of a child including the right to basic necessities, such as food, water, shelter, family safety and security. Section 28(2) establishes that the rights of a child are paramount, it states: “*A child’s best interests are of paramount importance in every matter concerning the child.*”
8. It is against this constitutional framework that South African courts have developed and nuanced the standards of adjudicating matters concerning the rights of a child. In *S v M*,² the court stressed that the best interests of the child are a fundamental consideration. The paramountcy principle places the rights of children at the forefront of the issue. The court further explained that the best interests of the child must consider other rights, including the rights of others and broader societal needs. Sachs J stated that:

¹ Constitution of the Republic of South Africa, 1996.

² *S v M* 2008 (3) SA 232 (CC).

“The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned.”³

9. SECTION 27’s work has included the interpretation of the best interests of the child principle, read together with section 29 of the Constitution, dealing with the right to basic education. In *Centre for Child Law v Minister of Basic Education*, the court stated “[s]ection 28(2) does not only create a stand-alone right but strengthens the right to basic education as well. In seeking to uphold the best interests of children in ‘every matter’ it also serves to augment the right to education.”⁴
10. The standard of adjudicating and approaching matters relating to children should be retained in the best interests of the child. This standard has been set by international treaties and adopted and enforced domestically.

C. ISSUES AFFECTING CHILDREN – BARRIERS AND DISCRIMINATION

11. The socio-political landscape in South Africa accentuates the vast differences in experiences and challenges of children. Barriers to accessing education and discrimination are mainly experienced by Black learners living in poverty. Black learners living in low-income and/or rural areas face discrimination based on their race, socio-economic status, gender, nationality and sexual orientation.

³ Id at para 42.

⁴ *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG) at para 77

12. SECTION27 assists learners from vulnerable and marginalised communities. These children have not had the financial means to access justice or psycho-social support. The State's failure to provide adequate infrastructure in schools, or to ensure the implementation of policies that provide equal access to basic education, hinders access to justice.⁵

Inadequate infrastructure at schools

13. In 2016, in a rural village in the Limpopo province, a 6-year-old learner, Michael Komape drowned in a pit latrine toilet at school. SECTION27 assisted the family in obtaining compensation and accountability for the death of their child.⁶ In 2018, the Limpopo High Court granted SECTION27 a structural order, ordering the Limpopo Department of Education to develop and furnish its plans to eradicate plain pit latrines in the province.⁷

Gender

14. The gendered impact of the State's failures was highlighted in the failure to implement policies relating to sexual harassment and misconduct. In 2021, SECTION27 represented the Teddy Bear Foundation and the parents of a learner to secure justice for the rape of a girl learner. The 12-year-old learner was raped by a caretaker at a school in 2015. The education authorities had failed to act against the alleged perpetrator, which forced the learner to obtain legal assistance.

⁵ This was the case of *EM obo BM v Peter Diale and Others* (Case no. M592/21) unreported, wherein the North-West Department of Education failed to take any disciplinary action against the alleged perpetrator. After months of liaising with the Department, without any positive response, we had to litigate. The applicants based their case on implementation of the Protocol of Management and Reporting of Sexual Abuse.

⁶ *R K v Minister of Basic Education* 2020 (2) SA 347 (SCA).

⁷ <https://section27.org.za/wp-content/uploads/2024/07/Komape-Judgment-17.09.21.pdf>.

It was a result of SECTION27's intervention that the learner obtained redress. However, the criminal matter has not commenced, nine years after the incident.

15. The increasing rate of teenage pregnancy hinders learners' access to basic education.⁸ Although South Africa has positive policies to protect learners' access to school, societal and cultural barriers hinder access. In 2022, four girl learners in Kwa-Zulu Natal were expelled on the basis of their pregnancy. One learner was unable to write her final school leaving exam. The hostility of the community against these learners and their families placed additional pressure on the school to prevent the learners from returning to school. After SECTION27 intervened, the Department of Basic Education capitulated to SECTION27's demands, and the learner was permitted to write the exam. Teenage pregnancy is a multifaceted problem that requires various departments to work together to address the gender disparities in basic education.

16. Finally, gender discrimination includes stigmatisation and barriers for LGBTQIA+ learners. The Department of Basic Education has made progress in strengthening inclusive education. However, religious backlash against protecting LGBTQIA+ learners at schools places hurdles for the full realisation of these learners' rights to access basic education.⁹

⁸<https://www.georgeherald.com/News/Article/Local-News/teen-pregnancies-continue-to-rise-202402150235>

⁹ <https://theconversation.com/lgbtiq-learners-at-risk-in-south-africa-as-conservative-christian-groups-fight-plans-for-safer-schools-194823>.

