

## VERSLAG VAN DIE MODERAMEN BYLAAG 3



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#### COMMENTS ON THE DRAFT BASIC EDUCATION LAWS AMENDMENT BILL, 13 OCTOBER 2017

These comments were prepared as a response of the Dutch Reformed Church (DRC) in response to an invitation that was issued by the Minister of Basic Education.

The concerns and submissions that are stated are motivated by a commitment to the ideal of a society that values democracy and the participation of parents concerning the education of their children in all its dimensions.

#### Introduction

The establishment of school governing bodies represented a significant decentralisation of power in the South African school system. The South African Schools Act (SASA), Act 84 of 1996, plays an important role in encouraging the principle of partnership in and mutual responsibility for education. With the institution of school governing bodies (SGBs), SASA was aimed to give effect to the principle of the democratisation of schooling by affording meaningful power over their schools to the school-level stakeholders including the governors serving on SGBs.

SASA established the right of parents to participate in the governance of the schools their children attend, and confirmed the Government's intention to give effect to these rights. The preamble to the Act itself states "WHEREAS this country requires a new national system for schools which will... uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State... BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa..."

From this declaration, it is clear that it was the aim of the Schools Act to (1) uphold the rights of the parents and (2) to enable parents to accept their responsibilities with regards to the governance of public schools. The rights of parents are summed up in White Paper 1: "Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by State authorities with respect to the form that education should take and to take part in its governance. Parents have the inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling, whether provided by the State or not, subject to reasonable safeguards which may be required by law. The parents' right to choose includes choice of the language, cultural or religious foundation of the child's education, with due respect to the rights of others and the rights of choice of the growing child." Through the establishment of school governing bodies with parent members in the majority parents were given the chance to realize these rights and take responsibility for their role in governance."

On 13 October Basic Education Minister Angie Motshekga, on behalf of the Department of Basic Education, has published the draft Basic Education Laws Amendment Bill (the Bill) in the *Government Gazette* and invited written comments. The Dutch Reformed Church (DRC) wants to express its gratitude for the opportunity to comment on the Bill regarding the proposed changes to current legislation.

The Bill proposes to amend the South African Schools Act, 1996 (Act No. 84 of 1996) and the Employment of Educators Act, 1998 (Act No. 76 of 1998) (the SASA and the EEA, respectively), so as to align them with developments in the education landscape and to ensure that systems of learning and

excellence in education are put in place in a manner that respects, protects, promotes and fulfils the right to basic education enshrined in section 29(1) of the Constitution of the Republic of South Africa.

The draft amendments do indeed contain certain improvements of the SASA for which the Department should be commended. The focus of this submission, however, is to comment on issues that are of concern to the DRC. The expectation is that the Minister of Education will, in the finalisation of the Bill, respect and consider comments and proposals made in this submission. The Dutch Reformed Church would also like to invite the Minister of Basic Education to feel free in interacting with the Dutch Reformed Church in regard to comments made in this submission.

### **Specific proposed amendments/insertions and their implications**

#### **1. Clause 1(g)**

- Clause 1(g) proposes the insertion of an amended definition of "loan" to allow public schools to deal with the day -to -day business of the school without obtaining the written approval of the MEC.
- The proposed definition of a loan will cast the net too wide and will create uncertainty with the words "but are not limited to". What will the "the day-to-day operational costs" of a school entail? A more precise definition of "day-to-day operational costs" is needed. We propose a definition of "day-to-day operational costs" that will be reasonable in relation to the normal activities of schools and that will be easy to understand and implement.

#### **2. Clause 2(b)**

- This proposal makes it an offence for any person to willfully interrupt or disrupt any school activity or to willfully hinder or obstruct any school in the performance of the school's activities, and a penalty clause is provided for.
- The wording of this clause is problematic. It is conceivable that a person may have to willfully disrupt or interrupt a school activity for a just cause (for example a principal requesting an evacuation due to bomb threats). We therefore propose the insertion of "and without just cause" after the word "willfully".

