Centre for Child Law

submissions

to the

Basic Education Laws Amendment Bill

To	The Select Committee on Education & Technology, Sports Arts & Culture of the NCOP c/o: Noluthando Skaka, belabill@parliament.gov.za
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CENTRE FOR CHILD LAW
FACULTY OF LAW, UNIVERSITY OF PRETORIA

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UNIVERSITEIT VAN PRETORIA
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YUNIBESITHI YA PRETORIA
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1. ABOUT THE CENTRE FOR CHILD LAW

The Centre for Child Law ("Centre/CCL") is a public interest litigation organization that is registered with the Legal Practice Council as a child law and child rights law clinic, established in terms of the Legal Practice Act. CCL is housed in the University of Pretoria's Law Faculty and contributes to the establishment and protection of children's rights through litigation, legislative and policy advocacy, research, as well as education.

CCL's mission is to set legal precedents to improve and strengthen laws pertaining to children and to ensure that they enjoy their constitutionally guaranteed rights.

Our submissions below are intended to enhance existing provisions of law, while aligning the Basic Education Laws with other sources of law with South Africa's international obligations and domestic laws.

2. SUMMARY OF SUBMISSIONS

Our substantive submissions focus on the following aspects:

- Expansion of the definition of 'corporal punishment' to include psychological harms;
- All children must be admitted, but where 'required documents' are unavailable a copy of the proof of birth, clinic card or affidavit will suffice in line with the *Phakamisa* judgement and Circular 1 of 2020;
- Admission of children in all possible care arrangements;
- Admission of children in child-headed households and referrals to social workers;
- Removal of the 12-month maximum imprisonment period, as this would be *ultra vires* and runs contrary to existing criminal law system, regarding assault and the imposition of appropriate sanctions;
- There must be procedures adopted to facilitate child participation for child victims and witnesses when such children testimony in cases where non-teaching/auxiliary staff is involved in a disciplinary inquiry.

3. DEFINITIONS

3.1. Caregiver, clause 1

The term 'caregiver' must be added to the present list of terms to be defined in terms of the South African Schools Act.

In 2015, Stats SA's General Household Survey showed that there are about 90 000 children in 50 000 child-headed households.[1] In 2022, Children Count estimated that there were about 44,000 children living in child-only households. This equates to 0.2% of all children. Because this household form is very rare, the confidence intervals are quite wide and the true number may lie within a margin of 15,000 around either side of the estimated number.

The term 'care' is extensively defined in the Children's Act and includes the exercise of various activities all aimed at ensuring that the child's needs are met,[2] this includes "respecting, protecting, promoting and securing the fulfilment of , and guarding against any infringement of, the child's rights set out in the Bill of Rights", and "guiding, directing and securing the child's education and upbringing, in a manner appropriate to the child's age , maturity and stage of development".

The right to basic education is a constitutionally entrenched right.[3]The caregiver of the child has an obligation to ensure that the child's right to access basic education is met. Should the caregiver fail to have a child admitted into school. The caregiver is liable, on conviction to be fined or imprisoned for failing to ensure that a child of school going age goes to school.[4]

It must be noted that according to StatsSA's 2022 General Household Survey, South Africa has 21 million children. Of that 4,4% of these children live with their grandparents, mostly in the rural provinces. This amounts to 9 240 000 (9 million, two hundred and forty thousand) children whose grandparents cannot be expected to produce children's court orders, and should not be expected to. Unnecessary children's court applications further spread thin the minimal resources of the state and unnecessarily encumbers social workers and the courts . Grandmothers and family members caring for children should not have to endure unnecessary bureaucratic processes to register their grandchildren into school.

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[1] No data is available from Stats-SA in this respect beyond 2015.
[2] Children's Act 38 of 2005, section 1, defines 'care' in relation to a child, to include, providing the child with a suitable place to live
[3] Constitution of the Republic of South Africa 1996, section 29(1).
[4] SA Schools Act 84 of 1996, section 3(6)(b).

