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Upholding South Africa's National Accord

To: **The Western Cape Provincial Parliament Standing Committee on Education**
For attention: Hon D Baartman
Chairperson of the Standing Committee on Education, Western Cape Provincial Parliament
Per email: wasiema.hassenmoosa@wcpp.gov.za ; deidre.baartman@wcpp.gov.za
Re: **Submission on the Basic Education Laws Amendment Bill [B2B-2022]**
Date: 26 March 2024 (**Deadline for comments: Thursday, 4 April 2024**)

INTRODUCTION

Dear Honourable Baartman,

1. We refer to the [invitation](#) from the Western Cape Provincial Parliament's Standing Committee on Education ("the Committee") for written submissions on the [Basic Education Laws Amendment Bill \[B2B- 2022\]](#) ("the Bill" or "BELA 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 Committee on the above Bill. We trust that our submission will be of assistance to the Committee.
5. We also request an opportunity to make a verbal submission.

PROCEDURAL CONCERNS

6. It is trite law that the “*public involvement process must give the public a meaningful opportunity to influence Parliament, and Parliament must take account of the public’s views*”.¹
7. The Bill as adopted by the National Assembly, fails to reflect the significant public submissions made on it, indicating a lack of Parliament being influenced by the public’s concerns about the Bill.
8. This is contrary to what is required of Parliament by the Constitution, particularly sections 59(1) and 72(1), emphasising the fundamental role of meaningful public engagement in shaping legislative decisions.

SUBSTANTIVE CONCERNS

9. We are concerned that the Bill will amend the South African Schools Act² (“SASA”) in a way that will depart from the Constitution’s framework, values and intentions in a democratic state, by infringing directly upon the right to education in an official language of your choice (section 29(2) read with section 6), and the right of individuals and communities to use the language and to participate in the cultural life of their choice (sections 30 and 31).
10. The State has an obligation to respect, protect and promote these rights³ in terms of both the Constitution, and international covenants the Republic is signatory to, including, but not limited to, 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).
11. Public schools are the assets of the community they serve.⁴ The parents whose children are in a school make up the majority of members of a School Governing Body (“SGB”).
12. Yet, the Bill will empower provincial education department heads to overrule SGB’s ability to determine admissions and language policies:

¹ [Mogale and Others v Speaker of the National Assembly and Others](#) 2023 (6) SA 58 (CC) at paras 34 and 35.

² Act 84 of 1996.

³ Sections 7(2) and 8(1) of the Constitution of the Republic of South Africa, 1996.

⁴ [Orqanisasie vir Godsdiensle-Onderriq en Demokrasie](#) 2017 (6) SA 129 (GJ) at para 89.



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- 12.1. It will require admission policies based on “equality” and “equity”⁵ – although these terms are not defined.⁶ 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.⁷
- 12.2. It will give provincial education heads the ability to overrule SGBs’ power to determine schools’ language policies⁸ – also based on “equality” and “equity” – and the need for schools to make effective use of classroom spaces and resources.
13. The Bill discriminates against undocumented learners through the inclusion of the definition of “required documents”.⁹ This goes against the court’s ruling in the [Centre of Child Law and Others v. Minister of Basic Education and Others](#)¹⁰ (“Phakamisa”) that confirmed that undocumented learners must not be denied access to basic education because of their status.
14. The proposed amendments to section 3 of the SASA, particularly subsections 6(a) and (6)(b), raises constitutional concerns. By **criminalising** parents for non-compliance with compulsory attendance, the amendment may infringe on the constitutional rights of parents and learners, particularly regarding freedom of arbitrary arrest or detention¹¹ and the right to education¹². The punitive measures, including fines and imprisonment, disproportionately impact vulnerable families facing socio-economic challenges, potentially violating the right to equality¹³ and the right to human dignity¹⁴. This raises significant constitutional concerns about the appropriateness of criminal sanctions for addressing attendance issues.

⁵ Clause 4 of the Bill.

⁶ Clause 1 of the Bill.

⁷ Clause 4 of the Bill.

⁸ Clause 5 of the Bill.

⁹ Clause 1 of the Bill.

¹⁰ 2020 (3) SA 141 (ECG) (12 December 2019).

¹¹ Section 12 of the Constitution.

¹² Section 29 of the Constitution.

¹³ Section 9 of the Constitution.

¹⁴ Section 10 of the Constitution.

15. 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:

15.1. Decision-making powers of SGBs and the parallel provisions expanding the State's power in this regard; and

15.2. Undocumented learners.

LEGAL FRAMEWORK

16. The Constitution entrenches as a justiciable right the right to receive education in the official language¹⁵ or languages of their choice in public educational institutions where that education is reasonably practicable.¹⁶ Furthermore, it imposes a duty on the state to take practical and positive measures to elevate the status and advance the use of indigenous languages.¹⁷

17. In addition, education in South Africa is highly regulated by the following subsidiary legislation and policies: the National Education Policy Act¹⁸ ("NEPA"); SASA; as amended by the Education Laws Amendment Acts¹⁹, respectively; Adult Basic Education and Training Act²⁰ ("ABET"); Employment of Educators Act²¹; [White Paper on Education and Training in a Democratic South Africa, 1995](#) ("White Paper 1"); and the [White Paper on the Organisation, Governance and Funding of Schools, 1996](#) ("White Paper 2"); [Education White Paper on ECD, 2001](#); and, the [Education White Paper 6 on Inclusive Education, 2001](#).

18. 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.

