Cape Town Office

Aintree Office Park • Block D • Ground Floor • c/o Doncaster Road and Loch Road • Cape Town 7708 • South Africa
PO Box 36083 • Glosderry • 7702 • South Africa
Tel: (021) 879 2398 • Fax: (021) 423 0935 • Website • www.lrc.org.za
PBO No. 930003292
NPO No. 023-004

LRC
Legal Resources Centre

SUBMISSION ON THE BASIC EDUCATION LAWS AMENDMENT BILL [B2–2020]

Submitted by:

Legal Resources Centre (LRC)

www.lrc.org.za

Prepared by:

Sherylle Dass (Director, Cape Town)

Sipesihle Mguga (Attorney)

Zimkhitha Mhlahlo (Attorney)

Amy-Leigh Payne (Attorney)

Devon Turner (Attorney)

Cecile Van Schalkwyk (Attorney)

Ona Xolo (Attorney)

Charlene Kreuser (Candidate Attorney)

Goodness Maumo (Candidate Attorney)

Muyenga Mugerwa-Sekawabe (Candidate Attorney)

ABOUT THE LEGAL RESOURCES CENTRE

1. The Legal Resources Centre (LRC) is a public interest non-profit law clinic in South Africa founded in 1979. The LRC uses the law as an instrument for justice for poor and marginalised persons. The LRC pursues equality, access to justice, and the recognition of constitutional rights for all through creative and effective solutions. To this end, we provide legal advice and legal representation that empowers our clients, take on strategic and impact litigation, and participate in multi-pronged advocacy and law reform.

INTRODUCTION

2. The LRC welcomes the call for public comment on the Basic Education Laws Amendment Bill [B2–2020] (BELA).
3. Our submissions are informed by the experiences of our clients in accessing basic education, our interactions with the Department of Basic Education (DBE) and Provincial Education Departments (PED), and established case law and international standards on the right to education.
4. Where we do not explicitly comment on any provisions of BELA, it can be assumed that the LRC welcomes the provision.

SOUTH AFRICAN SCHOOLS ACT 84 OF 1996

SECTION 1: DEFINITIONS

5. Section 1 (a) of BELA provides that "'**basic education'** means grade R to grade 12". We welcome this amendment and the inclusion of grade R under basic education.
6. We are concerned that this definition lacks substance. The South African Schools Act 84 of 1996 (SASA) does not expressly give content to the right to basic education. Content has been given to the right to education in numerous judgments.[1]

[1] For example, the right to education has been interpreted to include access to textbooks, the provision of basic nutrition and non-educator staff, as well as scholar transport. See: *Section 27 v Minister of Education* 2013 (2) SA 40 (GNP); *Equal Education v Minister of Basic Education*

7. We recommend that the definition of basic education in Section 1 of BELA elaborate on the contents of the right to basic education. At a minimum, the right to education should include those elements that have already been established in case law. These include, but are not limited to, scholar transport, school infrastructure, qualified educators, non-educator staff, and learning and teaching support materials.
8. In this regard, it is important that the content of the right to education should not represent an exhaustive list but should be open-ended to allow the right to evolve with increasing educational standards and capacities in South Africa to meet the changing requirements of a dynamic society in the process of political, social, and economic transformation.[2]

SECTION 3: COMPULSORY ATTENDANCE

Section 3(1)(a)

9. Section 2 of BELA states that that school attendance is compulsory from grade R. The LRC welcomes the introduction of compulsory grade R. This is in line with the National Development Plan 2030 wherein the Government commits to the provision of universal access to grades R and RR.
10. While Section 28 (2) of the South African Constitution provides that a child's best interests are of paramount importance in every matter concerning the child, there is still no explicit right to early childhood development (ECD) in South Africa.
11. Section 28 inter alia provides that, "every child has the right to basic nutrition, basic health care services, social services, as well as the right to be protected from maltreatment, neglect, abuse or degradation". ECD comprises of all the aspects of children's rights contained in the Constitution. However, an aspect of ECD that is not explicitly provided for

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2021 (1) SA 198 (GP)*; Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183; *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG).

[2] *Moko v Acting Principal, Malusi Secondary School* 2021 (3) SA 323 (CC) para 30. See also Chrizell Churr 'Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany' (2015) 18 *PELJ* 2405 at 2412.

in the Constitution is the right to stimulation of early learning which includes access to quality, age-appropriate early learning programmes.

