CENTRE FOR CHILD LAW

# CENTRE FOR CHILD LAW SUBMISSIONS ON THE BASIC EDUCATION LAWS AMENDMENT BILL [B-2015]

## INTRODUCTION

1. The Centre for Child Law (CCL) is an impact litigation and advocacy organisation. The CCL's vision is to establish and promote child law and uphold the rights of children in South Africa, within an international and regional context, particularly insofar as these interests pertain to their legal position.

2. The CCL makes the following submissions to the Education Laws Amendment Bill in order to ensure that the proposed amendments are in line with the principles, rights and obligations set out in the Constitution as well as rulings made by the Constitutional Court.

## CENTRE FOR CHILD LAW SUBMISSIONS

Preamble

3. The preamble sets out the purpose of the Basic Education Laws Amendment Bill. The CCL recommends that the following be included in the preamble "encourage school enrolments of children through promotion of the right to basic education".

Clause 1

4. The CCL does not have submissions in this regard.

Clause 2

5. Clause 2 sets out proposed amendments to section 3 of the South African Schools Act, 1996 (SASA) by increasing the penalty applicable to parents and another person that prevents a learner, who is subject to compulsory school attendance, from attending school.

6. The CCL is concerned about the radical departure from 6 months imprisonment to 6 years imprisonment. In addition, the proposed amendments now make it possible for both a fine and up to 6 years imprisonment to be applied, whereas in the current provisions the penalty applicable is either a fine or imprisonment.

7. The CCL is further concerned about the impact that such penalty will have if children prevent other children from attending school.

8. The CCL understands that this proposed amendment is in response to recent incidents in which communities, or portions of communities, prevented learners from attending school as part of planned protest action. However, the CCL is concerned that the planned amendments take the wrong course of action. Clause 2 seeks to amend Section 3(6)(a) which pertains to parents. While it is reasonable to expect that parents will take all steps to ensure that their children attend school, this is complicated in protest situations where parents may decide that they need to keep their child at home for safety reasons.

9. The CCL doubts the wisdom of trying to use the Schools Act as a general deterrent to protest action by persons via the insertion of the new section 3(7) and recommends that other laws more suited to that purpose would be a more appropriate avenue – such as the Intimidation Act. It should be noted that the proposed amendments to section 3(6)(b) will also place protesting teachers at risk of arrest and imprisonment. While teacher strikes are to be discouraged, criminalisation is not the answer. The stretching of this provision to cover every protest situation strains its logic.

10. In sum, the sentencing provisions should not be increased for sections 3(6)(a) and (b) and the new section 3(7) should not be inserted. Instead, resources should be invested in the process of inquiry and written notice as set out in section 3(5) of the SASA.

11. Should the insertion of section 3(7) and the increase in sentences for section 3(6) be retained despite these submissions, the CCL recommends that the proposed amendments include a list of considerations that courts may apply when deliberating on a sentence for a parent who is convicted. In particular, the amendment should require a sentencing court to take into consideration the effect that the sentence may have on the child or children concerned. With regard to child offenders (where a learner has prevented other learners from attending school), it is important to consider where this statutory offence fits into the scheme of the three schedules to the Child Justice Act, and the Constitutional injunction in section 28(1)(g) that detention must be a measure of last resort and for the shortest appropriate period of time. With regard to parents who are being sentenced, the CCL draws attention to the Constitutional Court case of *S v M (Centre for Child*

*Law as Amicus Curiae)* [2007] ZACC 18; 2008(3) SA 232 (CC) in this regard, which requires that imprisonment of primary caregivers should not be applied where an alternative is available.

12. We propose the insertion of a clause along the following lines:

(8) Any court sentencing a person in relation to a conviction mentioned in section 6 or 7 must consider the effects of such any period of imprisonment being contemplated on the child or children concerned, keeping in mind the need to protect persons below the age of 18 from detention, except as a measure of last resort, and where the person being sentenced is a caregiver, the importance of alternatives to imprisonment in order to prevent the separation of children and parents.

Clause 3

13. The CCL is in broad agreement with the proposed amendments set out in clause 3. The proposed amendments ensure that a level of accountability and transparency is created in the admission processes and development of admission policies of public schools.

14. The CCL, however recommends that the proposed insertion of section 5(5)(a) into the SASA which provides that *"the Head of Department has the final authority … to admit a learner to a public school"* must include a provision that highlights the fact that this final authority must be exercised in a manner that is based on proper engagement with the school and/or school governing body concerned. The Constitutional Court has commented on the importance on such engagement:

*"At the provincial level, government is under an obligation to ensure that there are enough school places for every child to attend school. However, this obligation must … take into account the fact that determination of capacity is a complex process that applies not only to the school as an entity, but also to each and every grade and class within the school. It involves a consideration of a range of interwoven factors relating to the planning and governance of the school as a whole. Planning and coordination in partnership with school governing bodies is crucial … Where a provincial department requires a school to admit learners in*

*excess of the limits stated in the school's admission policy, there must be proper engagement between all parties affected."*[1]

15. The CCL further recommends that the proposed insertion of section 5(5)(d) be amended. This subsection talks to the factors that must be taken into account by the Head of Department when considering the admission policy of a public school or any amendment thereof for approval.