19. Both domestic law and court rulings hold that SGBs are best positioned – as parents or guardians of school learners and members of their local communities – to ensure "*democratic school*

¹⁵ Section 6(1) of the Constitution states that the following are official languages: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa, isiZulu and Sign Language.

¹⁶ Section 29(2).

¹⁷ Section 6(2).

¹⁸ Act 27 of 1996.

¹⁹ Acts 24 of 2005, Act 31 of 2007 and Act 50 of 2002.

²⁰ Act 52 of 2000.

²¹ Act 76 of 1998.



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*governance”.*²²

20. The White Paper on Education and Training in a Democratic South Africa, 1995 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 the law. The parents’ right to choose include 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.”*²³

21. The Education White Paper on ECD, 2001 holds that:

*“Public school governance is part of the country’s new structure of democratic governance”*²⁴ and that “governance policy for public schools is based on the core values of democracy”. It expressly states, “governing bodies will have substantial decision-making powers”. 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”.

22. The Bill subverts the partnership model between SGBs and the Department of Basic Education (“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 of 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,***

²² [Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others \(CCT 29/10\) \[2011\] ZACC 13; 2011 \(8\) BCLR 761 \(CC\); Federation of Governing Bodies for South African Schools \(FEDSAS\) v Member of the Executive Council for Education, Gauteng and Another \(CCT 209/15\) \[2016\] ZACC 14.](#)

²³ Chapter 4 para 3, page 21 of the White Paper on Education and Training in a Democratic South Africa, 1995.

²⁴ Chapter 3 para 3.17, page 15 of the Education White Paper on ECD, 2001.

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 exercises defined autonomy over some of the domestic affairs of the school."²⁵

"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 democracy' in ensuring a democratically run school and allowing for input from all interested parties."²⁶

23. The amendments proposed in the Bill would add further, unnecessary barriers to access to basic education by, for example, forcing the 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.
24. It would further amount to an unconstitutional infringement of the affected sections 29, 30 and 31 in so far as it's the Bill's limitation of these rights the limitation is neither reasonable nor justifiable in an open and democratic society based on human dignity, equality and freedom.²⁷ It is contrary to the duty the Constitution imposes on the State to further indigenous languages (section 6(2)). 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, – including private educational institutions which are recognised by the right to establish such institutions under section 29(3) - based on a common culture, religion or language.

Justification analysis:

25. The fundamental rights guaranteed in the Constitution may only be limited by laws of general application and only to the extent that they are reasonable and justifiable in an open and

²⁵ Chapter 3 para 3.1, page

²⁶ 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.

²⁷ As required by section 36 of the Constitution.



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democratic society based on freedom and equality, and do not negate the essential content of the right in question.²⁸

26. The continued erosion of language rights resulting from the implementation of the Bill and the failure to implement the Use of Official Languages Act,²⁹ would amount to an unjustifiable and unreasonable limitation to fundamental human rights.
27. The nature of the right to education in one's chosen language is crucial, and the Bill's interference undermines this fundamental aspect. While the state may have a legitimate interest in strengthening the public schooling system, the importance of this purpose does not sufficiently justify the severe limitations on language rights imposed by the Bill.
28. Consequently, the Bill's language provisions contravene section 36, rendering them unjustifiable and unconstitutional in the context of South Africa's constitutional framework.
29. 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 courts.
30. The Bill is seen as a means of overturning the 2018 judgment of the Pretoria High Court in [Hoërskool Overvaal vs Panyaza Lesufi](#)³⁰ - 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 judgment "*all the way to the Constitutional Court.*"
31. The Bill's definition of "*required documents*"³¹ 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 as legitimate purpose and fails to consider or resolve the

²⁸ Section 36, Constitution of the Republic of South Africa, 1996.

²⁹ Act 12 of 2012.

³⁰ Hoërskool Overvaal v. Head of Department of Education, Gauteng Province & Others [2018] ZAGPPHC 1.

³¹ Clause 1(m) of the Bill.

practical barriers in obtaining such documents from the Department of Home Affairs.

32. The Bill's inclusion of punitive criminal sanctions for non-compliance with compulsory attendance, including fines and imprisonment, fail to address the practical barriers faced by vulnerable families in obtaining the "*required documents*", thereby disproportionately infringing upon the right to dignity³², education³³, equality³⁴, and the right to freedom from arbitrary arrest or detention³⁵.
33. We are concerned that, in its endeavour to strengthen the public schooling system, the Bill:
- 33.1. Will infringe the right of a person to receive education in the official language or languages of their choice;
- 33.2. Will prove to be unconstitutional, given its failure to pass a justification analysis;
- 33.3. Will prove to be illegal, given the scope and limitation of fundamental rights protected under international covenants ratified by South Africa; and
- 33.4. Will result in a situation that is unworkable and impractical given the already scarce financial, structural and human resources at the DBE's disposal.

REMEDIES

34. In order to bring the Bill in line with the Constitution, we propose the following amendments:
- 34.1. Deletion of the provisions which take away or limit powers correctly vested with the SGB and confer them instead with 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;
- 34.2. The provision by the Bill of provincial oversight and consultation with the SGB on language an 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;

³² Section 10 of the Constitution.

³³ Section 29 of the Constitution.

³⁴ Section 9 of the Constitution.

³⁵ Section 12(1)(a) of the Constitution.



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- 34.3. The provision of definitions of key concepts such as “equality” and “equity”; and
- 34.4. A review of clause 1’s “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.
35. We submit that SGBs are the most 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, and 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.

Sincerely,

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