

CENTRE FOR CHILD LAW SUBMISSIONS ON

THE BASIC EDUCATION LAWS AMENDMENT BILL [B2 – 2022]

**CONTRIBUTORS**

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# ABOUT THE CENTRE FOR CHILD LAW

The Centre for Child Law (“Centre/CCL”) is a children’s rights organisation registered as a Law Clinic with the Legal Practice Council. CCL contributes to the establishment and protection of children’s rights through litigation, legislative and policy advocacy, research, as well as education. CCL’s mission is to set legal precedent to improve and strengthen laws pertaining to children and ensure that constitutional rights are realised.

# SUMMARY OF SUBMISSIONS

The CCL’s submissions are intended to provide comment on the Basic Education Laws Amendment (BELA) Bill and its alignment with the Constitution of South Africa and recent judicial precedent. Four key issues are of particular concern to the Centre. They are:

1. The definition of “required documents” in clause 1; and the establishment of intergovernmental committees to whom undocumented children are to be reported in clause 4;
2. The definition of corporal punishment in clause 1.
3. The factors to be taken into account in the drafting of a code of conduct in clause 7.
4. The lack of guidance on procedures to be followed in the case of sexual assault or harassment by staff at schools.

Each issue will be discussed in detail below.

# THE CENTRES’ PROPOSALS

Our summarised proposals are as follows:

1. Clause 1(m), the definition of “required documents”, should be deleted in its entirety for creating an unreasonable barrier to admission to school, particularly for marginalised children.
2. Clause 4(b) which relates to the establishment of intergovernmental committees to whom undocumented learners must be referred should be deleted in its entirety; alternatively, it should be amended to allow voluntary referral to the committee with prior consent of the parent and child. The proposed amendment is in violation of the principle of maintaining a “firewall” between those who provide fundamental services (like education) and immigration control.
3. The definition of corporal punishment in clause 1(c) should be expanded to include emotional and verbal abuse as defined in UN Committee of the Rights of the Child (UNCRC) general comment 8.
4. Clause 7(b) regarding the factors to be taken into account when drafting a code of conduct should be expanded to include the age and individual circumstances of the learner. The clause should also be expanded to include a provision which requires a reconciliatory measure in the aftermath of incidents between learners or learners and teachers.
5. Clause 1 should include the word “relevant disciplinary body”, and should include the School Governing Body (SGB), SACE and any other relevant disciplinary body that is empowered to request a child witness to provide testimony in disciplinary proceedings in terms of the South African Schools Act, as read with the Protocol on the Reporting and Management of Sexual Harassment in Schools.
6. The timeframe in clause 8(4) on the right to appeal the SGB’s refusal to an exception application to the SGB should be extended to 90 days, to accommodate the socio- economic and geographic realities in our deeply unequal society.
7. Clause 8(4) should include the provision of written information regarding the right to appeal and exception to the Code of Conduct.
8. Clauses 8(7) to 8(9) on disciplinary procedures should extend to any relevant disciplinary body, including the governing body, SACE, or the hiring Department where non-educators are concerned.
9. Clause 8(7) must ensure that child witnesses in sexual abuse matters be offered the services of an intermediary and the process that follows must be explained to them, whose function will be explained and be provided the opportunity to accept or decline the services of an intermediary, instead of relying to the sole discretion of disciplinary body. obligatory and not discretionary.

# SUBSTANTIVE SUBMISSIONS: SOUTH AFRICAN SCHOOLS ACT (SASA)

CCL’s submissions are as follows:

## “REQUIRED DOCUMENTS” FOR ADMISSION (CLAUSE 1(m))

* + 1. **Introduction**

The clause proposes the insertion of a definition for the term ‘‘required documents’’ to provide clarity in respect of the documents which must be submitted for the purpose of the admission of learners to schools.1 Clause 1(m) creates four groups of children according to their parents’ immigration status and prescribes required documents for school admission for each. The required documents are extended from the previously required “official birth certificate” to now include the child’s and their parents’ identity documents, or passports and visas / permits.

The CCL is concerned that this clause is not in line with the recent judgment in *Centre for Child Law and others v Minister of Basic Education and others* (*Phakamisa*)2 which addresses the issue of undocumented children’s access to education. The Court in *Phakamisa* declared clauses 15 and 21 of the Admission Policy for Ordinary Public Schools, which required an official birth certificate for admission, unconstitutional. Clause 1(m) in BELA effectively reinserts this unconstitutional provision into the legislation, but makes it significantly more prescriptive, and thus more likely to lead to exclusion. The inclusion of such an unreasonably lengthy list of required documents is likely to reinforce the barriers to education which the *Phakamisa* case sought to address.

