JOINT SUBMISSION TO THE NATIONAL COUNCIL OF PROVINCES

BY

EQUAL EDUCATION AND EQUAL EDUCATION LAW CENTRE

ON

THE BASIC EDUCATION LAWS AMENDMENT BILL

B2B-2022

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Prepared jointly by

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A. INTRODUCTION

1. This is a joint submission made by Equal Education (EE) and Equal Education Law Centre (EELC) in response to the Basic Education Laws Amendment Bill B2B-2022 that was passed by the National Assembly on 26 October 2023, and which has now been transmitted to the National Council of Provinces for concurrence (**"2022 Bill"**).

2. EE is a movement of learners, post-school youth, parents, and community members, advocating for quality and equality in the South African education system. EE's campaigns are informed by the experiences of EE members, policy analysis, and research.

3. The EELC is a public interest law centre specialising in education law. EELC works closely with EE in pursuit of their mutual goals of an equal education system and quality education for all.

4. EE and EELC welcome the process of legislative reform, especially the reform of the South African Schools Act ("**SASA**"). Given the stage in the process, we focus in this submission only on the essential changes needed. If required, a more comprehensive outline of our recommendations and reasons therefore can be found in Annexure A.

B. SUBMISSION

SUBMISSION IN RESPECT OF THE BASIC EDUCATION LAWS AMENDMENT BILL, B2B-2022			
Clause in the 2022 Bill	**Amended section in the South African Schools Act 84 of 1996**	**EE/EELC Comments**	**EE/EELC Recommendations**
COMPULSORY GRADE R			
2	3(1)	Clause 2 would amend section 3(1) of SASA to make Grade R attendance compulsory. Broadly speaking, EE and EELC welcome this change. By making Grade R compulsory, access to free early learning opportunities will likely be improved – including for children with disabilities. However, the precise framing of the clause is problematic. Parents would *immediately* be required to ensure that children in their care "attend *school*, starting from grade R on the first school day of the year in which such learner *reaches the age of six years*". Given that public school capacity is seriously limited, with thousands of learners unplaced each year, we do not think it would be desirable, at least in the short term, to require that young children stop attending Grade R classes at ECD centres and must instead be accommodated in already over-crowded schools, with criminal sanctions attached if parents intentionally fail to comply. Another problem is that the amendments to section 3(1) would create tension with section 5(4), which prescribes	EE and EELC recommend that: ● Amendments are made to reflect a phased approach to the introduction of compulsory school attendance starting from Grade R. We recommend that a new subsection is inserted, stipulating that: "(1) A learner turning six years old either: (a) in the year in which this Act comes into effect; or (b) in the year immediately thereafter, is not required to attend Grade R in terms of section 3(1). (2) A learner who does not attend Grade R in terms of subsection (1) must attend Grade 1 on the first school day of the year in which the learner reaches the age of seven." ● 'Admission age' should be defined as the earliest age that a learner may enter a given grade unless the conditions set out in section 5(4)(b) or (c) of SASA are met. This will help

		the age of admission. Under section 5(4), the *admission age* for Grade R is age four turning five by 30 June in the year of admission. But, under section 3(1), it would now be *compulsory* to send a child to Grade R when they are age five turning six. This will likely be confusing for a parent, teacher, principal or other stakeholder attempting to apply the legislation.	to distinguish the admission age from the compulsory school-going age and will help clarify the responsibilities of parents and other stakeholders.
RELIANCE ON CRIMINALISATION THROUGHOUT THE BILL			
2(b)	3(6)(a)	The 2017 Draft Bill proposed that the penalty for parents who fail to take their children of compulsory school-going age to school, or people who prevent such learners from attending school, be increased considerably from six months to six years. In the 2022 Bill the six-month penalty currently contained in SASA is increased to 12 months and allows for the imposition of *both* a sentence and a fine. Despite lowering the penalty from what was proposed in the 2017 Draft Bill, we remain concerned that this amendment harshly and unfairly punishes parents. It leaves parents vulnerable to prosecution should they, out of fear for their children's safety because of protest or unsafe school conditions, decide to keep their children away from school. It primarily targets female caretakers and ignores the potential negative effects of parents' incarceration on learners' lives. The DBE itself notes that the causes of irregular/non-attendance are, more often than not, outside of parental control and due to the State's failure to provide social protection. **The National Policy on Learner Attendance states that "Learners stay away from school for many reasons, but in many communities poverty is the root cause of irregular school**	EE and EELC recommend that section 3(6)(a) of SASA be amended to remove the prospect of criminalisation and that section 3(6)(a) of SASA be amended to make provision for a more cooperative social interventionist approach aimed at securing learner attendance during the compulsory schooling phase. *If the unfortunate decision is taken to not remove criminalisation altogether, the following recommendations are made in the alternative and as a means to ameliorate the impact of criminalisation of parents*. The proposed increase to the penalties in section 3(6)(a) should be abandoned. Section 3(6)(a) should require a court to be satisfied that a parent is capable of paying the fine imposed. Section 3 should make provision for a parent, upon receipt of notice from the HOD, to make representations. A non-exhaustive list of valid defences should be legislated, and section 3 should be amended to include further procedural safeguards and supportive mechanisms to secure learner attendance.

		attendance." However, opting for the incarceration of parents assumes that a parent's conduct serves as the sole cause for chronic absenteeism during the period of compulsory schooling and that parents possess complete control and must accept all blame in this regard. EE and EELC are also of the view that there exist other laws more suited to the purpose of ensuring learners attend school.	
2(b)	3(6)(b)	Currently, 3(6)(b) provides that any other person who, without just cause, prevents a learner subject to compulsory attendance from attending school commits an offence and is liable to fine or imprisonment not exceeding 6 months. Clause 2(b) of the 2022 Bill proposes an increase to the maximum imprisonment from 6 months to 12 months and allows for the imposition of both a fine and a sentence. EE and EELC are of the view that there exist other laws more suited to ensure the prosecution of persons whose conduct may fall under this section.	We recommend that section 3(6)(b) be deleted in its entirety. Should the section be kept as is, we alternatively propose that the increase to the penalties contained in the section be abandoned.
2(c)	3(7)	This amendment pertains to penalties for any person who "unlawfully and intentionally" interrupts, disturbs or hinders a school activity or hinders or obstructs any school in the performance of its activities. We are encouraged that the 2022 Bill narrows the application of this provision to *unlawful* activities; however, this provision remains worrying to EE and EELC as there are sufficient existing laws on criminal conduct and violent protests, and SASA should not be the legislative tool where such activities are dealt with. The amendment which increases the penalty from 6 to 12 months, and allows for both the imposition of a fine and a sentence is also of concern.	EE and EELC strongly urge that the offence created by this amendment be removed.

36	59	This section creates a criminal offence in respect of parents (or other persons responsible for the learner) who knowingly submit false information, misleading information, a forged document or a document which is declared to be a true copy of the original when it is not a true copy. Parents or other persons are guilty of an offence and liable to a fine or imprisonment not exceeding 12 months or both a fine and imprisonment if convicted. The EELC and EE do not condone fraud, however, we submit that the proposed amendment to jail parents for supplying false information, harshly penalises often desperate and invariably black and poor parents seeking to obtain a better education for their children and/or to shelter their children from social ills like gangsterism and drug abuse plaguing their communities and neighbourhood schools. It also harshly penalises non-nationals who despite their numerous attempts to regularise their stay in South Africa, simply cannot due to vast backlogs at the Department of Home Affairs as well as extreme ill-treatment thereby forcing them to obtain documents illegally. Moreover, successful prosecution under this proposed reform is likely to have devastating consequences for those children whose parents are imprisoned. We strongly recommend that the government should rather focus on the improvement of the quality of education at underperforming and poorly resourced schools to ensure that all children, regardless of geographical and socio-economic circumstance, can receive an adequate basic education in a safe learning environment. Attention must be placed on dismantling the legacy of apartheid inequality in education which restricts the poorest families to the worst-off schools in terms of education quality and safety – and forces them	We recommend that this clause be **removed** in its entirety.

		to seek better education opportunities elsewhere by any means possible.	
CLARITY ON SCHOOL GOVERNING BODY POWERS REGARDING LANGUAGE AND ADMISSIONS POLICIES			
4	5	The 2022 Bill provides welcome clarity related to the powers of school governing bodies (SGBs) on admission by providing that the PEDs HOD has the final authority to admit a learner. EE and EELC recognise that rather than being new, this brings the law in alignment with what Constitutional Court and Supreme Court of Appeal have already confirmed about the relationship between SGBs and provincial education departments - specifically, that the role of SGBs is crucial, but the State has important and final oversight responsibility to ensure equity. For a detailed description of the case law, see "Clause 4 - School Admissions (Amending S5 of SASA)" below. These judgments are important to note, and emphasise, in particular because we are aware of the push back from some corners of civil society and the public on these provisions and the argument that these provisions significantly encroach on the autonomy and/or rights of schools, even though the amendments confirm an existing status quo.	EE and EELC welcome this clause with no recommended amendments.
5	6	The 2022 Bill has made some welcomed changes and additions to the version of the amendment contained in the 2017 Draft Bill. However, EE and EELC remain concerned that they do not provide sufficient safeguards against language policies being used to preserve privilege, as a proxy for racist and exclusionary practices and in a way that obstructs effective and efficient	EE and EELC recommend that for the new proposed section 6(7) of SASA, the factors listed be inserted into clause 5(c): the extent of excess capacity in the case of a single medium school and the trends in this regard; and the availability of and accessibility to other similarly resourced public schools, for learners who are language barred from attending the single medium school. We recommend that, with reference to the proposed section 6(10) of

		planning and management of the education system.	SASA, the factors listed below be inserted into clause 5(c): the extent of excess capacity in the case of a single medium school and the trends in this regard; the demand for conversion to dual-medium of a single medium school; the availability of and accessibility to other similarly resourced public schools, for learners who are language barred from attending the single medium school; the geographical areas that learners attending the single medium school come from; and the curriculum options offered. We recommend that a clause be inserted which makes it clear that it is not for the SGB itself to apply the school's language policy directly in the admission of entry-phase learners. In particular, it should be made clear that schools should not be permitted to refuse to accept applications from learners whose choice of LOLT differs from a school's language of tuition; or to refuse to include these learners on admissions waiting lists for consideration by the Department. We further recommend that a clause be inserted that clarifies that school language policies be applied by the Department when it places entry-phase learners at public schools, subject to the HOD's proposed power to alter a school's language policy.
SCHOOL DISCIPLINE			
7	8	Clause 7(c) of the 2022 Bill sets out a process by which a learner obtains an exemption from a school's code of conduct. While this is a welcome change, aimed at ensuring school codes of conduct do not discriminate against learners and undermine their right to basic education, we believe it would be strengthened through the inclusion of a standard according to which exemptions should be granted.	EE and EELC recommend that clause 7(c) of the 2022 Bill set out a standard according to which exemptions should be granted. This standard must take into consideration, *inter alia,* the best interests of the child; the child's right to be treated fairly and equitably; the child's right not to be unfairly discriminated against; and the inherent dignity of the child.
9	9	Clause 9 of the 2022 Bill deals with serious misconduct.	EELC and EE recommend that:

