



**FW de Klerk**  
FOUNDATION

**THE FW DE KLERK FOUNDATION**  
*Upholding South Africa's National Accord*

**To:** The Department of Basic Education  
For attention: Adv TD Rudman  
Per email [rudman.d@dbe.gov.za](mailto:rudman.d@dbe.gov.za)  
**RE:** Comments on the Draft Basic Education Laws Amendment Bill, 2022  
**Date:** 12 August 2022 (Deadline for comments: Monday, 15 August 2022)

**INTRODUCTION**

Dear Honourable Minister Motshekga,

1. We refer to your invitation for written submissions on the Draft Basic Education Laws Amendment Bill ("the Bill").
2. The FW de Klerk Foundation ("the Foundation") is a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 ("the Constitution").
3. To this end, the Foundation seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their constitutional rights and to assist them in claiming their rights. The Foundation does so in the interest of everyone in South Africa.
4. As such, the Foundation welcomes the opportunity to make concise submissions to the Department of Basic Education on the above Bill.
5. We trust that our submission will be of assistance in guiding the Department in its deliberations regarding the Bill. We are also available to make a verbal submission if required.

**PREMISE**

6. We are concerned the Bill will amend the South African Schools Act 84 of 1996 ("SASA") in way that will depart from the Constitution's framework, values and intentions in a democratic state, by infringing directly upon the right to language (section 6), education (section 29), culture (section 30) and association (section 31).
7. The State has an obligation to respect, protect and promote these rights in terms of not only the Constitution, but also international covenants the Republic is signatory to, including the Convention Against Discrimination in Education (UNESCO, 1960), the International Covenant on Economic, Social and Cultural Rights (UN, 1966), and the Convention on the Rights of the Child (UN, 1989).
8. The Bill will empower provincial education department heads to overrule School Governing Bodies' ("SGB") ability to determine admissions and language policies:

- 8.1. It will require admission policies based on “equality” and “equity” - although these terms are not defined. It will also enable provincial education heads to determine what space and resources are available at schools for the admission of additional learners – and whether there are other schools nearby with the capacity to admit prospective learners.
- 8.2. It will give provincial education heads the ability to overrule SGBs’ power to determine schools’ language policies - also based on “equality and equity” - and the need for schools to make effective use of classroom spaces and resources.
9. The Bill discriminates against undocumented learners through the inclusion of the section 1 definition of “required documents”, which goes against the courts ruling in *Centre for Child Law and Others v Minister of Basic Education and Others*<sup>1</sup> (“Phakamisa”) that confirmed that undocumented learners must not be denied access to basic education because of their status.
10. The Foundation submits that the unconstitutional consequences of the Bill can be avoided by altering and/or altogether forgoing certain provisions in the Bill relating to the decision-making powers of School Governing Bodies’ (“SGB”) and the parallel provisions expanding the State’s power in this regard, as well as those dealing with undocumented learners.

#### **LEGAL FRAMEWORK**

11. Basic Education in South Africa is already extensively provided for by the White Paper on Education and Training in a Democratic South Africa, 1995 (“the White Paper”); the White Paper on the Organisation, Governance and Funding of Schools, 1996 (“White Paper 2”); National Education Policy Act 27 of 1996 (“NEPA”); South African Schools Act 84 of 1996 (“SASA”) as amended by the Education Laws Amendment Act 24 of 2005, Act 31 of 2007 and Act 50 of 2002, respectively; Adult Basic Education and Training Act 52 of 2000 (“ABET”); Employment of Educators Act 76 of 1998; Education White Paper on ECD, 2000; and, the Education White Paper 6 on Inclusive Education, 2001.
12. The amendments proposed in the Bill would add further, unnecessary barriers on access to Basic Education and would amount to an irreparable, unilateral and permanent violation of the 1994 constitutional settlement by the ANC government, in so far as it would limit sections 6, 29, 30 and 31 of the Constitution. Read together, these sections provide for the right to use the language and participate in the cultural life of one’s choice, the right of language choice in educational institutions, and the right to establish educational institutions based on a common culture, religion or language.
13. In terms of Section 5(5) of SASA, the admission policy of a public school is determined by the SGB subject to the act and any applicable provincial law. In terms of Section 6(2) of SASA, the SGB is also empowered to determine the language policy of a public school subject to the Constitution, the act and applicable provincial law.
14. Both Domestic law and court rulings hold that SGB are best positioned as parents or guardians of school attendees and members of their local community to ensure “democratic school governance”.

---

<sup>1</sup> 2020 (3) SA 141 (ECG) (12 December 2019).



FW de Klerk  
FOUNDATION

**THE FW DE KLERK FOUNDATION**  
*Upholding South Africa's National Accord*

15. The White Paper holds that:

**“Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by the state authorities with respect to the form that education should take and to take part in its governance.** Parents have an inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling, whether provided by the state or not, subject to reasonable safeguards which may be required by law. **The parents’ right to choose includes choice of the language,** cultural or religious basis of the child’s education, with due regard for the rights of others and the rights of choice of the growing child.”<sup>2</sup>

16. The White Paper 2 holds that:

**“[P]ublic school governance is part of the country's new structure of democratic governance”<sup>3</sup>** and that “governance policy for public schools is based on the core values of democracy”. It expressly states **“[g]overning bodies will have substantial decision-making powers”<sup>4</sup>**. This is again emphasised in that the “decision-making authority of schools in the public sector would be shared among parents, teachers, the community (government and civil society) and the learners, in ways that would support the core values of democracy”.