The term care-giver as proposed below and already defined in the Children's Act 38 of 2005, is the most relevant and appropriate terminology for the present purpose and speaks to the realities of children in South Africa's children.

The term 'caregiver' is already defined in the Children's Act to mean the following:

> *'**Caregiver**' means any person other than a parent or guardian, who factually cares for a child and includes-*
>
> *i. A foster parent;*
> *ii. Person who cares for a child with the implied or explicit consent of a parent or guardian of the child;*
> *iii. A person who cares for the child whilst the child is in temporary safe-care;*
> *iv. A person at the head of a child and youth care centre where a child has been placed;*
> *v. A person at the head of a shelter'*
> *vi. A child and youth care worker who cares for a child who is without appropriate family care in the community, and;*
> *vii. The child at the head of a child headed-household*

The definition of care-giver goes far beyond just the parent or guardian and speaks to the reality that many children find themselves in, including children in kinship care and child-headed households.[5]

3.2. Corporal punishment, clause 1(c):

We welcome the statutory inclusion and expansive definition of 'corporal punishment' that is proposed in clause 1(c). However, note that the definition does not refer to "other forms of cruel and degrading treatment".

The Centre proposes that clause 1(c) be expanded to include a subsection that contains, "other

[5] Kinship care refers to instances where a child is in the care of extended family members. It is extremely common for children to be in the care of their grandparents, aunts or uncles. This however is not adequately reflected in the General Household Survey, as the survey only notes that 19,5% of all children live with neither parent.

forms of cruel and degrading treatment" to its definition. In line with the definition provided by UN Committee on the Rights of the Child in its *General Comment 8 on The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment* which includes:

Para 11, "Other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include for example punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares, or ridicules the child."

3.3. Required documents, clause 1(m),

We welcome the wide-ranging required documents accepted by the Department when admitting children into schools.

We recommend that children in child-headed households and those in the care of a caregiver (as defined above), also be included in list of persons who should be permitted to admit children into schools.

We recommend the insertion of a clause 1(m)(e) –(g) that will read as follows:

"(e) where a learner is in the care of any other caregiver:

(i) an affidavit from the caregiver citing their relationship with the child;

(ii) the care-givers identifying documents;

(iii)the learners birth certificate.

(f) where a learner is in the care of a child in child-headed household;

(i) the relevant order from the children's court placing the child as the head of a child-headed household;

(ii) the learner's birth certificate

(iii) where the child in a child-headed household is unable to present the relevant required documents, the child is to be admitted into school and referred to a social worker."

The above-proposed insertions are intended to align the appropriate provisions of the South African Schools Act with the relevant provisions of the Children's Act. The proposed clause recognises the various care formations that children find themselves in. Recognising that every child in any family structure remains entitled to access their right to basic education.

3.4. Use of correct terminology to avoid conflation and confusion

The proposed clause in 1(m)(d) stipulates the following:

> "where the *learner* is in alternative care: the following documents:
> (i)the relevant court order granting guardianship and custody; and
> (ii) the *learners* unabridged birth certificate."

Firstly, the term 'custody', is not applicable to South African law. The Children's Act refers to 'parental responsibilities and rights', which comprises of four elements, specifically: guardianship, care, contact and maintenance,[6]and not custody.

Secondly, it must be noted that some children are placed in Secure Care Centres('SCC') and Child and Youth Care Centres('CYCC'),[7] the placement order in such cases does not award guardianship to a particular person.

Thirdly, a foster care order does not grant guardianship, children in kinship care arrangements are often placed through the consent of the families concerned.

In its present form, the proposed provision excludes many children and undermines various provisions of the Children's Act, which delineates the requisite responsibilities and rights of foster parents,[8] children leading child-headed households, caregivers, heads of Secure Care Centres and Child and Youth Care Centres.