		EE and EELC are concerned that the definition of serious misconduct is too broad as well as unclear. This is particularly concerning because, if a learner's actions amount to 'serious misconduct', this triggers powers on the part of the SGB and HOD to suspend or expel that learner: disciplinary measures of the most extreme kind. Clause 9 creates a real risk of serious violations of learners' rights to basic education. For example, there is a risk that a girl who is sent a graphic image of another learner's penis, against her will, may be suspended or expelled for being 'in possession of pornography'. A learner who is sexually groomed by a teacher may be suspended or expelled for 'engaging in sexual activity on school premises'. This would be clearly disproportionate, unfair, and in violation of the learners' rights to basic education. We are also concerned that the definition of serious misconduct contained in clause 9 gives schools broad powers to sanction learners for conduct unrelated to the school or school community and which falls outside of the school's proper jurisdiction.	● Section 9(1)(b)(xi) of SASA be amended to say "engaging in consensual sexual activity on school premises" and the definition of "sexual activity" must be clarified. ● Section 9(1)(b)(iv) of SASA be amended to say "the illegal possession, distribution or consumption of a drug or liquor". ● "The repeated disruption of the school programme, or the imminent threat to commit such an act" must be removed from the definition of serious misconduct. ● Section 9 must make clear that each case of alleged 'serious misconduct' must be judged individually, to determine whether the conduct is serious enough to warrant the label and to trigger the powers to suspend or expel a learner. ● Section 9 must make clear that an action can only constitute 'serious misconduct' if it relates to the school.
1	1	EE and EELC welcome the inclusion of a definition for corporal punishment in section 1 of the BELA Bill, which provides for, "any deliberate act against a child that inflicts pain or physical discomfort, however light, to punish or contain the child..." This definition broadly aligns with the definition of corporal punishment provided for by the UN Committee on the Rights of the Child in General Comment 8. However, in its definition, the Committee also refers to, "other non-physical forms	We recommend that the current definition of corporal punishment in the BELA Bill also include other non-physical forms of punishment, which includes the threat of force.

		of punishment that are also cruel and degrading and thus incompatible with the Convention".	

ANNEXURE A

COMPULSORY GRADE R

1. One of the key changes introduced by the 2022 Bill is to extend compulsory education to include Grade R. EE and EELC support this development generally, but the framing of clause 2 is problematic.

CLAUSE 1 - DEFINITION OF BASIC EDUCATION (AMENDING SECTION 1 OF SASA)

2. Clause 1(a) would insert a definition of basic education, stating that basic education "includes Grades R to 12, as evidenced in the National Curriculum Statement".
3. The fact that the definition of basic education extends down to Grade R is consistent with the shift to make Grade R compulsory. The fact that it extends up to Grade 12 is consistent with the judgment of the Constitutional Court in *Moko v Acting Principal of Malusi Secondary School* 2021 (3) SA 323 (CC) and is to that extent welcome. However, it is very important to note that the definition is non-exhaustive. Courts can and should continue to develop the content of the right to basic education as protected under section 29(1)(a) of the Constitution.
4. We think it is strongly arguable that early learning prior to Grade R is also part of the right to basic education, and the new definition of basic education contained in the 2022 Bill should not be thought to preclude this possibility.

CLAUSE 2 - COMPULSORY GRADE R (AMENDING SECTION 3 OF SASA)

5. Clause 2 would amend section 3(1) of SASA to make Grade R attendance compulsory. EE and EELC welcome this change. Making Grade R compulsory is likely to have benefits for young children. It will create new state duties to ensure access to learning opportunities for young children. For example, under sections 3(3) and 3(5) of SASA, the MEC must ensure that there are enough school places for learners of compulsory school-going age. Making pre-primary education compulsory will improve access to early learning opportunities for all children.
6. However, the framing of this clause is problematic. Parents would *immediately* be required to ensure that children in their care "attend *school*, starting from grade R on the first school day of the year in which such learner *reaches the age of six years*". There are two main problems with this framing.

I. The need for a phased approach

7. The first problem is that it would immediately make it compulsory for learners to attend Grade R at a school, rather than at an ECD centre or other community-based setting. Many children currently attend Grade R at ECD centres. Some, but not all, of these ECD centres are registered

as independent schools. Given that public school capacity is seriously limited, with thousands of learners unplaced each year, we do not think it would be desirable – at least in the short term – to require that young children stop attending Grade R classes at ECD centres and must instead be accommodated in already over-crowded schools, with criminal sanctions attached if parents fail to comply.

8. This could be remedied by making amendments to reflect a phased approach to the introduction of compulsory school attendance starting from Grade R. We therefore recommend that a new section is inserted, stipulating that:

> "(1) A learner turning six years old either:
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> (a) in the year in which this Act comes into effect; or
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> (b) in the year immediately thereafter,
>
> is not required to attend Grade R in terms of section 3(1).
>
> (2) A learner who does not attend Grade R in terms of subsection (1) must attend Grade 1 on the first school day of the year in which the learner reaches the age of seven."

9. Further, and as we explain in detail below, we are opposed to the criminalisation of parents for failures to ensure that their children attend school. We think it would be especially problematic for parents to face criminal sanctions if they send their five-year-old child to Grade R in a community-based setting rather than at a school. Accordingly, we recommend that the prospect of criminalisation of parents be removed.

II. Tension between section 3(1) (compulsory school-going age) and section 5(4) (admission age)

10. The second problem is that the amendments to section 3(1) would create tension with section 5(4), which prescribes the age of admission. Under section 5(4), the *admission age* for Grade R is age four turning five by 30 June in the year of admission. But, under section 3(1), it would now be *compulsory* to send a child to Grade R when they are age five turning six. This is likely to be confusing for a parent, teacher, principal or other stakeholder attempting to apply the legislation. If the admission age to Grade R is age four turning five, but it is compulsory to attend Grade R only at age five turning six, when must a parent apply for their child to attend school?
11. The 2022 Bill does attempt to offer some clarity by adding to section 5(4) a proviso that, if a school has limited capacity for admission in Grade R, preference must be given to learners who are subject to compulsory attendance. This means that parents will only be subject to criminal sanctions for failing to send their child to Grade R if the child is aged five turning six; not if the child is aged four turning five.
12. Still, the undesirable impact of the two sections, read together, is likely to be that, while all children will be required to attend Grade R, some will start when they are aged four turning

five, provided that the school has capacity, while others will start when they are aged five turning six. This could potentially be resolved by amending the admission age contained in section 5(4) of SASA so that it is in line with the proposed amendment to section 3(1): in other words, by amending the admission age for Grade R to five turning six. However, we appreciate that the Department of Basic Education may have advisedly decided against this policy position.

13. Alternatively, and at the very least, the term 'admission age' should be defined to bring clarity and reduce the likelihood of confusion. 'Admission age' could be defined as the earliest age at which a learner may enter a given grade, unless the conditions set out in section 5(4)(b) or (c) of SASA are met.

Recommendation:

14. Section 3(1) should be amended to reflect a phased approach to the introduction of compulsory school attendance starting from Grade R. In line with Real Reform for ECD's submission to Parliament on the Basic Education Laws Amendment Bill B2-2022, we recommend that a new section is inserted, stipulating that:

> "(1) A learner turning 6 years old either:
>
> (a) in the year in which this Act comes into effect; or
>
> (b) in the year immediately thereafter,
>
> is not required to attend Grade R in terms of section 3(1).
>
> (2) A learner who does not attend Grade R in terms of subsection (1) must attend Grade 1 on the first school day of the year in which the learner reaches the age of 7."

15. 'Admission age' should be defined as the earliest age at which a learner may enter a given grade, unless the conditions set out in section 5(4)(b) or (c) of SASA are met.

B. SCHOOL GOVERNING BODY POWERS REGARDING SCHOOL ADMISSIONS AND LANGUAGE POLICIES

16. The 2022 Bill provides welcome clarity related to the powers of school governing bodies (SGBs) on admissions and language policies. EE and EELC recognise that rather than being new, these changes bring the law in alignment with what the courts have already confirmed about the relationship between SGBs and provincial education departments (PEDs) - specifically, that the role of SGBs is crucial, but the State has important and final oversight responsibility to ensure equity. In no uncertain terms, some schools have sought to maintain the status quo in terms of the learners they admit into the school, despite the changing needs of the surrounding community. They use language and admission policies to preserve privilege, and sadly often as a proxy for racist practices. The changes proposed by the Bill therefore provide a greater opportunity to identify and prevent discriminatory practices at schools, while keeping important input by SGBs in these processes.