12. Although we welcome the inclusion of grade R in compulsory education, it is important that the grade R curriculum must be of quality and be age appropriate.
13. Section 5(1)(a) provides that the "admission age of a learner to a public school to grade R is four turning five by 30 June in the year of admission". In our work with ECD centers, many grade R teachers have expressed that four-year-old children should be in an environment filled with play.
14. The current CAPS curriculum for grade R can be described as a watered-down version of grade 1, filled with academic content. There is room for an argument that this is not sufficiently focused on the perceptual development of the child.
15. The preschool years, including grade R, should be filled with concrete learning experiences and carefully curated guided play which will then result in strong perceptual development in the child. Strong perceptual development is crucial to ensuring that the child is ready to start abstract learning in grade 1. It is within this context that the LRC supports the compulsory provision to include grade R, that is of quality and has age-appropriate early learning programs.
16. We would, moreover, like to draw attention to the fact that BELA creates confusion regarding the compulsory age of entry into grade R.
17. In the current version of BELA, children born after June 30 will turn 7 in grade R and 8 in grade 1. As a result, these children will miss out on a year of education and will be behind their peers that were born in the same year. The memorandum on the objects of BELA does not provide a rationale for this amendment.
18. The LRC supports the age intake of SASA as it stands – it makes it compulsory for any child turning 6 years old in the year of admission to attend grade R, regardless of when in the year the child turns 6 years old.

Section 3(6)(a)

19. BELA recommends that parents who fail to ensure that their children of compulsory school-going age attend school or that any person who prevents a learner of compulsory school-going age to attend school shall be "guilty of an offence and liable, on conviction, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and such imprisonment".
20. The memorandum on the objects of BELA does not adequately explain the reasoning behind the expansion. As such, it is our recommendation that the period should not exceed 6 months, as it currently is in SASA.

Section 3(7)

21. Section 3(7) seeks to criminalise the unlawful and intentional interruption, disturbance or hindrance of any school activities.
22. This amendment, in certain circumstances, may limit the right to freedom of expression and the right to assembly, demonstration, picket, and petition guaranteed under Sections 16 and 17 of the Constitution. In this regard, we refer to *Phumeza Mlungwana and Others v the State and Another CCT 32/18,* where the Constitutional Court confirmed that the right to protest cannot be criminalised. We further draw attention to the fact that protests are not unlawful – it only becomes unlawful when it is no longer peaceful. Thus, a peaceful protest by learners, educators and parents may come within the purview of this amendment and as such criminalises a protected right.
23. We are, moreover, concerned that the proposed insertion is phrased so widely that it may criminalise disruptive children.
24. As such, it is our recommendation that Section 3(7) be removed entirely.

SECTION 4A: MONITORING LEARNER ATTENDANCE

25. We welcome the inclusion of this provision to monitor learner attendance, especially in light of the exponential increase in learner dropout during COVID-19.[3]
26. We recommend that the section include 'habitual absenteeism' and add a benchmark to determine when absenteeism can be classified as habitual absenteeism.
27. We further encourage that BELA goes further and discusses steps to be taken after the investigation by the principal. As it currently stands, the Department of Basic Education (DBE) absolves itself from taking responsibility for the learner, instead placing the responsibility on school governing bodies (SGB). We recommend that the DBE work in collaboration with schools and social workers, where necessary, to ensure that learners are encouraged and assisted with remaining in school.

SECTION 5: ADMISSION

Section 5(1A) – 5(1G)

28. In discussing Section 5(1A), we also address the definition of "required documents" under Section 1. We are concerned that Section 5(1A) will infringe on the right to education. Firstly, the list of documents creates barriers to accessing education; Secondly, the list of "required documents" do not speak to other education laws, regulations, policies, and court judgments. Thirdly, the National Intergovernmental Committee (NIC) and the Provincial Intergovernmental Committee (PIC) could act as a barrier to accessing education. Finally, criminalising parents, guardians, and caregivers for failing to cooperate with this provision is misplaced.
29. <u>"Required documents" is a barrier to accessing education</u>
    29.1. In its current form, Section 5(1A) creates four categories of learners whose documents are required for purposes of admission to a

[3] Debra Shepherd and Nompumelelo Mohohlwane 'The impact of COVID-19 in education – more than a year of disruption' (2021) *NIDS CRAM* at 2.

public school. It refers to children born to a South African parent, children born to two foreign national parents who are permanent residents or temporary residents, refugees and asylum seeker children and children in alternative care. Undocumented children are excluded from the ambit of BELA.

29.2. The "required documents" is in direct contravention of the judgement in *Centre for Child Law and Others v Minister of Basic Education and Others* (*Phakamisa* judgement), where Clauses 15 and 21 of the Admissions Policy for Ordinary Public Schools was declared unconstitutional.[4]

29.3. These clauses made the admission of learners to schools conditional upon the production of a birth certificate, passport, or permit within three months after the learner was admitted. Learners who were unable to produce the required documents, were excluded from schools or continuously intimidated to produce documents through, for example, withholding school reports or threatening messages that they will not be allowed to write the National Senior Certificate examinations.

29.4. The Eastern Cape High Court held that Section 29(1) of the Constitution provides "everyone" the right to basic education, and that "everyone" includes undocumented national and non-national children. Denying children their right to education based on not having prescribed documents not only infringed on their right to basic education but also on their rights to human dignity, equality, and is not in their best interest.

