

MEMORANDUM ON THE OBJECTS OF THE BASIC EDUCATION LAWS AMENDMENT BILL, 2021

1. BACKGROUND AND OBJECTS OF BILL

1.1 In 2013, the Minister of Basic Education ("Minister") instructed a task team to review the basic education legislation as a strategic priority for the Department of Basic Education ("Department"). The task team identified the South African Schools Act, 1996 (Act No. 84 of 1996) ("SASA"), and the Employment of Educators Act, 1998 (Act No. 76 of 1998) ("EEA"), as needing amendments.

1.2 The Draft Basic Education Laws Amendment Bill ("Bill"), which was published for public comment under Government Notice No. 1101 in *Gazette* No. 41178 on 13 October 2017, proposed to amend the SASA and the EEA 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 which respects, protects, promotes and fulfils the right to basic education enshrined in section 29(1) of the Constitution of the Republic of South Africa, 1996 ("Constitution"). Another aim of the Bill was to bring about certain technical and substantive adjustments in the SASA and the EEA, to clarify certain existing provisions and to insert certain provisions to cover matters which are not provided for in the existing legislation.

1.3 One of the developments in the education landscape came about in 2009, when the then Department of Education was split into two new departments, being the Department and the Department of Higher Education and Training (in terms of

Proclamation No. 44 of 2009, signed by the President on 20 June 2009 and published in *Gazette* No. 32367 on 1 July 2009).

1.4 The general public and education stakeholders submitted just under 5 000 comments in respect of the Bill. There were also 144 petitions, containing a total of 195 695 names, objecting to certain clauses of the Bill.

1.5 On 19 February 2018, a task team consisting of representatives from the Department and three of the provincial education departments (namely the education departments of Gauteng, Limpopo and the Western Cape) started with the process of perusing the submissions and amending the Bill by incorporating constructive comments into the Bill. During the period from 19 February 2018 to 14 February 2020, the task team had 31 meetings (57 days altogether) and held extensive discussions with other Department officials in order to clarify issues raised by some of the commentators and, where necessary, sought advice and inputs from persons outside the Department as well.

1.6 Late in January 2020, the Minister met with representatives of school governing body associations, teachers unions, and home education associations to further discuss pertinent matters with them. Further comments submitted by those stakeholders in relation to that meeting were also considered. A series of meetings with the National Economic Development and Labour Council ("Nedlac") also took place between February 2020 and September 2020, and the inputs made by Nedlac were also taken into consideration.

1.7 The version of the Bill that is currently under consideration is the result of the incorporation of many of the commentators' inputs, many hours of discussions at task team meetings, countless hours of individual work put in by task team members, and inputs from a variety of officials and other persons who were consulted.

2. CLAUSE-BY-CLAUSE ANALYSIS

Amendments to South African Schools Act, 1996 (Act No. 84 of 1996)

2.1 Clause 1: Amendment of section 1

2.1.1 This clause provides for the insertion of new definitions and seeks to amend certain existing definitions.

2.1.2 A definition for "basic education " has been inserted to clarify that basic education refers to grades R to 12, as evidenced in the *National Curriculum Statement Grades R – 12*. This was necessary in order to clarify the fact that basic education continues until the end of grade 12 even though a learner who has completed grade 9 is no longer subject to compulsory school attendance.

2.1.3 Definitions for "benefit in kind" and "other financial benefit" have been inserted in order to create clarity regarding the provisions of section 38A of the SASA, which prohibits the payment of unauthorised remuneration and the giving of financial benefit or benefit in kind to certain employees.

2.1.4 Definitions for "competent assessor" and "home education" are included in order to provide more certainty in the home education environment.

2.1.5 A definition for "corporal punishment" has been inserted as there exists a gap in regulating this definition in the sector. The incidents of corporal punishment are increasing within the school environment as well as the home environment and it is anticipated that the inclusion of the definition will provide clarity on what corporal punishment entails.

2.1.6 The definition for "Constitution" is amended to bring it in line with the provisions of the Citation of Constitutional Laws Act, 2005 (Act No. 5 of 2005).

2.1.7 A definition for "Department of Basic Education" is inserted in order to reflect the new education dispensation.

2.1.8 A definition for "drug" is inserted in order to better accommodate the kinds of issues with which schools struggle in relation to drugs and, by means of referencing applicable drug-related legislation, to make provision for recent legislative changes in regard to cannabis. As a result of the insertion of this new definition, the definition of "illegal drug" is therefore deleted.

2.1.9 A definition for "education district" is inserted in order to facilitate matters relating to a school's admission and language policies.

2.1.10 A definition for "Grade R" is inserted in order to clarify that Grade R is a reception Grade that must be completed before Grade 1.

2.1.11 A definition for "home education" is inserted in order to explain what home education entails and to distinguish it from school attendance.

2.1.11 A definition for "liquor" is inserted in support of the proposed amendment to section 8A of the SASA.

2.1.12 The definition of "loan" is amended to allow public schools to deal with the day-to-day business of the school without obtaining the written approval of the Member of the Executive Council ("MEC").

2.1.13 The clause proposes the insertion of a definition for "other financial benefit" which means any benefit of a monetary nature, including an exemption from the payment of school fees in respect of the child of an employee, and a credit card or a petrol card linked to an employee for his or her personal use.

2.1.14 The definition for "parent" is amended in order to align it with the changes in the provisions relating to home education.

2.1.16 Finally, the clause proposes the insertion of a definition for "required documents" in order to provide clarity in respect of the documents which must be submitted for the purpose of the admission of learners to schools.

