SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Submission on the Basic Education Laws Amendment Bill B2-2022

Submitted to the Portfolio Committee on Basic Education

August 2022

A. Introduction and Mandate

1. The South African Human Rights Commission ("the Commission") welcomes this opportunity to make comments to the *Basic Education Laws Amendment Bill* ("the Bill") and would like to thank the Portfolio Committee on Basic Education (Portfolio Committee) for affording the Commission and public this opportunity.

2. The Commission is an independent national human rights institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (Constitution) to support constitutional democracy. In terms of section 184(1) of the Constitution, the Commission is specifically mandated to
   2.1. promote respect for human rights and a culture of human rights;
   2.2. promote the protection, development and attainment of human rights; and
   2.3. monitor and assess the observance of human rights in the Republic.

3. Further, in terms of section 13(1)(b)(v) of the South African Human Rights Commission Act, 40 of 2013, the Commission -

   "*must review government policies relating to human rights and may make recommendations.*"

B. August SAHRC Urgent Roundtable on the Basic Education Laws Amendment Bill (2022)

4. To further appreciate the extent and impact of this Bill, the Commission convened an urgent roundtable on 11 August 2022. This roundtable was held virtually and was attended by a variety of important stakeholders. In part, the roundtable sought to unpack the proposed provisions relating to admission and language policies, explore the interpretation of the provisions and their potential impact on the education sector.

5. In particular, the roundtable sought to provide stakeholders with an opportunity to express their views and assist the Commission to formulate its submission in a comprehensive manner, indicative of the broad and varied views on the Bill.

6. The outcomes of the roundtable, inclusive of important reflections from the stakeholders, will be reflected throughout this submission.

C. General Comments on the Basic Education Laws Amendment Bill

7. In general, the Commission welcomes most provisions of the Bill, as formulated, but has certain concerns and comments regarding particular issues, raised hereunder.

D. Specific Comments on the Basic Education Laws Amendment Bill

8. *Inter alia*, **Clause 1** of the Bill provides for the inclusion of Grade R (Reception Grade) in the definition of 'basic education'.
   8.1. The Commission welcomes the inclusion of Grade R in the definition of 'basic education'. The Commission has previously held that teaching and learning ought to start as early as possible, to reaffirm the ability to read and write as the foundation upon which all other school-based learning is built. Studies have shown that the foundation phase of learning, which starts at age three (3), is

central to creative learning, and the exploration of concepts and ideas for problem solving.[1]

8.2. Further, this inclusion will bring much needed attention to early childhood development and its programmes – ensuring that children's nutritional and psychological needs are taken care of. For too long this area has been neglected or seen as peripheral to the core basic education.

8.3. Also important, this inclusion will bring the fight for inclusive-education to the forefront – as many children with learning challenges, who are not yet in formal schooling, are ignored and presumed to be the responsibility of the Department of Social Development (DSD), whilst DSD holds that these children are the responsibility of DBE.

8.4. Lastly, this inclusion will set the country on a good path of investing in quality education.

8.5. Equally, the Commission cautions that the necessary resources ought to be made available to follow the inclusion of Grade R into mainstream teaching and learning. The Commission proposes that a clause is added to the effect that the Head of Department must take all necessary steps to ensure that Grade R education is accessible in public schools for all qualifying learners and that public schools where Grade R is offered receive the necessary resources, including, but not limited to educators and learning and teaching support material, to enable the public school to provide adequate Grade R provision.

9. *Inter alia*, **Clause 2** provides for the compulsory attendance of learners from Grade R in the year a learner turns six (6) until a learner completes Grades 9 and/or has turned 15 years, whichever occurs first.

9.1. The Commission recognises that compulsory school attendance is crucial in contributing towards a learner's performance and development, and further notes with concern.

[1] https://gov.wales/sites/default/files/publications/2018-06/how-is-my-child-doing-in-the-foundation-phase-a-guide-for-parents-and-carers.pdf

10. *Inter alia*, **Clause 4**, provides for the establishment of a National Intergovernmental Committee that will facilitate the admission of learners without documentation into schools.

    10.1. The Commission is concerned that this provision is entirely inconsistent with the *Centre for Child Law and Others v Minister of Basic Education and Others* (*Phakamisa*) judgement.[1]

    10.2. The Commission was party (second *amicus)* to the Grahamstown High Court case – *Phakamisa*. This matter concerned a circular issued by the Provincial Department of Education, requiring all 'school governing bodies and management of the responsibility of updating the South African Schools Administration & Management System (SASAMS) Database with the correct National Identity ("ID") or Passport numbers for all learners'. This resulted in the exclusion of non-documented learners from accessing schools/education.