#### **3. Clauses 3 and 4**

- Clause 3 provides that the Head of Department (HoD) has the final authority to admit a learner to a public school. It provides that the governing body must submit the admission policy of the school, and any amendment thereof, to the HoD for approval. The HoD must take into account certain prescribed factors when considering the policy or any amendment thereof. In the event that the HoD does not approve the policy he or she must return it to the governing body with such recommendations as may be deemed necessary.
- Almost 48 000 policies will need to be submitted and considered by the Head of Department at least every three years. Provinces do not have the capacity to deal with ordinary day-to-day submissions and correspondence. With just under 24 000 public schools, and with provinces struggling to deliver on existing legislative obligations, we have difficulty in seeing how they will be able to respond to all the submitted policies. These provisions make no provision for a timeframe within which the HoD must reply. If the HoD does not respond or approve a policy, the school does not have a valid admission policy.
- Also, no mention is made of the obligation on and right of a governing body to determine the capacity of a school and the obligation of consultation imposed on the Head of Department in the event that there is a conflict between the HoD and the SGB. The HoD can therefore declare a school full without any input from the governing body.
- Clause 4 also provides that a governing body must submit the language policy of a public school, and any amendment thereof, to the HoD for approval. The HoD may approve the policy, or any amendment thereof, or may return it to the governing body with recommendations. The clause also seeks to empower the HoD to direct a public school to adopt more than one language of

instruction, after taking certain prescribed factors into account.

- The proposal that the HoD can instruct a school to offer more than one language of instruction do not sufficiently take account of the additional costs, resources and staffing required to offer more than one medium of instruction. Until the funding problem is rectified, the impracticability of a provision such as the proposed section 6(9) will remain a stumbling block in providing learners access to quality education in whatever language/languages. The proposed amendments signify an intention to increase authoritarianism and a reluctance to respect, protect, promote and fulfil the values and provisions of the Constitution.

#### 4. Clause 6(b)

- Clause 6 seeks to amend section 8 of the SASA by providing that the code of conduct of a public school must make provision for an exemption clause, making it possible to exempt learners, upon application, from complying with the code of conduct or certain provisions thereof, on just cause shown.
- “Just cause” is simply too wide and may lead to frivolous applications for exemption. It means that SGBs must meet to consider and deliberate on all these applications, react to them in a reasoned manner and come to a rational decision. “Just cause” should be replaced by “religious, cultural or medical grounds. There is no time limit within which the Head of Department must dispose of the appeal. A time limit of not more than 14 days should be set.

#### 5. Clause 7

- Clause 7 seeks to extend the provisions of section 8A of the SASA by providing for the prohibition of liquor and prohibited substances on school premises unless for legitimate educational purposes.
- “Legitimate educational purposes” as a concept is not defined. Liquor can form an important element of fundraising activities for schools, such as wine auctions. Events like these will not be allowed anymore if the amendment goes through. If no liquor may be brought onto school premises, schools will lose this income and it will have a detrimental effect on SGBs’ efforts to supplement their resources. These proposed amendments must not be applicable to fundraising events organised by the school governing body. FEDSAS supports the proposed amendment to subsection (2) and (8) to the effect that an individual learner can also be subjected to a search and test.

#### 6. Clauses 10(a), 32, 33 and 35

- Clause 10 seeks to amend section 20 of the SASA by limiting the powers of a governing body in regard to recommending candidates for appointment.
- If the amendment is accepted, a governing body will be able to recommend to the HoD the appointment of post level 1 educators only, which will have the effect that the selection and appointment of educators on post levels 2 to 4 will be the sole responsibility of the HoD. It should be very clear that the proposed amendments will not solve the problem of undue influence during the appointment of educators by taking away the powers of the SGB – it will only shift the problem.