2.2 Clause 2: Amendment of section 3

2.2.1 This clause seeks to amend section 3(1) of the SASA to provide that school attendance is compulsory from grade R and no longer only from grade 1. The clause further proposes to increase the penalty provision in section 3(6) of the SASA from six to 12 months in the case where the parent of a learner, without just cause, fails to

ensure that a learner, who is subject to compulsory attendance, attends school, or where any other person, without just cause, prevents such a learner from attending school.

2.2.2 The clause proposes the addition of subsection (7) which provides that it is an offence where any person unlawfully and intentionally interrupts, disturbs or hinders any school activity, or hinders or obstructs any school in the performance of the school's activities. The latter amendment is 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.

2.3 **Clause 3: Insertion of section 4A**

2.3.1 This clause seeks the insertion of section 4A into the SASA to ensure that the educators, principals and school governing bodies ("SGB") are accountable and responsible for the learners in their care. Enrolment of learners and their regular and punctual attendance at a school are a pre-requisite for an educated nation. Moreover, enrolment and punctual regular attendance at a school is important because a school that successfully curbs absenteeism without valid reason will most likely improve learner retention and performance. This will assist in mitigating the high learner dropout rate.

2.3.2 Educators, the principal and the SGB as *parentis in loco*, must take responsibility and accountability for learners that are within their school community by ascertaining the whereabouts of a learner who absents himself or herself from school for a period of more than three days without valid reason.

2.3.3 The principal, upon receiving a report from the educator that the learner is absent without valid reason, must within 24 hours investigate the matter by making reasonable effort to contact the parents to ascertain the reason as to why the learner is not present at school. Furthermore, the principal has a responsibility to report the matter to the SGB for further intervention.

2.3.4 The reason for establishing such a process is to ensure that learners attend school regularly thereby preventing them from dropping out of school. This requires a collective effort from the immediate school community, starting with the educator, principal and SGB.

2.4 Clause 4: Amendment of section 5

2.4.1 This clause seeks to amend section 5 of the SASA. Section 5(1) is amended to provide that a public school must admit and provide education to learners and must serve their educational requirements for the duration of their school attendance without unfairly discriminating in any way. In order to ensure that no learner is discriminated against in any way, the clause proposes the insertion of subsections (1A) to (1G) which provides for the establishment of the National Intergovernmental Committee and the Provincial Intergovernmental Committee, the main purpose of which will be to provide assistance to schools in obtaining the required documentation for those learners who are admitted without such documentation. The clause further provides that it is an offence for a parent, guardian or caregiver to knowingly, or negligently, fail to cooperate in securing the relevant national identity or status documents on behalf of any relevant learner.

2.4.2 The clause substitutes section 5(4)(a) and provides that despite the age at which school attendance is compulsory, as stipulated in section 3(1), a parent may, if he or she so wishes and subject to a few conditions, enrol a child at a school to start attending grade R at a younger age.

2.4.3 The clause proposes the amendment of subsection (5) which provides that the Head of Department ("HoD"), after consultation with the governing body of the school ("SGB"), has the final authority to admit a learner to a public school. It provides that the SGB of a public school 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 admission policy or any amendment thereof. In the event that the HoD does not approve the admission policy, or any amendment thereof, he or she must return it to the SGB with such recommendations as he or she may deem necessary. Furthermore, the SGB must review the admission policy at certain intervals or under certain conditions.

2.4.4 The clause proposes the insertion of subsections (5A) to (5D) which provides that should the HoD not respond to the SGB within 60 days after receiving the admission policy for approval, the admission policy will be regarded as having been approved and where an SGB submits an amendment to its admission policy to the HoD for approval and he or she fails to respond within 30 days after receiving such amendment, the amendment to the admission policy will be regarded as having been approved by the HoD.

2.4.5 The clause further proposes an amendment to subsection (9) and provides for time periods within which a learner who has been refused admission to a public

school, or the parent of such a learner, may appeal to the MEC against the decision. Furthermore, the clause proposes the addition of subsections (10) to (13) which provides that the MEC must respond to an appeal contemplated in subsection (9) within 14 days after receiving such an appeal and provides for an appeal by an SGB to the MEC if the SGB is not satisfied with the HoD's decision in terms of subsection (5)(c).

2.4.6 The aforementioned amendments have become necessary as a result of the confusion created by sections 5(5) and 5(7) in respect of the admission of learners to public schools and who has the final authority to admit a learner to a school. When exercising the authority to admit learners, the HoD is not rigidly bound by a school's admission policy. The general position is that admission policies must be applied in a flexible manner and that the right of a learner to be admitted to a school takes precedence over the right of a school to enforce the criteria set out in its admission policy.

2.4.7 Furthermore, the admission policy of the Department provides that the admission policy of a school must be consistent with the Department's admission policy. Therefore, the HoD must have an opportunity to study the admission policy of a school to ensure that it is in fact consistent with the Department's admission policy.

2.5 **Clause 5: Amendment of section 6**

2.5.1 This clause seeks to amend section 6 of the SASA to provide that South African Sign Language has the status of an official language for purposes of learning at a public school. The clause also provides that the SGB must submit the language policy of a public school, and any amendment thereof, to the HoD for approval. The

language policy of a public school may not list, as one of the languages of learning and teaching of the public school, a language other than one of the official languages provided for in section 6(1) of the Constitution. The language policy of the school must take into account the provision of sections 6(2) and 29(2) of the Constitution. The process that an HoD must follow in this regard, and factors that he or she must take into account when considering a language policy, or an amendment thereto, are also provided. As is the case with the admission policy, the SGB must review the language policy at certain intervals, or under certain conditions. The clause provides the time period for the submission of language policies to the HoD for approval, as well as the time period within which the HoD must respond to the SGB.