Guardianship is a specific type of order that can only be granted by the High Court. High Court processes tend to be expensive. High Courts are centrally located within the provinces. On the other hand, Children's Courts are easily accessible because every Magistrates Court is a

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[6] Children's Act 38 of 2005, section 18.

[7] Secure Care Centre ('SCC') placement is done in terms of the Child Justice Act 75 of 2008, for children who are in conflict with the law. The children are placed in SCCs as awaiting trial detainees, children serving sentences or placed on residential diversion for a specified period of time. Children in SCC are entitled to receive basic education on par with their counterparts who are not in conflict with the law, as part of their individual development, rehabilitation and integration with broader society. A child who is found to be in need care and protection can be placed in a Child and Youth Care Centre by a Children's Court order in accordance with the provisions of the Children's Act 38 of 2005.

[8] *Ibid*, section 118 provides for the responsivities and rights of foster parents. The Children's Court order prescribes the parental responsibilities and rights acquired by the foster parent with limitations.

Children's Court, and every district has one. Children's Court are also more informal and does not involve any legal costs, legal representation or formalities that would be required by the High Court. The wording used in the proposed clause 'granting guardianship or custody', thus excludes many other statutorily recognised care formations and does not reflect the true reality of many children in South Africa who are in foster care, child headed households, SCCs & CYCCs and kinship care.

In this premise, we recommend that the following wording be used:

> *"where the learner is in alternative care, the following documents:*
> *(i) the relevant court order placing a child in the persons/entity's care;*
> *(ii) an affidavit from the child's caregiver;*
> *(iii) the learner's unabridged birth certificate."*

4. ADMISSION REQUIREMENTS (clause 4):

We welcome the provisions of clause 4, that is section 5, in so far as it makes provision for the admission of children into schools even where their parents and guardians are unable to provide the 'required documents'.

We recommend that the clause include the following provision, to say:

"(1)(C) Where an official birth certificate is unavailable, the school/district must accept an alternative proof of identity such as:

viii. An affidavit or sworn statement deposed to by the parent, guardian or caregiver identifying the child's name, age, date of birth;

ix. A certified copy of the child's proof of birth or clinic card may also be accepted for purposes of identifying the child."

5. LANGUAGE POLICY (clause 5)

Clause 5(5)(a) states that before the Head of Department ('HOD') adopts a new language policy, or amends an existing one. The HOD must be satisfied that the policy takes due considerations of the language needs of the community where the school is situated as well as a list of other factors, including but not limited to, 'the best interests of the child.'

In this premise, we recommend the insertion of the following provisions to clause 5(7)(a):

" 7. The Head of Department when considering the language policy of a *public school* or any amendment thereof for approval, must be satisfied that the policy or the amendment thereof takes into account the language needs , in general , of the broader community in the *education district* in which the *public school* is situated, and must take into account factors including, but not limited to –

(a) [The best interests of the affected children , including childrens own views regarding how they will be affected]
(b) Equality in terms of section 9 of the *Constitution ...."*

6. CORPORAL PUNISHMENT (clause 10)

We welcome the criminalisation of corporal punishment; however, we further note that the definition of corporal punishment in the South African Schools Act does not align with international standards. We have made the relevant recommendation above in this respect.

It must be noted and clarified that the internal civil disciplinary process and the external criminal processes run parallel to each other, that is to say, the one is not reliant on the other so the disciplinary hearing does not wait for NPA to prosecute and for the court to make a finding of guilty. The state as an employer and the relevant disciplinary forums like SACE and others, must engage in the civil disciplinary process.

As it pertains to clause 10, We find this provision inappropriate for the following reasons.

Firstly, where corporal punishment is administered the person who commits corporal punishment must be held liable using both civil and criminal processes.

Secondly, The clause in its current form would permit the DBE (Department of Basic Education) and SACE (South African Council of Educators) to act outside of their powers. DBE & SACE do not have the powers to impose criminal sentences, the judiciary through the courts must hear every criminal case on its own merits, consider the various factors applicable to the matter and impose a sentence that the court finds to be in the interests of justice.