29.5. The DBE and the Eastern Cape Department of Education (ECDOE) was directed to admit and enrol all the children without birth certificates. Where they could not provide the required documents, schools were directed to accept alternative proof of identity such as

[4] 2020 (3) SA 141 (ECG).

an affidavit or sworn statement deposed to by the parent, caregiver, or guardian of the learner wherein the learner is fully identified.

29.6. Following the Phakamisa judgement, the DBE issued Circular 1 of 2020 which confirmed the judgement and informed schools across South Africa of their obligations.[5]

29.7. Importantly, Circular 1 of 2020 has not been recalled and the Phakamisa judgment has not been appealed or rescinded. Therefore, the legal position as set out in the Phakamisa judgement is the legal framework against which the definition of "required documents" and section 4 of the Bill must be read.

29.8. The list of "required documents" essentially ignores the Phakamisa judgement and again creates a situation where learners who are unable to provide these documents can be excluded from school.

29.9. The negative impact of the definition is exasperated by the fact that the documents are stated cumulatively, which means that <u>all</u> the documents must be submitted before a learner can gain access to education. Where one of the documents cannot be submitted, it provides grounds for a school to deny admission for the learner. This is worsened by the absence of a clear and concise statement in BELA that unequivocally determines that learners who are unable to provide the documentation must be admitted to school unconditionally. The Bill, moreover, makes no provision for alternative forms of identification.

29.10. Beyond going against the Phakamisa judgement and Circular 1 of 2020, we would also like to draw attention to the difficulties in obtaining the list of "required documents" and the very real impact on children's lives. In 2019, there were 1 million undocumented learners in public schools most of whom were undocumented South African children.

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[5] Minister of Basic Education Circular No. 1 of 2020 *Admission of learners to public schools* (2020).

29.11. The memorandum on the objects of BELA also does not indicate the purpose of all the documents required. We are concerned that many documents do not serve a purpose and are not useful or necessary to providing education to all learners. In fact, the Bill creates even more documentary requirements than was necessary under the now unconstitutional Clauses 15 and 21 of the Admissions Policy, which did not require documentation of the parents of the learners. The LRC submits that there is no purpose that can be served by requiring the parents' documentation such as identity documents, asylum, and refugee permits. Requiring these documents creates an impression that the DBE is mandated to perform immigration control functions and verify the documentary status of learners and the parents or guardians of the learners.

30. <u>The list of required documents is not aligned with current and prospective laws and policies on admission</u>

30.1. On 11 February 2021, the DBE published the Draft Admissions Policy for Ordinary Public Schools for public comment (Draft Policy) which closed on 12 March 2021.[6] The Draft Policy states that schools may not prevent the admission of learners from schools or exclude them from any aspect of the right to basic education on the basis of lack of documentation.

30.2. While the Draft Admissions Policy have a number of problems that have been addressed in the LRC's submission on the policy, it is less restrictive than BELA and more aligned with the *Phakamisa* judgment and Circular 1 of 2020. Clause 15 of the draft Admissions Policy makes provision for the admission of a South African learner to a school and allows either an official birth certificate with an identity number or an affidavit about the learner. Importantly, even if a parent or guardian is unable to submit the learner's birth certificate, the learner must be admitted.

[6] GN 38 GG 44319 of 10 February 2021.

30.3. The Draft Policy makes no reference to any documentation of the parents or guardians. Clause 23 of the Draft Policy also makes provision for the admission of learners who are undocumented. At this stage, it is unclear when the Draft Policy will be finalised and published. However, if BELA and the Admission Policy is accepted, there will be a complete disjuncture between the legislation and the policy framework on admissions. It is therefore important that one admissions framework be designed that reflects the *Phakamisa* judgment and the constitutional right of all learners, irrespective of nationality or documentary status, to attend school.

31. <u>The establishment of the National Intergovernmental Committee and the Provincial Intergovernmental Committee</u>

31.1. Sections 4(1A) to (1F) of BELA establishes the NIC and the PIC with the purpose of assisting with the facilitation of the admission of learners. In particular, the PIC's function is to assist public schools that refer cases of learners who have not submitted the required documents to the school to acquire the necessary documents.

31.2. It is vital that children receive documentation and that their births are registered. The LRC fully support any efforts to ensure that learners are documented and that the Department of Home Affairs complies with its laws, regulations, and policies in documenting learners. However, the LRC does not support the establishment of the NIC and the PIC.

31.2.1. Firstly, the makeup of the NIC and the PIC are problematic. It includes representatives at the level of Chief Director from the following departments: Department of Basic Education, Department of Social Development, Department of Home Affairs, Department of Justice and Constitutional Development, South African Police Services, Department of Employment and Labour, Department of International Relations and Co-operative Affairs, Department of Health,

National Treasury, and the Department of Statistics South Africa.

31.2.2. Secondly, the DBE does not have the relevant expertise or resources to obtain documents for children and is not empowered by any of the provisions in the Births and Deaths Registration Act or immigration laws to play any role in this process. It is the mandate of the Department of Home Affairs to see to the documentation of individuals.