2.5.2 The clause 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, and after the prescribed procedures have been followed. The factors to be taken into account, and the manner in which the HoD must act before he or she directs a public school to adopt more than one language of instruction, are set out in the clause. Where a school has been so directed, the HoD must, before his or her directive is implemented, take all the necessary steps to ensure that the public school receives the necessary resources to enable that public school to provide adequate tuition in the additional language of instruction.

2.5.3 Provision is made for an SGB, which is not satisfied with the HoD's direction to a school to adopt an additional language of instruction, to appeal against the HoD's direction to the MEC.

2.5.4 The proposed amendments to section 6 of the SASA are consistent with the Constitutional Court judgment of *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo and Another* [2010(2) SA 415 (CC)] ("Ermelo judgment"), which provided guidance with regard to the approval of a school's language policy. The Constitutional Court made it clear that even though the function of determining a school's language policy is a devolved function (or responsibility), in terms of section 6(2) of the SASA, it is not the exclusive preserve of a SGB. The devolution of power does not mean that the SGB's right to decide the language policy is absolute. This power is subject to the Constitution, the SASA and any applicable provincial law. The Constitutional Court in the Ermelo judgment further held that the SGB's extensive powers and duties do not mean that the HoD is precluded from intervening, on reasonable grounds, to ensure that the admission and language policies of a school pay adequate heed to section 29(2) of the Constitution.

2.5.5 Moreover, the Ermelo judgment, as well as the Constitutional Court judgment of *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* [CCT 103/12 [2013] ZACC 25], made it necessary to incorporate further checks and balances above and beyond those that are currently in the SASA in respect of the language and admission policies of schools.

2.5.6 The Constitutional Court in the Ermelo judgment held that the SGB of a school must in recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at

the time but also in the interests of the broader community in which the school is located and in the light of the values of our Constitution.

2.5.7 For the above reasons, it is also necessary to empower the HoD to direct a public school to adopt more than one language of instruction where it is practicable to do so. A number of checks and balances have been included in the clause to guide the HoD's decision in this regard. Furthermore, a comprehensive consultation process is provided for to ensure that the views of all interested parties are obtained and are given proper consideration.

2.6 Clause 6: Amendment of section 6A

This clause seeks to amend section 6A of the SASA to empower the Minister to appoint a person, organisation or group of persons to advise the Minister on matters relating to a national curriculum statement and a national process and procedures for the assessment of learner achievement. This allows the Minister to obtain inputs from a broader spectrum of people.

2.7 Clause 7: Amendment of section 8

2.7.1 Clause 7 seeks to amend section 8 of the SASA by providing that the SGB of a public school must adopt a code of conduct for the learners subject to the Constitution, the SASA and any applicable provincial law.

2.7.2 The clause further amends section 8 to provide that the code of conduct of a public school must also take into account the diverse cultural beliefs, religious observances and medical circumstances of the learners at the school. The clause makes provision for an exemption clause, making it possible to exempt learners,

upon application and on just cause shown, from complying with certain provisions of the code of conduct. If an application for exemption is refused, the learner or the parent of the learner may appeal to the HoD against the decision of the SGB and time periods within which these actions must take place are provided for.

2.7.3 The clause also provides that disciplinary proceedings must be age appropriate, should be conducted in the best interest of the learner, and should adhere to the principles of justice, fairness and reasonableness prescribed by the Constitution.

2.7.4 This amendment is informed by the United Nations Convention on the Rights of the Child, 1989 and the latest jurisprudence on this issue, as expressed in the Constitutional Court judgment of *MEC for Education: Kwazulu-Natal and Others v Pillay* [CCT 51/06 [2007] ZACC 21] case and other cases. The amendment seeks to bring the SASA in line with such jurisprudence.

2.8 Clause 8: Amendment of section 8A

2.8.1 This clause seeks to extend the provisions of section 8A of the SASA by providing for conditions under which liquor may be possessed, consumed or sold on school premises or during school activities, and to make consequential amendments to the section in this regard and in regard to the new definition of "drug". Provision is made for certain exceptions to the prohibition to allow the SGB, on application from any person and in consultation with the Head of Department, to permit the possession, consumption or sale of liquor in certain cases, on certain conditions, and subject to certain restrictions.

2.8.2 This amendment was informed by the fact that alcohol has a place in our society, if it is consumed responsibly, by adults and by the fact that events at which alcohol is present form an important part of the fundraising activities of most schools. A further factor that was taken into account is the fact that many schools rent out their halls or sports fields for religious services, weddings and other private events and that if alcohol was completely forbidden on school premises, schools would lose the income that they currently receive from those events. The clause also makes it clear that a school has the right to search an individual learner and not only a group of learners and consequential amendments in this regard are proposed to the section.

2.8.3 This amendment is necessitated by the fact that learners have increasingly been found in possession of, or abusing, liquor and a variety of drugs, dependence-producing substances, performance-enhancing substances and the like and that there are many cases of learners being expelled because of such abuses.

2.9 Clause 9: Amendment of section 9

Clause 9 seeks to amend section 9 of the SASA by proposing the insertion of a detailed definition of serious misconduct by a learner in order to provide greater clarity in this regard. In particular, the insertion is an attempt at addressing the growing incidents of violence at schools.