CLAUSE 4 - SCHOOL ADMISSIONS (AMENDING S5 OF SASA)

17. On school admissions, the Bill clarifies that the HOD of the provincial education department has the final authority to admit a learner to a public school.
18. These changes are not new and rather legislate what our Constitutional Court and Supreme Court of Appeal have already stated about admissions - that the ultimate responsibility for admission decisions in school rests with the HOD.
19. In *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others*[1] *("Rivonia")*, the Constitutional Court dismissed the argument that schools have the final say in admission decisions. In this case, the Court was at pains to point out that the provincial education department plays "a direct", not an indirect, passive or "remedial role", when it comes to the implementation of a learner's admission. The Court went further and made it expressly clear that the Department maintains "ultimate control" when it comes to learner admissions:

> *"[para 52] Rather, the scheme of the Schools Act in relation to admissions indicates that the Department maintains ultimate control over the implementation of admission decisions…" (Own underlining)*

20. Three years after the *Rivonia* decision, the SCA in *MEC for Education, Gauteng v FEDSAS* reiterated the Constitutional Court's finding about the role of the Department and the HOD and went further to say that the Schools Act envisages an interventionist role for the Department in the admission decisions. The SCA stated:

> *"The Constitutional Court also referred (para 42) to the direct role played by the provincial department of education in terms of ss 5(7) to 5(9) of the Schools Act in the admission of learners to school, as an indicator of the expressly intended interventionist role of the department in the admission of learners to schools." (Own underlining)*

Even on appeal, the Constitutional Court reiterated the extent to which an HOD has responsibilities over admissions, providing that "*the power to determine learner enrolment capacity and declare a school full or not, in the absence of norms and standards required by the Schools Act that are in force, rightly falls on the HOD.*"[2]

21. These cases are important to note and emphasise, in particular, because we are aware of the pushback from some corners of civil society on these provisions and the argument that these provisions significantly encroach on the autonomy and/or rights of schools, even though the amendments confirm an existing status quo.

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[1] *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC)*

[2] *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another 2016 (4) SA 546 (CC) at para 45*

22. The EELC, through its law clinic, regularly deals with cases where admissions policies and feeder zones are being used to unfairly exclude learners from being admitted into a school, even if they live close by. For example, in the Western Cape, each school may determine its feeder zone, and schools have been known to draw the boundaries of their feeder zone to specifically exclude poorer streets and neighbourhoods or neighbourhoods that have predominantly black residents.
23. Additionally, the school admissions crisis is exacerbated by a lack of clarity regarding the balance between the powers of SGBs and PEDs. There are no regulations for school capacity and there is no standard definition of "oversubscribed". This means PEDs battle to place unplaced learners at the beginning of the academic year. In our experience, unplaced learners are often placed in already under-resourced and overcrowded schools, because better-resourced public schools (often former Model-C) have stronger bargaining power and can merely refuse to admit learners, and litigate if necessary, to maintain small class sizes.
24. In light of this, we welcome the amendments in the BELA Bill, which we believe strike the balance between empowering and recognising the crucial role that SGBs play, while also ensuring through greater State oversight that SGBs also serve the public good and not only the interests of the individuals in their schools. We therefore welcome the amendment which requires the HOD to consult with the SGB before making the final decision regarding the placement of a learner, as well as giving the SGB the right to appeal. We also welcome the additional factors that the HOD must take into account when considering the admissions policy of a school, such as the efficient and effective use of state resources, as well as the shortening of the time in which a decision must be made during the appeal process.

CLAUSE 5 - SCHOOL LANGUAGE POLICIES (AMENDING S6 OF SASA)

25. The 2022 Bill has made some welcomed changes and additions to the version of the amendment contained in the 2017 Draft Bill. However, EE and EELC remain concerned that they do not provide sufficient safeguards against language policies being used to preserve privilege, as a proxy for racist and exclusionary practices and in a way that obstructs effective, equitable, and efficient planning and management and use of public resources in the education system.

I. Factors an HOD must consider when evaluating a school's language policy

26. SASA currently empowers SGBs to determine their language policy, subject to the Constitution and provincial laws. Clause 5(c) of the 2022 Bill requires SGBs to submit their language policies to the HOD for approval, and the HOD may approve the policy or return it to the SGB with recommendations.
27. Before signing off on a school's language policy, the HOD must be satisfied that the policy considers the best interest of the child (with emphasis on equality and equity), the changing number of learners who speak the language of learning and teaching (LOLT), the effective use of resources and classroom space, the enrolment trends of the public school, and the broader language needs of the community where the school is located. Last, the SGB must review

language policies every three years, or when circumstances necessitate a change in a school's language policy or at the request of the HOD. This is to ensure that language policies remain in line with the Constitution and provincial law.

28. EE and EELC welcome the introduction of these amendments as they will empower the HOD to oversee language policies/amendments thereto to ensure that these policies are constitutionally compliant. The proposed screening process could help safeguard against schools using their language policies in a way that is contrary to the interests of the community it serves and undermines the effective use of public resources within the public education system.
29. We also welcome the introduction of factors that will guide the HOD in their decision-making on whether to approve a policy or refer it back to an SGB with recommendations. We are, however, of the view that the insertion of certain additional factors will further aid the HOD in deciding whether to approve a language policy.

Recommendation:

30. EE and EELC make the following recommendation:
    30.1. With respect to the new proposed section 6(7) of SASA, the factors listed below should be inserted into clause 5(c):
        30.1.1. The extent of excess capacity in the case of a single medium school and the trends in this regard; and
        30.1.2. The availability of and accessibility to other similarly resourced public schools for learners who are language barred from attending the single medium school.

***II. Factors an HOD must consider when determining whether it is practicable for a school to have* more than one language of instruction**

31. Under clause 5(c) of the 2022 Bill, the HOD is empowered to direct a public school to adopt more than one language of instruction where this is practicable. The HOD must take into account the best interests of the child with emphasis on equality and equity, the dwindling number of learners who speak the LOLT, the need for effective use of classroom space and resources of the public school and the language needs of the broader community in which the school is located.

32. EE and EELC welcome these amendments as they will provide the necessary statutory muscle for the State to fulfil its constitutional duty under section 29(2) of the Constitution to provide everyone with a right to an education in an official language of their choice where this is reasonably practicable. Empowering the HOD in the manner proposed by the Bill will help guard against the possibility of single medium language policies of historically privileged schools operating in a way that keeps enrolment levels low and those schools undersubscribed,

and which invariably makes it impossible for black learners to attend those schools.

33. Indeed, the Constitutional Court in *AfriForum and Another v University of the Free State* has stated that:

> *"It would be unreasonable to slavishly hold on to a language policy that has proved to be the practical antithesis of fairness, feasibility, inclusivity and the remedial action necessary to shake racism and its tendencies out of their comfort zone. Section 29 of the Constitution. . . is fundamentally about . . . the impermissibility of racial discrimination, intended or otherwise, in all our educational institutions."*[3]

34. In this same matter, the Constitutional Court goes on to explain that intrinsic to the decision-making process under section 29(2) is the "*critical need . . . to undo the damage caused by racial discrimination"*.[4] What is reasonable must be considered in light of "*the need to cure the ills of our shameful apartheid past"*.[5] The Court recognised the challenges posed "*where scarce resources are deployed to cater for a negligible number of students, affording them close, personal and very advantageous attention while other students are crowded into lecture rooms.*"[6]
35. We are of the view that the insertion of certain additional factors under clause 5(c) (as listed below) will further aid the HOD in ensuring that determinations under section 29(2) are made, as required by the Constitutional Court, in a way that serves to dismantle racial privilege within education institutions as opposed to further entrenching the status quo.

Recommendation:

36. EE and EELC, therefore, recommend that, concerning the proposed section 6(10) of SASA, the factors listed below be inserted into clause 5(c):
    36.1. The extent of excess capacity in the case of a single medium school and the trends in this regard;
    36.2. The demand for conversion to dual medium of a single medium school;
    36.3. The availability of and accessibility to other similarly resourced public schools, for learners who are language barred from attending the single medium school;
    36.4. The geographical areas that learners attending the single medium school come from; and
    36.5. The curriculum options offered.

[3] *AfriForum and Another v University of the Free State* [2017] ZACC 48, 29 December 2017, at page 20, para 46. *('Afriforum v UFS')*
[4] *AfriForum v UFS* at page 22, para 50.
[5] *AfriForum v UFS* at page 23 para 53.
[6] *AfriForum v UFS* at page 23, para 52.

III. The need to guard against language policies being used for preserving privilege and/or as a proxy for racist practices

37. Notwithstanding all the positive suggested reforms, there remains in practice the danger of schools continuing to utilise language policies as a barrier to equitable access to education by simply turning potential applicants away on the basis that they seek tuition in a different language. This is despite the possible under-utilisation of resources at that school and a significant amount of overcrowding in neighbouring schools.

38. There is evidence, at least in Gauteng, that language policies have been used as a proxy for racist practices and actions by Afrikaans single-medium schools. These schools have employed their policies as a basis for barring black learners living within the geographical surrounds from applying to them.[7] The Federation of Governing Bodies of South African Schools (FEDSAS) has in fact acknowledged, in litigation initiated by it, that there are schools that have used their language policies as a "*mechanism for screening applications in a manner that suggests that the screening occurs with racist intent.*"[8]

39. Where schools can simply show potential applicants, particularly those seeking to be enrolled at entry-phase level, the door through reliance on its language policy, the HOD's ability to effectively gauge the language make-up and needs of the implicated schools and areas will be significantly compromised.

40. This would, in turn, adversely impact the HOD's ability (as contemplated in the 2022 Bill) to reach an informed conclusion on whether a school's language policy accords with the broader community's needs for learning and teaching and ought to be approved. It would similarly hinder an HOD's ability to properly determine if they should invoke their proposed power under clause 5(c) to direct a school, where practicable, to have more than one language of instruction.

41. EE and EELC are of the view that an amendment is needed that makes it clear that schools are obliged to accept all applications regardless of the LOLT needs of the applicant and to feed this information to the Department who must then apply the school's language policy in finalising admissions to that school. This will help ensure that the Department has the information needed to aid its understanding of why some single medium schools are not filled to capacity, whether single medium schools are favouring learners from outside of the school's feeder zone over learners within the feeder zone, and what the demand for the school would otherwise be

[7] *FEDSAS v MEC Department of Education, Gauteng and Another,* Gauteng Local Division 18246/15. Answering affidavit of Edward Mosuwe (DDG, Curriculum Management, Gauteng Department of Education) dated 15 September 2015 at pages 457 to 460 , para 112 and page 468 at para 119.7.

[8] FEDSAS, above note 55 Replying Affidavit of Paul Colditz (FEDSAS, CEO) dated 20 October 2015 at page 581, para 40.1, page 581.

if parallel/dual medium is offered.

42. We submit that the suggested amendments would help the DBE dismantle the perpetuation of historical inequities within the basic education system where single medium better-resourced schools are sealed off from black learners wishing to access them in the context of overwhelmingly poorly resourced and overcrowded public schools.

