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Our Reference: BELA Bill

Date: 15 June 2022

**Portfolio Committee on Basic Education
Parliament of the Republic of South Africa
CAPE TOWN**

Mrs B P Mbinqo-Gigaba

Chairperson of the Portfolio Committee on Basic Education

For attention: Mr L A Brown

By email: belabill02@parliament.gov.za

Honourable Mrs B P Mbinqo-Gigaba,

RE: SUBMISSIONS ON THE BASIC EDUCATION LAWS AMENDMENT BILL [B2-2022]

- 1 We refer to the abovementioned matter, specifically to the notice published in the Government Gazette on 15 May 2022 by the Honourable Mrs B P Mbinqo-Gigaba, Chairperson of the Portfolio Committee on Basic Education ("the Committee"), calling for public comments in respect of the Basic Education Laws Amendment Bill [B2-2022] ("the Bill").
- 2 Cause for Justice ("CFJ") hereby thanks the Committee for the opportunity to make these written submissions and to participate in the law-making process.
- 3 We also confirm our interest and hereby request an opportunity to make oral submissions to the Committee in addition to our written submissions.

BACKGROUND TO CAUSE FOR JUSTICE

- 4 CFJ is a non-profit human rights and public interest organisation founded in 2013 to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness on matters of public importance.
- 5 We focus our submissions on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights and related matters affecting the best interest of children and the public interest.

CHIEF EXECUTIVE: SA SMIT | NON-EXECUTIVES: EFJ MALHERBE | NC SNYDERS

- 6 All five of CFJ's core values give it a particular interest in the Bill, namely (1) the responsible exercise of freedom, (2) protection and promotion of human worth/value, (3) protection of the vulnerable in society (social justice), (4) ensuring accountable government action and (5) protecting the family against destructive outside (and inside) forces.
- 7 CFJ's involvement in matters pertaining to education, specifically the interplay between stakeholders (partners) in the education environment, goes back to September 2014 when we joined the court case of *Organisasie vir Godsdienste-onderrig en Demokrasie v Laerskool Randhart and Others 2017 (6) SA 129 (GJ)*, as a friend of the court (*amicus curiae*).
- 8 CFJ also submitted written comments to the Department of Basic Education on the draft Basic Education Laws Amendment Bill in January 2018.¹
- 9 Other examples of our involvement in the basic education sector include our submissions to the DBE the draft National Policy on the Prevention and Management of Learner Pregnancy² and the Admissions Policy for Ordinary Public Schools.³

STRUCTURE OF SUBMISSIONS

- 10 Our submissions are structured under the following headings:
- 10.1 **Primary submission:** Discussion of the importance of *the institutional authority of parents* as represented by the school governing body
- 10.2 Submissions on specific clauses
- 10.3 Clauses in respect of which we make no comment
- 10.4 Conclusion

PRIMARY SUBMISSION: IMPORTANCE OF THE INSTITUTIONAL AUTHORITY OF PARENTS AS REPRESENTED BY THE SCHOOL GOVERNING BODY

- 11 The primary responsibility for the education of a child is borne by the parents of that child. Consequently, parents enjoy certain fundamental rights, which rights enable them to ensure that their child receives the kind of and quality of basic education the parents desire for their child. The importance of these rights are acknowledged, promoted and protected in South African law.⁴

¹ [CFJ Submissions on the draft Basic Education Laws Amendment Bill \(10 January 2018\)](#).

² [CFJ written submissions on the Draft National Policy on the Prevention and Management of Learner Pregnancy in Schools \(3 June 2018\)](#).

³ [CFJ written submissions on the Admissions Policy for Ordinary Public Schools \(12 March 2021\)](#).

⁴ The Constitution, the South African Schools Act, 1996 and Education White Papers 1 and 2.