17. The Bill will discourage public participation through SGB’s as it subverts the partnership model between SGB’s and the DBE. The Constitutional Court has said the following about the partnership model that governs education:

*“An overarching design of [SASA] is that public schools are run by **three crucial partners**. The national government is represented by the **Minister for Education whose primary role is to set uniform norms and standards** for public schools. The **provincial government** acts through the MEC for Education who bears the obligation to establish and provide public schools and, **together with the Head of the Provincial Department of Education, exercises executive control** over public schools through principals. **Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school.**”<sup>5</sup>*

*“The importance of cooperative governance cannot be underestimated. It is a fundamentally important norm of our democratic dispensation, one that underlies the constitutional framework generally and that has been concretised in the Schools Act as an organising principle for the provision of access to education. Neither can we ignore the vital role played by school governing bodies, which function as a ‘beacon of grassroots*

---

<sup>2</sup> Chapter 4 para 3, page 21 of the White Paper.

<sup>3</sup> Chapter 3 para 3.17, page 15 of the White Paper 2.

<sup>4</sup> Chapter 3 para 3.1, page

<sup>5</sup> *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and others* 40/09 [2009] ZACC 32 at para 56.

*democracy' in ensuring a democratically run school and allowing for input from all interested parties.”<sup>6</sup>*

18. We are concerned that, in its endeavour to strengthen the public schooling system, the Bill:

- 18.1. May infringe the right of a person to receive education in the official language or languages of their choice;
- 18.2. Will prove to be illegal, given the scope and limitation of fundamental rights protected under the Constitution and international covenants ratified by South Africa; and
- 18.3. Will result in a situation that is unworkable and impractical given the already scarce financial, structural and human resources at the Department of Basic Education's disposal.

19. The fundamental rights guaranteed in chapter 2 of the Constitution may be limited by laws of general application only to the extent that they are reasonable and justifiable in an open and democratic society based on freedom and equality, and do not negate the essential content of the right in question.

20. The continued erosion of language rights resulting from the implementation of the Bill and the failure to implement the Use of Official Languages Act 12 of 2012, would amount to an unjustifiable and unreasonable limitation to fundamental human rights.

21. We believe the evident intention of the Bill is to force remaining single-medium Afrikaans schools to provide dual-medium education in English and Afrikaans. Experience has shown that dual medium education quickly leads to the extinction or severe dilution of Afrikaans, as evidenced by the language transformation processes followed by public universities in South Africa.

22. A further intention of the Bill is that SGBs will in future be able to appeal against decisions of provincial education heads only to MECs for Education – rather than to the courts.

23. The Bill is seen as a means of overturning the 2018 judgement of the Pretoria High Court in *Hoërskool Overvaal vs Panyaza Lesufi* - which struck down Gauteng Education MEC, Mr Panyaza Lesufi's – order to the Overvaal High School to admit 55 English-speaking students into its 2018 Grade 8 class. Mr Lesufi complained that the school's language policy was “the very essence of racism” and vowed to appeal the judgement “all the way to the Constitutional Court.”

24. The Bill's definition of “required documents” sets a higher threshold to access basic education and is not in line with current admission policies or SASA- which require different documents and processes. It thus imposes arbitrary requirements with criminal sanction for failure to comply- which does not serve a legitimate purpose and fails to consider or resolve the practical barriers in obtaining such documents from the Department of Home Affairs.

---

<sup>6</sup> *The Head of the Department: Department of Education, Free State Province v Welkom High School & Harmony High School* CCT 103/12 [2013] ZACC 25 (10 July 2013) at para 23.



**FW de Klerk**  
FOUNDATION

**THE FW DE KLERK FOUNDATION**  
*Upholding South Africa's National Accord*

**REMEDIES**

25. In order to bring the Bill in line with the rule of law, we propose the following amendments:

- 25.1. Deletion of the provisions which take away or limit powers correctly vested with the SGB and confer them instead to the State, centralising decision-making power in the Provincial Departments who are already overburdened and under-resourced and not appropriately placed to make such decisions- including language policy, admission, staff appointments and leasing of facilities;
- 25.2. The provision by the Bill of Provincial oversight and consultation with the SGB on language and admission in line with the Constitution and provincial law, with the final decision lying with the SGB and a reasonable dispute resolution process for parents;
- 25.3. The provision of definitions of key concepts such as “equality” and “equity”; and
- 25.4. A review of section 1 “required documents” definition considering the *Phakamisa* judgment and existing requirements set in SASA to ensure documents:
  - a) serve a legitimate purpose with regards to school administration or admission, and
  - b) are readily accessible and available via the Department of Home Affairs.

26. We submit that SGB's are the appropriate, competent body to deal with matters relating to admission and language in public schools. To vest power in the State would lead to a complete erosion of Afrikaans, an official language of the Republic as protected by section 6 of the Constitution. By empowering SGB's and their ability to decide on the best interests of their constituent children, the State empowers children.

Kind Regards,

Tyla Dallas

**Manager: Constitutional programmes**

**FW de Klerk Foundation**

Email: [tyla@fwdeklerk.org](mailto:tyla@fwdeklerk.org)