The categories of children created by clause 1(m) do not accurately reflect the types of documents which children may have. The four categories do not include vulnerable categories of children, such as stateless children and undocumented children who, for a variety of reasons, may be struggling to obtain documentation. These cases are almost always caused by a gap or discrimination in the law or practice which traps them in a state of being undocumented. It is never the child’s fault that they are undocumented. Even if the

1 Basic Education Laws Amendment Bill (B2-20220 at par 2.1.15.

2 *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZAECGHC 126.

parents are aware that the child should be documented it is often impossible to attain documentation even with legal intervention. Categories of children who often struggle to obtain birth certificates include:

* + - 1. The children of unmarried South African fathers where the mother is not present or is undocumented. In these cases, the DHA requires an expensive DNA paternity test (upwards of R1500)3 before the child can be registered. Many fathers simply cannot afford this, and their children remain undocumented.4
      2. Stateless children, whose parents might be citizens of a country which does not allow them to pass citizenship to a child born outside of that country (a stateless child born in South Africa). Technically, the child should be recognised as South African, but the Department of Home Affairs has not issued regulations to regulate such applications.5
      3. Children who had never been registered at birth whose birth circumstances and the identity of their parents are difficult to prove. In these cases, it can take years to prove their citizenship and negotiate with the DHA to issue documentation.6
      4. Refugee children who live in a city where there is no Refugee Reception Office (RRO). If their guardians do not have the money to travel to the RRO, the child might have expired permits for some time.

These are just some of the reasons why children may be undocumented. None of these reasons can be resolved by the intergovernmental committees. These are issues that the DHA should address by addressing the gaps and discrimination in the law.

3 Department of Home Affairs Circular number 5 of 2014.

4 For more on the struggles of unmarried fathers in the birth registration process see *Centre for Child Law v Director General: Department of Home Affairs and Others* [2021] ZACC 31.

5 For an example of such a case as well as the order for regulations see *DGLR and another v The Minister of Home Affairs and Others* (NGHC, 3 July 2014) Reasons for the order par 12.

6 These are the kind of circumstances which led to the court application in *Chisuse and Others v Director- General, Department of Home Affairs and Another [2020] ZACC 20.*

## The right to education – Centre for Child Law v Minister DBE (the Phakamisa judgment)

South African law is settled on every child’s right to access education regardless of their citizenship or their legal and/or documentation status. The Constitution protects every child’s right to education, including the rights of undocumented children or children who have irregular immigration status; asylum seekers and refugees; stateless children and children who are unaccompanied and separated from their parents. This constitutional principle was confirmed in *Minister of Home Affairs and Others v Watchenuka and Others* (*Watchenuka)7* which found that an individual’s fundamental rights are not dependent on their immigration status. In paragraph 25 the court explains:8

Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by s 10 of the Bill of Rights.

In 2019, in the *Phakamisa* case, the High Court confirmed this principle by ruling that undocumented children are entitled to be admitted to school and cannot be refused admission on the basis of lack of documentation. This judgment was followed by a directive issued by the Department of Basic Education which states clearly that no child may be refused admission based on lack of documentation.9

Even though this legal principle had always existed in the constitutional era, and no primary law formally excluded undocumented children admission to school, children were and still are routinely excluded from schools for lack of documentation. In 2018 an incident involving Eastleigh Primary School revealed that parents were being told that children would be taken to the police station should their parents not provide documentation of their child. An intervention by Centre for Child Law and Lawyers for Human Rights led to a retraction of the statement and the undocumented children were again allowed to attend school.10 The incident followed a visit by the Department of Home Affairs to the school the week before,

7 *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142.