Recommendation:

43. EE and EELC thus recommend that a clause be inserted that makes it clear that it is not for the SGB itself to apply the school's language policy directly in the admission of entry-phase learners. In particular, it should be made clear that schools should not be permitted to:
    43.1. Refuse to accept applications from learners whose choice of LOLT differs from a school's language of tuition; and
    43.2. Refuse to include these learners on admissions waiting lists for consideration by the Department.
44. We further recommend that a clause be inserted that clarifies that school language policies be applied by the Department when it places entry-phase learners at public schools, subject to the HOD's proposed power to alter a school's language policy.

SCHOOL DISCIPLINE

CLAUSE 7 - CODES OF CONDUCT (AMENDING SECTION 8 OF SASA)

45. Clause 7 of the 2022 Bill would amend section 8 of SASA, which deals with school codes of conduct.
46. EE and EELC have long been concerned about the negative impact of school codes of conduct on learners' rights. EE and EELC have resolved instances of discrimination against learners based on schools' codes of conduct, including discrimination against Rastafarian learners in the Western Cape who were unlawfully excluded from or denied admission to their schools on the basis that their dreadlocks were a violation of the schools' codes of conduct[9] and discrimination against a female, Muslim learner who was required to wear a short school skirt instead of trousers.[10] However, in most cases, settlements are only reached after some weeks of negotiation, and usually after the threat of litigation. We therefore welcome legislative reforms aimed at ensuring that school codes of conduct are non-discriminatory and respect, protect and promote learners' rights to a basic education.

47. Clause 7(b) would require that school codes of conduct consider *"the diverse cultural beliefs, religious observances and medical circumstances of the learners at the school."* EE and EELC

[9] *Radebe and Others v Principal of Leseding Technical School and Others* (1821/2013) [2013] ZAFSHC 111 (30 May 2013).
[10] See A victory for Equality! - unfair and exclusionary uniform policies in schools must be changed. | Equal Education Law Centre (eelawcentre.org.za).

welcome this amendment. Clause 7(c) of the 2022 Bill sets out a process for a learner to obtain an exemption from a school's code of conduct. We applaud the introduction of an exemption process as this will help ensure that learners learn in a diverse environment, characterised by understanding, tolerance of difference and mutual respect for Constitutional rights. However, we think it is essential that the clause is strengthened, by including a standard for granting exemptions.

Recommendation:

48. Clause 7(c) of the 2022 Bill sets out a standard according to which exemptions should be granted. This standard must take into consideration, *inter alia*:
    48.1. The best interests of the child;
    48.2. The child's right to be treated fairly and equitably;
    48.3. The child's right not to be unfairly discriminated against; and
    48.4. The inherent dignity of the child.

CLAUSE 9 - SERIOUS MISCONDUCT (AMENDING SECTION 9 OF SASA)

49. Clause 9 of the 2022 Bill amends section 9 of SASA, which deals with the suspension of a learner for serious misconduct. The 2022 Bill inserts a definition of 'serious misconduct'.

50. EE and EELC remain very concerned that the definition of serious misconduct is too broad as well as unclear, which could allow for actions to fall into the category of serious misconduct that should not rightfully be labelled as such. This is particularly concerning because if a learner's actions amount to 'serious misconduct', this triggers powers on the part of the SGB and HOD to suspend or expel that learner—disciplinary measures of the most extreme kind. In our view, clause 9 creates a real risk of serious violations of learners' rights to basic education.

51. For example, there is a risk that a learner who is sexually groomed by a teacher or who is sexually assaulted or harassed may be suspended or expelled for 'engaging in sexual activity on school premises'. The better interpretation is that the term 'sexual activity' only includes *consensual* sexual activity. However, we think it is vital that this is made clear and explicit, to avoid misinterpretation. A definition of 'sexual activity' should also be included, to avoid disproportionate sanctions. The definition should exclude, for example, kissing: two learners who kiss on school premises should not be subject to suspension or expulsion.

52. There is also a risk that a girl who is sent a graphic image of another learner's penis, against her will, may be suspended or expelled for being 'in possession of pornography'. To avoid overly broad interpretations, we think section 9 must make clear that each case of alleged 'serious misconduct' must be judged individually, to determine whether the conduct is serious enough to warrant the label and to trigger the powers to suspend or expel a learner.

53. We are especially concerned that categorising the disruption of the school programme or the imminent threat of doing so as serious misconduct will seriously infringe on a learner's right to protest. This is highly problematic given the importance and historical significance of learner protests (see further below: 'CLAUSE 2(C) - WILFUL DISRUPTION, INTERRUPTION, HINDERING AND OBSTRUCTION OF SCHOOL ACTIVITIES (AMENDING S3(7) OF SASA').

54. In some other instances, the proscribed conduct is too narrow. In particular, clause 9 only provides for the illegal possession of drugs or liquor to be classified as serious misconduct. EE and EELC are of the view that the consumption or distribution of drugs or liquor should also fall under serious misconduct.

55. Finally, we are concerned that the definition of serious misconduct contained in clause 9 gives schools broad powers to sanction learners for conduct unrelated to the school or school community and which falls outside of the school's proper jurisdiction. Some of the types of serious misconduct listed under clause 9 explicitly relate to the school e.g. 'physical assault of a learner, employee, or other person related to the school, with the intention to cause grievous bodily harm, or the imminent threat to commit such an act, while on school premises or during any school activity, or in any circumstance that could reasonably be connected to the school'. But others do not e.g. 'fraud', 'theft or any other dishonest act to the prejudice of another person '. We can see no logical basis for this distinction. It has the absurd consequence that a learner who steals from a person unconnected with the school may be suspended or expelled, but a learner who stabs a person unconnected with the school may not be suspended or expelled.

56. All types of serious misconduct that trigger powers to suspend or expel a learner must relate to the school. If a learner engages in criminal, violent, or harmful behaviour that does not fall within the school's proper jurisdiction, the school can take steps to mitigate any potential threat and protect other members of the school community by applying the National School Safety Framework ('NSSF') and other relevant laws and policies.

Recommendation:

57. EELC and EE submit that:
    57.1. Section 9(1)(b)(xi) of SASA be amended to say "engaging in consensual sexual activity on school premises" and the definition of "sexual activity" must be clarified.
    57.2. Section 9(1)(b)(iv) of SASA be amended to say "the illegal possession, distribution or consumption of a drug or liquor".
    57.3. "The repeated disruption of the school programme, or the imminent threat to commit such an act" must be removed from the definition of serious misconduct.
    57.4. Section 9 must make clear that each case of alleged 'serious misconduct' must be judged individually, to determine whether the conduct is serious enough to warrant the label and to trigger the powers to suspend or expel a learner.

57.5. Section 9 must make clear that an action can only constitute 'serious misconduct' if it relates to the school.

SUSPENSION AND EXPULSION

58. The 2022 Bill contains very few amendments concerning suspension and expulsion despite there being significant gaps in section 9 in SASA. Too much of the disciplinary process is left up to provinces to regulate resulting in wide discrepancies. In an earlier submission, we recommended that the Minister of Basic Education fill these gaps with a national policy. EELC has been working with the Department of Basic Education to develop model provincial school discipline regulations. We think this initiative is critical for ensuring, across all provinces, that the disciplinary processes are fair and respect, protect and promote learners' Constitutional rights.

Recommendation:

59. We recommend that provinces engage with the development of model school discipline regulations and, if and when a final version is published, align their provincial school discipline regulations with it.

CRIMINALISATION

60. This section addresses the BELA Bill's inappropriate and concerning reliance on criminalisation in multiple provisions. While these provisions aim to address numerous challenges that plague the sector (such as learner dropout and school admissions), we are of the strong view that prosecution is an ill-advised attempt to impose easy 'answers' on intricate issues.

CLAUSE 2(B) - RESPONSIBILITY OF THE PARENT (AMENDING S3(6) OF SASA)

61. Currently, section 3 of SASA creates a category of learners for whom it is compulsory to attend school. A failure by a parent, without just cause, to cause a learner subject to compulsory attendance to attend school, after receiving written notice by the HOD, is an offence under section 3(6)(a). A parent found liable under this section can, on conviction, face a fine or imprisonment not exceeding six months. Under section 3(6)(b), any other person who, in the absence of just cause, prevents a learner falling within the compulsory attendance bracket from attending school also commits a crime and if found guilty would be liable to the same penalty as would be attached to a parent.
62. Clause 2(b) of the 2022 Bill proposes an amendment to sections 3(6)(a) and (b) of SASA by firstly increasing the maximum prison sentence which can attach to these crimes from six months to **twelve months**, and secondly by allowing for the imposition of **both** a fine and a sentence.

63. The Socio-Economic Impact Assessment System Report (SEIAS Report)[11] accompanying the 2022 Bill explains the amendments as being '*necessitated by incidents, in several provinces, in which communities, or portions of communities, prevented learners from attending school in an attempt at making a political or other point.*' The suggestion that section 3 of SASA could serve as a *"deterrent against those who seek to disrupt the delivery of education"* is put forward by the South African Human Rights Commission in its hearing report on the impact of protest-related action on the right to basic education in South Africa (SAHRC Report).[12] The SAHRC recommends that a National Response Team be established to investigate the efficacy of section 3 as it relates to prosecuting people involved in protest action that denies learners access to education and, "*[s]hould it be determined by the National Response Team that amendments to SASA are necessary; the DBE should initiate the process to bring about the necessary amendments to the legislation*".[13]

64. The SEIAS Report makes no mention of whether a task team was established. Nonetheless, the Bill pushes ahead with suggested legislative reforms aimed at increasing the penalties contained in section 3 of SASA with no gauge as to the need for this. No mention is made in the SEIAS Report on the considered deficiencies or inadequacies of the current criminal penalty provided for under sections 3(6)(a) and (b) of SASA and why increasing a possible imprisonment sentence to 12 months would be more effective in punishing the mischief this section was aimed at addressing. This is likely because, as highlighted by the SAHRC Report, *"the DBE and SAPS rarely initiate the use of these criminal provisions in SASA"*.[14] Therefore, an investigation into the efficacy of section 3(6) by a National Response team, considering the rarity of prosecutions thereunder, would be of little benefit. Given the lack of prosecution under this section, an increase in the current penalties can hardly be justified.