2.10 Clause 10: Amendment of section 10

Clause 10 seeks to amend section 10 of the SASA by extending the prohibition of corporal punishment being administered to learners to include "during a school

activity or in a hostel accommodating learners of a school". This amendment is necessary to close an existing gap.

2.11 Clause 11: Amendment of section 10A

Clause 11 seeks to amend section 10A of the SASA by extending the prohibition of initiation practices to include "during a school activity". As with corporal punishment, the amendment is aimed at closing a gap in the legislation.

2.12 Clause 12: Amendment of section 12

2.12.1 Clause 12 seeks to amend section 12 of the SASA by providing that the SGB of a public school may apply to the MEC to be designated as a public school with a specialised focus on talent. The HoD may also identify a public school to be so designated and may make a recommendation to the MEC in this regard, and the MEC may so designate a public school if it is in the best interest of education in the province and if the school complies with the norms and standards determined by the Minister. The process to be followed before a school may be so designated is also set out in the clause.

2.12.2 This amendment is necessary to close a gap in the current legislation and to clarify the process that a school needs to follow to be designated as a public school with a specialised focus on talent. It further clarifies whose responsibility it is to designate such schools and the criteria that will be applied in the case of such a designation.

2.13 Clause 13: Amendment of section 12A

2.13.1 Clause 13 seeks to amend section 12A of the SASA to provide that, in instances where two or more schools are merged, a new public school will be established. Methods of communicating with interested parties in regard to such a merger are also clarified, and time frames within which the MEC must act are set out. Provision is made for the case where the MEC fails to act within the stipulated periods, and further details of the process to be followed by the MEC and the SGBs concerned are set out.

2.13.2 The clause further provides that a merger will not affect the liability of any person to be disciplined or prosecuted for any misconduct, crime or offence and further provides for the rationalisation or redeployment of the workforce of the new public school. In addition, after the merger of two or more public schools, the newly formed school will continue with all the academic programmes offered by the former public schools and provision is made for the governance of the new public school.

2.13.3 This amendment is proposed for the sake of clarity and uniformity in the manner in which schools are merged.

2.14 Clause 14: Amendment of section 18A

This clause seeks to amend section 18A by inserting a new clause in order to require members of the governing body to disclose their financial interest annually including that of their spouses, partners or family members. This amendment is proposed in order to prevent corruption and financial mismanagement by SGB members and to promote good governance.

2.15 Clause 15: Amendment of section 20

2.15.1 Clause 15 seeks to amend section 20 of the SASA to 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. However, in determining the conditions, the HoD must consult with the SGB of the school, which consultation must include the matter of the payment of necessary and reasonable expenses arising from the use of the facilities.

2.15.2 The proposed amendment must be seen in the context of the fact that public schools are assets of the State. Flowing from this, provincial education departments should be allowed to use the facilities of public schools free of charge, if such use is for educational purposes, is reasonable and takes place under fair conditions so that the schools in question will not suffer financially as a result of expenses arising from the use of the facilities. In many towns and villages, the public school is the only venue that a provincial education department can use for educational purposes.

2.16 Clause 16: Amendment of section 21

Clause 16 seeks to amend section 21 of the SASA to empower the HoD to centrally procure identified learning and teaching support material for public schools, in consultation with the SGB and on the basis of efficient, effective and economic utilisation of public funds or uniform norms and standards. This amendment is proposed in order to bring about economies of scale.

2.17 Clause 17: Amendment of section 22

2.17.1 Clause 17 seeks to amend section 22 of the SASA to empower the HoD to withdraw, on reasonable grounds and after complying with prescribed requirements,

"one or more functions" of an SGB and not only "a function", as the section currently reads. It also provides that, in cases of urgency, the HoD may withdraw functions without prior communication with such SGB. In such a case, the HoD must immediately thereafter furnish the SGB with written reasons for his or her actions, grant the SGB a reasonable opportunity to make representations, duly consider such representations, and inform the SGB of his or her final decision. Further provision is made for steps that the HoD must take if he or she acts in terms of this section, including the appointment of sufficient qualified persons to perform the withdrawn function or functions for a specified period. The appointed persons must build capacity to ensure that the SGB will in future perform the functions that it failed to perform. The clause also deals with the voting rights of such persons and provides for an appeal process.

2.17.2 The proposed amendment will create clarity regarding the powers of the HoD to withdraw functions of SGBs and clearly indicates the processes that need to be followed when functions are withdrawn.

2.18 Clause 18: Amendment of section 23

This clause seeks to amend section 23 of the SASA by substituting subsection (6) to provide that SGB representatives may co-opt members from within the community, as well as from outside the community, to assist the SGB in discharging its functions. The amendment is proposed to enable the SGB to co-opt experts in relevant fields where such experts may not be found within the community. In this way, the SGB is allowed to co-opt members with the requisite skills from outside the community in which the school is located without changing the requirement that the majority of SGB members must be parents.

2.19 Clause 19: Amendment of section 24

Clause 19 seeks to amend section 24 of the SASA by substituting "Member of the Executive Council" with "Minister" and the "Provincial Gazette" with "Gazette" in regard to arrangements for the election of members of an SGB of a public school for learners with special education needs. Currently, each province deals with these matters in its own preferred way, and this amendment will bring about uniformity across the provinces.