- 12 Parental rights are also acknowledged in international instruments. The International Covenant on Civil and Political Rights (ICCPR) requires that state parties thereto undertake to have respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.⁵ Likewise, the Convention on the Rights of the Child (CRC) requires state parties thereto to respect the rights and duties of the parents to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.⁶ The recognition, protection and promotion of the primary importance of the active participation of parents in the making of decisions concerning what parents consider to be an appropriate education for their child, is, therefore, obligations to which the South African government are bound as signatories of the mentioned international instruments.
- 13 The Constitution enshrines the right to basic education.⁷ Education White Papers 1 and 2 acknowledge and emphasise, directly and indirectly, the primacy of parents' rights concerning the governance of the school which their child attends, by providing policy guidelines as well as values and principles for parental participation in decision-making processes. The South African Schools Act, 1996 ("SASA") should comply with, promote and protect these rights, policies, values and principles.
- 14 The state is obliged to support and enable parents to exercise their fundamental rights and fulfil their obligation to provide their child with basic education. This means that parents have to be able not only to participate in the governance of the school which their child attends, but also to determine it, in consultation with the other partners in the cooperative model of public school education.
- 15 The importance of the participation of parents in school governance is evident when regard is had to provisions such as section 23 of SASA, which requires that the majority of the members of the school governing body should be parents. The Policy underlying South African law acknowledges that parents are the primary stakeholders in the basic education of their child.⁸
- 16 The state has four major obligations in this regard, being the provision of schools, the funding of schools, overseeing the quality of education, and the provision of appropriately trained and qualified educators. For the state to successfully fulfil its obligations, limited power is conferred upon it by the people, through the Constitution (firstly) and legislation.
- 17 The decentralisation of power from the state to the people is never the devolution of power, since in a constitutional democracy power (legal authority) does not originate with the state. The state is allowed to exercise power by its people (through the mechanism of the Constitution) in order to facilitate harmony in the interaction between the competing rights and claims of citizens and societal collectives and by way of legislative measures and the executive implementation and enforcement of those measures. The state is limited in its exercise of power by the rule of law,

⁵ Art 18 ICCPR.

⁶ Art 14 CRC.

⁷ Section 29(1)(a), 29(2) and (3).

⁸ Education White Papers 1 and 2, as given expression to in law by the South African Schools Act, 1996 as properly interpreted in light of the Constitution.

which means that it is obligated and legally accountable to respect the boundaries of its legal authority, as provided in the Constitution and in legislation that is in line with the Constitution.

- 18 Since the rationale for delegating these powers to the state is to enable the state to support and enable parents to provide their child with quality basic education, any provision which impedes rather than promotes the provision of such education to the child should be opposed by both parents and the state. It is not in the best interest of the child for parents or the state to endeavour otherwise.
- 19 It is also clear that certain functional spheres of authority exist for parents, the school governing bodies and the state (both national and provincial). When each societal component functions optimally in its own sphere, the greatest benefit is to be attained by all.
- 20 Parents exercise their rights, functions and obligations through the school governing body, which is a decentralised and collaborative decision-making structure and exemplifies grassroots democracy in action. It is participatory in nature and ensures schools remain sufficiently autonomous. Governance of every public school vests primarily in the school governing body, which is in line with the values and framework of our Constitution. The state therefore has a crucial role, interest and obligation to support and equip the school governing body to exercise its decision-making powers and to effectively govern a school. The state should not endeavour to impede the school governing body from effectively governing a school.
- 21 In line with the values of our constitutional democracy, the state can never be exalted to the all-encompassing totality of society, since it would mean that our hard won democracy would be lost and that South Africa would relapse into a totalitarian state.
- 22 In this instance, the decentralisation of decision-making to school governing bodies, acknowledges and has restored the inherent rights of parents. Parents, precisely because they are parents, are the final authority and retain the right to make decisions concerning the education of their child. Colloquially put, "parents have the final say", as long as they themselves don't act unconstitutionally.
- 23 The participatory nature of the decision-making process which involves parents, school governing bodies and the state emphasises the vitally necessary partnership between these parties to ensure that a child is provided with quality basic education.
- 24 Any proposed amendments should acknowledge the fundamental rights of parents, the importance of participatory governance of schools and collective decision-making processes, and uphold the societal spheres of authority.

SUBMISSIONS ON SPECIFIC CLAUSES

25 Our submissions below in respect of specific clauses are in addition to and in amplification of our above primary submission and should be read and interpreted as such.

CLAUSE 1(a)

26 We agree with, confirm and support the submissions and proposals made by the Federation of Governing Bodies of South African Schools ("FEDSAS") in respect of this clause.

CLAUSE 2(b) and (c)

27 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of these clauses.

CLAUSE 4(d)

28 We have serious reservations about the centralisation of powers in the Head of Department ("HoD") / provincial education departments.