    10.3. The Grahamstown High Court held that undocumented learners must not be denied access to schools because of their status and that the circular should be withdrawn immediately.

    10.4. The Commission is concerned that requiring a list of documents from learners and parents will lead to (1) an exclusionary approach amongst schools; and (2) serve as a deterrent for parents bringing their undocumented children to school. School principals and SGBs are not often lawyers and tend to err on the side of caution when it comes to complying with legislation. This is what happened under the current Act where there were indications of required documents (the birth certificate). Under the amendment the list of required documents is substantially longer and more complicated making it even more likely to cause confusion and exclusion.

11. *Inter alia,* **Clauses 1 and 10** provide for the extension of the definition of corporal punishment to include restricting a child's use of a toilet and the abolishing of this restriction during school activities or in hostels, respectively.

    11.1. Consistent with its previous position, the Commission welcomes the abolishing of corporal punishment in schools and hostels and has held that corporal punishment is inconsistent with constitutional values and rights in the

[1] [2020] 1 All SA 711 (ECG).

Bill of Rights, namely: the right to dignity (section 10); the right to freedom and security of the person which includes the right not to be treated or punished in a way that is degrading, cruel, or inhumane (section 12(1)(e)); the right of every child to appropriate alternative care when outside the family environment (section 28(1)(b)); the right of every child to be protected from "maltreatment, neglect, abuse or degradation" (section 28(1)(d)); the right of every child to have their best interests be considered as paramount in all matters concerning them (section 28(2)); and the right to basic education (section 29(1)(a)).

11.2. However, the Commission recommends that the definition and prohibition of corporal punishment be extended to protect all learners, and not only children, seeing as many learners in school attain the age of majority during their school years and are deserving of the same protection against corporal punishment and other degrading treatment.

E. Admission and Language Policy Provisions

12. *Inter alia*, **Clauses 4 and 5** provide that SGBs may develop admission and language policies of a public school, which needs to be approved by the relevant Provincial Head of Department. Both these clauses contain very similar provisions (and concerns for the Commission) related to the how admission and language policies are to be assessed by the Head of Department. The Commission's submission hereunder focuses more on the issue of language policies, in order to avoid effective duplication and also because the issue of language requires closer analysis given the implications of section 29(2) of the Constitution.

13. Section 29(2) of the Constitution states that everyone has the right to receive education in an official language/s of their choice in public institutions, where that education is reasonably practicable. In order to ensure effective access to, and implementation of this right, this section goes on to require the State to consider all educational alternatives, including single medium institutions, taking into account equity; practicability and the need to redress the results of past racially discriminatory laws and practices.

14. Studies have shown that when a child is not fully competent in the language of learning and teaching (LOLT), his or her performance tends to be lower, which often contributes to higher drop out levels. The Commission is therefore supportive of the need to ensure that the right set out in section 29(2) is realised, and where such a right is already exercised, that the continued exercise of the right is protected.

15. However, the Commission is sensitive to the difficulties faced in reconciling the aspiration of learners to be taught in their home language and/or language of choice with the need to ensure the broader societal objectives of multicultural integration, equitable access and balanced utilisation of public resources. Although the right of learners to receive education in the language of their choice is recognised in the Constitution, this right is not absolute, and must be viewed within the greater context of the country's social challenges. At the same time, research indicates clearly that where the transition from home language LOLT to another LOLT takes place too early, there is a negative impact on learning outcomes, which is not in the best interests of children. One also has to be mindful of the poor ability of learners to read for meaning in their home language by age 10 evident from the Progress in International Reading Literacy Study (PIRLS) reports.

16. The Constitutional Court in *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*[2] (*Hoërskool Ermelo*) highlighted the sharp disparities in the education system as a result of past discriminatory laws. In addition to ensuring that policies do not directly discriminate and that they are in line with constitutional principles, SGBs have a further obligation to consider the indirect effects of policy implementation, particularly where such policies may result in exclusion that may result in inequitable access to or quality of basic education.

17. In addition to considerations around the efficient and balanced utilisation of resources, language policies may inadvertently act as tools of exclusion and

[2] See *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* http://www.saflii.org/za/cases/ZACC/2009/32.html

discrimination and, due to the close link between language and race in South Africa, may contribute to the preservation of social divisions based on language and race.

18. While it is true that language policies may cause exclusion generally (and this has been noted by the courts as well as academic research) and that certain schools may be facing this challenge, the reality is that the true nature and extent of this potential exclusion has not truly been probed. We may be able to accept that such exclusion is possible, does occur and should be addressed, but there is little to no reliable scientific research or authority that would guide the Department of Basic Education in determining, in the case of any particular school or district, the true extent of such exclusion and thus what steps would be appropriate to address it when considering a particular school's language policy and admission policy.

