South African Institute of Race Relations NPC
Submission to the
Select Committee on Education and Technology, Sports, Arts and Culture,
in the National Council of Provinces,
regarding the
Basic Education Laws Amendment Bill of 2022 [B2B -2022]
Johannesburg,
31st January 2024

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1 Introduction

The Select Committee on Education and Technology, Sports, Arts and Culture in the National Council of Provinces (NCOP) has invited public comment on the Basic Education Laws Amendment Bill of 2022 [B2B-2022] (the Bill) by 31st January 2024. This submission is made by the South African Institute of Race Relations (IRR), a non-profit organisation

formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

2 The need for proper public consultation

The Constitutional Court has repeatedly stressed that proper public participation in the law-making process is a vital aspect of South Africa's democracy. Relevant rulings here include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*;[1] *Doctors for Life International* v *Speaker of the National Assembly and others*[2]; and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*.[3]

In these judgments, the Constitutional Court has elaborated on what is needed for proper public consultation. According to the court, citizens must be given 'a meaningful opportunity to be heard in the making of laws that will govern them'. They must also be given 'a reasonable opportunity to know about the issues and to have an adequate say'.[4]

The court has also stressed that adequate time must be allowed for the public consultation process. In the *Land Access* case, for instance, it stated that 'a truncated timeline' for the adoption of legislation may itself be 'inherently unreasonable'. If the period allowed is too short – as it was in the *Land Access* case, when roughly a month was allowed for the Restitution of Land Rights Amendment Bill of 2014 to proceed through the National Council of Provinces (NCOP) – then 'it is simply impossible...to afford the public a meaningful opportunity to participate'.[5]

In the *Doctors for Life* case, where the timeline for the adoption of the relevant Bill was also short, the court made it clear that legislative timetables cannot be allowed to trump constitutional rights. Said the court: 'The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.'[6]

In the *Land Access* case, the court cited this passage with approval and went on to say: 'In drawing a timetable that includes allowing the public to participate in the legislative process, [Parliament] cannot act perfunctorily. It must apply its mind taking into account: whether there is real – and not merely assumed – urgency; the time truly required to complete the process; and the magnitude of the right at issue'.[7]

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[1] [2006] ZACC 12
[2] 2006 (6) SA 416 (CC)
[3] [2016] ZACC 22
[4] Ibid; see also *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, para 630
[5] *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*. [2016] ZACC 22, paras 61, 67
[6] *Doctors for Life*, para 194
[7] *Land Access*, para 70

The Bill is a lengthy and complex measure with important ramifications for basic education in South Africa. Yet only a month has been allowed for public comment on its wide-ranging terms. This truncated period is not enough.

In addition, the Bill is an amendment one which must be read in conjunction with the South African Schools Act of 1996 (the Schools Act) and the Employment of Educators Act of 1998. People wanting to comment on the Bill must get to grips with both these statutes before they can understand the changes made by the Bill or the significance of these amendments. This situation makes the one-month period allowed all the more inadequate and unreasonable.

3 Inadequate socio-economic impact assessment

Since September 2015 all legislation and regulation in South Africa must be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS), developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced.[8]

According to the Guidelines, the SEIA system must be applied at various stages in the policy process. Once new regulations (or other rules) have been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.[9]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the bill in terms of implementation and compliance costs as well as the anticipated outcome'. When the bill is published 'for public comment and consultation with stakeholders', the final assessment must be attached to it.[10]

A SEIA report on the Bill has been produced and made available.[11] However, this report is too truncated and superficial to be helpful – particularly on many of the most important amendments.

The SEIA report simply brushes aside most of the objections that were made to a 2017 version of the BELA Bill. The only concerns it seems to have taken seriously are those raised by the South African Democratic Teachers' Union (Sadtu) and various other organisations to a proposed clause giving provincial education officials the 'sole responsibility' for selecting and appointing school principals, deputy principals, and departmental heads. Why Sadtu and

[8] SEIAS Guidelines, p3, May 2015
[9] Guidelines, p7
[10] Ibid, p7
[11] The Presidency, Socio-Economic Impact Assessment System (SEIAS), Final report (revised), 2020, Basic Education Laws Amendment Bill

other organisations objected to this clause is not explained in the SEIA report, which simply notes that concerns were raised and then states that the clause has been removed.[12]

A proper 'SEIA' report on the socio-economic impact assessment of the Bill would have helped the public to understand the ramifications of the measure and make more informed comments on it. The absence of a comprehensive SEIA report – coupled with the number and complexity of the Bill's provisions – has made it particularly difficult for the public to 'know about' the issues raised by the measure. This is inconsistent with the obligation resting on the National Assembly and its committees to 'facilitate public involvement in the legislative process' under Section 59(1) of the Constitution.

4 Content of the Bill

Constraints to time prevent full consideration of all the provisions in the Bill. Instead, only some of the most problematic clauses can be dealt with, as set out below. These changes generally apply to public schools, rather than independent ones.

4.1 Changes to Sections 5 and 6 of the Schools Act: admission and language policies, and appeals

4.1.1 Admission policies

Under the Bill, the admissions policies of public schools are still, in principle, to be determined by their elected school governing bodies (SGBs), as already set out in the Schools Act and (as the B version of the Bill now adds) 'in line with the Constitution and relevant legislation'.[13] However, the Bill also empowers provincial education heads of department (HoDs), 'after consultation' with SGBs – wording that allows these bureaucrats to disregard SGB views – to 'admit a learner to a public school'.[14]

HoDs will also be empowered to:[15]

- approve a school's admissions policy or recommend 'necessary' changes;
- require that an admissions policy put greater emphasis on 'equality' and 'equity';
- decide how many admissions the available 'space' and 'resources' of the school allow; and
- assess whether there are 'other schools in the vicinity' which prospective pupils could attend instead.

According to the Bill, when HoDs are 'considering an admission policy or any amendment thereof for approval, they must be satisfied that the policy or the amendment thereof takes into account the needs, in general, of the broader community in the education district in which the…school is situated'.[16]

[12] SEIA report, pp19-21
[13] Clause 4, B version of Bill; amended Section 5(5), Schools Act
[14] Clause 4, B version of Bill; amended Section 5(5)(d), Schools Act
[15] Clause 4, B version of Bill; amended Section 5(5)(a) to (c), Schools Act
[16] Clause 4, B version of Bill; amended Section 5(5)(c), Schools Act

This indicates that broader community needs will be allowed to trump the legitimate interests and concerns of individual schools – even though Section 3(3) of the Schools Act gives the state the obligation to ensure that sufficient schools are made available in all districts and across all provinces (see *Ramifications*, below).[17]

4.1.2 Language policies

Subject to any contrary directions from HoDs, as outlined below, SGBs remain entitled to determine the language policies of their schools, which the Bill says 'must be limited to one or more' of the country's official languages, including South African Sign Language.[18]

Again, however, an SGB policy must now be approved by the relevant HoD, taking account of 'equality' and 'equity' as well as 'the need for the effective use of the classroom space and resources of the school', the right to mother-tongue education in the Constitution, and 'enrolment trends' at the school.[19]

Community needs will again weigh heavily in the balance, as HoDs, in considering whether to approve language policies or any amendments to them, must 'take into account the needs, in general, of the broader community' in the relevant education district.[20]

In addition, SGB powers to determine language policies will in practice be negated whenever HoDs decide it is 'practicable' for a school to 'adopt more than one language of instruction' and therefore 'direct' the school to do so.[21]

According to the Bill, whether it is practicable for a school to become a dual medium one will depend on all relevant factors, including 'equality', 'equity', the 'effective' use of classroom space and other resources, and 'the language needs, in general, of the broader community in the education district where the school is situated'.[22]

Before making decisions of this kind, HoDs must conduct public hearings and invite SGBs, parents, and school communities to make representations. They must also 'give due consideration' to all the representations they receive.[23]