Migrant children

17. The multi-layered aspect of discrimination includes the rights of foreign nationals. Many children are unable to access school without the relevant documentation. In the matter of *Centre for Child Law v Minister of Basic Education*, the Centre for Child Law challenged the constitutionality of a departmental circular that prevented the enrolment of migrant learners into schools. The Court held that the circular was unconstitutional, stating

“In all these circumstances it must be concluded that clauses 15 and 21 of the Admission Policy unjustifiably limit the rights under sections 9(1), 10, 28(2) and 29(1)(a) of the Constitution and fall to be declared unconstitutional. The impugned Admission Policy (Circular 06 of 2016, as amended by Circular 01 of 2019) does not save clauses 15 and 21 from unconstitutionality. Circular 06 of 2016, which embodies policy, has not been withdrawn. It remains operative. A policy can hardly be amended by a circular. In any event, and as already pointed out, the 2019 Circular merely extends the period afforded to parents to obtain documents from 3 to 12 months. The requirement for learners to furnish identification documents has not been abrogated.”¹⁰

18. Despite the High Court ruling, migrant learners continue to face challenges in enrolling in schools. SECTION27 receives complaints from parents with access to the admission processes to ensure timely enrolment at schools.

Child safety

19. Children in South Africa continue to experience violence. When this violence takes place in school, it impacts not only their bodily integrity rights but their right to basic education. Many educators resort to egregious forms of corporal

¹⁰ *Centre for Child Law v Minister of Basic Education* supra note 4 at para 101.

punishment despite corporal punishment being abolished.¹¹ SECTION27 receives many complaints from parents on behalf of their children who have been victims of corporal punishment.

Racism

20. Racism continues to plague schools.¹² In July 2024, complaints of racism were lodged with the Department of Basic Education. In August 2024, at the high school in Pretoria, White learners formed a ‘Whites only’ WhatsApp group.¹³ In the Western Cape Province, a teacher used derogatory language against Black learners. In another instance, Coloured learners discriminated against Black learners by roleplaying a slave auction.¹⁴

D. STRATEGIES USED TO ENHANCE THE RIGHTS OF CHILDREN

21. SECTION27 uses a three-pronged approach to guide its work in ensuring justice for the communities it serves – research, advocacy and litigation.
22. Before initiating any legal process, research is central to interrogating the systemic issues on a particular issue. SECTION27 adopted this approach in its work on climate change and its impact on basic education.¹⁵ The research included the

¹¹ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757.

¹²<https://www.dailymaverick.co.za/article/2024-08-10-education-transformation-sa-schools-try-to-navigate-the-nuances-of-racial-clashes-in-the-classroom/>.

¹³<https://www.dailymaverick.co.za/article/2024-08-05-pretoria-high-school-for-girls-racism-row-independent-probe-launched/>.

¹⁴<https://www.news24.com/news24/southafrica/news/pinelands-high-pupils-back-at-school-after-auctioning-off-black-classmates-20240814>; <https://www.sanews.gov.za/south-africa/justice-department-condemns-alleged-racism-incidents>.

¹⁵ <https://section27.org.za/wp-content/uploads/2024/06/S27-ClimateChangeReport12024-FINAL.pdf>.

Committee's General Comment 26, the international jurisprudence and desktop research on the impact of climate change on basic education and healthcare. The research report will form the basis for collaboration with the Department of Basic Education for climate change awareness and the materialisation of adaptation plans. Following the research, advocacy plans have been drafted for implementation.

23. SECTION27's advocacy initiatives include legal literacy and workshops to capacitate communities on their rights to access basic education and healthcare, particularly access to sexual and reproductive healthcare.¹⁶ The workshops entail sessions on sexual and reproductive health rights and asserting one's rights against violence in the school environment. The workshops and training have been met with a positive response and have robustly engaged with the content.
24. Litigation is used as a last resort and only in matters where there is no room to negotiate for an amicable solution.¹⁷
25. These strategies effectively develop practice and jurisprudence that protect and promote children's rights. The litigation strategies vary depending on the nature and factual circumstances of a case. In some instances, litigation is the only option to obtain any action from a State party.

¹⁶ <https://section27.org.za/campaigns/adolescent-sexual-and-reproductive-health-rights/>.

¹⁷ See footnote 5.