#### 7. Clause 10(b)

- The clause will allow the reasonable use, under fair conditions determined by the HoD, of facilities of a public school for education-related activities, without the charging of a fee or tariff.
- This proposal will constitute an abuse of power if provincial departments are allowed to make use of school facilities without properly compensating the schools. The use of facilities of a school will automatically have financial implications for the school, e.g., higher water and electricity consumption and cleaning services. Governing bodies function in terms of an approved budget and these expenses will most certainly fall outside their approved budgets. Who will be liable for these expenses?

8. Clause 11

- Clause 11 seeks to empower the HoD to centrally procure identified learning support material for public schools, after consultation with the governing body and on the basis of efficient, effective and economic utilisation of public funds or uniform norms and standards.
- The implications of this amendment will be that the Department will centrally procure LTSM for schools. Given certain provincial departments' incapability to deliver books to schools, there is concern that the provincial departments will not have the capacity to deliver quality material on time. In practice, this amendment can be very problematic. We propose that school governing bodies be given a choice whether or not to procure centrally and where the schools that decided not to procure centrally fail to perform this function, be held accountable.

9. Clause 13

- This clause seeks to empower the HoD to dissolve a governing body that has ceased to perform functions allocated to it in terms of the Act, if there are reasonable grounds to do so.
- The Schools Act does not confer the power to dissolve a governing body upon the HoD in any of its provisions, yet the proposed amendment deals with decisions the HoD may take after dissolution. The proposed wording also does not match the heading of the section.

10. Clause 16

- This clause provides that only a parent member of a governing body who is not employed at the school may serve as the chairperson of the finance committee of that public school.
- In practice, this can pose to be a problem in schools where no such parent with the necessary financial expertise has been elected to the SGB or where there is no such a person in the parent body of the school. The chairperson of the finance committee of a school must have at least some background in financial management. This amendment should rather include that the chairman of the finance committee must be elected for his/her expertise in financial management.

11. Clause 19

- Clause 19 provides that the governing body must also seek the approval of the MEC to enter into lease agreements, for any purpose.
- The concept "lease" is not defined in the Act. The common understanding (and legal definition) of lease is an agreement in terms of which property is made available for use by another against payment of compensation. Is it really intended that SGBs must obtain permission from the MEC to lease the school hall (or any other property) for a single meeting?

12. Clause 21(6) and (7)

- In terms of this clause any significant or substantial deviation to the initial approved budget must be presented to a general meeting of parents for consideration. The proposed new section provides that a quorum of 15% of parents is required and that if a quorum cannot be achieved at the first meeting, a second meeting must be arranged, at which no quorum would be required.
- In practice, it has happened that just below 15% of parents have turned up for such meetings, constituting some 200 people, and then only 20 people turn up for the second meeting. The budget is then discussed and approved by a significantly smaller number of parents. The provision is therefore counter-productive.

13. Clause 22

- This clause prescribes what documentation the governing body may or should consider when deciding on an application by the parent of a learner for exemption from the payment of school fees.

- Restrictions will be placed on SGBs with regard to their right to decide on the exemption of payment from school fees. Schools are already struggling to make ends meet due to the high percentage of parents that cannot afford school fees. These restrictions will make the process to collect school fees even more difficult for schools. Restrictions are being placed on SGBs with regard to information that can be obtained concerning the gross income of parents.

Furthermore, a decree of divorce or a divorce agreement is irrelevant for the purposes of determining whether parents are entitled to exemption.

14. Clause 23(4)(a)

- Clause 23 seeks to amend section 43 of the SASA to empower the HoD to:
  - (a) authorise officers to conduct an investigation into the financial affairs of a public school and, where necessary, to access documents relevant to the investigation, after consultation with the governing body; (b) request the Auditor -General to undertake an audit of the records and financial statements of a public school; or (c) appoint forensic auditors or forensic investigators to conduct a forensic investigation into the financial affairs of a public school.
- In practice, this proposed amendment means that any officer, even without the necessary financial knowledge and expertise can conduct a financial investigation at a school. The HoD is also almost given a free rein to get involved in the finances of a school, without having to show reasonable or just cause.