Once HoDs have instructed schools to become dual medium ones, they must ensure that the relevant schools receive the necessary resources, including both teachers and adequate 'learning and teaching support material'.[24] This might well be done – as it was in the case of Afrikaans-medium Overvaal Hoërskool (see below) – via the HoD's provision of a single

[17] Section 3(3), Schools Act
[18] Clause 5, B version of Bill; amended Section 6(2), (4), Schools Act
[19] Clause 5, B version of Bill; Section 6(5) to (7), amended Schools Act
[20] Clause 5, B version of Bill; amended Section 6(7), Schools Act
[21] Clause 5, B version of Bill; Section 6(13), amended Schools Act
[22] Clause 5, B version of Bill; Section 6(14), amended Schools Act
[23] Clause 5, B version of Bill; Section 6(15), amended Schools Act
[24] Clause 5, B version of Bill; Section 6(17), amended Schools Act

additional teacher to cope with all the needs of 55 new English-speaking pupils, and by proposing that the school turn some of its laboratories into extra classrooms.[25]

4.1.3 Appeals

Under the Bill, appeals against HoD decisions or directives must generally be lodged with the provincial MEC (Member of the Executive Council) for education, rather than the courts. This applies to pupils and parents dissatisfied with decisions on individual admissions to particular schools,[26] as well as to SGBs that are dissatisfied with HoD:

- decisions on changes to the school's admissions or language policies;[27] and
- directives that the school must adopt more than one language of instruction.[28]

Where pupils or their parents lodge appeals against individual admission decisions, the MEC must inform them of the outcomes of their appeals within 14 days. The Bill makes no provision for appeals by SGBs against such admission decisions, which suggests that its intent is to exclude them from lodging such appeals.

Where an SGB lodges an appeal against an HoD decision on its admission and/or language policies – or any directive to adopt more than one language of instruction – the same time limit applies. The MEC must thus, within 14 days, 'consider and decide the matter and inform the SGB of the outcome of the appeal'.[29]

4.1.4 Why these changes are needed

According to the SEIA report, these amendments have 'become necessary as a result of confusion…in regard to where the locus of authority lies in respect of admission to public schools, and as to who has the final say on admissions'. Adds the report: '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.'[30] However, this supposed statement of the law conflicts with relevant Constitutional Court decisions on the powers of SGBs and the circumstances in which HoDs may be able to override them (as set out in this submission in due course).

The SEIA report also claims that these amendments are necessary to 'remedy discrimination against learners on a variety of grounds'.[31] However, where disputes over admission, language policies and other SGB powers have gone before the court in recent years, alleged

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[25] *Governing Body, Hoerskool Overvaal* v *Head of Department of Education Gauteng Province and others*, Case No 86367/2017, 15 January 2018, page 2; John Kane-Berman, 'Panyaza Lesufi, bully', *Politicsweb.co.za*, 28 January 2018, page 8

[26] Clause 4, B version of Bill; Section 5(9), amended Schools Act

[27] Clauses 4, 5, B version of Bill; Sections 5(11)-(13), 6(18)-(20), amended Schools Act

[28] Clause 5, B version of Bill; Section 6(18), amended Schools Act

[29] Clauses 4, 5, B version of Bill; Sections 5(12), 6(18), (19), amended Schools Act

[30] SEIA report, op cit, p3

[31] SEIA report, op cit, p16

discrimination against learners has not featured as an issue (see *Ramifications*, below). Nor does the SEIA report provide any evidence that discrimination has occurred and must therefore be 'remedied'. On the contrary, as Gauteng MEC for education Panyaza Lesufi has acknowledged, former Model C schools across the country are already 80% black, so it is hardly the case that black pupils are being excluded from them.[32]

4.1.5 Relevant Constitutional Court judgments

The Ermelo *case*

On 9th January 2007, the day before the 2007 school year was to begin, the head of department (HoD) in the Mpumalanga provincial education department instructed the principal of an Afrikaans medium high school in Ermelo – where pupil numbers had been dwindling for some years – to admit 113 learners who 'chose to be instructed in English' and were to be enrolled in Grade 8. The HoD added that all English-medium schools in the town were full and that the principal would face 'disciplinary action' if he did not admit the learners the following day.[33]

The chairman of the SGB countered that the pupils were welcome at the school, provided they complied with its Afrikaans medium language policy. Some 70 learners arrived at the school the following day but declined to be taught in Afrikaans and were not enrolled. On 25th January 2007 the HoD informed the SGB by letter that he had withdrawn its function of determining the school's language policy with immediate effect. He had also appointed an interim committee for three months. This committee would add English as a language of instruction and so ensure that the 113 stranded learners were admitted to the school.[34]

As the Constitutional Court was later to describe it, the HoD 'revoked the power of the governing body to set the language policy and conferred the power on an interim body, which instantly altered the policy to parallel medium in order to permit the admission of the stranded learners'. This decision was taken 'without consulting with the school governing body, the teaching staff, learners already admitted to the school, or their parents'.[35]

Yet the Constitution guarantees all pupils at public schools the right to 'receive education in the official language of their choice' where this is 'reasonably practicable'. Said the court: 'It must follow that when a learner already enjoys the benefit of being taught in an official language of choice, the state bears the negative duty not to take away or diminish the right without appropriate justification.'[36]

This did not mean that the decision on a public school's medium of instruction was 'the exclusive preserve of the governing body'. The HoD could therefore 'on reasonable grounds

[32] Panyaza Lesufi, 'Schools bill: We can't be held to ransom by transformation haters', Politicsweb.co.za, 20 November 2017

[33] *Head of Department, Mpumalanga Department of Education and another* v *Hoerskool Ermelo and another*, [2009] ZACC 32, paras 16-17

[34] Ibid, paras 18-21

[35] Ibid, paras 22, 27

[36] Ibid, para 52

withdraw a school's language policy'. In doing so, however, he would have to 'observe meticulously the standard of procedural fairness' laid down in Section 22(2)[37] of the Schools Act.[38]

According to the court, assessing whether these standards of reasonableness and fairness have been met 'requires full and due regard to all the circumstances that actuated the HoD to by-pass the governing body'. The 'purpose' of the HoD's action must be considered, along with 'the best interests of actual and potential learners, the views of the governing body and the nature of the power sought to be withdrawn, as well as the likely impact of the withdrawal on the well-being of the school, its learners, parents, and educators'. Where a school's language policy is in issue, this 'affects the functioning of all aspects of the school', making 'the procedural safeguards, and due time for their implementation, [all] the more essential'. [39]

The state also has 'an obligation…to ensure that there are enough school places for every child who lives in a province', the court went on. At the same time, SGBs must manage the public resources with which they are entrusted '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'.[40]

In this instance, said the court, the HoD had misunderstood his powers and acted unlawfully. This in turn meant that the decision to turn the school into a dual medium one could not stand. The key underlying problem, however, was 'the scarcity of classroom places for learners who want to be taught in English' in the town.[41]

In conclusion, the court instructed the SGB to 'reassess its language policy…[with] regard to its dwindling enrolment numbers'. It also instructed the HoD to file a report with the court 'setting out the likely demand for grade 8 English places at the beginning of [the next school year] and…the steps his department had taken to satisfy this likely demand for an English or parallel medium high school in the circuit of Ermelo'.[42]

The Welkom *case*

In the *Welkom* case, the HoD in the Free State provincial education department instructed a high school in Welkom and another in the town of Harmony to re-admit two pupils who had been excluded from attending school for prolonged periods under the schools' pregnancy policies. In both instances, the HoD made little attempt to engage with the governing bodies of the schools. In addition, though section 22 of the Schools Act allows him to strip a governing body of a function on reasonable grounds and on a procedurally fair basis, he had failed to

