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Attention Mr L A Brown
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Dear Mrs Mbinqo-Gigaba

BASIC EDUCATION LAWS AMENDMENT BILL ISBN 978-1-4850-0769-2

COMMENT BY THE SAOU (TRANSLATED AS SOUTH AFRICAN TEACHERS' UNION)

PART A: INTRODUCTORY REMARKS

1. The SAOU (Suid-Afrikaanse Onderwysersunie, translated as South African Teachers' Union) submits herewith its comment on the Basic Education Laws Amendment Bill (BELA Bill) for consideration by the Parliamentary Portfolio Committee on Basic Education.
2. The SAOU is registered with the Department of Labour and is an admitted party to relevant bargaining councils. The Union represents some 39 000 educators, the majority of whom provide service in public schools in the nine provinces of South Africa. The SAOU is one of the recognised teacher unions which

interacts with the Department of Basic Education at the national level, serving on some 38 national committees and working groups of that Department, and which also interacts with the relevant provincial structures of the nine education departments in the provinces.

3. The members of the Union are responsible for the provision of schooling in public schools, operating as members of school management teams and as educators. The provisions of the BELA Bill are therefore of relevance to them, and have the potential to affect their daily working lives. It can be noted that most of the provisions of the Bill have relevance to educators, including those which at first sight might seem to be somewhat removed from the usual sphere of operations of the educator in the classroom, or the member of a School Management Team.
4. The Union welcomes the opportunity to submit comment, and re-affirms its commitment to the advancement of quality basic education and schooling in South Africa.
5. The SAOU has consistently endorsed the governance principles which inform the structure of the South African Schools' Act, namely those of first-level governance at the national level, second-level governance at the provincial level, and third-level governance at the school level. In its analysis of the provisions now proposed, the SAOU will be applying the principles which have informed the structure of the Act since its promulgation during 1996. It needs to be mentioned that the SAOU has an intimate knowledge of said principles as we were an integral part of the Hunter Commission that predated the Act, and the undersigned was actively involved during the deliberation phase of the Act in the Parliamentary Portfolio Committee for Education under the guidance of Dr Blade Nzimande.
6. The SAOU has over the past more than twenty years taken note of judgments pronounced in various Courts of the land, including the Constitutional Court, which have endorsed the principles of co-operative governance enunciated in the White Paper on Education, and will in its comment on some of the provisions of the Bill invoke the principle of co-operative governance as a basic point of departure in its consideration of the Bill.

A significant judgment in the view of the SAOU is

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 2013 (9) BCLR 989 (CC)

The following excerpts guide the viewpoint of the Union on various of the matters which the BELA proposals bring to the fore:

“[123] 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 thus has been categorised in the [SASA] as an organizing principle for the provision of access to education.

“[124] Given the nature of the partnership that the [SASA] has created, the relationship between public school governing bodies and the State should be informed by close cooperation, a cooperation which

recognizes the partners' distinct but inter-related functions. The relationship should therefore be characterised by consultation, cooperation in mutual trust and good faith. The goals of providing high-quality education to all learners and developing their talents and capabilities are connected to the organization and governance of education. It is, therefore, essential for the effective functioning of a public school that the stakeholders respect the separation between governance and professional management, as enshrined in the [SASA].

7. At the second level of governance the MEC for Basic Education and the Head of Department have a statutory duty to act in the best interests of education and schooling in the province. At the third level of governance, that of the School Governing Body (SGB), the SGB has a statutory duty to act in the best interests of the individual school. There have been numerous instances in various provinces where the best interests of the province and the best interests of an individual school have not always been regarded as compatible – Rivonia, Ermelo and others are examples of this. A significant question is what actions need to be taken to protect the interests of minorities in the public school system – and within the context of co-operative governance an adequate answer cannot be that it is sufficient to take into account the interests of the majority.
8. The Constitutional Court has ruled that the goals of providing high-quality education to all learners and developing their talents and capabilities are connected to the organization and governance of education (see above). A key expression is all learners. The SAOU has in the past in its public submissions repeatedly made the point that the goal of providing equal educational opportunity must not fall into the trap of arguing that sameness of opportunity constitutes equality of opportunity. The proposed amendments to the SASA need to be appraised in the light of the imperative to advance equity (fairness) and genuine equality.
9. In its analysis of the BELA Bill and the accompanying Explanatory Memorandum, the SAOU is driven to the conclusion that
 - (i) The principle of partnership is now to all intents and purposes something of the past, and there is a clear view that the State is the dominant role-player in the public schooling and education system;
 - (ii) Although the Explanatory Memorandum states that the Bill seeks to give recognition to judgments of the Courts in regard to matters relating to the South African Schools Act which have been dealt with by the Courts, no material evidence of the carefully crafted judgments which have been handed down is to be found in the Bill – the drafters of the Bill have resorted to altering the legal provisions in such a way that there is no need for meaningful consultation with the school: ultimate authority rests one-sided with the State;
 - (iii) The recognition of the Governing Body as a third-tier political structure, elected by and accountable to the parent body of the school, has been replaced with the perception by and large that the Governing Body has certain advisory functions to fulfil, subject to final decision by a bureaucratic functionary who is accountable neither to the school nor to its parent body;