19. The Bill seems to recognise that a multi-factored analysis will be required before a determination can be made in respect of any school's language policy. However, this analysis falls upon the relevant Head of Department to determine from case to case, and section 5(7) states the following in this respect"

> *"The Head of Department, when considering the language policy of a public school or any amendment thereof for approval, must be satisfied that the policy or the amendment thereof takes into account the language needs, in general, of the broader community in the education district in which the public school is situated, and must take into account factors including, but not limited to—*
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> *(a) the best interests of the child, with emphasis on equality as provided for in section 9 of the Constitution and equity;*
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> *(b) section 6(2) of the Constitution;*
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> *(c) section 29(2) of the Constitution;*
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> *(d) the changing number of learners who speak the language of learning and teaching at the public school;*
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> *(e) the need for effective use of classroom space and resources of the public school; and*
>
> *(f) the enrolment trends of the public school.*

20. While the considerations in section 5(7) of the Bill above do seem to offer valuable guidance, the Bill itself requires the relevant Head of Department to revert to all the schools in their jurisdiction within 60 days to confirm all of their language policies (and admission policies, seeing as section 4(e) places similar requirements in respect of the confirmation of admissions policies and the timeframes for both are identical). According to the time periods of the Bill, this process should all be completed within 90 days of the Bill coming into law, seeing as schools have 30 days following the implementation of the Bill, to submit their language and admission policies to the Head of Department for consideration and confirmation.

21. The problem with the above approach is that there are simply far too many public schools in South Africa (over 24 000) for the Department of Education to come even close to properly considering all their language and admission policies in 60 days, especially not if they are to take into consideration the important and unique factors set out in section 5(7) of the Bill. In KZN, where there are 6000 schools, the Head of Department in that province, even if their offices worked 24 hours a day for 60 days, would only be able to afford each school 14 minutes of consideration (seven minutes for the language policy and seven minutes for the admission policy). In reality of course, this time will be significantly less in all provinces.

22. Even in Provinces with far fewer schools, it will still be impossible to properly finalise these assessments in 60 days. The result will be that the vast majority of schools will receive no response from the Department within 60 days, and their language policies will become valid by default according to the Bill. This is very problematic, as the children of these schools will be subjected to potentially problematic language and admission policies due simply to inaction of the Department. And the schools that do receive an instruction from the Head of Department to amend their policies, will need to accept that this instruction is reasonably based on what could only have been a few minutes of consideration, with no time to truly research and consider the complex and unique factors relevant to each school.

23. The aforementioned challenges also create a potential threat to the best interests of the child, which are paramount under section 28 of the Constitution, in that

children who are affected by a change (or lack thereof) in a school's language policy, are at risk of having their best interests undermined without the Department having sufficient time (as explained previously) to consider these impacts, even though section 5(7)(a) of the Bill highlights these interests as the first consideration that must be taken into account in these processes.

24. The Commission notes that section 4(5) of the Bill contains almost identical considerations, processes and time periods in respect of admission's policies, thus raising the same concerns.

25. The processes of section 5(7) and 4(5) of the Bill point decidedly to a lack of rationality in the drafting of the Bill. These concerns may at first seem to be quite clerical in nature – calling into question time periods and other such technicalities, but in truth they are concerns central to important questions about human rights. These sections are intended to comprehensively regulate the most important operations of the Bill in respect of language and admission policies (i.e. the process to be followed by schools and the Department in actually bringing life to these policies), yet they lack rationality to the extent that these operations are impossible to perform. This lack of rationality also potentially brings into question the extent to which the legislature applied its mind to the issues of language policies and school admission in the first place. If the legislature is of the view that exclusionary or otherwise flawed language policies are a severe threat to the right to, inter alia, a basic education, then it is very concerning that it also appears to believe it possible to review and correct the language and admission policies of every school in South Africa and essentially remedy the root cause of this national issue within 90 days of passing the Bill.

26. While the right of children to be taught in a language of their choice must be promoted to the extent that is reasonably practicable, this must also be weighed up against considerations such as the limited resources available to government to provide education to every child; the need to promote equality and equitable education; and the ability and critical role of schools in promoting social integration and transformation. However, the pursuit of these goals is severely undermined if Parliament creates checks and balances that are impossible to implement.

27. This being said, section 29(2) does provide for single-medium schools where this is reasonably practicable, taking into account the important factors mentioned above. Where Heads of Education Departments disapprove single-medium schools' (including single medium English schools') language policies, these schools will have to revert to one of two options – becoming parallel-medium or double-medium schools. If one of the latter options is exercised, this brings into question the implications of the Constitutional Court's rulings in *Gelyke Kanse*,[3] *Unisa*[4] and the *Free State University*[5] cases.