16. The CCL recommends inclusion into the list of factors set out in section 5(5)(d) and new factor (v) as follows:

(v) The need to ensure access to inclusive education for learners with disabilities.[2]

17. The CCL further recommends the inclusion of a new subsection 5(5)(11) as follows:

5(11) All decisions made by the Head of Department mentioned in this section must, as far as reasonably possible, be made in partnership with the relevant school governing body and after proper engagement between all affected parties.

Clause 4

18. The CCL supports the proposed amendments contained in clause 4 of the Bill on the adoption of language policies in public schools. The CCL is of the view that these proposed amendments ensure that the educational needs of children from diverse backgrounds are taken into account in a transparent process based on accountability. The importance of this was affirmed by the Constitutional Court:

*"the determination of language policy in a public school … must be exercised subject to the limitations that the Constitution and the Schools Act or any provincial law laid down. Even more importantly it must be understood within the broader constitutional scheme to make education progressively available and*

[1] *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) at paras 71-2.
[2] United Nations Convention on the Rights of Persons with Disabilities, article 2(b).

*accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress."*[3]

Clause 5

19. The CCL does not have submissions in this regard.

Clause 6

20. The CCL supports the proposed amendments contained in clause 6 of the Bill on the factors that the code of conduct a public school must take into account. The CCL is of the view that these proposed amendments ensure that the educational needs of children from diverse backgrounds are taken into account in a transparent process based on accountability.

21. The Constitutional Court has supported the inclusion of exemption clauses on public school codes of conducts. In reference to the facts before it, the Constitutional Court stated the following in the matter of *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 110:

*"It would be perfectly correct for a school, through its code of conduct to set strict procedural requirements for exemption. It would also be appropriate for the parents and, depending on their age, the learners, to be required to explain in writing beforehand why they require an exemption. That would ensure that these difficult matters are resolved responsibly, fairly and amicably. It seems that the absence of such a procedure in the Code is largely to blame, not only for the manner in which the complaint was raised, but for the way in which it was resolved. It is a serious obstacle to a search for reasonable accommodation that an appropriate procedure was not in place."*

[3] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 61.

Clause 7

22. The CCL recognises the need to create safe environments in schools, but is concerned about the idea of 'random' testing. It is noted that this is not an addition, but an existing word in the section. The CCL would like to take the opportunity to propose the deletion of the word 'random' which is at odds with the words in the same section 'if a fair and reasonable suspicion has been established'. These words point in the opposite direction of randomness. This blurring of notions was perhaps more tolerable when the clause was directed at a group, but now that the clause is being targeted at the individual, it is meaningless for the search to be both 'random' and 'based on a fair and reasonable suspicion'. We thus urge for the deletion of the word random in both the title of section 8A and in in all places where it appears in section 8A.

23. Furthermore, the CCL motivates for the inclusion of a clause at the end of 8A as follows:

    (15) All actions taken in terms of this section must be reasonable and proportionate, and must be aimed at the rehabilitation of learners concerned, with recourse to the criminal justice system to be used only as a measure of last resort.

Clause 8

24. The CCL notes the proposed insertion of section 2C which sets out which parties should be consulted when closure of a public school is being considered.

25. The CCL recommends that the parties to be consulted must include the learners to be affected by the closure. This is necessary to facilitate and affirm children's right to be heard and to have their views respected, as set out in the United Nations Convention on the Rights of the Child (article 12(1)) and the African Charter on the Rights and Welfare of the Child (article 7). South Africa has ratified and has an obligation to comply with both instruments.

26. The CCL proposes the inclusion, after sub-section (2) dealing with notice of mergers, as follows:

(f) Consult with learners who will be affected by the merger, where they are of such age, maturity and stage of development to participate, and take their views into consideration in the decision making process;

(g) consider the best interests of learners who will be affected by the merger, who are too young to participate, and give this principle appropriate weight in evaluating the decision to merge the two schools.

Clause 19 to 21

27. The CCL does not have submissions in this regard.

Clause 22

28. The CCL is concerned that the proposed insertion of section 41(2)(a) to (e) may prejudice and cause challenges for unmarried parents – who are the primary caregivers of their children – who cannot produce the salary advice of the other parent or cannot produce a divorce agreement or court order because they were never married to the other parent.

29. The CCL is also concerned that the proposed section 41(2A)(a) to (d) may create particularly stringent requirements that poor parents may not be able to comply with due to resource constraints.

30. The CCL recognises that the requirement to produce these documents is based on the discretion on governing body. However to eliminate the possibility of this discretion not being exercised fairly, and being exercised in a prejudicial manner, the CCL recommends that the provisions should require school governing bodies to exercise their discretion in light of the individual circumstances of the learner and parent requesting exemption from payment of school fees.