2.20 Clause 20: Insertion of section 24A

2.20.1 Clause 20 proposes the insertion of section 24A into the SASA to provide that the provisions of section 23 of the SASA, excluding subsection (5), which deal with the membership of SGBs of ordinary public schools, will apply to a public school with a specialised focus on talent and that the authority to co-opt members includes the authority to co-opt relevant experts in the specialised focus of the public school, whether from inside or outside the community.

2.20.2 This amendment is necessary to address a gap in the SASA and to ensure uniformity in the establishment of the governance structures for public schools with a specialised focus on talent.

2.21 Clause 21: Substitution of section 25

2.21.1 Clause 21 proposes to substitute section 25 of the SASA in order to empower the HoD to dissolve an SGB that has ceased to perform the functions allocated to it in terms of the Act, if the HoD has reasonable grounds to do so. Provision is made for steps that the HoD must take if he or she acts in terms of this section, including the appointment of sufficient qualified persons to perform the functions of the SGB

for a specified period. The clause also deals with the voting rights of such persons and provides that the HoD may act in terms of this section only after following certain prescribed procedures. The clause also provides that the HoD must ensure that a new SGB is elected within one year, and provides for an appeal process.

2.21.2 The proposed amendment creates clarity regarding the powers of the HoD to dissolve an SGB and clearly indicates the processes that need to be followed when an SGB is dissolved.

2.22 Clause 22: Substitution of section 26

2.22.1 Clause 22 proposes to substitute section 26 of the SASA and provides for the declaration of a direct or indirect personal interest that an SGB member, or any of his or her family members, close friends or business partners has and where such a personal interest exists, the SGB member must recuse himself or herself and withdraw from a meeting of the SGB for the duration of the discussion and decision-making on an issue in which such member has a personal interest.

2.22.2 The clause further provides that should a SGB have knowledge that a member who is present has a personal interest in a matter under discussion, the SGB may not take a decision on the matter until such member has withdrawn from the meeting. Furthermore, the clause provides for the imposition of a sanction, after due process, where an SGB member contravenes the provisions of the section. The amendment also applies to a committee of an SGB and to committee members. A definition for "family member" has also been inserted into the clause.

2.22.3 The proposed amendment is made to promote the prevention of corruption and to promote good governance.

2.23 Clause 23: Amendment of section 27

Clause 23 seeks to amend section 27 of the SASA which provides that SGB members are not entitled to be remunerated for the performance of their duties, by adding the words "or for the attendance of meetings and school activities". This amendment is proposed merely to clarify the matter of remuneration.

2.24 Clause 24: Amendment of section 28

2.24.1 Clause 24 seeks to amend section 28 of the SASA by substituting "Member of the Executive Council" with "Minister" and "*Provincial Gazette*" with "*Gazette*" in regard to arrangements for the election of members of an SGB of a public school and by deleting the reference to "any applicable provincial law".

2.24.2 Currently, each province deals with the election of the members of a SGB in its own preferred way and this amendment will bring about uniformity across all provinces.

2.25 Clause 25: Amendment of section 29

Clause 25 seeks to amend section 29 of the SASA to provide that, where reasonably practicable, only a parent member of a SGB, who is not employed at the school, may serve as the chairperson of the finance committee of that public school. This amendment seeks to promote good governance.

2.26 Clause 26: Amendment of section 32

Clause 26 seeks to amend section 32 of the SASA to provide for a technical amendment that is required as a result of the provisions of the Children's Act, 2005 (Act No. 38 of 2005), which changed the age of majority from 21 to 18 years. This will ensure that learners 18 years and older are not a party to litigation by virtue of their membership of the SGB. A new provision is also inserted to ensure that learners who are SGB members are not involved in the appointment of educators.

2.27 Clause 27: Substitution of section 33

2.27.1 Clause 24 proposes to substitute section 33 of the SASA which deals with the closure of public schools. The MEC must embark on a comprehensive consultation process before closing a school. The proposed amendment also empowers the MEC to close a public school in his or her sole discretion if there are no learners registered at that public school. However, the MEC must first verify, by means of a site inspection by an official nominated by him or her, that there are no learners registered at that school. The amendment also empowers the MEC to close a public school after following a prescribed consultation process if, in the case of a primary school, 135 or fewer than 135 learners are registered at that school, and, in the case of a secondary school, 200 or fewer than 200 learners are registered at the school. The MEC must inform interested parties of his or her decision in the above regard and, if the decision is to close a public school, must make arrangements for the learners of the school to attend another school and, where appropriate, make arrangements for the transport of qualifying learners to that school. The MEC must, furthermore, take certain prescribed factors into account before acting under this section.

2.27.2 The purpose of this amendment is to provide for a proper consultation process and to simplify the procedure when dealing with the closure of a school.

2.28 Clause 28: Amendment of section 26

2.28.1 Clause 28 seeks to amend section 36 of the SASA to provide that the SGB must also seek the approval of the MEC to enter into lease agreements, for any purpose, including loans and overdrafts which are already provided for in the said section. The clause also provides that the approval of the MEC is not required in regard to the lease of immovable property of the school if the lease is for a period not exceeding 12 months.

2.28.2 With regard to lease agreements, the proposed amendment seeks to ensure good governance, economies of scale, that money is spent economically, and a reduction in the risk that the State will be held responsible for acts or omissions on the part of schools.

2.28.3 The proposed amendment further reduces the burden on schools to apply for permission when entering into small lease agreements in regard to immovable property.