28. A risk pointed out by the Constitutional Court, particularly in *Gelyke Kanse*, is that where single-medium education in a school is not possible, then the only options remaining are dual or parallel-medium education. The court pointed out that, while not a guaranty thereof, dual and parallel-medium education often leads to segregation of students or learners along racial lines, adding to "racial friction". In order to appropriately guard against such outcomes, proper consideration of the complex and nuanced realities of every school affected, as well as the particular historical and current context of the communities within which each such school operates, is required. And as stated previously, the Bill does not allow the Department sufficient time to make such considerations, despite them being crucial for the protection of the best interests of the child as well as the rights to non-discrimination and others.

29. The Constitutional Court, in the above matters, repeatedly raised concerns that, while certain changes in our approach to language is certainly required for the purposes of the constitutional project, minority languages are becoming increasingly at risk in pursuit thereof and South Africa should tread carefully on this journey.

[3] *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* 2020 (1) SA 368 (CC).
[4] Case CCT135/20 [2021] ZACC 32.
[5] *AfriForum and Another v University of the Free State* 2018 (4) BCLR 387 (CC).

30. The way the Bill is currently drafted, particularly in respect of the crucial aspect of departmental review of school admission and language policies within the irrational framework of clause 5(7), strongly suggests that the necessary caution has *not* been observed when trying to address this important and sensitive issue.

31. Further, in its submissions on admission policies (attached), the Commission has stressed that: '…there ought to be sufficient; systemic; sustainable and/or clear guidelines to give practical effect to the development and intentions of any language policy and section 29(2) of the Constitution. Given the ambiguity inherent in section 29(2) of the Constitution and related jurisprudence, it is in particular unclear whether it will be "reasonably practicable" to accommodate learners who do not speak the language of the medium of instruction, especially at single medium schools. If it is "reasonably practicable" to accommodate such learners, viewed in the light of the factors set out in section 29(2) of the Constitution, then schools would benefit from detailed guidance as to how such learners can be appropriately and reasonably accommodated.'

F. Codes of Conduct

32. *Inter alia* **Clause 7(b)** of the 2022 Draft Bill moves to amend section 8(2) of SASA in addressing the codes of conduct adopted by schools. It is further proposed that school codes of conduct must consider "the diverse cultural beliefs, religious observances and medical circumstances of the learners at the school."

    32.1. Although commended that these considerations are to be taken into consideration expressly, it is the SAHRC's belief that the school's code of conduct should not only focus on these specific areas of diversity in considering its content and approach. Instead, it is recommended that the full list contained in section 9 of the Bill of Rights, and echoed in the definitions of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA) be included herein. SGBs must be cognisant of ethnic and social origin, gender as well as several other issues in the adoption of its codes.

    32.2. Furthermore, Clause 7(c) of the 2022 Draft Bill sets out a process for a learner to obtain an exemption from a school's code of conduct. Although the SAHRC aligns itself with the Constitutional jurisprudence echoing this process

in Pillay, the SAHRC is of the view that this is an opportunity to strengthen and further the right to freedom of expression of learners where such expression does not interfere with the provision of education at the school. In this regard, the SAHRC is of the view that where a learner wishes to express his cultural, religious and or other beliefs, he she/they should not be subjected to an increased burden so as to exercise this constitutionally afforded right. It is the SAHRC's position that where section 29 of the Constitution is not infringed, limited and/or threatened, that learners should be allowed to express themselves freely and within reason, without having to have such expression subjected to the approval of the SGB.

32.3. PEPUDA describes discrimination as any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on any person on one or more of the prohibited grounds. It is the view of the SAHRC that subjecting only certain learners to an approval process before they can freely express their religion, culture and/or gender, may impose an increased burden and/or obligation on them, same which may amount to a discriminatory process. The SAHRC supports a more inclusive approach where the right to education is realised without giving credence to a subjective decision-making and adjudication process.

33. *Inter alia,* **Clause 37** provides for home education.

33.1. Although the Commission notes and welcomes this provision, the Commission is particularly concerned about the absence of provisions that speak to and regulate online and blended learning.

33.2. The Covid-19 Pandemic and challenges in the education sector has led to the creation of an alternative means to teaching and learning, online schooling. With several institutions, including the University of Cape Town's Online High School, leading the way in quality, affordable online schooling, it is important for the Committee to reflect on this phenomenon and regulate it accordingly.

33.3. This to ensure that learners and parents are not taken advantage of and that new innovative teaching and learning means are encouraged but regulated.

34. The Commission would welcome an opportunity to make an oral presentation to further articulate this submission and other issues before the Portfolio Committee.

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