29 The school governing body has been assigned the obligation and the concomitant right to determine the admissions policy of a school for very good reason, as it is functionally the best-suited authority to make such determination, due to its close proximity to the school and its surrounding community. Should a disagreement arise between the HoD and the school governing body, the HoD has an obligation to consult on an even footing with the school governing body. The proposed amendment of section 5(5) of SASA does not reflect this obligation.

30 In further amplification and motivation of our position, we refer to our primary submission hereinabove and to the submissions of FEDSAS in respect of this clause, including the various legal precedents and constitutional imperatives cited in their submissions.

31 **We accordingly propose that clause 4(d) be deleted and that the *status quo* be maintained.**

CLAUSE 4(e)

32 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause, subject to our proposal to delete clause 4(d), thereby leaving section 5(5) unaltered by the Bill.

CLAUSE 4(g)

33 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSE 5(c)

- 34 We have serious reservations about the centralisation of powers in the HoD / provincial education departments.
- 35 The current models for the funding of schools and provisioning of staff, precludes most schools from offering more than one language of instruction. Additional costs, resources and staffing will be required before the offering of more than one language of instruction can be seriously considered.
- 36 In further amplification and motivation of our position, we refer to our primary submission hereinabove and to the submissions of FEDSAS in respect of this clause, including the various legal precedents and constitutional imperatives cited in their submissions.
- 37 **We accordingly propose that section 6(5) should not be amended and that new sections 6(6) – (20) should not be inserted. We propose that clause 5(c) should be scrapped from the Bill for the reasons set out above.**

CLAUSE 6

- 38 Without express safeguards to protect against the risk of ideological capture of the Minister and/or the curriculum enforced on public schools and independent schools that follow the CAPS curriculum, the proposed addition of a new section 6A(3) should not be supported.
- 39 **We accordingly propose that clause 6 be deleted from the Bill. In the alternative, if clause 6 is to be retained, we propose that safeguards to prevent the ideological capture of the curriculum should be expressly drafted into the Bill.**

CLAUSE 7(c)

- 40 In respect of the **proposed insertion of the section 8(4)(b)**, we propose a narrower scope for allowing exemptions to the school's code of conduct. As the proposal in the Bill currently reads, "just cause" can lead to frivolous applications for the exemption, because it is too vague and overbroad.
- 41 We propose that three express grounds should be recognised for a valid exemption. These would be "religious, cultural and medical" grounds. These three grounds are those that a school governing body needs to take into account when the code of conduct is adopted. Hence it would only be logical to narrow down the exemption clause to encompass only these three grounds.
- 42 The **proposed section 8(4)(c)** contains a requirement that the SGB must come to a decision within 14 days after receipt of an exemption application. This time requirement is unreasonably rigid and short - depending on the complexity of the exemption request and the capacity of the

SGB at the time, taking into account holiday, work and other commitments of members, the SGB may not be able to comply with the 14-day requirement.

43 **To remedy this, we propose that the reference to “14 days” be replaced “a reasonable time”.**

44 The proposed section also contains a requirement that the SGB must provide written reasons for its decision in the event that it refuses the exemption application. This requirement is supported. However, because exemption of certain individuals from complying with the code of conduct may have an impact on the rights and interests of other learners, the section should include a requirement to provide reasons to other learners and their parents in the event that the SGB’s decision impacts on other learners’ rights and interests.

45 **We accordingly propose that the following wording should be added to subsection (c) after “... and must in case of a refusal provide written reasons for the refusal ...”:**

“... to the learner or the parent of the learner, and must in the case of an approval that impacts on or affects the rights and interests of other learners provide written reasons for the approval to such learners and the parents of such learners.”

46 The proposed new section 8(4)(d) purports to provide a right of appeal to the HoD against the SGB’s decision to refuse an exemption application. We assume that this means that the HoD’s decision on appeal may contradict the SGB’s decision, and to the extent that it does, the HoD’s decision would replace and nullify the SGB’s decision.

47 This proposal, if we interpret it correctly, undermines the SGB’s authority as provided in section 8(1) of SASA to adopt a code of conduct for learners of the school. See generally our concerns and underlying reasons in our primary submission hereinabove.