8 As above at par 25.

9 Department of Basic Education Circular number 1 of 2020.

10 Joint press release LHR and CCL dated

illustrating the pressure that schools can experience from fellow departments, such as Home Affairs, leading to increased exclusion. The problem has been so pervasive that the South African Human Rights Commission stepped in and released a position paper on the rights of undocumented children to education. Their position is that undocumented children are entitled to education while they are in the country.11

In addition to denial of admission, the Department of Basic Education (DBE) online system for registration of students required identity numbers or passport numbers. The number of students registered (with an ID or passport number) then determined how much funding a school would receive from the Department. Schools were refusing to admit undocumented learners because they did not receive funding for those children. Some school principals told CCL that they had been threatened with a fine and even imprisonment by the Department of Home Affairs for allowing undocumented children to attend school. This was based on a section in the Immigration Act which criminalized aiding and abetting a foreign national with obtaining a service to which they are not entitled. This section did not apply to the service of providing education (a fundamental human right), but it succeeded nonetheless in persuading principals not to admit undocumented learners. These practices under the previous regime are relevant here because it illustrates the power of a provision which alludes to a requirement for documentation even though the legislation read together does not technically and legally prevent a child from being admitted to school. This is the Centre’s concern with the inclusion of the definition of required documents in clause 1(m) of the amendment, which then triggers referral to the intergovernmental committee.

The mere presence of a list of required documents will lead to not only an exclusionary approach amongst schools but will also 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. In the

11 South African Human Rights Commission *Position Paper Access to a Basic Education for Undocumented Learners in South Africa* September 2019

(https[://www](http://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20).s[ah](http://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20)r[c.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20](http://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20) a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-

%2012092019.pdf).

Phakamisa case, the majority of the 37 children who were party to the case were South African citizens by birth, who had been refused birth registration by the DHA.

## Limitation of the right to education

Where fundamental rights are limited or likely to be limited by legislation, the Constitution requires such limitations to be compliant with section 36 of the Constitution. Section 36 requires the limitation to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and taking into account the following 5 factors; the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

As illustrated, the requirement of a specified and extensive list of documents is highly likely to serve as an exclusionary provision in practice regardless of what the specificities of the law might conclude upon technical interpretation. As such it should comply with section 36 of the Constitution.

1. *Is the limitation reasonable justifiable in an open and democratic society based on human dignity, equality, and freedom??*

Presumably, as under the current Act, the requirement of documentation (currently a birth certificate) is to determine the age of the child and to place them in the correct grade. For this very reason, the judgment in *Phakamisa* allows the parent or guardian to attest to an affidavit stating the child’s details. In this way the school is able to place the child in the correct grade. In order for the BELA to be in line with the most recent law, it cannot prescribe more documents for admission than a birth certificate or an affidavit confirming the child’s details. However, an extended list of documents of not only the child, but also their parents is included, going far beyond the aim of determining age. It cannot be said that requiring this amount of documentation is rationally connected to the determination of age. Instead, it seems the provision attempts to regulate immigration statuses in children and their parents, an issue irrelevant to the right to education as confirmed by the constitution and the court. The provision is unreasonable. It places a burden on the parent and the child which is likely to present a significant barrier to education for a purpose unrelated to the right to education.

Considering the extreme likelihood of exclusion from school or at least the frustration of admission practices, the limitation cannot be said to be justifiable. Firstly, it far exceeds the measures necessary to determine school going age, and it sacrifices unrestricted access to education for what can only be the purpose of regulating immigration. This brings us to the five factors. The nature of the right is education and is considered to be one of the most crucial rights of the child. This has been confirmed by the courts. The second is the importance of the purpose of the limitation. If we accept that the only purpose of this limitation can be immigration control, we can also accept that it is an important governmental aim, but not so important that it can sacrifice the right to education. It might be a legitimate governmental aim, but nevertheless, the aim may not be achieved in an unconstitutional manner.

1. *Taking into account the five factors*

The right to education is an undeniably essential right. The reason for its limitation (immigration control by all indications) is desirable but not of equal importance to education. The nature and extent of the limitation is such that it is likely to cause a complete limitation of the right to education for some children. The relation between the limitation and its purpose is weak. The exclusion of children from school based on their documentation status cannot resolve immigration control issues. Last, there are less restrictive means of achieving the purpose of the limitation. The Department of Home Affairs have a variety of options available to them in terms of the Immigration Act, amongst others, to regulate immigration, none of which include exclusion from admission to schools.

The highly likely limitation of the right to education through this belaboured provision is unconstitutional. The CCL proposes that it be deleted in its entirety. Instead, a provision should be added which requires the documentation as determined by the court in the *Phakamisa* judgment, which is a birth certificate, alternatively an affidavit containing the details of the child (alternative proof of age).