65. For the reasons set out below, EE and EELC are of the view that, despite the SAHRC recommendations in this regard, it would be undesirable and misdirected to use sections 3(6)(a) and (b) of SASA for purposes of prosecuting persons who partake in protest activity that frustrates or denies learners their right to basic education.

I. Parental Responsibility under 3(6)(a)

a. Inappropriate use of SASA

66. From the memorandum accompanying the SASA Bill which led to the enactment of SASA, it is clear that section 3(6)(a) was intended to ensure that parents fulfil their parental duty and not simply provide their children with the choice to play truant or drop out before the conclusion of the compulsory school-going period.[15]

[11]The Socio-Economic Impact Assessment System Report, 2021 available: https://static.pmg.org.za/SEIAS_Final_Assessment.pdf

[12] The South African Human Rights Commission Report: *National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa* (2017) at page 13, available: https://www.sahrc.org.za/home/21/files/WEBSITE%20Impact%20of%20protest%20on%20edu.pdf

[13] SAHRC Report, above note 1 at v.

[14] SAHRC Report, above note 1 at 13.

[15] Memorandum on the Objects of the South African Schools Bill, GGN 17385 of 22 August 1996 at page 48.

67. This stated purpose behind section 3(6)(a) also accords with the understanding of *"compulsory schooling"* as set out in General Comment 11 to the International Convention on Economic Social and Cultural Rights:

> "[t]*he element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education."*[16]

68. Section 3(6)(a) is therefore an attempt to fulfil South Africa's national and international obligations guaranteeing that schooling be compulsory for a defined minimum period.[17]
69. EE and EELC believe that there are more suitable laws to achieve the stated purpose of the amendment and are concerned that the amendments could render parents vulnerable to prosecution should they, out of fear for their children's safety because of social protest-related action, decide to keep their children away from school.[18]
70. Section 7 of the Children's Act 38 of 2005, provides that whenever a provision of the Act requires the best interests of the child standard to be applied, the factors which must be taken into consideration include the likely effect on the child of any change in their circumstances, including the likely effect on the child of any separation from both or either of the parents and the need for the child to remain in the care of their parents, family and extended family and to maintain a connection with their family.
71. It is our view that in doing such an assessment, one would find that often, it would be in the best interests of the child that their parent is not imprisoned, and such an assessment should form part of the enquiry and/or investigation required by section 3(5) of the SASA.

b. Criminalising parents is harsh, unfair, and ineffective

72. EE and EELC recognise that the purpose underlying the right to basic education is multifold. Amongst others, it has enormous transformative potential, especially in terms of correcting persistent racial inequalities. We thus acknowledge that society has a vested interest in ensuring that children receive an adequate basic education and that both the State and parents have an important role to play in this regard.
73. We therefore do not condone the conduct of parents who fail to ensure that their children receive a basic education. We are, however, of the view that the prosecution of these parents represents an ill-advised attempt to impose an easy answer on an intricate issue. Opting for the incarceration of parents assumes that a parents' conduct serves as the sole cause for chronic

[16] Article 14 of the *CESCR General Comment No. 11: Plans of Action for Primary Education*, commenting on article 13(2)(a) of the International Covenant on Economic, Social and Cultural Rights which requires primary education to be compulsory.
[17] South Africa's obligation to provide compulsory schooling is also set out in international and regional conventions such as article 28(1)(a) of the Convention on the Rights on the Child which requires that primary education be made compulsory and article 11(3) of the African Charter on the Rights and Welfare of the Child which requires compulsory basic education. South Africa has ratified both these instruments. Article 4(a) of the Convention against Discrimination in Education also requires that primary education be compulsory and article 26(1) of the Universal Declaration of Human Rights requires compulsory elementary education.
[18] Centre for Child Law Submission on the Basic Education Laws Amendment Bill [B-2015] submitted to the DBE in November 2017 at page 3, para 8.

absenteeism from compulsory schooling and that parents possess complete control and must accept all blame in this regard.

74. The National Policy on Learner Attendance, however, recognises otherwise, identifying poverty in the South African context as more often the *"root cause of irregular school attendance"*:

> *"Learners stay away from school for many reasons, but in many communities poverty is the root cause of irregular school attendance. Irregular attendance may be the result of parents' inability to pay school fees or buy uniforms; lack of transport to school; parents or children's chronic illness, including HIV/AIDS and tuberculosis; poor nutrition or hunger, child labour, unstable or dysfunctional family and gang violence."*[19]

75. In addition, there have been instances where parents have prevented their children from attending school for their own safety due to unsafe or inappropriate school infrastructure.[20] The SAHRC Report indicates that the State's poor provision of resources, which can create safety hazards for learners, is another reason that parents may keep their children away from school. While noting that in some instances the prosecution of parents may be warranted, the Report states: *"In some instances there are genuine reasons why caregivers may hinder a child's attendance at school, for example, due to lack of water or proper sanitation facilities or for reasons of insecurity and absence of learner transportation."*[21]

76. In its 2017/2018 Global Monitoring Report on Accountability in Education ('Global Monitoring Report'), UNESCO's analysis of 34 countries with truancy laws, including South Africa, and concludes that no substantial evidence exists that a punitive approach to learner absenteeism works. What is proven is that applying this approach impacts harshly on poor families and penalising parents for learner absenteeism therefore equates to penalising poverty:

> *"There is no substantial evidence to suggest that truancy laws reduce chronic absenteeism (Atkinson, 2016). Moreover, socioeconomic factors influence truancy patterns, with disadvantaged or low-income students consistently at greater risk (Hutchinson et al., 2011; UK Department for Education, 2017). Research suggests that punitive measures can impose harsh and undue burdens on disadvantaged families and students. "*[22]

77. In South Africa, as the Constitutional Court has recognised, "[m]*any women rear children single-handedly with no help, financial or otherwise, from the fathers of the children"*.[23]

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[19] Department of Basic Education: Policy on Learner Attendance, GGN 33150 of 4 May 2010 at pages 8 and 9.

[20] IOL *'Teachers at a Soweto high school working in parked cars as staff room is too small'* 12 May 2022 available at https://www.iol.co.za/news/south-africa/gauteng/teachers-at-a-soweto-high-school-working-in-parked-cars-as-staffroom-is-too-small-says-sgb-cfa0cc14-557d-497e-82fd-ce059aab5837;Sowetan Live *'Enraged parents protest over at schools'* 2 March 2022 available at https://www.sowetanlive.co.za/news/south-africa/2022-03-02-enraged-parents-protest-at-overcrowding-in-school/

[21] SAHRC Report, above note 1 at page 34

[22] United Nations Educational Scientific and Cultural Organisation*, Accountability in Education – Meeting Our Commitments Global Monitoring Report* 2017/2018 UNESCO, (2017) at pages 88 and 89. (UNESCO Global Monitoring Report).

[23] *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 at para 110.

Imprisoning these mothers for up to 12 months for their children's absenteeism from school would devastate their families and is eminently contrary to the best interests of their children. Children, whether the truant child or others in the household, will be left without a parent to ensure their health and well-being. A zero-tolerance approach will likely result in these children becoming disengaged, isolated and alienated.[24] Convicted mothers, upon release, may battle to find employment given their criminal records, thus further compounding their family struggles. Incarceration may thus function to exacerbate the problem of irregular attendance and early dropouts.

78. As noted by Dr Michele van Eck and Professor Amanda Boniface, criminalising parents may paradoxically hinder a child's right to education. The absence of a parent due to imprisonment can "*negatively impact the child's right to education (as the parent would not be available to support the child) as well as the child's social, emotional and psychological development, in having to deal with an absent parent for a prolonged period of time and/or being placed in the care of another person or foster care, which may result in the loss of the home environment of the child, separation from siblings, hampering of transportation to and from school, disruption of routines and other practical inhibitions to the child's development.*"[25]

79. They further noted that:

> *"Criminalisation, if implemented in these circumstances, will likely have the effect of placing the Constitutional ideals of the right to education at risk rather than protecting them, In fact, Justice Sachs, in the Constitutional Court case of S v M (CCT 53/06) (2007) ZACC 18 at par 35, noted that "… It is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the … court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm". In this, Justice Sachs noted that one must weigh two competing duties – the first being the maintenance of family care and the family environment (par 38) and that of the State's duty to deal decisively with criminal conduct (par 39). Yet, imprisonment is not the only manner of addressing criminal conduct."*

80. Furthemore, the proposed amendment which allows for the imposition of both a fine and imprisonment simultaneously, is an increased burden on financially struggling families. These families may find it challenging to bear the costs of legal representation, bail and fines, further exacerbating their economic difficulties.

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[24] Susan Coetzee and Rienie Venter, *South African Law and Policy Regulating Learner Absenteeism at public schools: Supporting an Ecosystemic Management Approach* (2016) 36 *SA Journal of Education* at page 6.

[25] *Van Eck, M and Boniface, A "Haven't been to school? Off to prison your parents go! accessed https://news.uj.ac.za/news/opinion-havent-been-to-school-off-to-prison-your-parents-go-2/*

81. Whilst we fervently oppose having a provision which criminalises parents in the first place, it is also noteworthy that there is a lack of nuance in addressing varying degrees of conduct which otherwise would not fall within the requirement of "just cause." Whilst preventing children from attending school without a valid reason may be unreasonable, the reasons for which this may be done may vary, whilst the current approach imposes a blanket punishment without considering the diverse circumstances that may contribute to a child's absence.
82. EE and EELC are of the view that ensuring that all South African learners subject to compulsory attendance actually do attend school requires a holistic and welfare-based interventionist approach grounded in the spirit of constructive engagement and cooperativeness between parents and schools, as required by SASA.[26]
83. EE and EELC are of the view that South Africa should follow the example of jurisdictions like Finland which have elected to steer clear of imprisonment as a means of tackling truancy in schools. Given the significance of education and the special role it plays in society, parents who fail to send their children to school should be educated on the need for their children to attend and the adverse consequences of a failure to ensure that they are there. There should be a more solution-oriented approach to learner absenteeism in which parents and their children are constructively and meaningfully engaged. Ensuring that all learners attend school and can realise their right to a basic education should be viewed as a welfare-based issue rather than characterised as a criminal one.

d. The excessiveness of the proposed amendment to the penalty

84. We remain firmly of the view that criminalisation of parents for failing to ensure that their children are in school is an inappropriate and undesirable approach to the problem of learner absenteeism and early dropouts, and that the penalty of imprisonment ought to be deleted from SASA. However, in the event of the Department proposing to maintain this punitive approach, we are deeply concerned about the increase in the penalties proposed in clause 2(a) of the 2022 Bill. Increasing a possible sentence of imprisonment from 6 months to 12 months for parents is not only highly inappropriate, but is also a draconian response to the challenge of ensuring all learners subject to compulsory attendance are in schools.