[37] Under section 22(2) of the Schools Act, the HoD may not withdraw a function from a governing body unless he has informed the SGB of his intention to do so and given his reasons, granted the SGB 'a reasonable opportunity to make representations' to him, and given 'due consideration' to any such representations received.
[38] Ibid, paras 58, 71, 73
[39] Ibid, paras 74, 75
[40] Ibid, paras 76, 80
[41] Ibid, paras 93, 100
[42] Ibid, paras 100, 104

comply with these provisions and acted unilaterally in demanding the pupils' return to school.[43]

In handing down its judgment, the Constitutional Court emphasised the limits on the powers of HoDs under the Schools Act. Said the court: 'The Schools Act does *not* empower an HoD to act as if policies adopted by a school governing body do not exist. Rather, the Act obliges the HoD to engage in a comprehensive consultative process with the relevant governing body regarding the particular policies.' If this process shows that 'there are reasonable grounds for doing so', the HoD may then 'take over the performance of the particular…function' but must do so 'in terms of section 22'.[44]

In this instance, however, 'at no stage did the Free State HoD observe the consultation requirements in…section 22,…and at no stage did he purport to withdraw the policy-making function from the governing bodies pursuant to section 22(1)'. The HoD's powers to intervene are necessary to protect pupils 'if a governing body has acted unreasonably or unconstitutionally'. But this does not 'entitle him to superimpose his own policies and countermand those of the school by fiat, simply because he is of the opinion that the latter are unconstitutional'.[45]

Added the court: 'The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process… Where clear internal remedies are available, an organ of state is obliged to use them, and may not simply resort to self-help.…The Schools Act offers the Free State HoD clear remedies to deal with the exact problem with which he was faced…[and he] was not entitled to ignore them'.[46]

The Rivonia *case*

In the *Rivonia* case, the Rivonia Primary School had said it was too full to admit a prospective Grade 1 pupil in January 2011 but would place her on its waiting list (where she was 14th in line). However, when the school's tenth-day statistics (compiled on the tenth day of the new school year) showed it had admitted 124 pupils, rather than the 120 referred to in its admission policy, the HoD in Gauteng took the view that the school must therefore have space for additional learners and instructed the school to admit the pupil. He also sent his officials to place the pupil physically in a Grade 1 classroom, at an empty desk intended for another pupil with learning difficulties.[47]

The Constitutional Court referred to the *Ermelo* and *Welkom* judgments and drew from them the following key principles:[48]

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[43] *Head of Department, Department of Education, Free State Province* v *Welkom High School and others*, [2013] ZACC 25, paras 6, 8, 9-12, 18-19, 47-48, 72
[44] Ibid, para 72
[45] Ibid, paras 78-79
[46] Ibid, paras 86, 90
[47] *Member of the Executive Council for Education, Gauteng Province and others* v *Governing Body of the Rivonia Primary School and others*, [2013] ZACC 34, paras 9, 12, 14
[48] Ibid, para 49(a) to (d)

a) ‘Where the Schools Act empowers a governing body to determine policy in relation to a particular aspect of school functioning, a head of department or other government functionary cannot simply override the policy adopted or act contrary to it’, even if he thinks the policy ‘offends the Schools Act or the Constitution’.

b) ‘A functionary may…depart from a school governing body’s policy, but only where that functionary is entitled to do so in terms of powers afforded to it by the Schools Act or other relevant legislation’.

c) ‘Where it is necessary for a properly empowered functionary to intervene’, he ‘must act reasonably and procedurally fairly’.

d) ‘Given the partnership model envisaged by the Schools Act, as well as the co-operative governance scheme set out in the Constitution, the relevant functionary and the school governing body are under a duty to engage with each other in good faith on any disputes’.

Overall, a decision to overturn an admission decision of a principal, or depart from a school admission policy, had to be ‘exercised reasonably and in a procedurally fair manner’.[49] Yet the HoD had failed to comply with these obligations.

As the Constitutional Court put it: ‘Almost four weeks into the school year, the dictates of fairness required affording the school an opportunity to address the Gauteng HoD on the impact that such a placement would have on factors such as the quality of education of other learners at the school, access to resources for the learner herself, and the time that may have been required to accommodate the learner effectively. This opportunity was never afforded to the school’.[50]

In addition, given the importance of the 10th day statistics to the HoD’s intervention, ‘the HoD should have afforded the school an opportunity to make representations and respond to the tenth-day statistics report, before the learner was forcibly placed in the school’.[51]

4.1.6 Unconvincing reasons in the SEIA report

As earlier noted, the SEIA report claims that ‘confusion’ has arisen as to ‘where the locus of authority lies in respect of admission to public schools, and as to who has the final say on admissions’.[52] Yet the Constitutional Court in the *Rivonia* case has set out the relevant rules with great clarity.

[49] Ibid, para 58
[50] Ibid, para 64
[51] Ibid, para 68
[52] SEIA report, op cit, p3

The problem is not that the existing rules in the Schools Act are confusing, but rather that officials have acted without adequate regard to them in each of the three cases (*Ermelo*, *Welkom* and *Rivonia*) that have come before the Constitutional Court. The same phenomenon is evident in the most recent dispute – the *Overvaal* case in 2018 – where the Constitutional Court declined to hear an appeal because it had no prospect of success. This in turn was because the relevant officials in the Gauteng provincial department of education had acted unlawfully and in breach of all the principles laid down in the *Rivonia* case.

4.1.7 The Overvaal *case*

In December 2017 the Gauteng education department ordered Overvaal – an Afrikaans medium high school in Vereeniging – to admit 55 English-speaking pupils into its Grade 8 class, starting in January 2018.[53]

The SGB objected that the school was already full, and that it could not afford to hire a handful of English-speaking teachers for the benefit of this small group. It also asked why two nearby English-medium schools, General Smuts and Phoenix, could not take the pupils instead.[54]

The department responded that it had already put in place all the necessary measures to accommodate the 55 pupils, including a single English teacher (who could hardly teach in all the high school subjects the pupils would need), along with furniture and study material. It also suggested that the school turn some of its laboratories into additional classrooms for the 55 additional entrants.[55]

The department also pressurised the two nearby English-medium schools into declaring that they had no space for the 55 children. The principals of these two schools had previously sworn affidavits saying they had more than enough room for the 55 pupils and would be glad to admit them. But they changed their statements – saying they had erred and did not have extra space after all – after departmental officials threatened them with dismissal and the loss of their pension rights.[56]

Judge Bill Prinsloo granted the SGB's urgent application to have the decision set aside for breaching the constitutional principle of legality[57] as well as various provisions in the Promotion of Administrative Justice Act (PAJA) of 2000. He also found the conduct of various Gauteng officials so contrary to the relevant rules as to merit a punitive costs order.[58]

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[53] *Governing Body, Hoerskool Overvaal* v *Head of Department of Education Gauteng Province and others*, Case No 86367/2017, 15 January 2018, page 2; John Kane-Berman, 'Panyaza Lesufi, bully', *Politicsweb.co.za*, 28 January 2018

[54] Kane-Berman, op cit

[55] *Overvaal* judgment, op cit, page 8

[56] *Overvaal* judgment, pp38-46, particularly at pp 44-45; Kane-Berman, op cit

[57] This principle, said the court, 'means broadly that an administrator exercising or purporting to exercise certain powers must do so only within the ambit of the powers vested in him or her or lawfully conferred upon him or her': *Overvaal* judgment, page 31

[58] *Overvaal* judgment, pp35-36, 48-50

The high court strongly criticised the department, saying it had made no attempt to verify Overvaal's capacity 'relative to other schools in the district', as the law required. Instead, the department had tried to 'force [the school] in an arbitrary fashion on very short notice to convert to a double medium institution when it was not practically possible to do so'.[59]

Undue pressure had also been placed on the principals of the two English-medium schools to change their earlier sworn statements. In addition, a senior official had disclosed an 'obvious bias' in describing Afrikaans as 'a language whose legacy is sorrow and tears to the majority'.[60]

In response to the judgment, Gauteng MEC for education Panyaza Lesufi said that school language policies were 'malignant' and 'the very essence of racism'. He vowed that the ruling would prove 'a short-lived victory for the school' as he would appeal it all the way to the Constitutional Court. But the Constitutional Court gave him short shrift, refusing in July 2018 even to hear his appeal as it had no prospect of success.[61]

The Bill seems an obvious attempt to circumvent Judge Prinsloo's ruling by increasing the government's powers to decide on admission and language policies, as well as the admission of individual pupils to particular schools. However, there is no need for the Bill to circumvent the four clear legal principles laid down by the Constitutional Court, as earlier described.

