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Our Reference: BELA Bill

Date: 10 January 2018

The Director-General, Department of Basic Education

**For Attention: Adv TD Rudman**

By email: [rudman.d@dbe.gov.za](mailto:rudman.d@dbe.gov.za)

Dear Advocate Rudman,

## **SUBMISSIONS: Draft BASIC EDUCATION LAWS AMENDMENT BILL**

- 1 We refer to the abovementioned matter, specifically to the notice published in the Government Gazette of 13 October 2017, calling for public comments in respect of the draft Basic Education Laws Amendment Bill ("the BELA Bill"). We also refer to the meeting of the Portfolio Committee on Basic Education on 28 November 2017 and the extension of the deadline for public comments to 10 January 2018.
- 2 Cause for Justice ("CFJ/We/our/us/ourselves") hereby want to thank the Department for the opportunity to present you with these written submissions and to participate in the law-making process.

## **BACKGROUND TO CAUSE FOR JUSTICE**

- 3 CFJ is a non-profit human rights and public interest organisation founded in 2013 to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness on matters of public importance.
- 4 All five of CFJ's core values give it a particular interest in the Bill, namely (1) the responsible exercise of freedom, (2) protection and promotion of human worth/value, (3) protection of the vulnerable in society (social justice), (4) ensuring accountable government action and (5) protecting the institutional authority of the family.
- 5 CFJ's involvement in matters pertaining to education, specifically the interplay between stakeholders (partners) in the education environment, goes back to September 2014 when we joined the court case of *Organisasie vir Godsdienste-onderrig en Demokrasie v Laerskool Randhart and Others 2017 (6) SA 129 (GJ)*, which case was concluded on 27 June 2017.

**MANAGEMENT COMMITTEE MEMBERS:** RYAN SMIT, GENERAL MANAGER | WYNAND VILJOEN, CHAIRPERSON  
CRAIG SNYDERS, EX-OFFICIO EXECUTIVE MEMBER | DIETER VON FINTEL, EX-OFFICIO EXECUTIVE MEMBER

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## STRUCTURE OF SUBMISSIONS

6 Our submissions are structured under the following headings:

6.1 **Primary submission:** Discussion of the importance of *the institutional authority of parents* as represented by the school governing body

6.2 Submissions on specific clauses:

- **Clause 3** – Amendment of section 5 of the South African Schools Act, 1996 – *‘admissions policy’*
- **Clause 4** – Amendment of section 6 of the South African Schools Act, 1996 – *‘language policy’*
- **Clauses 10(a), 32, 33, 35** – Amendment of sections 20, 6, 7 and 8 of the South African Schools Act, 1996 – *‘appointment of educators’*
- Clauses 7, 10(b), 11, 16, 19, 21(6) and (7), 22, 23(4)(a), 23(5)(a) and 41
- Clauses 1(g), 6(c), 17, 26(3) and 27

6.3 Proposals in respect of specific clauses

6.4 Conclusion

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

7 The primary responsibility for the education of a child is borne by the parents of that child. Consequently, parents enjoy certain fundamental rights, which rights enable them to ensure that their child receives the kind of and quality of basic education the parents desire for their child. The importance of these rights are acknowledged, promoted and protected in South African law.<sup>1</sup>

8 Parental rights are also acknowledged in international instruments. The International Covenant on Civil and Political Rights (ICCPR) requires that state parties thereto undertake to have respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.<sup>2</sup> Likewise, the Convention on the Rights of the Child (CRC) requires state parties thereto to respect the rights and duties of the parents to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.<sup>3</sup> The recognition, protection and promotion of the primary importance of the active participation of parents in the making of decisions concerning what parents consider

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<sup>1</sup> The Constitution, the South African Schools Act, 1996 and Education White Papers 1 and 2.

<sup>2</sup> Art 18 ICCPR.

<sup>3</sup> Art 14 CRC.

to be an appropriate education for their child, is therefore obligations to which the South African government are bound as signatories of the mentioned international instruments.

- 9 The Constitution enshrines the right to basic education.<sup>4</sup> Education White Papers 1 and 2 acknowledge and emphasise, directly and indirectly, the primacy of parents' rights concerning the governance of the school which their child attends, by providing policy guidelines as well as values and principles for parental participation in decision-making processes. The South African Schools Act should comply with, promote and protect these rights, policies, values and principles.
- 10 The state is obliged to support and enable parents to exercise their fundamental rights and fulfil their obligation to provide their child with basic education. This means that parents have to be able not only to participate in the governance of the school which their child attends, but also to determine it, in consultation with the other partners in the cooperative model of public school education.
- 11 The importance of the participation of parents in school governance is evident when regard is had to provisions such as section 23 of the South African Schools Act, which requires that the majority of the members of the school governing body should be parents. The Policy underlying South African law acknowledges that parents are the primary stakeholders in the basic education of their child.<sup>5</sup>
- 12 The state has four major obligations in this regard, being the provision of schools, the funding of schools, overseeing the quality of education, and the provision of appropriately trained and qualified educators. For the state to successfully fulfil its obligations, limited power is conferred upon it by the people, through the Constitution (firstly) and legislation.
- 13 The decentralisation of power from the state to the people is never the devolution of power, since in a constitutional democracy power (legal authority) does not originate with the state. The state is allowed to exercise power by its people (through the mechanism of the Constitution) in order to facilitate harmony in the interaction between the competing rights and claims of citizens and societal collectives and by way of legislative measures and the executive implementation and enforcement of those measures. The state is limited in its exercise of power by the rule of law, which means that it is obligated and legally accountable to respect the boundaries of its legal authority, as provided in the Constitution and in legislation that is in line with the Constitution.
- 14 Since the rationale for delegating these powers to the state is to enable the state to support and enable parents to provide their child with quality basic education, any provision which impedes rather than promotes the provision of such education to the child, should be opposed by both

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<sup>4</sup> Section 29(1)(a), 29(2) and (3).