E. REMEDIES

26. The outcomes of cases are important in obtaining tangible relief for the children. In cases of children, the outcomes should promote and enhance the best interests of children that protect their rights to equality,¹⁸ dignity,¹⁹ and safety and security.²⁰
27. The courts in South Africa have adopted child-centric approaches in dealing with cases. In the matter of *Pridwin*,²¹ the court held that children have a right to be heard in disciplinary hearings. The case involved the suspension and expulsion of two learners from a private school. The learners' parents contested the school's decision that the school had failed to hear from the learners before a decision was taken. The court asserted that as part of procedural fairness, learners have a right to be heard in matters concerning their rights to access basic education. This matter was also central in holding private entities accountable for infringing constitutional rights.
28. In the matter of *Centre for Child Law v South African Council of Educators (SACE)*,²² the court dealt with the leniency of the sanction imposed on educators for egregious corporal punishment, providing pragmatic and effective outcomes. The Centre for Child Law and the parents of two learners who were severely injured because of corporal punishment, approached the court challenging the lenient sanctions imposed on the educators. The relief sought included remitting

¹⁸ Section 9 of the Constitution.

¹⁹ Section 10 of the Constitution.

²⁰ Section 12 of the Constitution.

²¹ *AB v Pridwin Preparatory School* 2020 (5) SA 327 (CC).

²² *Centre for Child Law v South African Council for Educators* 2024 (4) SA 473 (SCA).

the matters to SACE and revising the Mandatory Sanction Policy. The Supreme Court of Appeal provided SACE with guidance when re-adjudicating the matter and revising the mandatory sanction policy. The Court relied on *Pridwin*,²³ adopting child-centric remedies and the importance of the procedural aspects of the best interests of the child held that the SACE has a duty to assess the impact of the harm on learners.

29. In light of the State's failures to implement court orders, structural orders have been used to ensure compliance with court orders. In 2021, the *Komape* matter returned to court challenging the Department's unconstitutional plans to eradicate pit latrine toilets at all schools in the province. SECTION27 successfully obtained a structural order against the Limpopo Department of Education. The court ordered that the Limpopo Department of Education produce progress reports every six months on the eradication of pit latrine toilets. The progress made in eradicating pit latrine toilets requires constant monitoring and verification.
30. Over the thirty years of democracy the Constitutional Court has come to the aid of learners in matters relating to language,²⁴ learner pregnancy,²⁵ school governance and admissions,²⁶ school exclusions during examinations²⁷ and the provision of basic education in private schools.²⁸ This purposeful jurisprudential development,

²³ *AB v Pridwin* supra note 21.

²⁴ *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC).

²⁵ *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2014 (2) SA 228 (CC).

²⁶ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School* 2013 (6) SA 582 (CC); *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng* 2016 (4) SA 546 (CC).

²⁷ *Moko v Acting Principal of Malusi Secondary School* 2021 (3) SA 323 (CC).

²⁸ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O.* 2011 (8) BCLR 761 (CC); *AB v Pridwin Preparatory School* supra note 21.

pursued largely by public interest law centres including SECTION27, has laid the foundations for a rights-focussed basic education sector.

31. The Constitutional Court's jurisprudence has aligned with the goals of transformative constitutionalism. As such, remedies entrenching transformative constitutionalism have since been embedded in legislative reform. For example, the Basic Education Law Amendment Bill aims to significantly amend the South African Schools Act²⁹ and incorporates progressive provisions of corporal punishment and departmental oversight of School Governing Body policies.
32. It is against this backdrop, that we submit that litigation has the potential to result in long-term impact in protecting the rights of children.

F. RECOMMENDATIONS

33. Having outlined SECTION27's experiences, we recommend that the Committee incorporate the following:
 - 33.1. Research, advocacy and litigation are important approaches to enhancing the rights of children.
 - 33.2. Structural orders are useful to ensure the implementation of court orders.
 - 33.3. Child-centric approaches must be adopted throughout the litigation process.
 - 33.4. The remedies sought and awarded must have tangible outcomes that enhance the realisation of the rights of children.

²⁹ 84 of 1996.

- 33.5. Intergovernmental relationships should be strengthened to ensure holistic redress for children.

G. CONCLUSION

34. The best interests of the child principle must transcend in all matters relating to children. SECTION27 advocates for a combination of research, advocacy and litigation that enables holistic outcomes and impact to enhance the rights of the child. The remedies sought in litigation must incorporate child-centric remedies that ensure the best interests of children.

SECTION27

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