2.29 Clause 29: Amendment of section 37

Clause 29 seeks to amend section 37 of the SASA by substituting the word "directions" with the word "directives". The proposed amendment is a technical correction.

2.30 Clause 30: Amendment of section 38

2.30.1 Clause 30 seeks to amend section 38 of the SASA to provide that a document explaining the budget of a school, together with the budget itself, must be made available to parents before the budget is presented to a general meeting of parents for consideration. It also sets out the procedure that an SGB must follow if it proposes to deviate from the initial budget by 10% or more of the initial approved budget, or if it proposes to reallocate funds for a purpose that is different from the purpose set out in the budget originally approved by a general meeting of parents.

2.30.2 Reasons for the deviation or reallocation must also be made available to the parents prior to the meeting and parents must be informed that this information will be available for inspection at the school at least 14 days prior to the meeting. A quorum of 10% of the parents is required for the general meetings referred to above. If a quorum cannot be achieved at the first meeting, a second meeting must be arranged, at which no quorum is required. A copy of the notice of the second meeting must also be distributed to every learner at the school with an instruction to hand the notice to their parents. This amendment is proposed to address issues concerning governance and fairness.

2.31 Clause 31: Amendment of section 38A

2.31.1 Clause 31 seeks to amend section 38A of the SASA to extend its application to a state employee who is paid any additional remuneration or any other financial benefit or benefit in kind. It requires SGBs to provide full details of the nature and extent of the remuneration or benefit; the reasons for the remuneration or benefit; if practicable, the monetary value of the remuneration or benefit; and details of the

process that will be followed and the resources that will be used to compensate or remunerate the employee.

2.31.2 The proposed amendment is necessary to provide clarity and to reduce the financial burden on parents who pay substantial school fees at fee-paying schools.

2.32 Clause 32: Amendment of section

Clause 32 seeks to amend section 41 of the SASA by inserting a new subsection (2A) to provide that when a parent applies for exemption from the payment of school fees, such parent may submit additional documentary evidence in the form of an affidavit in instances where information cannot be obtained from the other parent of the learner. The proposed amendment aims to lessen the burden on single parents whose ex-partners are untraceable or unwilling to provide information on their financial situation.

2.33 Clause 33: Substitution of section 42

Clause 33 proposes to substitute section 42 of the SASA to provide that the SGB of a public school must keep detailed records on prescribed aspects of its financial affairs; draw up annual financial statements within a specified time and in a specified manner; and present the financial records and statements to a general meeting of parents. The proposed amendment expands the existing provision contained in section 42 to ensure transparent accounting and good governance.

2.34 Clause 34: Amendment of section 43

2.34.1 Clause 34 seeks to amend section 43 of the SASA to empower the HoD, if he or she deems it necessary, on just cause shown, to authorise an investigation into

the financial affairs of a public school; to request the Auditor-General to undertake an audit of the records and financial statements of a public school; or appoint forensic auditors or forensic investigators to conduct a forensic investigation into the financial affairs of a public school. All of these steps must be taken in accordance with specified requirements.

2.34.2 The clause also places a responsibility on the SGB to provide the HoD with quarterly reports on all income and expenditure in accordance with directives issued by the HoD. The provision that the SGB must submit a copy of the annual financial statements within six months after the end of each financial year to the HoD remains unchanged.

2.34.3 The proposed amendment further expands on the existing provision by creating more options for the HoD if he or she needs to have the financial matters of a school investigated after, for example, receiving allegations of corruption, fraud and the like. In addition, the amendment seeks to create certainty with regard to reporting and to promote open and transparent accounting and financial accountability, bearing in mind that public funds and parents' money are at stake.

2.35 Clause 35: Amendment of section 46

Clause 32 seeks to amend section 46 of the SASA by increasing the penalty provision from six to 12 months in the case where a person establishes or maintains an independent school that is not registered by the HoD.

2.36 Clause 36: Amendment of section 48

2.36.1 Clause 36 seeks to amend section 48 of the SASA to provide that the subsidy granted to an independent school can be made subject to conditions determined by the MEC. The amendment also provides that an independent school must submit quarterly reports to the HoD on all income and expenditure relating to the subsidy, and must, within six months after the end of each financial year, provide the HoD with a copy of the audited financial statements relating to the subsidy.

2.36.2 The proposed amendment seeks to create certainty in regard to reporting and to promote open and transparent accounting for the sake of financial accountability when dealing with public funds.

2.37 Clause 37: Substitution of section 51

2.37.1 Clause 37 seeks to substitute section 51 of the SASA to provide clarity with regard to home education. The amendment makes it clear that learners may be educated at home only if they are registered for such education. A parent must, at the end of each of the three school phases, notify the HoD if he or she intends to continue educating the learner at home. The criteria that the HoD must consider, when deciding whether or not to approve an application, is also set out.

2.37.2 The amendment provides that the HoD may, when considering an application, require a delegated official to conduct a pre-registration site visit and consultation with the parents and learner to verify the information supplied in the application documentation and to provide support, where necessary, with the application process. It also sets out the main responsibilities of a parent who wishes to educate his or her child at home.

2.37.3 The amendment stipulates that, in the case of learners who are not yet registered for home education, application must be made within 30 days after the section comes into operation. Provision is also made for a time limit within which the HoD must respond to an application for registration for home education. The amendment further stipulates that home-educated learners must be assessed annually by a competent assessor and sets out the options for a home-educated learner after reaching the age of 15 or after completing grade 9.