Those principles may be summarised as follows: HoDs are not 'rigidly bound' by SGB policies on admissions and language, but they cannot 'simply override' them. Rather, they must act strictly within the limits of their powers, have adequate reasons for any interventions, act 'reasonably' and 'procedurally fairly', and engage with SGBs 'in good faith' and in keeping with 'the partnership model' in the Schools Act and the 'cooperative governance' principle in the Constitution.[62]

By contrast, the Bill's provisions allow HoDs to ride roughshod over SGB decisions on admission and language policies, provided only that they 'consult' with governing bodies, parents and communities. There is also a risk that state entities will simply go through the motions on public consultation, while failing to pay adequate attention the viewpoints and concerns thus raised. Yet superficial public consultation cannot suffice, given the 'partnership model' on which the Schools Act is premised and the need for state entities to engage with one another in good faith under the 'co-operative governance principle' in the Constitution.

In addition, as the apex court stated in the *Ermelo* case, the Constitution guarantees all pupils at public schools the right to 'receive education in the official language of their choice' where this is 'reasonably practicable'. As the court added: 'It must follow that when a learner already

[59] *Overvaal* judgment, pp15, 16
[60] *Overvaal* judgment, pp38-46, particularly at pp44-45, 47, 49-50; Kane-Berman, op cit
[61] News24.com, *Business Day* 26 July 2018
[62] SEIA report, op cit, p3; Rivonia judgment, op cit, para 49(a) to (d)

enjoys the benefit of being taught in an official language of choice, the state bears the negative duty not to take away or diminish the right without appropriate justification.'[63] Moreover, a school's language policy 'affects the functioning of all aspects of the school' – which makes 'procedural safeguards, and due time for their implementation, [all] the more essential'.[64]

Moreover, it is the *state* that bears the burden of 'ensuring that there are enough school places for every child who lives in a province', as the Constitutional Court has pointed out. It follows that the burden of ensuring adequate access to all pupils cannot be placed on existing schools, in the way the Bill seeks to achieve.

The current provisions of the Schools Act strike a more appropriate balance between competing interests and should be retained, not changed. The Bill's amendments to Sections 5 and 6 of the Schools Act are unnecessary and damaging and should simply be withdrawn.

So too should the Bill's provisions on appeals. Under the Bill, as earlier noted, SGBs may appeal to provincial MECs against HoD decisions on admissions and/or language policies, as well as HoD directives that schools must adopt more than one language of instruction. By contrast, the Bill gives them no explicit right to appeal against HoD decisions on the admission of individual pupils to schools.[65]

However, the Bill cannot exclude the constitutional right of access to court under Section 34, which gives 'everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court'.[66] Also relevant is the right to administrative justice under Section 33 of the Constitution. HoD decisions on the admission of individual pupils, as well as on admissions and language policies, are administrative decisions that must comply with the constitutional right to 'administrative action that is lawful, reasonable and procedurally fair'. Administrative action that fails to comply with these obligations is subject to 'review by a court', as Section 33(3) of the Constitution confirms.

The rule of law must also be upheld. As stated by the Constitutional Court in the *Welkom* case, 'the rule of law does not allow an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process…[and] does not authorise self-help'.[67] The supremacy of the rule of law is one of the founding values of South Africa's democracy and cannot be brushed aside.

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[63] *Ermelo* judgment, op cit, para 52
[64] Ibid, paras 74, 75
[65] See again Clauses 4, 5, B version of Bill and Sections 5(9)-(10), (11)-(13), 6(18)-(20), amended Schools Act; Clause 5, B version of Bill and Section 6(18), amended Schools Act; and Clauses 4, 5, B version of Bill and Sections 5(12), 6(18), (19), amended Schools Act
[66] 'In appropriate circumstances', as Section 34 adds, a dispute may instead be 'referred to another independent and impartial tribunal or forum' – but the Bill's attempt to confine appeals to MECs is inconsistent with this wording too.
[67] *Welkom* judgment, para 86

Relevant too is the doctrine of the separation of powers underpinning South Africa's democracy. Under this doctrine, the role of the executive is to implement and administer the laws adopted by Parliament, while the judiciary has the task of interpreting and enforcing the law and settling legal disputes. This doctrine is intrinsic to the country's constitutional order – and further confirms that the executive cannot lawfully usurp the powers of the judiciary.

4.2 Changes to Section 21, Schools Act: centralised procurement

The Bill seeks to introduce a new subsection into Section 21. This new provision (sub-section (3A) is to read: 'Notwithstanding the provisions of subsections (1)*(c)* and (3) and section 22, the Head of Department may, in consultation with the governing body, centrally procure identified learning and teaching support material for public schools on the basis of efficient, effective and economic utilisation of public funds or uniform norms and standards.'[68]

At present, under Section 21 of the Schools Act, SGBs may apply in writing to provincial HoDs to be allocated the function of 'purchasing textbooks, educational materials or equipment for the school', which HoDs may grant 'unconditionally or subject to conditions'. Provincial MECs may also allow some governing bodies to exercise this function without first applying for permission, if 'they are satisfied that the governing bodies concerned a) have the capacity to perform [this] function effectively' and b) 'there is a reasonable and equitable basis for doing so'.[69]

The Bill changes these provisions by empowering HoDs, 'in consultation' with SGBs, to insist on centralised procurement of 'identified learning and teaching support material'. According to the Bill, such centralised procurement must be 'based on efficient, effective, and economic utilisation of public funds or uniform norms and standards'.[70]

Under the existing Act, purchasing powers may be granted or exercised only by SGBs which have the capacity to manage the procurement function. Why SGBs with this capacity should be stripped of this important function is not adequately explained in the SEIA report, which claims that 'money is often wasted' under the current procurement rules and that 'learners do not receive sufficient amounts of the correct quality of learner support material'.[71] The Memorandum on the Objects of the Bill also skirts the issues by simply asserting that the change will 'bring about economies of scale'.[72]

The Bill thus assumes that centralised procurement will be more efficient and cost-effective. Yet it could also be far slower and more cumbersome, resulting in long delays before essential textbooks or other learning materials are bought and received. Many provincial

[68] Clause 14, B version of Bill; amended Section 21(3A), Schools Act
[69] Sections 21(1)(c), (3), (6)(a), (b), Schools Act
[70] Clause 14, B version of Bill; Section 21(3A), amended Schools Act
[71] SEIA report, op cit, p15
[72] Para 2.16, Memorandum on the Objects of the Bill

education departments fail to deliver textbooks and support materials at the start of the school year – or even until the year is far advanced – to the great detriment of pupils. In 2017, for instance, more than 500 schools in Limpopo were still without them in the fifth month of the teaching year; in 2022, more than 3 000 schools in the Eastern Cape were unlikely to receive them until sometime in April or May.[73]

In addition, the recent reports of the Zondo commission into state capture – and of the Special Investigation Unit (SIU) charged with probing Covid-19 emergency procurement – are replete with examples of corruption and inflated prices in state contracts both large and small.[74]

Preferential public procurement for black economic empowerment (BEE) purposes is often also tainted by fraud and inflated pricing. In October 2016, the then chief procurement officer in the National Treasury, Kenneth Brown, warned that between 30% and 40% of the state's overall procurement budget, then worth R600bn, was tainted in this way. In August 2018 his acting successor, Willie Mathebula, told the Zondo commission that normal procurement requirements for state entities were 'deliberately not followed in at least 50% of all tenders'. Moreover, once some excuse had been found to bypass normal procurement rules, a contract that 'started at R4m was soon sitting at R200m'.[75]

Centralised procurement is therefore no guarantee of probity, cost-effectiveness, or 'economies of scale'. No good reason has been provided as to why SGBs with the capacity to procure their own textbooks and educational materials should be barred from doing so. This clause in the Bill should also be scrapped and the existing rules retained.