## Clause 4 on intergovernmental committees and the right to privacy and the principle of a firewall

Clause 4 establishes intergovernmental committees, made up of ten departments at Chief Director level. When the child cannot provide the required documents, the child must be referred to the committees which will then attempt to assist the child. If this process is not voluntary and does not require consent, many parents will be weary of exposing their child and themselves to such scrutiny, and stay away from school altogether.

The level of detail required by the “required documents'' provision, as already illustrated, far exceeds what is necessary for the purposes of education. It is an unnecessary burden which requires more detail about the child’s life than is justifiable and making it available to a wide range of actors in the government sphere. It violates the child’s right to privacy and the principle of a *firewall* between the provision of basic services and the immigration system. Joint general comment number 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and their Families and number 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in international migration makes it clear that the sharing of information between duty bearers to children and immigration is not in the best interest of the child. In paragraph 17 the committees state the following:

Children’s personal data, in particular biometric data, should only be used for child protection purposes, with strict enforcement of appropriate rules on collection, use and retention of and access to, data. The Committees urge due diligence regarding safeguards in the development and implementation of data systems, and in sharing of data between authorities and/or countries. States parties should implement a “firewall” and prohibit the sharing and use for immigration enforcement of the personal data collected for other purposes, such as protection, remedy, civil registration, and access to services. This is necessary to uphold data protection principles and protect the rights of the child, as stipulated in the Convention on the Rights of the Child.

Considering the above, the establishment of intergovernmental committees to whom children are referred based on the data collected by schools can only be detrimental to the rights of the child. Particularly because the sharing of information is for the purpose of addressing the civil registration and immigration status of the child and their parent/s.

The Centre proposes that the inclusion of clause 4 with regards to the establishment of intergovernmental committees be deleted in its entirety. At the very least, the committees should be available to children and parents should they wish to enlist their support and consent to be assisted by them. If this amendment is included at all it should be stated clearly that no child and their parents will be forced to be “assisted” by the committees.

In conclusion:

1. The documents which are required are, in many cases, entirely impossible to obtain leading to unintended exclusion from admission to school.
2. The categories are incomplete and do not cover the full extent of cases I which children might find themselves leading to a situation where it is unclear how to deal with such cases, ultimately leading to exclusion.
3. The establishment of intergovernmental committees are detrimental to the rights of children in their current wide mandate without limitation.
4. The criminalization of parents in the context of failure to admit children to school is unreasonable.

Proposals:

1. The Centre proposes that clause 1(m) is deleted in its entirety and replaced with a section which requires the following documents for admission:
   1. A birth certificate, issued by the country of birth or citizenship; alternatively, the country of nationality.
   2. If no birth certificate is available an affidavit which identifies the child.
2. The Centre recommends that clause 4(b) be either:
   1. Deleted entirely; alternatively
   2. Replaced with a section which establishes a committee made up of solely DBE, DSD and DHA to which families can be referred voluntarily and with their prior consent.

## CORPORAL PUNISHMENT (clause 9(c))

The definition of corporal punishment in clause 9(c) does not include other forms of cruel and degrading treatment.

The Centre proposes that clause 9(c) be expanded to include (as per the definition provided by general comment 8 of the UN CRC):

Other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include for example punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares, or ridicules the child.”

## CODES OF CONDUCT (clause 7)

The Centre welcomes the expansion of section 8(2) by the addition of factors, such as diverse cultural beliefs, when drafting a code of conduct for a school. The Centre would like to propose that the child’s age and their individual circumstances are also added to the list of factors.

Clause 7 could also include a provision which requires reconciliatory measures to be taken after an incident between learners or between learners and teachers.

# SEXUAL HARASSMENT PROTOCOLS DO EXTEND THE ENCESSARY PROTECTIONS

## Clause 8 (4) on the Code of Conduct and the obligation of learners to comply therewith

We commend the proposed amendment to section 8(4) and the inclusion of exemptions to the schools’ code of conduct to accommodate varying cultural and religious views and medical circumstances of different learners; and its overall attempt to recognise and respect the diversity of all children in the Republic.

Nonetheless, we note that there are specific practical problems in the application of this provision. Due to the deep-seated inequality in our society, the appeal process which requires the appeal to be lodged to the Head of Department, who often sits in the provincial capital, may have the effect of rendering this appeal process as inaccessible to many poor families and those without technological devices and email accounts that permit them to lodge such an appeal *via* email or telephonically.