85. A comparison of the maximum prison sentences which can potentially be imposed on parents for their children's truancy in other jurisdictions underscores the excessiveness of the proposal that South African parents could face up to 12 months behind bars if successfully prosecuted:

Pennsylvania	3 days where failure to comply with penalty of court[27]
Jamaica	3rd or subsequent conviction – 14 days[28]

[26] *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) at paras 137-147 ('*Harmony and Welkom'*).
[27] Public School Code of 1949 – Omnibus Amendments Act of Nov. 3 of 2016, P.L. 1061, No 138 (Act 138 of 2016). (Amended in 2016, previously a maximum of 5 days).
[28] Section 21(5) of the Education Act 8 of 1965. (19 of 1980).

Bahamas	3rd or subsequent conviction - 1 month[29]
Nigeria	2nd conviction - 1 month Subsequent convictions - 2 months[30]
Malaysia	6 months[31]
California	'chronic truancy' – deferred entry of judgment - 12 months[32]
Singapore	12 months[33]
England and Wales	3 months and/or a fine[34]

86. Some of these jurisdictions offer supportive steps as a possible sentence, including appearing before a *'school attendance improvement conferenc*e' and undertaking improvement or mediation programmes, parenting classes or substance abuse treatment, referrals to mental and physical health services, and periodic meetings with school district representatives. These reflect an acknowledgement that a criminal approach divorced from social realities is an ineffective way to combat truancy.

87. In many of the jurisdictions tabled there are detailed prior steps required or valid defences specifically legislated, or provision made for a process of exemption. Imprisonment may not necessarily be a permissible sentence for a first offence. Section 3(6)(a) of SASA, however, contains very little in the way of a supportive framework or procedural safeguards.

Recommendation:

88. In light of the above, EE and EELC recommend the following:
    88.1. That section 3(6)(a) of SASA be amended to remove the prospect of criminalisation.
    88.2. That section 3(6)(a) of SASA be amended to make provision for a more cooperative social interventionist approach aimed at securing learner attendance during the compulsory schooling phase.

Alternative recommendation:

89. EE and EELC remain firmly of the view that the criminalisation of parents for failing to ensure that their children attend school is an inappropriate way to secure learner attendance. *The following recommendations, however, are made in the alternative and as a means to ameliorate the impact of criminalisation on parents, should the decision be taken not to remove this section:*

[29] Section 26(1) of the Education Act (Chapter 46) No. 15 of 1962.
[30] Section 2(4) of the Compulsory, Free Universal Basic Education Act 2004, A 113 and Section 15(6) of the Child's Right Act 2003.
[31] Section 29A. (4) of the Education Act of 1996, Act 550.
[32] California Penal Code 270.1. and Senate Bill 1317. Prosecution is also possible under Penal Code 272.
[33] Section 7 of the Compulsory Education Act 27 of 2000 (Chapter 51).
[34] Section 444(1A) of the Education Act 1996.

89.1. That the proposed increase to the penalties contained in sections 3(6)(a) be abandoned.
89.2. That section 3(6)(a) of SASA be amended to require a court to satisfy itself that a parent is capable of paying any fine imposed.
89.3. That clause 3 be amended to make provision for a parent, upon receiving notice from the HOD, to make representations setting out their reasons for failing to cause a child to attend school.
89.4. That a non-exhaustive list of valid defences be legislated.
89.5. That section 3 of SASA be amended to include further procedural safeguards and supportive mechanisms to secure a learner's attendance at school.

II. Prevention by any other person under section 3(6)(b)

90. Currently, Section 3(6)(b) of SASA states that any other person who, without just cause, prevents a learner subject to compulsory attendance from attending school, commits an offence and is liable to a fine or imprisonment not exceeding 6 months. Clause 2(b) of the 2022 Bill proposes an increase to the maximum imprisonment from 6 months to 12 months and allows for the imposition of both a fine and a sentence.
91. There are other laws more suited to ensure the prosecution of persons whose conduct may fall under this section. To the extent that persons engage in unlawful activities which prevent learners from accessing education, then existing common law crimes or statutory crimes better suited for the purpose of criminalisation will apply.

Recommendation:

92. In light of the above, EE and EELC recommend that section 3(6)(b) be deleted in its entirety.

Alternative Recommendation:

93. Alternatively, the proposed increase to the penalties contained in sections 3(6)(b) of SASA be abandoned.
94. The EELC and EE align themselves to the views of Section27 on aspects of their submission which state that instead of increasing the potential sanctions that may be meted out against parents, the BELA should be revised to fully remove the criminal penalties in the SASA for parents who fail to cause their children to attend school.

CLAUSE 2(C) - WILFUL DISRUPTION, INTERRUPTION, HINDERING AND OBSTRUCTION OF SCHOOL ACTIVITIES (AMENDING S3(7) OF SASA)

95. Clause 2(c) of the 2022 Bill seeks to insert an extraordinarily wide provision into SASA creating a new statutory crime for unlawful and intentional interruption, disturbance or hindrance of any school activity, or the hindrance or obstruction of a school in the performance of its activities.

The penalty for this new criminal offence would be a fine or imprisonment not exceeding 12 months, or both.

96. We are encouraged that the revised 2022 Bill narrows the application of this provision to *unlawful* activities. However, this provision is still too broad and would potentially include a range of activities that notionally "interrupt", "disturb", "hinder" or "obstruct" school activities, but which are justified by compelling reasons or in the course of the exercise of other constitutionally protected rights, including the right to protest.

97. Further, this provision remains concerning to EE and EELC as there are sufficient existing laws pertaining to criminal conduct and violent protests, and SASA should not be the legislative tool where such activities are dealt with. EE and EELC believe that it would be undesirable and misdirected to use education legislation for purposes of prosecuting persons who partake in protest activity. The amendment which increases the penalty from 6 to 12 months is also a concern.

I. The Constitutional right to protest

98. In the context of education in South Africa, the right to protest has a long history. The most iconic example of public protest in support of equality in education is the 1976 Soweto Uprisings where students organised, mobilised and demonstrated demanding the abolition of inferior quality education for black children as part of the broader liberation struggle. Since then, the Constitution has enshrined the 'right to protest' in a basket of rights including section 17, which grants everyone the right to peacefully assemble, demonstrate and present petitions; section 16, which grants everyone freedom of expression; and section 18, which provides everyone with the freedom of association.

99. In *Satawu v Garvas,*[35] the Constitutional Court stated:

> *"The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights."*

II. Causes and effect of social protest on education

100. The SAHRC report acknowledges that South Africa experiences over 13 500 incidents of public protest annually, the majority of which are non-violent, and that only some affect the right to a

[35] *South African Transport and Allied Workers Union and Another v Garvas and Others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae* 2013 (1) SA 83 (CC) at para 61 ('*SATAWU v Garvas'*).

basic education.[36] In those incidents that do affect the right to basic education, it is further acknowledged that they are "largely unrelated to education"[37] and tend to primarily relate to government service delivery.[38]

101. The SAHRC report also notes that protests may be due to young people's frustration with poverty, unemployment, and a lack of change in their material conditions; while also noting the cause to be parents' apathy, despair and frustration with education's failure to remove their children from a vicious cycle of poverty.[39] Due to all of these problems, the SAHRC finds that the disruption of education is seen as an easy target by protestors to elicit government action. Therefore, in its recommendations, the SAHRC identifies an obligation resting on the Department of Basic Education to use the instruments available to it to ensure that disruptions of education caused by public protests are minimised. Specifically, the SAHRC recommends that amendments to SASA are affected to ensure the criminal prosecution of any persons engaged in public protests who deny learners access to education.[40]

102. It is clear from the above that, while the SAHRC identifies some groups of persons who may be responsible for disruption of schooling, the amendment it recommends the DBE make to SASA is intended to apply as a blanket measure against all persons who cause disruptions regardless of the circumstances. This might apply to a wide array of people, including ordinary members of the community surrounding a school; learners, teachers and other staff inside the school; or other groups, individuals or organisations who might seek to stage a protest at or near the school, which will cause a disruption to schooling. Therefore, an amendment couched in terms as wide as the proposed section 3(7) is likely to have unintended consequences that undermine constitutional rights such as the right to protest, freedom of association and even the constitutional right to strike, in the case of teachers.

III. Equal Education's experience

103. EE learner members (called Equalisers) use campaigning, mass mobilisation, demonstrations and protest as key tools to advocate for the improvement of the quality of education in mainly township and rural schools.

104. Indeed, Equalisers have run several national campaigns on issues such as school infrastructure, scholar transport and school sanitation. Equalisers use peaceful protest as a means to self-advocate for their right to basic education and the realisation of the Constitution's vision.

105. Learners such as Equalisers may sometimes undertake protest actions at school. By definition, protest action may entail some element of "interruption" or "disruption" even if only minimally so (for example, a silent protest in a classroom against teacher abuse). The effect of the

[36] SAHRC Report, above note 1 at pages 4 and 30

[37] SAHRC Report, above note 1 at page 3.

[38] SAHRC Report, above note 1 at page 31. The examples cited include demarcation disputes in Vuwani, Limpopo; access to water in Zeerust, North West; mass evictions in Hammanskraal, Gauteng; and the construction of a road in Kuruman, Northern Cape.

[39] SAHRC Report, above note 1 at page 31.

[40] SAHRC Report, above note 1, Recommendation 4, at page 40.

proposed amendment would be to place these children at risk of criminalisation merely for exercising their constitutionally protected rights to protest and freedom of expression.