4.3 Changes to Section 22, Schools Act: withdrawal of functions

The existing provision in the Schools Act allows the HoD, 'on reasonable grounds', to 'withdraw *a* function of a governing body' (emphasis supplied). The Bill, by contrast, allows the withdrawal of 'one or more' functions.[76] Given the extensive powers the Bill seeks to give HoDs to override SGB decisions on admission and language policies, these extended powers could easily function as a 'sword of Damocles', putting great pressure on governing bodies to yield to HoD demands on pain of losing their functions in any event.

The Bill supposedly increases the safeguards against any abuse of this power by requiring the HoD to give written notice of his intention and the reasons for it, grant SGBs a reasonable opportunity to make representations, give 'due consideration' to those representations, and then (in a new sub-clause) 'inform the governing body of his or her final decision, in

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[73] *Business Report* 30 May 2017; https://legalbrief.co.za/diary/legalbrief-today/story/education-department-struggling-to-provide-school-books/

[74] https://mg.co.za/coronavirus-essentials/2020-08-08-special-investigating-unit-probes-covid-19-tenderpreneurs/; Judicial Commission of Enquiry into State Capture: Reports 1-4

[75] Businesstech.co.za 6 October 2016, News24.com, 21 August 2018

[76] Clause 15, B version of Bill; amended section 22(1), Schools Act

writing'.[77] Much will depend, however, on how open HoDs are to SGB views and whether they adequately maintain the necessary 'partnership' spirit, as set out by the Constitutional Court in the *Rivonia* case.[78]

The Bill also provides that the HoD 'must' appoint suitably qualified people to take over the withdrawn function(s) for up to three months at a time, but not for more than one year. These individuals will have 'exclusive voting rights and decision-making powers on any function they have been appointed to perform'. Within the period of their appointment, they must also 'build the necessary capacity to ensure that the governing body will thereafter be able to fulfil the functions that it previously failed to perform'.[79] This wording (which seems to be derived from Section 25 of the Schools Act) may reduce the potential for abuse as it indicates that HoDs will not have 'reasonable grounds' to withdraw SGB functions except where governing bodies are unable to fulfil them.

The Bill echoes the existing provisions of the Schools Act in stating that anyone aggrieved by the HoD's decision 'may' appeal against it to the provincial MEC. The Bill adds that the MEC must 'communicate his decision…within 30 days [of] receiving the appeal and provide written reasons for it'.[80] Resort to this appeal procedure is fortunately not obligatory – while any attempt to limit the right of access to court under Section 34 of the Bill of Rights is prima facie unconstitutional.

4.4 Changes to Section 25, Schools Act: dissolution of SGBs

Under the Bill, the HoD may 'on reasonable grounds' dissolve a governing body, but only where 'it has ceased to perform its functions' under the Schools Act or any provincial law. Before doing so, the HoD must give written notice of his intention and the reasons for it, grant 'a reasonable opportunity' to make representations to affected SGBs, give 'due consideration' to any representations received, and then 'inform the governing body of his or her final decision, in writing'.[81]

HoDs must also (in wording that echoes the amended Section 22 described above) appoint 'sufficiently' qualified people to perform all the functions of the governing body for up to three months and a maximum period of one year. They must also ensure that 'a new governing body is elected' within that year.[82]

Under a further sub-clause, not included in the current Schools Act, any person aggrieved by the HoD's decision 'may' appeal to the MEC, who must 'communicate' his decision within 14 days and give written reasons for it.[83] Again, this wording is fortunately not peremptory,

[77] Clause 15, B version of Bill; amended Section 22(1), (2), Schools Act
[78] *Rivonia* judgment, para 49
[79] Clause 15, B version of Bill; amended Section 22(5) to (8), Schools Act
[80] Clause 15, B version of Bill; amended Section 22(9), Schools Act
[81] Clause 19, B version of Bill; amended Section 25(1), (5), Schools Act
[82] Clause 19, B version of Bill; amended Section 25(2) to (4), (6), Schools Act
[83] Clause 19, B version of Bill; amended Section 25(7), Schools Act

while any limitation on the right of access to court under Section 34 of the Constitution is prima facie unlawful.

4.5 Changes to Section 48, Schools Act: subsidies to independent schools

Under the current provisions of Section 48, the minister of basic education may 'determine norms and standards for the granting of subsidies to independent schools' and must do so 'after consultation' with the Council of Education Ministers and 'with the concurrence' of the finance minister. Provincial MEC may then 'grant subsidies to independent schools' out of funds appropriated by provincial legislatures for this purpose.[84]

The Bill makes no change to the minister's powers. Instead, it states that MEC may grant subsidies to independent schools out of provincially appropriated funds but 'subject to conditions determined' by those MECs.[85]

No parameters are laid down to guide MECs as to what conditions may be imposed. Yet various Constitutional Court judgments have condemned 'broad and unbound administrative discretion' as contrary to the rule of law, which is a foundational value of the Constitution.[86]

The proposed new section 48(6) requires independent schools to provide quarterly reports 'on all income and expenditure' relating to the subsidies that they have received. It also obliges such schools to provide copies of 'audited or examined annual financial statements' relating to the subsidies they have received within six months of the end of their financial years.[87]

That these financial statements may be 'examined' rather than formally 'audited' should help low-fee independent schools comply with this new provision. For such schools, the option of providing six-monthly (rather than quarterly) reports on subsidy-related income and expenditure should also be provided.

4.6 Changes to Section 51, Schools Act: home schooling

The existing provisions of the Schools Act are more than adequate to regulate home schooling. They allow parents to apply to HoDs for 'the registration of a learner to receive education at the learner's home'. HoDs 'must' register the learner in this way if they are satisfied that: [88]

(a) 'the registration is in the interests of the learner';
(b) 'the education likely to be received at home' will 'meet the minimum requirements of the curriculum at public schools' and 'be of a standard not inferior to the standard of education provided at public schools', and
(c) 'the parent will comply with any reasonable conditions' set by them.

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[84] Clause 34, B version of Bill; amended Section 48(1), (2), Schools Act
[85] Clause 34, B version of Bill; amended Section 48(2), Schools Act
[86] *Business Day* 6 February 2013
[87] Clause 34, B version of Bill; amended Section 48(6), Schools Act
[88] Section 48(1) (2), Schools Act

Under the existing Act, HoDs may withdraw such registrations provided they first inform the parents, give them the opportunity to make representations, and 'duly consider any representations received'. Appeals against HoD decisions 'may' be brought before provincial education MECs.[89]

These provisions are sufficient to safeguard the interests of pupils and should not be changed. The Bill nevertheless introduces a number of unnecessary and unduly onerous requirements. These amendments seem calculated to restrict or end home schooling, rather than promote the best interests of the pupils whose parents would prefer them to be educated in this way.

These burdens are being imposed, moreover, even though some 80% of public schools are dysfunctional. In addition, as the Memorandum on the Objects of the Bill acknowledges, many public schools are beset by 'problems with drugs' and the 'abuse' of liquor by learners as well as 'growing incidents of violence'. Schools are sometimes also subject to disruptive protests by communities attempting to make political points.[90] Since 2020, most schools have been wholly or partially closed by the government as part of a prolonged Covid-19 lockdown which has greatly disrupted schooling but largely failed to halt or slow the spread of the virus (see *Ramifications*, below).