Thirdly, DBE and SACE are responsible for the civil disciplinary processes for misconduct for acts such as corporal punishment in the school environment. DBE and SACE do not have any authority to prosecute criminal matters or to impose criminal sanctions. #

Fourth, the South African Police Services, National Prosecuting Authority and the Courts on the other hand are responsible for imposing charges, carrying out investigations, running a criminal trial and imposing a sentence. The decision to impose a fine or a sentence of imprisonment lies in whole and solely in the purview of the judiciary and must not be subverted by the present provision.

Fifth, the proposed clause would have the untenable result that the prospective penalty for the crime of assault, assault with intent to cause grievous bodily harm or attempted murder would become a lesser criminal offence because the victim is a child.

Lastly, we emphasise the importance of an independent judiciary as a fundamental pillar of South Africa's constitutional democracy. Which must not be undermined.

6.1. Parallel running of civil and criminal proceedings for corporal punishment

We reiterate that in instances of a charge for corporal punishment, both the internal civil disciplinary process and the external criminal processes are conducted at the same time for the same charge in two different and separate forums, the one being a disciplinary hearing the other being a criminal court.

In the civil forum, being a disciplinary hearing, the allegation will be investigated and determined on a balance of probabilities by the disciplinary panel or committee.

In the civil forum, being a criminal court, the matter must be investigated, adjudicated and determined beyond reasonable doubt.

6.2. 'Finding that a person unsuitable to work with children', in the National Child Protection Register

The Children's Act, in section 120 makes provision in terms of which a person can be found to be unsuitable to work with children. This order 'finding persons unsuitable to work with children', can be handed down in civils forums, and must be handed down by criminal courts in specific cases.

Section 120(6)(A) is very clear in its wording that:

> "A finding in terms of subsection 1(b) that a person is unsuitable to work with children is not dependent upon a finding of guilty or innocent in the criminal trial of that person"

In this premise we further recommend that the relevant civil disciplinary forums (SACE, DBE) make orders, where it deems such orders necessary for a person to be found to be unsuitable to work with children for engaging in acts such as sexual harassment or infliction of aggravated incidence of corporal punishment.[9]

Recommendations:

In this premise, we recommend that the provision be amended as follows:

> *"(1) Corporal punishment is abolished and no person may administer corporal punishment at a school to a learner at school, during a school activity, in a hostel accommodating learners at a school.*
>
> *(2) Any person who contravenes subsection (1);*
>
> *(a) is guilty of corporal punishment and liable to:*
>
> *(i) A civil charge for misconduct through civil disciplinary processes;*
>
> *(ii) A criminal charge and subject to imprisonment following the relevant South African Criminal Law and procedures;*
>
> *(3) Those found guilty of corporal punishment may be included in the National Child Protection Register, as a person unsuitable to work with children in terms of section 120(1)(b) of the Children's Act 38 of 2005."*

[9] See these facts taken from the of the SACE Corporal Punishment case in the Pretoria High Court, *Centre for Child Law & Others v. South African Council of Educator & Others* (61630/2020) [2022] ZAGPPHC 787 (13 October 2022). The first case concerned a 7-year old Gauteng boy in grade 2 who was hit on the back of his head with a PVC pipe by his teacher and he suffered head injuries which became infected and resulted in hospitalisation. The same teacher assaulted another learner leaving him with a bloody nose and threatened both learners to not report the incidents. In the second case, a 10-year-old Limpopo learner in grade 5 was slapped over the head and cheek by her teacher. She was left with bleeding ears and suffered ongoing complications and had to repeat the year. Both educators pleaded guilty to the charges and received the same sanction of removal from the roll of educators, wholly suspended for 10 years and payment of R15000 -00 fine to be paid over 1 months, of which R5000-00 was suspended. In real terms, the teachers continued to teach and paid R10 000-00 over 12 months towards the fine. This was found to be unacceptable and was taken on appeal to the High Court. The Court found that 'SACE's Mandatory Sanctions on the Contravention of the Code of Professional Ethics' penalties must include (i) corrective and rehabilitative sanctions such as anger management and training on non-violent discipline techniques, (ii) must recognise the best interests of the child as a guiding principle ,and (iii) the adoption of a child centred approach ,. Requiring children and their parents to consulted on the appropriate sanction and to be afforded a meaningful opportunity to make representations on an appropriate sanction.