Firstly, CCL proposes that where an adverse decision is made, the affected learner and caregivers -as the case may be- must be provided with written reasons for such refusal. Additionally, such learner and caregiver must be provided with the contact details of the office, or relevant persons with whom such an appeal must be lodged. In this way, the provision of access to information will give effect to a more meaningful, feasible and objectively fair appeal process.

Thirdly, CCL proposes that the appeal period within which a child or caregiver may appeal must be extended to accommodate the various socio-economic and geographical factors that may negatively affect their ability to seek further recourse in the form of an appeal.

In this vein, we propose that the provision should read as follows, proposed amendments are emboldened and underlined in the text below:

1. Despite paragraph *(a)*, the code of conduct must contain an exemption provision in terms of which a *learner*, or the *parent* of a

*learner*, may apply to the *governing body* for exemption of that *learner* from complying with certain provisions of the code of conduct on just cause shown.

1. On receiving an application contemplated in paragraph (*b)*, the *school governing body* must communicate its decision to the *learner*, or the *parent* of the *learner*, as the case may be, within 14 days after receiving the application, and must in the case of a refusal provide:

***[(i)]*** written reasons for the refusal;

***[(ii)] be notified in writing of their right to appeal within 90 days, and:***

***[(iii)]provided the address and contact details of the relevant Head of Department.***

1. A *learner*, or the *parent* of a *learner*, who has been refused exemption as contemplated in paragraph *(c)* may, within ***90 days*** of receiving the notice of the decision, appeal to the *Head of Department* against the decision of the *governing body*, and the *Head of Department* or must, after considering the reasons for the appeal and the reasons for the refusal by the *governing body*, communicate his or her decision to the *learner* or the *parent* of the *learner*, as the case may be, and to the *governing body*, within 14 days after receiving the appeal, and must provide written reasons for his or her decision.’’

CCL welcomes the inclusion of the proposed section 8 (5)(c) which stipulates as follows:

*(d)* by the addition to subsection (5) of the following paragraph:

‘‘*(c)* The disciplinary proceedings referred to in this subsection must be age-appropriate, must be conducted in the best interests of the *learner*, and must adhere to the principles of natural justice, fairness and reasonableness prescribed by the *Constitution*.’’.

## Section 8(7) -8(9) on the Code of Conduct and Sexual Abuse in Schools

Section 8 of the South African Schools Act dictates provisions concerning the form of a school’s code of conduct, in sections 8(1) – 8(6), and the way disciplinary proceedings ought to be conducted by the SGB in sections 8(6)-8(9).

Section 8(7) -8(9) of the South African Schools Act outlines the way disciplinary proceedings ought to be conducted by the SGB. In essence the provisions codified in sections 8(7) – 8(9), collectively allow the school to make use of an intermediary, in instances where it is clear to the SGB that, the pending disciplinary hearing would expose a child witness to undue mental stress or suffering if he/she testifies at such proceedings, then the SGB may appoint an intermediary to enable the child witness to give testimony. The child witness may further be examined, cross-examined, and re-examined through that intermediary at any informally arranged place that would put the child witness at ease. The SGB may further permit that the child be placed in a separate room or in a way “any person whose presence may upset that witness, is outside the sight and hearing of that witness.”

The submissions that follow are not based on the aspects covered in the BELA Bill. Nonetheless, they are put forth because of identified *lacunae* that arises in law and in practice in the context of sexual abuse cases in schools.

Although we do recognise and appreciate the relevant provisions of the *Protocol on the Reporting and Management of Sexual Harassment in Schools*, we are aware that there are deficiencies in so far as procedural fairness and psycho-social support are concerned for those child victims.

The South African Schools Act does not envision a case where a child is victimized by a staff member or anyone in the school space who is not a fellow learner, hence the limitation that disciplinary processes be initiated by the governing body. Educators and non-educational staff are not regulated are not regulated by the Schools Act, they are regulated by SACE or other disciplinary measures. In essence if the governing body attempts to initiate disciplinary actions where an adult staff members violates a child, such disciplinary body would be acting *ultra vires,* which is outside of the scope of their assigned powers.