- (iv) The initial objective expressed in White Paper 1 that schools would be given meaningful governance powers as an incentive for school communities to make a financial contribution – over and above their standard taxation obligations – has been attenuated to the point where the question might be asked whether it is worth the while of communities associated with fee-paying schools to continue to do that: there seems to be little advantage for schools to make additional contributions when in fact all significant decisions are subject to bureaucratic review and the lack of recognition of the third-tier political structure in schooling; and
 - (v) Evidence of provisions which will enable the interests of minorities in the public schooling system to be protected is not obvious in the provisions: there are evidences that the interests of the majority will predominate, irrespective of the situation in a specific school. In this regard the dominance of the needs in an education district is noted with concern.
 - (vi) The SAOU notes that three pillars of a public school system are removed by the Bill, namely local governance decisions on admission, language, and use of facilities, and that State control is re-instituted, as was the case before the advent of the current democratic political dispensation – this despite the reality that the Courts have furnished more than adequate guidance on how differences of opinion between the second and third tiers of political governance are to be resolved. The SAOU further notes the potential effect of parental de-incentivisation on the income streams of schools under a State-managed and controlled public schooling system. In effect the Governing Bodies of schools are reduced to administrative agencies responsible for carrying out the directives of the State in the school.
10. The SAOU wishes to recognise the years of hard work which have gone into the process of bringing the BELA Bill to its present point of development. The authorities are to be commended for the efforts which have been made to respond to and incorporate the various opinions and viewpoints which have arisen in connection with the revision of SASA. Where the SAOU expresses views which may be different from those expressed in the Bill, these should not be seen as an attempt to be obstructive, but rather as an attempt further to enhance the pursuit of excellence in public schooling and education.
11. The noblest aims of legislation can be – and often are – thwarted in the absence of related provisions which would make possible the achievement of those aims. As an example, the expansion of the public schooling system by the addition of a compulsory reception year is a step which could enable the wider provision of education and schooling to learners who currently do not have that opportunity. However, if that expansion does not take place within the context of adequate funding, adequate facilities, a sufficient supply of teachers trained to work with young children and meaningful support systems outside of the school, the accomplishment of the goal will be materially impeded. It is recognised that other agencies have a responsibility in ensuring that the various needs are recognised and properly channelled, but the point the SAOU wishes to make is that legislation can be enabling, but that it does not necessarily enhance quality either in the classroom or in the wider context.
12. The parameters of the debate are clear. Does the State wish to revert to a state-school model, or does it wish to retain a public-school model? The former requires no partnership or meaningful community involvement. The latter requires the provision of opportunities to enable meaningful partnership

between all the parties concerned. The SAOU wishes the Parliamentary Portfolio Committee on Basic Education well as it debates this very significant piece of draft legislation.

13. Proposed new Sec 21A: Application by school for self managed status

- (1) Subject to this Act, a governing body of a public school may apply to the Head of Department in writing for self managed status on the basis of having satisfactorily:
 - a. Performed the functions referred to in Section 21(1) for the preceding five years;
 - b. Obtained a clean audit record in regard to the financial management of the public school for the preceding five years;
 - c. Complied with the minimum criteria determined by the Minister in regard to academic performance; and
 - d. Maintained the minimum requirements in regard to academic performance.
- (2) A public school with self managed status will, for a period of ten years:
 - a. Have the following powers and functions:
 - i. The functions referred to in sections 5(5), 6(2), 8(1), 9(1), 20, 21(1); and
 - ii. The self managed school will be entitled to determine the curriculum and assessment programme, provided that the CAPS minimum national norms and standards with regard to the curriculum and assessment programme is complied with.
 - b. Be exempt from the attendance of departmental meetings by the educator staff and the non-educator staff.
 - c. The attendance of a self managed school will be on a voluntary basis, provided that the principal shall attend the departmental meetings held for principals of self managed schools.
- (3) During the period referred to in sub-section (2): the self managed school must comply with the following:
 - a. The self managed school must comply with the following:
 - i. The annual submission of unqualified audited financial statements to the Head of Department;
 - ii. The principles of fit and proper governance of the school;
 - iii. The minimum requirements in regard to academic performance;
 - iv. The minimum requirements for service in the broader community;
 - v. The chairperson of the governing body of a self managed school shall attend the annual meeting for chairpersons of the governing bodies of self managed schools; and
 - vi. Such other reasonable requirements determined by the Head of Department;
 - b. The self managed school will qualify for financial assistance; and
 - c. That educators remain in the employment of the Department as contemplated in the Employment of Educators Act, No. 76 of 1998.
- (4) The Head of Department may refuse an application contemplated in sub-section (1) only if the governing body does not comply with the requirements as stated in sub-section (1).

- (5) The Head of Department may approve such application unconditionally or subject to conditions.
- (6) The decision of the Head of Department on such application must be conveyed in writing in terms of the principles of administrative justice to the governing body concerned.
- (7) Any person aggrieved by the decision of the Head of Department, in terms of this section, may appeal to the Member of the Executive Council.

Please note the specific SAOU comment (Part B) is annotated in the relevant clause in the Bill itself to enable easier reading and contextualization.

Yours sincerely



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SAOU

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