31.2.3. Thirdly, education laws and policies cannot be used to create bodies for the purposes of implementing immigration laws. This is contrary to the role that education plays in South Africa and acts as a deterrent for people to access education services and other social services.

31.3. We are concerned that the NIC and the PIC violates domestic privacy laws and is not aligned with international law on children's right to privacy

31.3.1. The establishment of the NIC and PIC will result in the sharing of children's, as well as their parents' personal information between government departments. This contravenes Section 14 of the Constitution, as well as the Promotion of Personal Information Act 4 of 2013 (POPIA).[7]

31.3.2. The United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child issued a Joint General Comment in 2017 in which it obligated member states to erect effective firewalls between health institutions, child protection services, educational institutions, and immigration authorities to ensure the effective protection of migrant children's' rights.

[7] Section 34-35.

This includes ensuring that irregular migrant children are not criminalised for exercising their socio-economic rights.[8]

32. Criminalising parents, guardians, and caregivers for failing to cooperate with this provision is misplaced.

32.1. Section 4 of the Bill criminalises any parent, caregiver, or guardian who refuses to cooperate in securing the required documents. They are guilty of an offence if convicted and can be fined or imprisoned for up to 12 months. This provision is overly harsh and devoid of the realities that parents and caregivers face in obtaining documents for their children.

32.2. The LRC have regularly assisted parents and caregivers who have struggled for years to obtain documentation for their children, finally having to resort to a court application in order to obtain the documents.

32.3. These parents and caregivers are generally poor, black, and live in rural areas where access to Department of Home Affairs offices is limited. This provision creates a mechanism to punish parents and caregivers for the failures of the Department of Home Affairs. It could leave children without their parents and caregivers and deprive them of a stable family. It is also not helpful in assisting the children to obtain documentation. In fact, it deprives the child of the people who are meant to assist them in obtaining their documentation. The LRC suggests that rather than criminalising parents and caregivers, the focus must be on advocating for resources that enables the Department of Home Affairs to assist parents to obtain documents for their children.

33. Recommendations

33.1. Sections 5(1A) to 5(1G) must be deleted from BELA.

[8] CRC Committee 'General Comment No. 23 (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' (16 November 2017) CRC/C/GC/23.

33.2. The definition of “required documents” in Section 1 of BELA be replaced with a definition that takes into consideration the following:

33.2.1. That the right to education extends to everyone within the boundaries of South Africa, regardless of their documentation status, their immigration status, or their nationality. Accordingly, no child may be denied admission to school on account of their documentation status, their immigration status, or their nationality. Accordingly, all schools must admit learners and serve their education requirements irrespective of their documentation.

33.2.2. That South African children must provide a birth certificate where it is available. Where a birth certificate of the child is not available, a sworn statement or affidavit deposed to by the parent caregiver, or guardian confirming the identity and age of the child must be provided. The child’s immunisation certificate must also be provided.

33.2.3. That non-national children must provide a birth certificate (either a birth certificate issued by the relevant authority from the country of origin, or a handwritten birth certificate issued by the Department of Home Affairs in accordance with the Births and Deaths Registration Act, 1992), temporary residence visa, permanent residence permit, asylum seeker visa, refugee visa, other visa or permit authorising the child to remain in the Republic, or a passport. Where none of this documentation of the child is available, a sworn statement or affidavit deposed to by the parent, caregiver, or guardian confirming the identity and age of the child must be provided. The child’s immunisation certificate must also be provided.

33.2.4. That children who are in alternative care must provide a court order granting placement of the child in alternative

care. Where the court order is not available, a sworn statement or affidavit deposed to by the head of the child and youth care center, the foster parent, or the caregiver providing alternative care at a temporary place of safety, confirming the identity and age of the child, must be provided. The child's immunisation certificate must also be provided.

33.2.5. A child whose parent, caregiver, or guardian does not provide any of the above documentation must still be unconditionally admitted to school. The principal of the school must provide the parent, caregiver, or guardian of a learner who does not provide any of the above documentation, with a referral letter advising them to approach the Department of Home Affairs to obtain documentation for the child. The referral letter should request the Department of Home Affairs to prioritise assisting the learner and their parent or caregiver to obtain the outstanding document(s).

33.3. Importantly, there must be an unequivocal statement that where these documents cannot be provided, children may still attend school and may not be excluded in any way.

Section 5(5)(d)(ii)

34. The substitution of this provision into SASA has the adverse potential of reinforcing the so-called discriminatory "feeder-zone" policy of school admission. According to Section 5 of the Admission Policy for Ordinary Public Schools, feeder zones are determined in order to control the learner numbers and coordinate parental preferences.[9] Therefore, the feeder zone rule has always meant that schools must give preference to learners who live within a particular distance from the school.

[9] GN 2432 GG 19377 (19 October 1998).