In one of the few changes made to the B version of the Bill, the HoD need no longer, in considering an application for home schooling, 'require a designated official to conduct a pre-registration home education site visit and consultation' with both the parents and the learner. Instead, under the amended wording of the Bill, the HoD 'may, on just cause shown and after notification to the parent, require a delegated official to conduct a pre-registration consultation with the parents and learner'. The purpose of this consultation (as stated in both versions of the Bill) is to 'verify the information supplied in the application documentation and provide support, where necessary, for the application process'.[91]

However, since the most onerous of the Bill's new requirements for home schooling have not been changed, the small amendment introduced is unlikely to ease the unnecessary burden to be placed on parents wanting home education for their children. On the contrary, officials may in practice insist that, in their view, there is indeed 'just cause' for pre-registration consultation – and that this consultation must take place at the home where the pupil is to be schooled. Should this occur, the changed wording will make no difference at all.

In addition – and despite all the salient objections raised in public comments to the portfolio committee – the most important requirements for home education have remained the same. Under the current version of the Bill, the HoD 'must' still decline registration for home schooling unless he is satisfied that 'the parent understands what home education entails and accepts full responsibility for the implementation of home education for the learner' – criteria

[89] Section 48(2), (3), (4), (5), Schools Act
[90] Memorandum on the Objects of the Bill, paras 2.1.8, 2.8.3, 2.9, 2.2.2
[91] Clause 37, Bill; Clause 35, B version of Bill; amended Section 51(3), Schools Act

that are so uncertain as to contradict the doctrine against vagueness of laws. He must also refuse registration if he thinks the parent might not comply with the Bill's requirements for annual external assessments (as described below), or if the outcome of the official's 'pre-registration consultation…fails to satisfy the HoD that home education is in the best interests of the learner'.[92]

The B version of the Bill no longer demands that 'the learner's educational attainment be assessed by a competent assessor' in every year from Grades R to 9 (or until the pupil turns 15 if that occurs first). Instead, it requires that this assessment be done at 'the end of each phase' of basic schooling: that is, at the end of Grades 3, 6, and 9. It also says that these assessment reports must be signed by the assessor and submitted to the HoD. As in the initial Bill, these assessments must be carried out 'against a standard that is not inferior to the standard determined in the National Curriculum Statement'.[93] However, regular external assessments of this kind are not required for pupils attending public schools, even though many of these schools fail to impart basic literacy and numeracy skills or to complete curriculums in key subjects (see *Ramifications*, below).

Under the Bill, the minister's regulatory powers over home schooling have also been increased. The current Schools Act empowers the minister to make regulations regarding 'registration for home schooling'. The Bill (in both its initial and current versions) also gives the minister the power to make regulations on 'the administration of home education'.[94] This additional power could be used to place a considerable administrative burden on parents engaged in home schooling, especially as the Bill sets no guiding parameters for its exercise. Yet 'broad and unbound administrative discretion' is contrary to the rule of law, as the Constitutional Court has repeatedly ruled.[95]

According to the Bill, registration may not be refused – or cancelled after it has been granted – without HoDs first informing parents in writing and providing them with reasons. HoDs must also invite representations, give 'due consideration' to all representations received, and provide written reasons for the decisions they then take. Parents may appeal against HoD decisions that decline or cancel registration – or other HoD decisions they consider 'unreasonable' – to the MEC for education in the province. The MEC must 'consider and decide' such appeals within 30 days of receiving them.[96]

Where pupils have completed Grade 9 or are over the age of 15 – so that school attendance is no longer compulsory – registration for home schooling is no longer required. However, if parents want their children to be eligible to write the National Senior Certificate (NSC) examination at the end of Grade 12, they must comply with the home-schooling rules in the

[92] Clause 35, B version of Bill; amended Section 51(2), (4), Schools Act
[93] Clause 37, Bill; amended Section 51(2) Schools Act; see now Clause 35, B version of Bill; amended Section 51(2) Schools Act
[94] Clause 35, Bill, amended Section 51(16), Schools Act
[95] *Business Day* 6 February 2013
[96] Clause 35, B version of Bill; amended Section 51(13), (14), (15), Schools Act

Regulations Pertaining to the Conduct, Administration and Management of the National Senior Certificate Examination of 2008.[97]

These 2008 regulations require, in essence, that a home-schooled pupil 'register with an education provider' who is registered with the body responsible for the administration of the NSC examination. This education provider must ensure that the pupil complies with:[98]

(a) the 'programme requirements' for Grades 10, 11 and 12;
(b) the 'school-based', 'practical', and 'oral language' assessments always or often required in these three grades and which in Grade 12 count significantly towards the final NSC mark; and
(c) the 'external assessment' requirement in Grade 12.

Since the 2008 regulations are not new, the main changes under the Bill are:

(a) the compulsory pre-registration consultations with officials;
(b) bureaucratic assessments of whether parents 'understand' and take 'full responsibility' for the home schooling they wish to provide;
(c) the need for external assessment of pupils by 'competent assessors', backed by written reports to HoDs, at the ends of Grades 3, 6, and 9; and
(d) an untrammelled discretion for the minister to impose additional rules for both registration and 'the administration' of home schooling.

As regards the external assessment requirements to be imposed, the SEIA report acknowledges that this will involve considerable additional expense for affected parents.[99] According to the SEIA report, an important advantage of these requirements is that they will 'create employment opportunities for competent assessors'.[100] However, parents who see home schooling as a better option for their children than dysfunctional public schooling, should not be obliged to provide jobs for assessors.

The SEIA report also states that the aim of the Bill, as initially written, was to ensure that external 'tutors provided assessment reports to the department on a quarterly basis'.[101] This obligation was not reflected in the wording of the initial Bill. Nor is it included in the B version of the measure. It does, however, point to an underlying intention to increase assessment requirements in the future, probably by regulation. Should this be done – perhaps by requiring assessment reports on an annual basis, as the initial version of the Bill demanded – this will make the B version of the Bill much more onerous for parents and greatly increase their compliance costs.

[97] Clause 35, B version of Bill; amended Section 51(10), (11), Schools Act; Clause 7(4A), Regulations Pertaining to the Conduct, Administration and Management of the National Senior Certificate Examination, *Government Gazette 31337*, 29 August 2008
[98] Section 7(4A), Regulations
[99] SEIA report, p26
[100] SEIA report, p37
[101] SEIA report, p9

4.7 Insertion of Section 59A, Schools Act: dispute resolution

Section 59A, as set out in the Bill, is a new provision with no counterpart in the existing Schools Act. It seeks to prevent governing bodies from turning to the courts for relief until various steps have been taken. It thus applies to all disputes not expressly governed by provisions dealing with appeals to provincial MECs, as earlier described.

The new section 59 is a catch-all provision intended to cover all other disputes, whether with provincial HoDs or MECs for education. Where the dispute is between a governing body and the HoD, the parties must attempt to resolve it 'informally'. If this fails, the aggrieved party must set out the details of the dispute in writing and propose a solution. If this does not lead to agreement within 14 days, both parties must appoint representatives within seven days who must try to settle the dispute within another 14 days. If this too fails, the SGB 'may' appeal to the provincial MEC, who must 'consider and decide' the matter within 30 days.[102]

Broadly similar rules apply to disputes between governing bodies and provincial MECs. Again, the parties must try to resolve the matter informally, failing which the aggrieved party must provide written details of the dispute and propose a solution. If this is not accepted within14 days, both parties must appoint representatives within seven days who must try to settle the matter within a further 14 days. In this instance, appeal to the MEC – who is a party to the dispute – does not apply.[103]

Though access to the courts cannot be excluded, for all the reasons earlier outlined in this submission, the Bill's new provisions may make for considerable delay. Initial attempts to resolve disputes 'informally' could continue for many weeks. It is only when these potentially lengthy 'informal' processes have been exhausted that the 35-day process of recording disputes in writing and seeking solutions (either directly between the parties or via representatives) can begin. Thereafter, at least for disputes between SGBs and HoDs, which are likely to be the most common, appeals may be lodged with MECs, who have 30 days to decide.