2.37.4 Clarity is also provided to ensure that a learner who is educated at home after the age of 15, or after completion of grade 9, will not be at a disadvantage. In the case of a learner who will be writing the NSC, the parent must, before the learner embarks on any studies following grade 9, ensure that the learner complies with the requirements stipulated in regulation 7(4A) of the Regulations Pertaining to the Conduct, Administration and Management of the National Senior Certificate Examination, for a learner receiving home education.

2.37.5 The amendment further provides that the HoD must decline to register a learner for home education if the HoD is satisfied that the parent does not meet certain requirements, or that home education is not in the best interests of the learner; and that the HoD may cancel a learner's registration for home education if, after investigation, the HoD is satisfied that home education is no longer in the best interests of the learner. Before so cancelling a learner's registration, the HoD must satisfy certain requirements. Provision is also made for an appeal process.

2.37.6 The amendment provides that the Minister may make regulations relating to the registration and administration of home education. The proposed amendment

creates clarity on the powers and responsibilities of officials and of the parents of a learner who is educated at home and proposes steps to protect parents who want to educate their children at home in the Further Education and Training Phase (grades 10 – 12) and will ensure that the final qualification obtained will give the learner opportunities for further study at institutions of higher education.

2.38 Clause 38: Amendment of section 59

Clause 35 seeks to amend section 59 of the SASA to provide for a technical amendment and provides that where a parent, or any other person, applies for the admission of a learner to a public school, or applies for exemption from the payment of school fees, and submits false or misleading information, or submits a forged document or a document he or she claims is a true copy of the original but is not, is guilty of an offence.

2.39 Clause 39: Insertion of section 59A

Clause 39 proposes the insertion of section 59A into the SASA to provide for dispute resolution mechanisms in the event of any dispute between an SGB and the HoD, or any dispute between an SGB and an MEC. It is anticipated that this proposed amendment will save costs for all concerned parties and will enable the parties involved to resolve disputes amicably.

2.40 Clause 40: Amendment of section 60

Clause 40 seeks to amend section 60 of the SASA. This section deals with the liability of the State for any delictual or contractual damages caused as a result of any school activity conducted by a public school for which the public school would have been liable. The proposed amendment to section 60 excludes the liability of the

State if the provisions of section 36(2) of the SASA have not been complied with. This amendment seeks to protect the interests of the State in the case where a school does not comply with the provisions of the SASA.

2.41 Clause 41: Amendment of section 61

2.41.1 Clause 41 seeks to amend section 61 of the SASA to extend the powers of the Minister to make regulations on the management of learner pregnancy; on the admission of learners to public schools; on the prohibition of the payment of unauthorised remuneration or the giving of other financial benefits or benefits in kind to employees; on minimum norms and standards for provincial teacher development institutes and district teacher development centres; on the organisation, roles and responsibilities of education districts; and on a national education information system. The clause also provides for the possibility of creating offences in the regulations made by Minister.

2.41.2 The amendment further provides that any regulation contemplated in section 61(1) may provide that any person who contravenes a provision of the regulation, or fails to comply therewith, is guilty of an offence.

2.42 Clause 42: Amendment of Preamble

Clause 42 provides for the insertion of a phrase into the Preamble of the SASA to facilitate the education_of children through the promotion and protection of the right to basic education.

Amendments to Employment of Educators Act, 1998 (Act No. 76 of 1998)**2.43 Clause 43: Amendment of section 1**

Clause 43 seeks to amend section 1 of the EEA by deleting obsolete provisions in order to align the Act with the new education dispensation. The proposed amendment deletes the references to "adult basic education centre" and "further education and training Institution".

2.44 Clause 44: Amendment of section 5

Clause 44 seeks to amend section 5 of the EEA by deleting obsolete provisions in order to align the Act with the new education dispensation. The clause deletes the references to "further education and training institution", "adult basic education centre", "institution" and "centre".

2.45 Clause 45: Amendment of section 7

Clause 45 seeks to amend section 7 of the EEA to extend the application thereof to promotions on any educator establishment and to bring it in line with the provisions of the Citation of Constitutional Laws Act, 2005 (Act No. 5 of 2005). The clause further provides for the possibility that an appointment to a promotional post can be made on probation. The intention is to close the gap and extend the provision to promotional posts in addition to appointments.

2.46 Clause 46: Amendment of section 8

Clause 46 seeks to amend section 8 of the EEA by proposing the deletion of the obsolete references to "council" and "adult education and training centre".

2.47 Clause 47: Amendment of section 9

Clause 47 seeks to amend section 9 of the EEA to provide for the secondment of educators to another department.

2.48 Clause 48: Amendment of section 11

Clause 48 seeks to amend section 11 of the EEA by proposing the deletion of obsolete references to "institutions" and "centres".

2.49 Clause 49: Amendment of section 17

Clause 49 seeks to amend section 17 of the EEA by inserting a phrase that expands the list of acts of serious misconduct. This is necessary because "conducting business with the state" is a new act of serious misconduct that is introduced in the Bill in the proposed insertion of section 19 in the EEA and the current section 17 of the EEA is no longer adequate. The new phrase is worded in a manner which will ensure any acts of misconduct that may be identified in future legislation will be covered.

2.50 Clause 50: Amendment of section 18

Clause 50 seeks to amend section 18 of the EEA by proposing the deletion of the obsolete references to "adult learning centre" and includes a provincial department of education within the ambit of the section.