In so doing, the provisions ensure that the courts retain their independence and that each matter is decided on its own merits. Equally, the DBE and SACE give effect to their duty to protect all learners by ordering the educator to be 'found to be unsuitable to work with children', as empowered by section 120 of the Children's' Act.

7. SCHOOLS MERGERS AND CHILD'S BEST INTERESTS

The importance of child participation in determining the best interest of the child or the affected group of children must be inclusive of the child's voices and their specific circumstances as children attending a specific school, with specific educational needs and a particular context that applies to those children.

The proposed provision on the merger and closure of schools seem to be already decided, and does not show in any way that there is a possibility for reconsideration of the decision, that would be reviewed once the children, parents and communities are engaged.

The provision places the onus on communities to challenge the state's decision, without consideration of the high level of power inequality between ordinary people, children and the state.

The merger of schools, does, necessarily have extensive consequences for the children. Some children may require transport from their homes to the new schools owing to distance. Others may move to reside with extended family or family acquaintances, affecting their right to a family life. Other children may move to entirely different provinces with parents or relatives because the merger is untenable given the child's specific circumstances. Learners may be resident in the school boarding house, should the schools merge or be closed this may mean that the child is unable to attend that school. Some learners may require physical accessibility for wheelchair access which may be unavailable at the new school premises. Others may drop out of school altogether owing to the costs of fees or cost of transport.

7.1. The child's best interest and child participation

The inclusion of the child's best interests is a welcome reprieve. However, the provision does not specify the 'child' whose best interests will be considered, nor is there an explanation as to how this best interest will be ascertained. In this respect further clarity is sought.

'The best interests of the child' as codified in section 28(2) of the Constitution and section 9 of the Children's Act is a stand-alone right, and both provisions categorically state that the child's best interest is the paramount concern in every matter concerning the child. The use of the article "the" denotes specificity to a particular child rather than an abstract child with no specific context.

In determining the best interests of the children affected, the MEC must include child participation and the participation of the affected parents and the community within which the school is located.

Section 10 of the Children's Act, makes provision for child participation and states that "every child that is of such an age, maturity and stage of development as to participate in any matter concerning that child has the right to participate in an appropriate way and have their views given due consideration".

The UN Committee on the Rights of the Child, in their *General Comment No.14 (2013) on the Right of the Child to have his/her Best Interests taken as a Primary Consideration (Art.3, para1),* states that the best interest's determination must be made by the decision maker, in this case the MEC, or other officials appointed or designated to do so. The Committee recommends that the assessment be conducted by a multi-disciplinary team. The assessment should also include child participation.

It must be reiterated that the best interest assessment must centre on the holistic development of the child. Therefore, in weighing all the different rights at play, it must be kept in mind that the necessity for the assessment is to ensure the full and effective enjoyment of the rights recognised in the Bill of Rights.

The Committee recommends the inclusion of an objective Child Rights Impact Assessment ('CRIA') to help predict the impact of any proposed policy, legislation, regulation, budget or other administrative decision which affects children. CRIA needs to be built into Government processes at all levels and as early as possible in the development of policy and other general measures in order to ensure good child rights governance. The assessment itself must include input from the children, academic research, data from other state departments and subject matter experts. The Child Rights Impact Assessment must include, after all the relevant

research is conducted, recommendations for amendment, alternatives and improvements and must be made publicly available.