Court reviews under PAJA of damaging decisions made by HoDs may thus be delayed for two to three months via the new Section 59A and the internal remedies it introduces. This could leave schools and their governing bodies in limbo for long periods, which will increase the pressure on them to acquiesce in whatever the state demands. In practice, this major obstacle to court review is likely to be far more damaging to affected schools than its supposed benefits. (According to the Memorandum on the Objects of the Bill, these benefits include 'saving costs for all concerned parties' and enabling them to 'resolve disputes amicably'.)[104]

[102] Clause 37, B version of Bill; amended Section 59A(1)(a) to (e), Schools Act
[103] Clause 37, B version of Bill; Section 59A(2), amended Schools Act
[104] Memorandum on the Objects of the Bill, para 2.39

5 Ramifications of the Bill

As earlier noted in this submission, the short period of time allowed for public comments makes it impossible to deal with all the provisions of this Bill, which is long and often complex. Hence, any assessment of its ramifications must be similarly truncated.

5.1 Damaging amendments on admission and language policies

5.1.1 Dirigiste changes

For most pupils and families in South Africa, the Bill's dirigiste provisions on school admission and language policies are likely to be the most important changes.

Proposed changes to the rules regarding admissions, under Section 5 of the Schools Act, will allow HoDs to override SGBs and admit individual pupils to particular schools *after* consultation with these governing bodies. This wording allows HoDs to ignore SGB views and is contrary to 'the partnership model envisaged by the Schools Act', as the Constitutional Court described it in the *Rivonia* case.[105]

HoDs will also be able to demand significant changes to the admissions policies adopted by SGBs, based on various criteria. In deciding what changes to make, HoDs are likely to emphasise the needs of communities in relevant educational districts, which are often large. Yet many of the resources available to former Model-C schools (the ones most likely to be targeted under the Bill) are provided by parents out of their after-tax income – and once they have already made major contributions to the education of the country's entire school-going population.[106]

That most public schools are unable to provide sound education to their pupils is also not the fault of the parents who help maintain high standards at former Model-C schools through their fee and other contributions. In addition, the only way to help the broader community is to improve the quality of schooling overall. This requires many constructive reforms – not the Section 5 amendments set out in the Bill. These amendments will simply encourage HoDs to focus on dirigiste interventions against successful schools, rather than on the upliftment of all struggling schools in their provinces.

HoDs will also be empowered to override the language policies adopted by SGBs. In addition, they will be able to order single medium schools to become dual medium instead – and to direct that schools which already teach in two languages should start providing tuition in a third language as well. (Under the Bill, HoDs will have an open-ended power to 'direct a public school to adopt *more than one* language of instruction'.)[107]

However, language policies are particularly important as they 'affect the functioning of all aspects of a school', to cite the Constitutional Court in the *Ermelo* case once again.

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[105] *Rivonia* judgment, para 49

[106] Sara Gon, 'Equal(ly bad) education for everyone', Politicsweb, 29 October 2018, p1

[107] Clause 5, B version of Bill; amended Section 6(13), Schools Act, emphasis supplied by the IRR

Moreover, as the apex court noted in that case, 'when a learner already enjoys the benefit of being taught in an official language of choice, the state bears the negative duty not to take away or diminish the right without appropriate justification'.[108]

Proponents of the Sections 5 and 6 amendments will doubtless emphasise that the Bill requires HoDs to consult with SGBs, parents, and communities before overriding existing admission and language policies. In practice, however, the overall needs of school districts – which are the responsibility of the *state* to meet – may well be allowed to trump the legitimate interests and concerns of targeted schools. There is also a risk that officials will simply 'go through the motions' on public consultation, rather than genuinely engaging with the representations made by affected schools.

A 'tick-box' approach to public consultation on the Bill itself underscores the risk that consultation on changes to admission and language policies will be equally superficial. In the words of Democratic Alliance MP Baxolile Nodada, the public's concerns about the Bill have been 'ignored' while the entire public participation process was marred by 'a series of irregularities'. These included 'departmental structures trying to dictate who may attend hearings and attempting to coerce educators into supporting the Bill; faulty reports being adopted by the portfolio committee, despite objections;…[and 9 000] email submissions that remained unprocessed until opposition parties forced their analysis and inclusion in a report'. As Mr Nodada adds: 'The public participation process was merely a very expensive box-ticking exercise – a pretence at engagement.'[109] If Parliament can be so disdainful of public concerns, HoDs are likely to be at least as cavalier in brushing them aside.

In addition, the limited criteria set out in the Bill for overriding SGB policies cannot be allowed to trump the principles laid down by the Constitutional Court in the *Rivonia* case. According to those principles, HoDs must act strictly within the limits of their powers and have adequate reasons for any interventions. They must also act 'reasonably' and 'procedurally fairly'. In addition, they must engage with SGBs 'in good faith' and in keeping with 'the partnership model' in the Schools Act and the 'co-operative governance' principle in the Constitution. [110]

5.1.2 A shortage of public schools

What lies at the heart of disputes over admission and language policies is the shortage of good public schools teaching in the language (usually English) which pupils prefer. The Constitutional Court stressed this point in the *Ermelo* case, saying 'the underlying challenge relates to the scarcity of classroom places for learners in Ermelo who want to be taught in English'. However, under Section 3(3) of the Schools Act, 'the obligation lies on *the state* to ensure that there are enough school places for every child who lives in a province'. The

[108] *Ermelo* judgment, op cit, paras 75, 52
[109] https://www.news24.com/news24/opinions/fridaybriefing/baxolile-nodada-public-participation-over-bela-bill-was-just-an-exercise-in-pretence-20231005
[110] *Rivonia* judgment, op cit, para 49

Constitutional Court thus also instructed the Mpumalanga education department to 'set out the steps it was taking to satisfy this demand' in the area.[111]

Statistics on growing pupil numbers and diminishing numbers of public schools underscore the importance of this need. Some 4 200 public schools were closed between 2000 and 2022, yet the number of pupils at such schools went up from 11.6 million in 2000 to 12.7 million in 2022, an increase of more than 1 million.[112]

Public school closures have been particularly marked in the Eastern Cape, the Free State, Limpopo, and the North West, where pupil numbers have mostly also declined. Many learners have moved to Gauteng, where the number of pupils has gone up from around 1.4 million in 2000 to 2.3 million in 2022, an increase of some 820 000 (in round figures). Many have also moved to the Western Cape, where pupil numbers have gone up from roughly 888 000 in 2000 to 1.18 million in 2022, an increase of close on 290 000 (also in round figures).[113]

The number of schools in Gauteng has increased too, rising from 1 905 in 2000 to 2 056 in 2022, an increase of 151.[114] This increase seems insufficient, however, to cater for rising demand. Yet, as Section 3 of the Schools Act underscores, it is the state that has the obligation to ensure that it is taking adequate account of internal population shifts and building enough schools to meet pupil needs in provinces or towns where demand is high. It cannot simply, as the Mpumalanga provincial education department sought to do in the *Ermelo* case, put the burden of supplying enough new schools on individual schools with good resources and educational results.

The quantity of the public schools made available is not the only consideration. Even more important is the quality of the education that schools provide. Hence, a key part of the problem is that some 80% of public schools are largely dysfunctional (as further described below) – which is why parents want to avoid them and to flock to the relatively few well-performing schools instead.

However, these few schools cannot meet the scale of need. Nor should they be falsely accused of discrimination if they cannot accommodate all the pupils that apply to them. Yet this is the charge the SEIA report repeatedly makes as a supposed justification for the new admission rules in the Bill.