2.51 Clause 51: Insertion of section 19

Clause 51 proposes the insertion of a new section 19 into the EEA, which prohibits educators from conducting business with the State or from being a director of a public or private company conducting business with the State and provides that a

contravention of the aforementioned provision is an offence. Such contravention will also constitute serious misconduct, which shall result in the termination of the educator's employment by the employer. This proposed amendment aims to promote good governance to protect the financial interests of the State and to prevent corruption.

2.52 Clause 52: Amendment of section 35

Clause 52 seeks to amend section 35 of the EEA to extend the powers of the Minister to make regulations on norms and standards for district staffing.

2.53 Clause 53: Repeal of section 38

Clause 53 seeks to repeal section 38 of the EEA which has become obsolete.

2.54 Clause 54: Amendment of Schedule 1

Clause 54 seeks to amend Schedule 1 to the EEA by proposing the deletion of the obsolete references to "public further education and training institution or public adult learning centre".

2.55 Clause 55: Amendment of Schedule 2

Clause 55 seeks to amend Schedule 2 to the EEA by proposing the deletion of the obsolete references to "public further education and training institution or public adult learning centre". It also provides for a time frame within which an appeal contemplated in Schedule 2 must be considered.

2.56 **Clause 56: Short title**

Clause 56 provides the short title of the envisaged Act and provides that the envisaged Act comes into operation on a date fixed by the President by proclamation in the Gazette.

3. DEPARTMENTS, ORGANISATION AND INSTITUTIONS CONSULTED

The following national and provincial Departments, agencies, the major stakeholders in the basic education sector and other organs of State responsible for the following functions were consulted:

- All nine provincial education departments;
- all national government departments;
- the Heads of Education Departments Committee;
- the Council of Education Ministers;
- South African Democratic Teachers Union (SADTU);
- SA Onderwysersunie (SAOU);
- National Professional Teachers' Organisation of South Africa (NAPTOSA);
- Federation of Association of Governing Bodies (FEDSAS);
- Governance Alliance (GA);
- National Association of School Governing Bodies (NASGB);
- Governing Body Foundation;
- the Pestalozzi Trust for Home Educators;
- National Economic, Development and Labour Council (NEDLAC);
- The Technical Working Group; and
- The Social Protection, Community and Human Development Cluster.

4. FINANCIAL IMPLICATIONS FOR STATE

The Bill will create financial liability for the State in the form of implementation costs relating to the following:

- In terms of the provision of Grade R, it is estimated that an additional amount of R5.26 billion will be required. The amount is composed of both the funding needed for equalisation of conditions of service and the funding of appointment of additional educators to address the estimated increased learner enrolment. The calculations are based on the current provisioning of Grade R in public schools;
- in terms of additional infrastructure, a total of 7 888 schools still need to be provided with Grade R classrooms, and an amount of R12 billion is required to address the shortfall. The shortfall will continue to be funded from the Education Infrastructure Grant, the equitable share and other funding mechanisms to ensure that schools receive the requisite spaces to accommodate Grade R learners;
- Home Education Assessment costs have been divided into two categories, namely, the sourcing, preparing of exam papers and marking of scripts and Invigilation. A suggested rate of R100 per hour for marking of scripts and R150 could be added for sourcing and preparing of papers. The estimated cost for invigilators is R40 per hour. The bearers of these costs will be the parents.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department are of the opinion that the Bill must be dealt with in accordance with the procedure established in section 76 of the Constitution.

5.2 Chapter 4 of the Constitution specifies the manner in which legislation must be enacted by Parliament. It prescribes different procedures for Bills, including ordinary Bills not affecting provinces (section 75 procedure), and ordinary Bills affecting provinces (section 76 procedure). The determination of the procedure to be followed in processing the Bill is referred to as tagging.

5.3 In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with section 76 if it falls within a functional area listed in Schedule 4. Schedule 4 to the Constitution lists functional areas of concurrent national and provincial legislative competence. In the Constitutional Court judgment of ***Ex-Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill***¹ (“***Liquor Bill*** judgment”), Cameron AJ held the following:

"[27] It must be borne in mind that section 76 is headed 'ordinary Bills affecting provinces'. This is my view, a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under section 76.

...

¹ (CCT/12/99) [1999] ZACC 15.

[29] *Once a Bill falls within a functional area listed in Schedule 4, it must be dealt with not in terms of section 75, but by either the section 76 (1) or the section 76(2) procedure...*".

5.4 Following the **Liquor Bill** judgment, the Constitutional Court in the judgment of **Tongoane and Others vs Minister for Agriculture and Land Affairs and Others**² ("**Tongoane** judgment") confirmed the following:

"[59] *...the tagging test focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance.*".

5.5 Furthermore, the Constitutional Court held that:

"[66] *...procedural safeguards are designed to give more weight to the voice of the provinces in legislation substantially affecting them...they are fundamental to the role of the NCOP in ensuring that provincial interests are taken into account in the national sphere of government...*".

5.6 As the Court held in the **Tongoane** judgment, a Bill must be tagged as a section 76 Bill if its provisions in substantial measure deal with a Schedule 4 functional area. We are therefore of the view that the Bill should be classified as a section 76 Bill, which is an ordinary Bill affecting province, as its provisions in a

² 2010 (8) BCLR 741 (CC).

substantial measure fall within a functional area listed in Schedule 4 to the Constitution, namely "Education at all levels, excluding tertiary education".

5.7 The State Law Advisers are of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), as it does not contain any provisions which directly affect traditional or Khoi-San communities or provisions which pertain to customary law or customs of traditional or Khoi-San communities.