SACE disciplinary processes are centred on labour laws and employee rights that are geared towards advancing the right to fair hearing looking specifically at procedural and substantive fairness. This reflects in the letter of the SACE Act and the SACE disciplinary procedure. Under the SACE Act and the SACE disciplinary procedures no provision is made for a child to give testimony through an intermediary, the panellists and other persons are permitted to examine, cross-examine, and re-examine child witnesses without due consideration as to the measures to be adopted to ensure that the child is able to give effective testimony. Section 170A of the Criminal Procedure Act protects child complainants and witnesses of sexual offences from the harsh effects of cross-examination by allowing them to give evidence through an intermediary, here a judge is expected to make an assessment as to whether such a child requires an intermediary.

The Centre for Child Law proposes that the words ‘governing body’ used in clauses 8(7) - 8(9) on the use of intermediaries in cases that expose the child to “undue mental stress or suffering if he/she testifies at such proceedings”, ought to be changed to say ‘the relevant disciplinary body’ instead of ‘governing body’, in so doing the proposed sections will apply to all disciplinary bodies when they are dealing with sexual abuse matters before them.

Employees, whether educators or other staff operating in a school environment will often have legal representation or trade union support. This creates an intimidating space for a child who may be subjected to examination, cross-examination, and re-examination by members of the panel as well as the representatives of the alleged sexual perpetrator. This necessitates the adoption of measures to ensure that learners are protected from the harsh effects of adversarial disciplinary proceedings, as these may have the effect of intimidating a child and deterring them from making such testimony.

The proposed inclusions are intended to cover all cases where a child victim would find themselves before a disciplinary body, and are expected to provide evidence - as is often the case in sexual abuse matters- will potentially expose the child to undue mental stress or suffering if he/she testifies at such proceedings.

By altering the wording in clause 8(7)-8(9) from only ‘governing body’ to “governing body or other the relevant disciplinary body”, will ensure that intermediary services are rendered

pending sexual assault matters. This will mean that the Act will make provision for the necessary protections in any of the following instances:

1. Firstly, the ability of a child to access intermediary services in instances of sexual abuse that occurs in a school content;
2. Secondly, in those cases where one child sexual abuses another, and the relevant disciplinary body is School Governing Body;
3. Thirdly, in those cases where a general worker employed through the DPSA;
4. Lastly, in those cases where an educator is accused of sexually abusing a learner, the relevant disciplinary committee would be SACE.

Where a child puts forth an allegation of sexual assault against a staff member, the relevant disciplinary body must ensure that the child is informed of the relevant process that will follow. The learner should not be questioned or placed in the same room as the alleged offender during disciplinary proceedings. The relevant body must provide the child victim with an intermediary. The present provisions make the provision of an intermediary optional, the nature of sexual abuse is by its very nature traumatic and will induce further trauma when a child witness is required to speak during proceedings.

The text of clauses 8(7) – 8(9) is outlined below for ease of reference and provides as follows, the proposed amendments are emboldened and underlined in the indented text, we have proposed the insertion of clause 8(7)(b) to outline the circumstances under which intermediaries are needed and to provide a framework on how to determine the necessity of an intermediary:

*8 Code of Conduct*

*“(7)* ***[a]*** *Whenever disciplinary proceedings are pending before any governing body* ***[or other the relevant disciplinary body]****, and it appears to such governing body* ***[or other the relevant disciplinary body]*** *that it would expose a witness under the age of 18 years to undue mental stress or suffering if he or she testifies*

*at such proceedings, governing body****[or other the relevant disciplinary body]*** *may, if practicable, appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.*

***[7(b)In deciding whether an intermediary is required an assessment regarding the following aspects must be undertaken–***

1. ***the nature of the crime alleged to have been committed;***
2. ***the age and maturity of the child;***
3. ***the best interests of the child in question.***

***7(c) In cases where a child witness was allegedly sexually abused by an adult staff member, an intermediary must be appointed;***

1. *(a) An examination, cross-examination, or re-examination of a witness in respect of whom a governing body has appointed an intermediary under subsection (7), except examination by the governing body, must not take place in any manner other than through that intermediary.*

*(b) Such intermediary may, unless the governing body directs otherwise, convey the general purport of any question to the relevant witness.*

1. *If a governing body appoints an intermediary under subsection (7), the governing body may direct that the relevant witness must give his or her evidence at any place which –*
   1. *is informally arranged to put that witness at ease;*
   2. *is arranged in a way any person whose presence may upset that witness, is outside the sight and hearing of that witness; and*
   3. *enables the governing body and any person whose presence is necessary at the relevant proceedings to hear, through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.”*

CCL requests an invitation to make oral submissions before the Portfolio Committee if necessary and is open to producing further written submissions.

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