35. SGBs define feeder zones, deciding who gets to go to specific schools. As such, feeder zones have become synonymous with excluding disadvantaged learners from well-resourced schools. By law, white-only schools no longer exist. However, former white-only schools are often those who enforce feeder zone policies strictly. The neighbourhoods where these schools are situated are made up of predominantly white residents. Feeder zone policies enforces discrimination under the pretense of proximity to home.[10]

36. Another aspect of feeder zones that perpetuates inequality is the quintile system. Quintiles are heavily correlated with feeder zones. Not only do the categories of schools determine the allocation of funding, which in turn determines which schools can charge fees, but they also show disparities in aspects such as geography. For example, there is a clear disparity between the quintiles of schools in urban areas and rural areas. The fourth and fifth quintiles are the wealthier categories of schools situated in the urban areas. The poor quintiles, one through three, are situated in rural townships and former homelands.

37. The provision in BELA providing that Head of Departments, when considering the school admission policy, should consider whether there are other schools in the community accessible to learners fails to consider the importance or regularity of learner applications to schools outside of their community.

38. The use of feeder zones has and continues to perpetuate apartheid-era discrimination in access to education. Feeder zones are a barrier to education. Further evidence of the discriminatory nature of feeder zone policies lies in the apartheid-era spatial planning model, which purposely designated and divided communities based on racial lines. This continues to pervade the racial and socio-economic make-up of communities and still affects the nature of schools found within a community.

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[10] Bernita Isaacs *Exclusion by design: A constitutional analysis of admission policies and practices in selected Cape Town schools* (M.Ed. thesis, University of the Western Cape, 2019).

39. We strongly recommend that any provisions which promote feeder zone admission policies be acknowledged as an undue barrier to accessing education. This is particularly detrimental for learners from previously disadvantaged backgrounds and locations.
40. Therefore, we recommend that this provision be deleted. This provision should not place the emphasis on admission policies being tailored to ensuring that children are restricted to their community-based schools but that diversity and equal access to equal education be emphasized as the criteria for school admission policies.

SECTION 8: CODE OF CONDUCT

41. BELA provides for the substitution of Section 8(2) of SASA. The substitution requires that a code of conduct must take into account the "diverse beliefs, religious observances and medical circumstances of the learners at the school".
42. We commend the amendment for seeking to ensure that schools are inclusive spaces. However, we are concerned that the legislature did not take the opportunity to place an obligation on SGBs to take into consideration diverse sexual orientations and gender identities of learners.
43. Learners with diverse sexual orientations and gender identities are vulnerable to discrimination and abuse in the school environment as a result of the lack of any explicit protection afforded to them by the DBE.[11]
44. We are, moreover, concerned that BELA does not refer to the need for a code of conduct to commit to racial and socio-economic diversification. South Africa remains plagued by racial discrimination, which plays out in all parts of society, including at school.

[11] See, in general: Carl Thomas *'Strand: Transgender seun vebried om seunsuniform the dra'* Die Burger 23 Junie 2021; Thabo Msibi ''I'm used to it now': experiences of homophobia among queer youth in South African township schools' (2012) 24 *Gender and Education* at 515; *Mpehla and Others v Manamela and Limpopo Department of Education* (2016) case no1/2016 (unreported case), Seshego Equality Court.

45. Against this backdrop, we recommend the following amendment to Section 8(2):

> A code of conduct referred to in subsection (1) must be aimed at establishing a purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process, taking into account the diverse cultural beliefs, religious observances, medical circumstances, and sexual orientation and gender identities of the learners at the school and the constitutional obligation to prohibit all forms of racial discrimination [addition underlined].

46. BELA also proposes a substitution for Section 8(4) of SASA, providing for learners or their parents to apply to the SGB for an exemption from complying with certain provisions of the code of conduct on "just cause shown".
47. The LRC is concerned that this provision would require transgender learners to "out" themselves to the SGB in order to apply for an exemption from complying with a uniform policy adopted in terms of the school code of conduct which is arguably based on learner's perceived gender based on their sex and not their gender identity.
48. Section 8(4) is discriminatory and creates undue stress and trauma on transgender learners who are already vulnerable. These learners should not be forced to show "just cause" or to apply for an exemption. We are further concerned that it is unclear what constitutes "just cause".
49. It is our submission that the legislature should use this opportunity to place an obligation on SGBs to take into account diverse sexual orientations and gender identities when drafting the code of conduct. Learners who identify with the gender assigned to their sex at birth do not have to apply for an exemption to wear the school uniform that reflects their gender identity. It is, therefore, unacceptable to demand this of learners who identify with a different gender than assigned to their sex at birth.

SECTION 9: SUSPENSION AND EXPULSION FROM SCHOOL

50. The LRC welcomes the definition of serious misconduct under the section. However, we are concerned over the breadth of the definitions.

51. The benchmark for serious misconduct warranting suspension under SASA is whether the learner poses a danger to themselves or to others. The amendment proposed by BELA goes much further, raising concerns around whether some behaviours do, in fact, qualify as serious misconduct that should warrant suspension.