15. Clause 23(5)(a)

- This clause places a responsibility on the governing body to provide the HoD with quarterly reports on all income and expenditure in accordance with directives issued by the Head of Department.
- The submission of quarterly reports, apart from the annual audited financial statements, that a governing body would have to submit will place a financial and administrative burden on the governing body and the school's resources. It is difficult to see how the submission of extra reports or documents on a quarterly basis will combat the mismanagement of finances. The provision, if retained, must therefore be individualised to instances where sufficient reasons exist for such reports, e.g. where there are irregularities in Schools expenditure patterns or where another justifiable cause for such intervention is present.

16. Clause 26(3)

- Clause 26(3) creates an offence where the parent of a learner submits false or misleading information, or submits a forged document or one which purports to be a true copy of the original but is not, in the application for admission to a public school or for exemption from the payment of school fees.
- This amendment seeks to eliminate the risks associated with the provision of false information. Governing bodies will be able to hold parents liable when providing false information. FEDSAS strongly supports this insertion.

17. Clause 27

- Clause 27 inserts a new provision in the SASA to provide for dispute resolution mechanisms in the event of any dispute between the HoD and a governing body.
- Parties must now meaningfully engage with each other to resolve disputes. It is hoped that this amendment will save costs for all concerned and will enable the parties involved to resolve disputes amicably. FEDSAS supports the principle of insertion of this provision.

18. Clause 32

See comments under clause 10.

19. Clause 33 and 35

See comments under clause 10

20. Clause 41

- Clause 41 inserts a new provision in the Employment of Educators Act, requiring educators to disclose to the HoD their financial interests as well as the financial interests of their spouses or of persons living with such educators as if they were married to each other. Failure by an educator to do so constitutes misconduct.
- This proposed insertion in its present wording constitutes an infringement of educators' as well as their spouses or partner's right to privacy.

## **Conclusion**

The Bill in its current form is flawed for all the reasons stated above, notably about provisions relating to the role and powers of governing bodies of public schools. The proposed changes to the SASA would render governing bodies powerless in effect, which in turn can compromise the quality of education in public schools. School communities need to have more say in the affairs of public schools, not less. The primary function of school governing bodies and the HoD is to serve children, consistent with the Constitution. To do this they need to engage according to the noble principles of cooperative governance. The proposed amendments fall short in achieving this and need to be carefully redrafted, with due consideration to the powers and functions of governing bodies.

Against this background the fundamental approach and questions should be: How might the amendment of education laws contribute to the improvement of the quality of education every child in this country is entitled to and is in fact receiving – or, in the majority of cases, not receiving? Would the proposed amendments improve the experience and quality of the education children are receiving?

The motivating factors for amendments is that many public schools, especially in deep rural areas, do not have functional governing bodies and persons with the necessary skills to conduct interview processes. This seems cynical at best as it is not reasonable to curb the powers of all governing bodies because of the deficiencies of some. Surely there can be different measures to address the problem, for instance a proper system of support by the HoD in those instances where a lack of necessary skills may be prejudicial to appointment processes. Such an approach would arguably be more effective than amending the Act and thereby restricting the functions and powers of all governing bodies in an ill-begotten one-size-fits-all approach.

These proposed amendments will undermine the “fundamentally important norm of our democratic dispensation” and will infringe on the “defined autonomy” of parents and members of the school community to decide on domestic affairs of their schools. The proposed amendments represent a fundamental denial on the side of the Department of Basic Education, and ultimately

the State, that parents have a crucial role to play in the governance of their children's education, that they are part of the “grassroots democracy” of control and virtually usurp the role of parents by seeking to centralise control in provincial departments in what might at best be seen as a totalitarian intervention.

Kind regards

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**GENERAL SECRETARY**