106. Similar effects of criminalisation are likely to arise in the case of parents, community members or any other individual who engages in peaceful protest which may cause some "disruption" to school activities. For example, in March 2022, parents from Sediba sa Thuto Primary School protested the poor and unsafe infrastructure of their childrens' school, where at least 70 pupils are in one classroom and "infrastructure is so poor that the 36 mobile classrooms have started to crumble and the toilets do not work, forcing children to relieve themselves on floors of the two unused and dilapidated classrooms". In doing so, parents blocked the entrance of the school. One should not and cannot criminalise parents for not allowing their children to be in a school environment that poses a threat to their physical safety and infringes so severely upon their dignity. Such criminalisation will not withstand constitutional scrutiny.

IV. The effect on teachers

107. Like learners, teachers are directly affected by the education system as internal stakeholders. However, they are in the unique position of also being employees within education, and therefore also hold labour rights which are constitutionally protected. These are the right to freedom of trade, occupation and profession in section 22; and others such as the right to fair labour practices, the right to form and join a trade union, and the right to strike, all protected in section 23 of the Constitution.

108. Similar to the students of 1976, teachers and teachers' unions have been at the forefront of the struggle against inferior quality education for black students provided by the apartheid government. The Transvaal African Teachers' Association organised numerous strikes as a sign of opposition to Bantu education, saying that it was used to 'produce ignorant…cheap labour…of an oppressed people'.[41] In a mass march organised in 2017, teacher unions in the Western Cape joined EE in campaigning for safer schools.[42] In May 2020, teachers again joined parents and learners from across five provinces in a plea for cohesive and detailed implementation plans from basic education authorities, following Basic Education Minister Motshekga's revision of the date for Grade 7 and Grade 12 learners to return to school after the nationwide lockdown. Through this action, educators were given a platform to speak extensively about their concerns for the health and safety of their students, highlighting issues including overcrowding in classrooms; the poor state of school toilets; lack of water; and feeling unsafe at school given the number of burglaries.[43] Therefore, teachers have used the right to

[41] J Hyslop, *'Teacher Resistance in African Education from the 1940s to the 1980s'* in M. Nkomo (ed) Pedagogy of Domination Toward a Democratic Education in South Africa (1990) at page 101.
[42] BusinessLive 'Equal Education Leads March for Safety At Western Cape Schools' 28 October 2017 https://www.businesslive.co.za/bd/national/education/2017-10-28-equal-education-leads-march-for-safety-at-western-cape-schools/
[43] Statement: Testimonies Of Equal Education Members (Learners, Teachers, Parents) Demand Cohesive and Detailed Implementation Plans From Basic Education Authorities 6 May 2020 https://equaleducation.org.za/2020/05/06/statement-testimonies-of-equal-education-members-learners-teachers-parents-demand-cohesive-and-detailed-implementation-plans-from-basic-education-authorities/

strike to advocate for not only the improvement of their working conditions as employees, but also in advance of the right to education.

V. *Existing remedies for unlawful conduct*

109. EE and EELC do not condone unlawful conduct that materially compromises the right to education and best interests of children. However, to the extent that persons are responsible for such conduct, there already exist several laws that may be used to deter such conduct. This includes, for example, penalties under the Regulation of Gatherings Act.

Recommendation:

110. In light of the above, EE and EELC recommend that clause 2(b) be abandoned in its entirety.

CLAUSE 36 - SUBMISSION OF FALSE OR MISLEADING INFORMATION WHEN APPLYING FOR ADMISSION OR FEE EXEMPTION (AMENDING S59 OF SASA)

111. This section creates a criminal offence in respect of parents (or other persons responsible for the learner) who knowingly submit false information, misleading information, a forged document or a document which is declared to be a true copy of the original when it is in fact not a true copy. Parents or other persons are guilty of an offence and, if convicted, liable to a fine or imprisonment not exceeding 12 months or both a fine and imprisonment.
112. Whilst EE and EELC do not condone fraud, we do not believe that creating a statutory offence for this conduct is justified as it belies the complex social context that people live in in South Africa, the history of education segregation in South Africa that continues to characterise of schooling sector, and the structural factors that cause parents to resort to such actions. The proposed amendment harshly penalises often desperate and invariably black and poor parents seeking to obtain a better education for their children and/or to shelter their children from social ills like gangsterism and drug abuse which plague their communities and neighbourhood schools. It also harshly penalises non-nationals who, despite their numerous attempts to regularise their stay in South Africa, simply cannot due to vast backlogs at the Department of Home Affairs as well as extreme ill-treatment, thereby forcing them to obtain documents illegally.
113. Successful prosecution under this proposed reform is likely to have devastating consequences for those children whose parents are imprisoned. We are of the view that government should rather focus on the improvement of the quality of education at underperforming and poorly resourced schools to ensure that all children, regardless of geographical and socio-economic circumstance, can receive an adequate basic education in a safe learning environment. Attention must be placed on dismantling the legacy of apartheid inequality in education which restricts the poorest families to the worst-off schools in terms of education quality and safety and forces them to seek better education opportunities elsewhere by any means possible.

I. Contextual understanding & discriminatory Impact

114. South Africa's education system has been described as "a tale of two systems" where, judging from learner performance, a minority of learners (roughly estimated at 25%) possess the 'privilege' of attending functional schools and achieving at acceptable levels on national and international testing whereas the remaining majority (a rough 75%) are doomed to dysfunctional schools and perform abysmally on these same tests.[44] In 2015, nearly all (82%) of the country's best-performing schools (those whose pass rates exceeded 80%) were quintile 5 schools (i.e. wealthier schools). Whereas the majority of schools achieving below 30% were classified as quintile 1 or 2 (i.e. poor schools).[45]

115. Wealth, or a lack thereof, manifests as deep inequalities within South Africa's schooling system. Good quality schools are still located in select areas, where often only the very wealthy can afford to live.[46] In post-apartheid South Africa, financial constraints are thus intimately intertwined with the historical constraints of apartheid inequality and racialised spatial segregation. Despite the removal of apartheid restrictions on mobility and settlement, poorer people who are overwhelmingly black, especially those living in informal settlements on the outskirts of cities, are still effectively prevented from living in well-off areas with better educational opportunities for their children. Schools in wealthier areas rely on the strict application of self-determined geographical feeder zones to only admit learners who live within the radius of the school.

116. School admissions processes, both formal and informal are one of the primary factors shaping inequality in South Africa.[47] Against the backdrop of South Africa's deeply unequal and lopsided education system, it comes as no surprise that many parents would try all means necessary, including making additional travel arrangements, sending their children to live with relatives, or falsifying residence documents to save their children from dysfunctional schools and provide them with an opportunity to receive an adequate education.

117. Also, many black townships are notorious for crime and parents may feel forced to use incorrect and otherwise misleading information to increase their children's chances of admission to schools that might offer their children a safer learning environment. Punishing these parents with 6 months imprisonment for these attempts would be callous, if not cruel.

118. Whilst clause 36(3) is drafted in neutral terms, if inserted into SASA it is destined to have a discriminatory impact on black parents who are far more likely to be prosecuted for falling foul of its terms. Indirect discrimination has been described by Sachs J in *City Council of Pretoria v Walker* as having been developed:

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[44] Nic Spaull, Education in SA, 31 August 2012. Accessible at: http://www.politicsweb.co.za/news-and analysis/education-in-sa-a-tale-of-two-systems

[45] Equal Education's Pre-Matric Media Statement: Matric Results an indicator of primary schooling in Crisis, 4 January 2017. Accessible at: https://equaleducation.org.za/2017/01/04/matric-results-an-indicator-of-primaryschooling-in-crisi

[46] F Yamauchi School Quality, Clustering and Government Subsidy in Post-Apartheid South Africa Economics of Education Review (2011) 30: 146–156 at page 150.

[47] M. Hunter Racial Desegregation and Schooling in South Africa: Contested Geographies of Class Formation Environment and Planning (2010) A 42(11): 2640.

"precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them."[48]

119. In the Walker judgment, the Constitutional Court stated, "*the effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory*".[49]

120. More recently in a different constitutional matter EELC, representing EE as an amicus, made submissions on the unconstitutionality of a provincial regulation introduced by the Gauteng MEC for Education which set default feeder zones to operate in the absence of the MEC making use of her or his power to establish feeder zones. The default feeder zones were described largely in spatial terms and relied strongly on the surrounding radius of the relevant school. EE argued that since these default feeder zones are defined spatially through reliance on place of residence and place of work and since apartheid residential and workplace lines persist, the impact of the default feeder zones is to further entrench and perpetuate racial exclusion.[50]

121. The Constitutional Court, though deciding not to pronounce on this argument, was of the view that EE's submissions held "traction".[51] Clause 36(3) of the 2022 Bill does not make mention of race or geography in formulating the offence. However, in the absence of legally prescribed feeder zones, some SGBs have formulated their own feeder zones through their admissions policies and processes using geographic proximity to the school. The implications are that although 36(3) is seemingly neutral, its *de facto* effect would be to entrench and intensify existing inequalities through its discriminatory impact on black parents.

II. Contrary to the best interests of affected children

122. The amendments proposed in clause 36(3) are contrary to the best interests of those children whose parent(s) or caregiver(s) stand to be prosecuted should this clause be made law. In particular, given the possibility of imprisonment, it undermines a child's right to family care or parental care under the Constitution.[52] A right which has been described as "encompassing a loving and stable environment,"[53] and as being important for "the well-being of all children"[54] and for "maintaining the integrity of family care".[55]

123. Clause 36(3) if successfully implemented would compromise the right to family care as the incarceration of a parental figure would spell the loss of parental support for the child(ren)

[48] City Council of Pretoria v Walker [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257, para 115. ('Walker')
[49] Walker judgment, at para 32.
[50] Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) at para 38. ('FEDSAS v MEC Gauteng')
[51] FEDSAS v MEC Gauteng at para 39.
[52] Section 28(1)(b) of the Constitution.
[53] Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae) [2002] ZACC 20; 2003 (2) SA 198 (CC);2002 (10) BCLR 1006 (CC) at para 22. ('Du Toit' judgment)
[54] Du Toit judgement, above note 104 at para 18.
[55] S v M ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 38.

under their care. A parent behind bars for a protracted period of 6 months, is a parent unable to fend for their child or assist their child with homework or otherwise support their studies and ensure their well-being. Families provide a sense of belonging and security for a child. They serve as a space within which discipline is instilled and spirituality and values nurtured. This is a sacrosanct space which should not be disrupted easily, especially not as a result of the actions of a parent aimed at the betterment of their children.