The provisions of, section 10 of the Children's Act largely incorporate Article 12 of the Convention and Article 4(2) of the African Charter on the Rights and Welfare of the Child into our domestic law and thus gives effect to South Africa's international obligations. Notably, section 10 of the Children's Act goes further than the international position. It does not limit the right to be heard to "judicial and administrative proceedings." Instead, it "applies horizontally and binds families and other private actors to consider the child's views before making decisions which affect the child".[10]

This Constitutional Court held that, in some contexts, particularly in the exercise of public power, section 28(2) incorporates a procedural component affording a right to a fair hearing where the interests of children are at stake.[11] In *C,* it was held that the child concerned must be given an opportunity to make representations to a Children's Court on whether the removal to a place of safety is in the child's best interests.[12]This position was confirmed in the *Fochville* matter.[13]

Recommendations:

We recommend the insertion of the following clause before clause 13(c)/[(section 12A(c)] :

" (2). Before merging of two or more public schools, the Member of the Executive Council must-

(a) ….

(b) ….

(c) The MEC must designate a multidisciplinary team to conduct a Child Rights Impact Assessment before any schools are merged or closed;

(d) The designated multidisciplinary team must include the following aspects in their Child Rights Impact Assessment:

i. <u>The affected children's views;</u>

ii. <u>the views of the parents, teachers, school governing body and the community where the school is located;</u>

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[10] *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC) (17 June 2020), at para 243-244.

[11] Ibid, at para 73.

[12] *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC), at para 22.

[13] *Centre for Child Law v The Governing Body of Hoërskool ,Fochville* 2016 (2) SA 121 (SCA) at para 22

iii. *The ability of children to travel to the proposed merged school;*

iv. *the children's personal circumstances, and common communal circumstances;*

v. *Preservation of the family and maintaining familial relations;*

vi. *Care, protection and safety of the children;*

vii. *Situations of vulnerability (disability, refugee or asylum status, children in a street situation).*

viii. *The Child Rights Impact Assessment must provide an analysis of the findings, and tender recommendations for amendments, alternatives or improvements to the proposed decision to merge or close the school.*

(e) *The Child Rights Impact Assessment must be made available to the affected community and public in line with the states obligations to ensure administrative justice in terms of the Promotion of Administrative Justice Act 3 of 2000.*

We recommend the insertion of th following provision into proposed clause 13(d)/ [section 12A(d)]

" (d) The MEC must consider the Child Rights Impact Assessment and be satisfied that

(i) the decision to merge or close the schools is in the best interests of the children concerned

(j) the necessary recommendations have been adopted to ensure that all affected children are able to access a public school should the decision to close or merge be undertaken.

8. CHILD PARTICIPATION IN STAFF DISCIPLINARY PROCESSES

Children in schools are exposed to a myriad of adults who are necessary in the basic education value chain. From the drivers transporting children from their homes to schools, to the school-based security guards, to the general workers who engage in cleaning and groundskeeping, administration staff, education assistants and general school assistants.

These employed adults perform essential non-teaching functions within schools. As employees in a school, these adults do come in frequent contact with learners, which necessarily must be

regulated as there have been instances where learners and staff members are at odds or where staff members assault learners or sexually abuse learners.

The standard of care imposed on teachers and the commensurate accountability measures are equally stringent. However, current law and policy fails to practically regulate the non-teaching staff and learner relationship when it comes to disciplinary procedures.

Where non-teaching staff members violate learners, the current policy framework fails to:

(a) effectively facilitate the provision of a testimony by a learner in that space;

(b) it does not establish any policies that help facilitate a child witness's testimony, especially in cases where there is a reasonable expectation that the child will subject the child to undue mental stress and stress.

The procedural fairness rights of employees on the one hand, and the child's right to participate provide testimony on the other hand must be impartial. The rights of the one cannot be upheld to the detriment of the other.

8.1. Teachers/Educators

Educators are subject to disciplinary processes and procedures codified in the Employment of Educators Act, SACE Code of Professional Ethics, the SACE Disciplinary Procedure.