<sup>5</sup> Education White Papers 1 and 2, as given expression to in law by the South African Schools Act, 1996 as properly interpreted in light of the Constitution.

parents and the state. It is not in the best interest of the child for parents or the state to endeavour otherwise.

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

## **SUBMISSIONS ON SPECIFIC CLAUSES**

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

**CLAUSE 3 – AMENDMENT OF SECTION 5 OF THE SOUTH AFRICAN SCHOOLS ACT – ‘ADMISSIONS POLICY’**

- 22 We have serious reservations about the centralisation of powers in the Head of Department / provincial education departments.
- 23 The school governing body has been assigned the obligation and the concomitant right to determine the admissions policy of a school for very good reason, as it is functionally the best suited authority to make such determination, due to its close proximity to the school and its surrounding community. Should disagreement arise between the Head of Department and the school governing body, the Head of Department has an obligation to consult with the school governing body. The proposed amendment of section 5 does not reflect this obligation.

**CLAUSE 4 – AMENDMENT OF SECTION 6 OF THE SOUTH AFRICAN SCHOOLS ACT – ‘LANGUAGE POLICY’**

- 24 We have serious reservations about the centralisation of powers in the Head of Department / provincial education departments.
- 25 The current models for the funding of schools and provisioning of staff, precludes most schools from offering more than one language of instruction. Additional costs, resources and staffing will be required before the offering of more than one language of instruction can be seriously considered.

**CLAUSES 10(a), 32, 33, 35 – AMENDMENT OF SECTIONS 20, 6, 7 AND 8 OF THE SOUTH AFRICAN SCHOOLS ACT – ‘APPOINTMENT OF EDUCATORS’**

- 26 We have serious reservations about the centralisation of powers in the Head of Department / provincial education departments.
- 27 The centralisation in the Heads of Department of the power to appoint, promote and transfer educators, will place an enormous and undue administrative burden on the provincial departments. The provincial departments will face a significant challenge in securing and maintaining the necessary capacity and competency to successfully undertake such a task and it is therefore unlikely that it will be able to successfully perform the obligations as proposed in these clauses.
- 28 We refer to the submissions and proposals made by FEDSAS in this regard, and agree with, confirm and support same. Specifically, we wish to comment on the following:
- 28.1 There exists a significant body of judgments against provincial education departments, where it was found that decisions were made irrationally, authority was misconceived and/or other

grounds were found, all which indicate that it is ineffective for provincial departments to appoint educators without the input and recommendations by school governing bodies.

- 28.2 We take cognisance of the fact that many schools do not have functioning governing bodies and persons with the necessary skills to conduct interview processes. However, the provincial departments likewise do not have the necessary resources. The best and sustainable solution would be for the provincial departments to focus on capacity building on a local community level and assisting specifically identified schools in need.
- 29 As already discussed, the primary responsibility of the education of the child, and the accompanying rights, are borne by the parents and originates in the parental/family relationship. Where powers and obligations are delegated to the state, they are so delegated in terms of the Constitution and other relevant laws that are not constitutionally objectionable. It is therefore unnecessary, impractical and unwise for the state to take upon itself the performance of obligations best performed by the parents and the school governing body at a grassroots level.
- 30 The centralisation of obligations and powers and decisions in the provincial department will, most emphatically, worsen instead of solve the dilemma. The solution which best serves the child, parents, schools and the provincial departments, is for the provincial departments to support, equip and strengthen school governing bodies.

## PROPOSALS

31 In summary, our proposals are as follows:

### 31.1.1 **Clause 3**

In our opinion there is no need to amend section 5.

### 31.2 **Clause 4**

In our opinion there is no need to amend section 6.

### 31.3 **Clauses 10(a), 32, 33, 35**

We propose that clauses 10(a), 32, 33 and 35 are removed in their entirety and that the *status quo* is retained.

### 31.4 **Clauses 7, 10(b), 11, 16, 19, 21(6) and (7), 22, 23(4)(a), 23(5)(a) and 41**

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

31.5 **Clauses 1(g), 6(c), 17, 26(3), 27**

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

**CONCLUSION**

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

33 We trust that the above submissions are of assistance to the Department and look forward to your response thereto (if any) in due course. CFJ remains at the Department's disposal to assist in the further development and/or amendment of the Bill to effectively achieve its intended purposes.

34 We also hereby respectfully request the Department to give us an opportunity to make oral submissions (representations) to the Department at an opportune time to augment these brief written submissions.

Yours faithfully,

**Liesl Stander (Preparer)**  
***Legal Advisor: Law and Policy***

and

**Ryan Smit (Reviewer)**  
***Director: Law and Policy***