52. We draw attention to the issues relating to the inclusion of the following as serious misconduct:

    52.1. “Illegal possession of a drug or liquor”

    Illegal possession of a drug or liquor can be a once off incident or experimental use and does not necessarily give rise to serious misconduct. The punishment for possession of drugs or liquor is thus retributive and not rehabilitative. The current wording of drug-related offences paints all offenders with the same brush and doesn’t whether it is a once-off or recurring incident or progressive discipline.

    52.2. “Repeated disruption”

    Children are naturally disruptive. The reference to “repeated disruption” is vague and can result in learners being punished for being children.

    52.3. “Serious transgression relating to any test, examination or examination paper”

    We submit that a learner cheating on a test does not pose a danger to their fellow learners or themselves. While cheating is a disciplinary offence that warrants a sanction, it should not be regarded as a serious misconduct warranting suspension.

    52.4. “Fraud”

We are concerned that learners would not understand what fraud means. The section, moreover, does not state who would be competent to decide what fraud means.

52.5. "Sexual activity and sexual assault"

Sexual activity is too broad to be included with sexual assault. This could be construed to include holding hands, hugging or kissing.

53. We recommend that the above terms be removed from the definition of serious misconduct. The punishment is severe in light of the fact that the conduct complained will only in exceptional circumstances result in learners posing a threat to themselves or to others.

54. It is important to further make the comparison to sanctions given to teachers who commit any of these offences. They do not face suspension or similar harsh punishment. As such, it is unreasonable to do so in respect of learners.

SECTION 10: PROHIBITION OF CORPORAL PUNISHMENT

55. The LRC fully supports the abolishment of corporal punishment and the sanction imposed upon conviction. However, we note that there is an omission regarding the laying of criminal charges against a person who has been found guilty of the offence.

56. It must be emphasised that corporal punishment meets the definitional elements of the common law crime of assault.[12] Therefore, we submit that once a person has been found guilty of administering, inflicting or imposing corporal punishment, the Director for Public Prosecutions must be requested to attend to the matter or that a criminal charge must be laid at the SAPS.

57. Given the seriousness of corporal punishment, we recommend that Section 10(2) be amended to impose a "fine or imprisonment for a period not

[12] Assault consists in unlawfully and intentionally applying force to the person of another or inspiring a belief in that other that force is immediately to be applied to him.

exceeding 24 months, or to both a fine and such imprisonment" [addition underlined] on any person who contravenes Section 10(1).

SECTION 12A: MERGER OF PUBLIC SCHOOLS

58. The LRC welcomes this amendment. However, we note that the amendment does not include a provision for arranging scholar transport for learners who were previously provided with transport prior to the merger.
59. The amendment also excludes a provision that provides for scholar transport for learners who will be eligible for scholar transport as a result of the merger.
60. We propose that the Member of the Executive Council be empowered to indicate, prior to the merger, that where school mergers are affected, scholar transport will be prioritised for learners who qualify and attend the merged school.

SECTION 24: MEMBERSHIP OF GOVERNING BODY OF ORDINARY PUBLIC SCHOOL FOR LEARNERS WITH SPECIAL EDUCATION NEEDS

61. No explanation has been provided as to why the function was taken away from the MEC and given to the Minister.

SECTION 28: ELECTION OF MEMBERS OF THE GOVERNING BODY

62. Our concern with the amendment of Section 28 is the same as with Section 24. No explanation has been provided as to why the function was taken away from the MEC and given to the Minister.

SECTION 38: ANNUAL BUDGET

63. It is our recommendation that a provision be added to allow/provide for virtual meetings and voting via electronic communications to ensure proper participation.

SECTIN 59A: DISPUTE RESOLUTION

64. We welcome the inclusion of a dispute resolution process as it removes pressure from an already overburdened judicial system.

SECTION 61: REGULATIONS

Scholar transport

65. We welcome the amendment to Section 61 and addition of matters in respect of which the Minister may make regulations.
66. We are concerned that the amendments do not make provision for regulations to be adopted in respect of scholar transport. Although Section 61 gives a discretion to the Minister to promulgate regulations "on any matter which must or may be prescribed by regulation under this Act", it is our submission that scholar transport is too important to be left to the discretion of the Minister.
67. According to the DBEs Report on the State of Readiness for the 2022 Academic Year, there were 776 114 learners in need of transport, but only 645 104 were transported. Nationwide, 131 010 learners who are eligible and deserving of scholar transport are not benefitting from it.[13]
68. A review of the nine (PEDs) learner transport policies indicates that the policies fail to comprehensively address learners' need for scholar transportation in the various provinces. The policies invariably fail to provide guidance on issues such as the format learners and/or parents must submit their learner transport applications in, when, and to whom these applications should be submitted; what the timeframes are for when learners and schools will be informed of the decision/outcome of their applications for eligible learners; what the appeal mechanism is if learners are aggrieved by the decision not to transport them (except for KwaZulu Natal); or what the roles and responsibilities of key stakeholders are.
69. Critically, the policies do not reflect the constitutional imperative that children should have access to basic education, and the obligation,

[13] Department of Basic Education *Report on the state of readiness for 2022 academic year* (2021).

confirmed by our courts, to transport qualifying children to public schools to realise their right to basic education.