124. Whilst clause 36(3) does make provision for a fine being imposed as an alternative, the possibility of a presiding officer opting for jail time persists. There is also the reality of many parents who may struggle to pay a fine and who do not have the funds to mount a strong legal defence, especially as those who would stand to be prosecuted under this amendment will likely be poorer parents with little alternative to secure their children's future. If the 'offending parent' is the head of a single-parent household, the injustices brought on by this proposed amendment are compounded. Experiences borne out in the USA, show that prosecution for what is termed there as 'boundary hopping' - enrolment of a child in a different school education district through the use of a false address – have repeatedly involved "non-traditional family groupings, including single parents (usually mothers), divorced parents, and multi-generational or grandparents".[56]

125. This has been ascribed to, in part:

> *"the struggles of single parents to juggle the demands of work and parenting. When work schedules are not in sync with school schedules, low-income parents are faced with the difficulties of finding safe and affordable after-school care and transportation for their Children."*

126. Several of the cases suggest that the parents were trying to resolve these problems by placing their children in out-of-district schools.[57]

127. The proposed amendments may thus lead single parents to be more susceptible to prosecution thereunder and would definitely leave their children more vulnerable to the adverse consequences flowing from a loss of their parent's support, should they be placed behind bars.

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[56] Leah Faw, Huriya Jabbar, Poor Choices: The Sociopolitical Context of "Grand Theft Education", Urban Education First Published June 9, 2016 at page 17. Accessible https://doi.org/10.1177/0042085916651322.

[57] Gustafson, Kaaryn, Degradation Ceremonies and the Criminalization of Low-Income Women (April 19, 2013). 3 U.C. Irvine Law Review, Vol. 3, No. 2, 2013; UC Irvine School of Law Research Paper No. 2014-42 at p 327. Available at SSRN: https://ssrn.com/abstract=2254054 Leah Faw, Huriya Jabbar at pages 17 and 18: "It is important to note that, in every case reported here, except that of a White family in the CopleyFairlawn District (where Williams-Bolar's case also took place), the criminalized hoppers are people of color (in largely White districts) and/or members of non-traditional families, with either single- or divorced-parent heads. This reality points to district hopping not as a racialized act—anecdotal evidence finds families from all racial and ethnic backgrounds engage in hopping—but as one racially coded as criminal. Although all types of families may hop, racial minorities in White districts are especially subject to suspicion; thus, the criminalization of hopping is used to penalize and control these families." "The repeated instance of non-traditional family groupings, including single parents (usually mothers),divorced parents, and multi-generational or grandparents draws our attention to the fact that the criminalization of district hopping is being used as an added punitive measure against families that do not fit the nuclear, two parent family model assumed in district enrolment policies. Families that do not fit this mold are, as these cases show, systematically excluded from access to higher quality districts. Together, these complex dynamics influence district hopping and districts' responses to it, providing context for the anecdotal tales of district hopping reported in the media.

An incriminated parent, upon release, must also contend with a criminal conviction which may negatively colour any attempts that she/he may make at securing gainful employment. Thus, further compromising the well-being of their child(ren).[58]

III. Stigmatisation based on race and class and the vulnerabilities of foreign migrant parents

128. In the USA, a handful of states have elected to criminalise the actions of parents who resort to the use of fake residence addresses when enrolling their children in schools.[59] The US example has shown that '[p]arents of color and/or low-income parents are being disproportionately targeted for enforcement of school residency laws."[60] In fact, some US schools are overtly engaging in racial profiling when identifying instances of potential violations of 'residency laws' through the targeting of African American, Latino and special education students.[61] Residency verification forms by US schools for purposes of vetting have also been described as a "scare tactic to weed out [undocumented immigrants] and their children."[62]

129. There are claims that US schools have made use of 'school residency verification programs', (which some schools have employed in their efforts against residency enrolment fraud) to "regulate and/or control the influx of people of colour entering their schools.[63] Invasive practices aimed at parents that schools suspect of falsifying records include the hiring of private investigators to conduct in-depth surveillance of the suspected families who then trail children to bus stops and/or home, follow parents, run property records checks and trace parents' licence plates in an attempt to 'catch them out'. The use of residency fraud hotlines and the offer of 'bounties' have also been employed.[64] In Long Island, New York there has been a growth of, what is termed, the "border patrol industry," as all-white school boards have attempted to reverse the increasing trend of New York City students enrolling in 'their' schools. "Boarder patrollers" engage in school "home visits" and all-white school boards provide on-going support for these initiatives.[65]

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[58] On the severe impact on a single parent's ability to sustain themselves and their children in the wake of the stigmatisation and employment limitations that accompany a criminal conviction for residency fraud see: Anderson, C, Caught On the Wrong Side of the Property Line: An Analysis of the "Akron Mom" case, Urbana, Illinois 2012, at page 44.

[59] Orlando, J Criminal Penalties for Falsely Claiming Residency Within a School District (ORL Research Report 2011-R-0214), 5 May 2011. Accessible at https://www.cga.ct.gov/2011/rpt/2011-R-0214.htm

[60] Testimony of Gwendolyn Samuel, Founder of Connecticut's Parent's Union before the Judiciary Committee Connecticut General Assembly Public Hearing Raised H.B. 6695: An Act Concerning Misrepresentation of Town Residency with Respect to Schools Accommodations, 15 April 2013 at page 2. Chettiar, I and Mc Cray, R Sending Your Kid to the Wrong School Could Land You Five Years Behind Bars, ACLU Criminal Law Reform Project, 28 January 2011. 112 Gustafson, Kaaryn, above note 108 at pages 328 and 329 and; Leah Faw et al. above note 107 at page 13 and; Testimony of Gwendolyn Samuel, above note 111 at page 4. On subtle racial profiling, see Anderson, C above note 109 at page 43.

[61] Gustafson, Kaaryn, above note 108 at pages 328 and 329 and; Leah Faw et al. above note 107 at page 13 and; Testimony of Gwendolyn Samuel, above note 111 at page 4. On subtle racial profiling, see Anderson, C above note 109 at page 43.

[62] Mayra Turchiano Resisting Educational Apartheid: Low-Income Latino Parents' Experiences with School Residency Policies, California State University thesis (6 May 2016) at page 20.

[63] Turchiano, above note 113 at pages 16-17 and 71.

[64] Eller, R and Rooks N, Cutting School: Privatization, Segregation, and the End of Public Education, 26 September 2017; Turchiana, above note 113 at page 10 and Spencer K, Can you steal an education? Wealthy school districts are cracking down on 'education thieves', Hechinger Report, 18 May 2015. Accessible at: http://hechingerreport.org/can-you-steal-an-education/

[65] Tate IV, WF (ed) Research on Schools Neighbourhoods and Communities: Towards Civic Responsibility, Duran J; Grzesikowski KH; Roda A; Ready D; Warner M; Wells AS; White T, Chapter 7 - Still Separate, Still Unequal, But Not Always "So Suburban":

130. People from minority groups who have been pursued through these invasive practices have recorded feeling intimidated, frightened and that their privacy was under attack.[66] Public outcry about racial profiling in the prosecution of parents of minority groups eventually resulted in Connecticut repealing a law which criminalised 'school boundary hopping' in 2013.[67] The repeal occurred against the backdrop of a court case attacking the constitutionality of this law.[68]

131. It is easy to see how the prosecution of offences proposed by clause 36(3) of the 2022 Bill is likely to play itself out in South Africa with the possibility of more stringent attention paid and accusations made against children of a certain race or class who seek admission to a school or more audits of admissions materials or requests for additional documentation from parents who seek fee waivers versus those able to pay school fees. Should the proposed offence in clause 26(3) be enacted, the US experience shows that the likelihood of black and poor families being profiled, harassed and stigmatised is substantial.

132. More affluent schools in South Africa are already able to use their ability to set catchment areas as ways to exclude poor and working-class children from their schools. The effect of clause 36(3) being made law would be to further embolden these schools through arming them with the ability to hang, even the implicit threat of prosecution over parent's heads as a way to further intimidate them into not applying. Indeed, in the US school residency laws have been described as an "instrument of the relatively privileged to maintain their privilege":

> *"black parents are being sentenced to jail because of their desire for a quality education for their children. In a broken economy, Black people are finding ways in the informal economy to live out valuable and dignified lives, and are being punished [for this]."*[69]

133. Clause 36(3) if enacted will therefore reinforce structural racism and shield privilege. The introduction of clause 36(3) may also deter undocumented migrants in South Africa, many of whom live under transitory or informal arrangements, from enrolling their children for fear of being 'discovered' and prosecuted or even deported. Foreign migrant parents in South Africa already face many barriers to ensuring their children's access to education.[70] Clause 36(3), if made law, will significantly compound these obstacles. EE and EELC therefore recommend that clause 36(3) be removed in its entirety.

The Changing Nature of Suburban School Districts in the New York Metropolitan Area, Rowan and Littlefield Publishers, inc 2012 at page 145. Published for the American Education Research Association

[66] Turchiano, above note 113 at pages 65 and 66.

[67] Dugas, CM New Legislation Decriminalizes Theft of School Accommodations for Non-Residency, Berchem Moses, Attorneys and Counsellors, 14 August 2013.

[68] Marie Menard v Stratford Board of Education,18 July 2011, Complaint accessible at: http://webcache.googleusercontent.com/searchq=cache:PHnwQMU3otcJ:rishawnbiddle.org/outsidereports/MENARDCOMPLAINT.pdf+&cd=1&hl=en&ct=clnk&gl=za

[69] Radtalks: What could be possible if the law really stood for black lives? The City University of New York (CUNY) Law Review Vol 19.91, 7 March 2016 at page 128. A Series of Talks Delivered at the Law for Black Lives Convening, Organized by the Bertha Justice Institute at the Center for Constitutional Rights. On school residency laws as an instrument of the privileged, see also Turchiano, above note 113 at page 71.

[70] South African Alternate Report Coalition, Alternate Report to the UN Committee on the Rights of the Child in respect of SA's Combined 2nd, 3rd and 4th Periodic Country Report on the UN Convention on the Rights of the Child, dated October 2015 at section 13.5 Education For Foreign Migrant Children, paras 268 and 269, page 34.