48 **We accordingly propose that the new subsection 8(4)(d) be deleted from the Bill, in order to respect and protect parents’ rights and governance authority in respect of the public school that their children attend.**

CLAUSE 9

49 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSE 13(c)

50 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSE 14

- 51 We are of the opinion that inserting this section about the disclosure of the financial information is too wide and may have a detrimental effect on parents who make themselves available to be elected to the SGB. Financial information would only become relevant if there is a conflict of interest between the SGB member or a close family member and the particular school where the SGB member is involved.
- 52 Furthermore, personal information, such as financial information, should only be required to be disclosed if the purpose of disclosure is in accordance with POPIA and if the purpose relate to school activity or function.
- 53 **We, therefore, recommend the deletion of the proposed section 18A(4A) and that clause 14 be removed from the final version of the Bill.**

CLAUSE 16

- 54 We would like to draw attention to the practical implications that this proposed provision will have. Increasingly, provincial departments are withholding funds due to schools in terms of the National Norms and Standards for School Funding (NNSF) on the basis that the departments will then centrally procure LTSM for schools. This is problematic because in practice either schools do not receive the LTSM or it is such an inferior quality that it simply cannot be used. This is problematic due to the fact that the **funds that schools are entitled to** do not actually go to the school.
- 55 SASA and the NNSF, 2006 allow public school governing bodies to be responsible for managing aspects of recurring expenditure of public schools. Prescribing to these governing bodies how to exercise their section 21 functions, would in effect render the purpose of section 21(1)(c) functions void. We do acknowledge that where specific governing bodies do not perform their functions according to section 21, they should be held accountable, and, if not remedied, their functions should be withdrawn by the Department. However, a blanket approach to policy will not work and governing bodies should be given the freedom to obtain their own procurement and promote better school management.
- 56 **Accordingly, we propose that clause 16 should be scrapped. There are sufficient existing provisions that efficiently deal with procurement in the best interest of learners.**

CLAUSE 18

- 57 Without express safeguards to protect against the risk of ideological capture of the school's governance function, the proposed amendment of section 23(6) should not be supported.

58 **We accordingly propose that clause 18 be deleted from the Bill. In the alternative, if clause 18 is to be retained, we propose that safeguards to prevent the ideological capture of the SGB should be expressly drafted into the Bill.**

CLAUSE 22

59 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSE 24

60 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSE 29

61 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSE 30

62 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSE 31

63 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSE 34

64 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSE 36

65 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSE 38

66 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSE 39

67 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSE 41

68 We do not support the broadening of the Minister's powers, without reasoned justification for such broadening. The broadening of the Minister's powers is directly linked to the diminution of school governing bodies' (i.e. parents') powers, resulting in the limitation of parents' and their children's constitutional rights.

69 **Broadening of the Minister's powers without reasoned justification, accordingly, should not be supported as it would likely result in limitations of rights that fall foul of the limitations clause (section 36 of the Constitution).**

CLAUSE 51

70 We agree with, confirm and support the submissions and proposals made by FEDSAS in respect of this clause.

CLAUSES IN RESPECT OF WHICH WE MAKE NO COMMENT

71 We make no comment on the following clauses: 1(b)-(m), 2(a), 3, 4(a)-(c), 4(f), 5(a)-(b), 7(a)-(b), 7(d), 8(a)-(i), 10, 11, 12, 13(a)-(b), 13(d)-(e), 15, 17, 19, 20, 21, 23, 25, 26, 27, 28, 32, 33, 35, 37, 40, 42-50, 52-56.

CONCLUSION

72 In conclusion, we reiterate the importance of cooperative governance as it is a fundamentally important norm in our democratic dispensation. School governing bodies are beacons of grassroots democracy, ensuring that schools are democratically governed, and acknowledging that parents have the final say in decisions concerning the education of their child.

73 We trust that the above submissions are of assistance to the Committee and look forward to your response thereto (if any) in due course. CFJ remains at the Committee's disposal to assist in the further development and/or amendment of the Bill to effectively achieve its intended purposes, in a manner that respects, protects, promotes and fulfils the rights of parents in respect of the education of their children.

74 We also hereby respectfully request the Committee to give us an opportunity to make oral submissions (representations) to the Committee at the public hearings on the Bill to be held by the Committee at some time in the future.

Yours faithfully,

Stefanie Kotze (Preparer)

and

Ryan Smit (Reviewer)

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