70. It is our recommendation that provision also be made for minimum norms and standards in relation to learner transport in the following way:

(aG) on the minimum norms and standards for learner transportation.

Literacy interventions

71. The LRC recommends that Section 61 also provides for the adoption of literacy-focused regulations.

72. The most recent Progress in International Reading Literacy Study (PIRLS) statistics released in 2017 revealed that 78% of grade 4 learners cannot read for meaning in any language.[14] Although there has been improvements in early grade reading outcomes – with the percentage of grade 4 learners reading for meaning improving from 13% (2006) to 18% (2011) to 22% (2016) – the reality is that, at the current rate of improvement, South Africa will only get to 90% of grade 4 learners reading for meaning by 2084.

73. The ability to read for meaning as an essential component of the right to basic education has been confirmed in *Minister of Basic Education v Basic Education for All*.[15] The Supreme Court of Appeal drew attention to the importance of literacy to address poverty, to promote democracy, and to enable children to grow up into adults who can contribute to the development of society.[16] This was echoed by President Cyril Ramaphosa in his third State of the Nation Address (SONA) in February 2019.[17]

[14] Sarah Howie, Celeste Marie Combrinck, Karen Rouch, and Mishack Tshele 'PRILS Literacy 2016 Progress in International Reading Literacy Study 2016: South African Children's Reading Literacy Achievement' (2017) *PILS*.
[15] 2016 (4) SA 63 (SCA).
[16] Para 1.
[17] South African Government 'President Cyril Ramaphosa: 2019 State of the Nation Address' available at https://www.gov.za/speeches/president-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000, accessed on 13 June 2022.

74. There is a plethora of policies, plans and interventions that have been drafted to address the literacy crisis.[18] However, none of them are legally binding.

75. The DBE's 2008 National Reading Strategy has recognised numerous aspects that form part of ensuring that learners become literate. In this regard, the Reading Strategy draws attention to the importance of (i) continuous monitoring and assessment of learners' reading levels to assist teachers and national and provincial education departments to identify shortcomings and provide the necessary support; (ii) sufficient numbers of hours dedicated to teaching reading with effective teaching practices and methodologies; (iii) the provision of ongoing teacher training on the best teaching strategies and practices, with ongoing support from district curriculum officials; (iv) the effective prioritisation of the management of literacy teaching, particularly by the principal; and (v) and the critical role of having sufficient, available, quality reading resources.

76. Despite being in place for more than 13 years, the strategy's status and uptake is unclear, literacy rates remain appallingly low, and nothing suggests this is likely to change soon.

77. Considering these interventions, it is evident that the DBE is aware of the literacy crisis and has identified ways to address it. However, in the absence of legally binding interventions, it is our recommendation that provision be made in Section 61 for regulations to be adopted to promote literacy in the following way:

    (aG) on a national reading strategy.

[18] See, for example: Foundations for Learning Campaign GN 306 GG 30880 of 14 March 2008; Draft National Policy for the provision and management of learning and teaching support material (LTSM); ECDoE 'Reading Plan 2019-2023' 23 January 2020; WCED 'Reading Strategy 2020-2025' 15 March 2020.

EMPLOYMENT OF EDUCATORS ACT 76 OF 1998

SECTION 1: DEFINITIONS

78. The BELA Bill proposes an amendment to the definition of 'educator'.
79. It is our submission that this definition is too narrow. Like the South African Council for Educators Act 31 of 2000, the Employment of Educators Act does not apply to staff members beyond educators who are employed at schools and that have access to and authority over learners.
80. Sexual misconduct poses a considerable risk to the well-being of learners. Recent reports highlight a continuous failure by the DBE to sufficiently address allegations of educator sexual misconduct, as well as of sexual misconduct committed by staff members of schools.[19]
81. Considering the risk of harm to learners in the school environment, it is our recommendation that the definition of 'educator' be expanded to ensure that all persons who have access to learners at school are managed under the Employment of Educators Act.
82. We recommend that the proposed definition be amended to state the following:

> [A]ny person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, <u>or who provides administrative, maintenance or extra-curricular training service</u> at any public school or departmental office and who is appointed in a post on any educator establishment under this Act [addition underlined].

SECTION 8: TRANSFER OF EDUCATORS

83. The BELA Bill proposes a substitution of Section 8(4) which requires that the school governing body of the public school or the council of the further education and training institution provide a recommendation to the Head of

[19] Marecia Damons 'A Cape Town teacher sexually assaulted a learner five years ago. He's still teaching at the school' *GroundUp* 23 May 2022; Jonisayi Maromo 'Court hears how school boy was raped, bought teacher a PlayStation to stop the abuse' *IOL* 9 June 2022.