The Employment of Educators Act sets out a clear procedure to operationalise the SACE Code of Ethics and the Employment of Educators Act ('EEA'). Schedule 2 of the EEA on the Disciplinary Code and Procedures for Educators ('Disciplinary Code & Procedures for Educators') is an excellent tool in this respect.

These three documents (SACE Code of Professional Ethics, SACE Disciplinary Procedure and the EEA) collectively provide for procedurally fair disciplinary processes that include child participation for child victims to ensure procedurally fair process and access to justice where a child is subjected to corporal punishment, sexual abuse or other misconduct at the hands of an educator.

Section 7 of Schedule 2 ('Disciplinary Code & Procedures for Educators') sets out further in subsection 10(A) for the use of intermediaries where disciplinary proceedings may result in undue mental stress or suffering for a child learner who testifies at such proceedings.

Unfortunately, these clear and amicable disciplinary processes and procedures are only applicable where an educator is involved. There is no similar process and procedure for non-educators and auxiliary staff employed in schools.

The above is merely to illustrate the comprehensive body of law and policy that (i) governing educators in their relationship with learners, (ii) providing well developed disciplinary procedures for educators, and (iii) making provision for the relevant support, including counselling and intermediaries, for meaningful participation of children in disciplinary processes where those children are involved and required to provide testimony. The same cannot be said for education assistants, general assistants and auxiliary staff members in schools working closely with learners.

8.2. Education Assistants & General School Assistants

During the COVID-19 pandemic General School Assistants ('GSA') and Education Assistants ('EA') were employed as part of the Basic Education Employment Initiative under the umbrella of the Presidential Youth Employment Initiative.

Many education assistants and general assistants were employed and some continue to be employed as such.

Recognising that the conduct of the GSA's and EA's must be regulated, the Department of Basic Education adopted the 'Code of Conduct for Education Assistants and General School Assistants' ('Code of Conduct: GSAs & EAs') was developed.

The responsibility to discipline the GSA's and EA's lies within the powers of the School Principle, and the procedures to be applied in this respect are set out in Schedule 8 of the Labour Relations Act ("LRA") 66 of 1995.

Schedule 8 of the LRA does not envision a situation where a child/learner is a party to those disciplinary processes. Unfortunately, no provision is made regarding the processes to be followed where a GSA or EA assault or abuse a learner.

8.3. Auxiliary staff employed in schools

The Labour Relations Act, specifically Schedule 8, does not envision child witnesses and makes no provision of their testimony in disciplinary matters.

The principles of the Children's Act are clear about the importance of child participation and the statutory obligation to abide by the provisions the Children's Act, which provides that:

> "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."[14]

Section 8(7), 8(8) and 8(9) of the South African Schools Act, and, sections 7(10)(A)(a), 7(10)(A)(b) and 7(10)(A)(c) of Educators Disciplinary Code and Procedures in the EEA mirror one another in that both provisions show the importance of a fair and child-friendly procedure that gives the necessary support to learners, and adopts the appointment of an intermediary where necessary to avoid any 'undue mental stress and suffering if he or she testifies as such proceedings'.

Section 8(6) of the South African Schools Act provides for a child's caregiver to be informed of such disciplinary processes unless good cause is shown. The Employment of Educators Act, does not

Section 8(5)(b) of the South African Schools Act imposes an obligation on the school governing body ('SGB') to provide counselling for a learner involved in disciplinary proceedings in terms of the School Code of Conduct. Unfortunately, the Employment of Educators Act, which is meant to provide for a similar process does not have such a process. This means that where a learner is to attend disciplinary proceedings before SACE or the DBE, no prior counselling would have taken place.

The Labour Relations Act and Public Service Act, both does not envision a child would be involved in any disciplinary proceedings. In that premise, we recommend that provisions be adopted to ensure that children who provide testimony are granted a fair and enabling opportunity to do so, in the interests of justice.