DBE regarding the transfer of an educator to a different school within two months from the date requested to make such recommendation.

84. With the transfer of educators, the risk arises that an educator may be transferred pending the outcome of misconduct or serious misconduct proceedings, thereby avoiding accountability.

85. It is our recommendation that the following be inserted after the proposed amendment of Section 8(4):

A recommendation contemplated in subsection (2) shall be made within two months from the date on which a governing body was requested to make a recommendation, failing which the Head of the Department may make a transfer without such recommendation <u>provided that no such recommendation or transfer shall be made in the event that there is pending misconduct or serious misconduct proceedings against the educator</u> [addition underlined].

SECTION 17: SERIOUS MISCONDUCT

86. We welcome the addition Section 17(1)(g).

87. We are concerned that the amendment has overlooked crucial amendments to the Employment of Educators Act in respect of protecting learners from educator sexual misconduct.

88. As mentioned above in relation to the definition of ‘educator, we are concerned the Employment of Educator Act does not apply to non-educators who have access to learners at school.

89. Schools employ administrative and maintenance staff, coaches, and choir teachers, to name but a few. Unlike educators, non-educators are not registered or regulated by any professional body. Nonetheless, they have access to learners and pose an enormous danger to the safety of learners.

90. In light hereof, we reiterate the importance of bringing non-educators who work at schools under the purview of the Employment of Educators Act.

91. Section 17(1)(c) limits ‘serious misconduct’ to an educator found guilty of ‘having a sexual relationship with a learner of the school where he or she is employed’. This suggests that educators who commit sexual misconduct against learners from other schools may not face the same consequences. There can be no rationale in differentiating between sexual relationships between educators and learners at the schools where they teach and learners that attend schools where they do not teach.
92. It is our recommendation that Section 17(1)(c) be amended to read as “[a]n educator must be dismissed if he or she is found guilty of the sexual harassment, sexual assault, rape or statutory rape of a learner” [addition underlined].

SECTION 18: MISCONDUCT

93. Section 18(1)(dd) provides that ‘an educator commits misconduct if he or she commits a common law or statutory offence’. Moreover, Section 18(5) states that an educator *may* be dismissed if they are found guilty of rape.
94. Any educator sexual misconduct, whether sexual harassment, sexual assault, rape, or statutory rape, are profoundly serious offences and should be dealt with under Section 17, which demands immediate dismissal.
95. It is in this context that we would also like to draw attention to the shortcomings in the disciplinary procedures that are followed when an educator is accused of committing a misconduct or a serious misconduct.
    95.1. Where allegations are brought against a teacher for sexual misconduct committed, the school principal must report the matter to the Provincial Education Department’s (PED) district office, as well as to the South African Police Service (SAPS). However, if the principal does not find the matter to be ‘sufficiently serious’, they may choose to investigate it internally. The issue that arises here is that this does not keep in mind the various role-players that should be involved where allegations of sexual misconduct arise.

95.2. Currently, there is no reciprocal obligation on the South African Council of Educators, SAPS, the Department of Social Development or the PEDs to inform one another of complaints. As such, incidents reported to one role player does not result in investigations by all and may be managed internally. The incoherence amongst role-players means that learners may be required to provide evidence at numerous hearings, being re-traumatised by each one.

95.3. Should it be decided that a complaint of educator sexual misconduct should be dealt with internally, educators may escape accountability by resigning, putting an end to the investigation and enabling potential sexual predators to remain in the education system.

96. The shortcomings outlined above indicates the necessity of crucial amendments to the Employment of Educators Act. We, therefore, recommend the following:

96.1. The Employment of Educators Act should be amended to not allow teachers who are appealing a decision of educator sexual misconduct against them to continue teaching. Instead, educators whose matters are on appeal must be placed on paid suspension and not be allowed to work with children until the appeal is finalized.

96.2. Where an educator resigns while under investigation for sexual misconduct or while suspended, Section 14(1)(c) and (d)(ii) must be invoked. Thus, should educators resign before the disciplinary process is completed, they must be deemed dismissed.

96.3. The legislative framework should, moreover, be amended to provide that, where an educator who is under investigation for educator sexual misconduct seeks employment at a different school, information on the allegations should be provided to the school.

96.4. The Employment of Educators Act must require that schools share the outcome of disciplinary proceedings with PEDs and SACE

regardless of the perceived seriousness of the allegation of educator sexual misconduct.

96.5. Finally, it is necessary to provide clarity regarding the definitions of misconduct and serious misconduct in a manner that aligns with the Constitution, the Children's Act, and existing sexual offences laws.

CONCLUSION

97. We trust that you will find this submission useful.

98. Should you have any comments or questions, please do not hesitate to contact Amy-Leigh Payne at amyleigh@lrc.org.za or Charlene Kreuser at charlene@lrc.org.za.

ENDS