Schedule 8 of the Labour Relations Act('LRA'), provides in its section 3 is wide and remains ambiguous regarding the procedures to be followed when non-teaching staff members are

[14] Children's Act 38 of 2005, section 10.

subjected to disciplinary hearings for misconduct against learners. Schedule 8 of the Labour Relations Act is wholly silent in this respect, this position is untenable given the various reports of abuse of learners at the hands of non-teaching staff.[15] Resultantly, it is our position that a new and clear provision is the only tenable

CCL recommends that an additional provision be adopted in the South African Schools Act, as section **'8B Procedure in disciplinary proceedings involving learner and non-teaching staff'**, intended to regulate civil disciplinary processes where learners are at odds with auxiliary staff members, GSAs & EAs. We recommend the adoption of the following provision:

'8B Child participation in disciplinary proceedings of staff

(1) Where a child/learner is to give testimony in disciplinary proceedings:

(a) The learner must be accompanied by parents or other designated person, unless good cause is shown by the disciplinary body for continuing the proceedings in the absence of the parent or other designated person.

(b) Support measures or structures for counselling must be provided for a learner involved in disciplinary proceedings.

(2) Whenever disciplinary proceedings are pending, and it appears to the disciplinary body that it would expose a witness under the age of 18 years to undue mental stress or suffering if he or she testifies at such proceedings, the governing body may, if practicable, appoint a competent person as an intermediary to enable the child witness to give his or her evidence through that intermediary.

(3) (a) An examination, cross-examination or re-examination of a witness in respect of whom a governing body has appointed an intermediary, except examination by the disciplinary body, must not take place in any manner other than through that intermediary.

(b) Such intermediary may, unless the disciplinary body directs otherwise, convey the general purport of any question to the child witness.

[15] 'A Grade 1 pupil was raped at a school in Soshanguve, Tshwane, allegedly by a general assistant working at a school', 10 August 2021, available at https://www.iol.co.za/news/south-africa/gauteng/grade-1-pupil-raped-at-gauteng-school-ee5a55ba-6335-4c1a-b8f6-fe018396fa96 . 'Grade one learner assaulted with lunch box container by teaching assistant', 23 September 2023 available https://www.citizen.co.za/african-reporter/news-headlines/2023/09/23/grade-one-learner-assaulted-with-lunch-box-container/. 'Delft learner transport driver convicted for rape of a teen', 29 May 2023. Available at https://www.iol.co.za/capeargus/news/delft-scholar-transport-driver-convicted-for-rape-of-a-teen-3cd78579-55d0-45f6-8bd7-583d6b7027bd. CCL has also dealt with a case concerning a school general worker who sexually harassed a learner.

(4) If a disciplinary body appoints an intermediary, the disciplinary may direct that the relevant witness must give his or her evidence at any place which:

(a) is informally arranged to put that witness at ease;

(b) is arranged in a manner in which any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) enables the disciplinary body and any person whose presence is necessary at the relevant proceedings to hear, through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

The above provisions wholly mirror section 8(5)-8(9) of the South African Schools Act. While section 10A(a)-(c) of the Employment of Educators Act mirrors sections 8(7)-8(9) of the South African Schools Act, as regards the use of intermediaries. The only difference would be that this general provision applies to all matters where learners and non-teaching staff are involved, serves as clear guidance to the relevant disciplinary body, usually the employer in the matter being SACE or the relevant school governing body.

Sections 8 and 9 of the South African Schools Act and provide for a very clear process which must be applied in disciplinary processes involving a learner. The provisions concerning disciplinary processes in a matter involving an educator and a learner, that is governed by Section 7 of Schedule 2 of the Educators Disciplinary Code & Procedures must be replicated in a disciplinary code for non-teaching/auxiliary staff members.

9. CONCLUSION

The Centre for Child Law is available to make oral submissions, should we be called upon to do so.

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