5.1.3 Accusations of discrimination

The SEIA report claims that 'privileged' schools – which in fact receive very little revenue from the state under the post-1994 funding formula – use their admission and language

[111] *Ermelo* judgment, op cit, paras 100, 76 (emphasis supplied by the IRR), 104; Section 3(3), Schools Act
[112] Centre for Risk Analysis, *Education*, September 2023, pp18, 19
[113] Ibid
[114] Ibid

policies to 'discriminate against certain sections of learners'.[115] However, it fails to cite any evidence in support of its unsubstantiated assertions. It also ignores the fact that some 80% of pupils at Model C schools are black (by Mr Lesufi's own admission), while some of these schools have become almost exclusively black.[116]

Racial discrimination was not in issue in any of the three recent cases involving school admission and language policies. In the *Ermelo* and *Overvaal* cases, these already racially mixed former Model-C schools were happy to admit black pupils provided they complied with their language policies. The Rivonia primary school was also not discriminating against a black pupil when it refused a late application for admission because its Grade 1 classes were already full and it had 13 children also wanting admission already on its waiting list.[117]

In each of these cases, the key issue was that education officials had acted unreasonably and unlawfully, and without complying with core principles of procedural fairness. It was their high-handed conduct that was the problem, not unfair discrimination by the schools against prospective black pupils.

In the light of the *Ermelo* and *Overvaal* cases – and Mr Lesufi's determination to overturn the latter decision – it seems likely that the Bill will be invoked primarily to compel the country's remaining 1 260 single medium Afrikaans schools[118] to start teaching in English as well. Yet these schools make up only 5.5% of the country's roughly 22 600 schools.[119] Even if all of these schools are compelled to become dual medium institutions – and then start admitting as many English-speaking pupils as they can accommodate – this will still be little more than a drop in an ocean of need.

5.1.4 What the new rules could allow

However, compelling Afrikaans single medium schools to become dual medium ones is not the only change the new sections 5 and 6 could usher in. The new provisions could also be used to implement major shifts with damaging ramifications for many more schools.

HoDs would have to go through the motions of publicly consulting SGB, parents, and communities, but could in practice disregard their concerns. On this basis, education officials could in time demand strict demographic representivity among school pupils in every school, with the maximum permitted representation for minorities set at 4% for 'whites', 7.5% for so-called 'coloureds', and 1.5% for 'Indians. This approach would be consistent with laws and regulations requiring greater demographic representivity in employment, public procurement, and water use, among other things. It would also be in line with a July 2022 call by Lindiwe

[115] SEIA report, op cit, p11
[116] John Kane-Berman, 'Panyaza Lesufi, bully', Politicsweb.co.za 28 Jan 2018; John Kane-Berman, *Achievement and Enterprise in School Education*, IRR Special Report, December 2017, pp3-4
[117] *Rivonia* judgment, op cit, para 9
[118] Angie Motshekga, minister of basic education, 'Number of single medium schools in South Africa', 22 May 2020, https://businesstech.co.za/news/government/400673/new-language-changes-planned-for-south-african-schools/
[119] CRA, Education, op cit, p19

Sisulu, then minister of tourism and the chair of the ANC's Social Transformation Committee, for 50:50 racial quotas in all schools.[120]

In time, HoDs empowered by the Bill could also demand that *all* schools should start using isiZulu, isiXhosa, Sepedi, or other African languages as additional mediums of instruction – over and above their current use of English and/or Afrikaans. Yet many parents want their children to be taught in English and may see little value in the change. Shortages of teachers and teaching materials would also make it difficult to implement the policy successfully. On the contrary, the attempt to do so could overburden many schools already struggling to provide an adequate standard of education.

In addition, if policy shifts of this magnitude are the underlying rationale for the Bill's proposed amendments to Sections 5 and 6, then the government should acknowledge that new rules of this kind cannot be introduced by subordinate regulation and executive fiat under a framework statute such as the Schools Act.

Instead, major policy shifts need to be adopted by Parliament through statutes specifically providing for them. This is required by the doctrine of the separation of powers, as well as the Constitution's commitment to a multiparty democracy characterised by 'accountability, responsiveness, and openness'.

5.2 Other harmful amendments

Also particularly worrying are the Bill's proposed changes to Section 22 of the Schools Act. These allow HoDs to remove various functions from SGBs, and vest them instead in individuals appointed by the state and empowered to act in place of elected governing bodies. The amended Section 22 could thus be used to pressurise SGBs into agreeing to changes in admission and language policies that are not in the best interests of their schools. Prior consultation will again be needed before HoDs may take such steps, but this may not suffice to guard against potential abuse.

Harmful too are the obstacles the Bill seeks to place in the way of home schooling. The Bill's extensive, expensive, and often vaguely phrased requirements are likely to prejudice learners who would like to avoid dysfunctional and increasingly violent public schools – but in practice will no longer have the home-schooling option available to them.

The introduction of centralised procurement is more likely to increase corruption and wasteful spending than to 'eliminate' such problems, as the SEIA report claims.[121] The lengthy internal processes for resolving disputes to be introduced in a new Section 59A will significantly delay access to court review under the Promotion of Administrative Justice Act

[120] James Myburgh, Time for the numerus clausus?', politicsweb.co.za 1 April 2022, p1; https://www.politicsweb.co.za/politics/school-racequota-risk--irr
[121] SEIA report, op cit, pp 7, 15

(PAJA), which may be their underlying purpose. Such delay may also add to the pressure on SGBs to acquiesce in what the state demands, even if this is not in the best interests of their schools and the pupils attending them.

Another worrying clause will give HoDs the capacity to impose conditions on the provision of provincial subsidies to independent schools. Officials will be able to do so by regulation and without clear parameters to guide the exercise of their discretion. Yet untrammelled discretionary powers of this kind are contrary to the rule of law.[122]

5.3 Some positive developments and clauses

One important improvement has already been achieved – for a clause in the 2017 version of the bill, that would have given provincial education bureaucrats 'the sole responsibility' for selecting and appointing school principals and their deputies, has been removed.

When this clause was earlier proposed, an article in the *Financial Mail* warned strongly against it. It said the shift would alienate fee-paying parents and encourage experienced teachers wanting advancement to leave public schools for private ones. Teacher unions and other organisations objected too, prompting the removal of the provision.

Some of the proposed amendments in the Bill seem positive too in that they could help curb increasing incidents of violence at schools;[123] deter mass action aimed at school closures to serve political purposes;[124] and curb people from bringing alcohol, drugs, and dangerous objects on to school premises.[125] However, the plethora of important and intrusive bills being brought before Parliament in recent years has resulted in legislative overload and made it increasingly difficult for the public to give adequate consideration to all the changes being introduced.

The main problem with the Bill is also a far more complex and more pressing one. Basic education is in crisis in South Africa – and yet the Bill does little to address this core issue. Instead, it distracts attention from the vital need for real reform by focusing on damaging and often unnecessary changes on matters largely peripheral to the major problems crying out for resolution.

5.4 A crisis in basic education

According to the National Treasury's budget for the 2023/24 financial year, South Africa plans to spend 6.4% of GDP (20.2% of budgeted expenditure) on basic and further education. This is significantly more than most other countries manage. (Botswana, for example, spent 6.9% of GDP in 2020, but most other emerging markets spend significantly less).[126] However, South Africa gets little bang for its extensive tax buck.

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[122] *Business Day* 6 February 2013
[123] Clause 9, B version of Bill; amended Section 9, Schools Act; Memorandum, op cit, para 2.9
[124] Clause 2, B version of Bill; amended Section 3(7), Schools Act; Memorandum, op cit, para 2.2.2
[125] Clause 8, B version of Bill; amended Section 8A, Schools Act
[126] CRA, *Public Finance*, August 2023, pp31-33; CRA, *Education*, September 2023, p7

The official National Senior Certificate (NSC) pass rate was 82.9% in 2023, but this figure conceals a high drop-out rate and many other shortcomings. The 'real' pass rate was far lower, as the roughly 573 000 pupils who passed their NSC exams in 2023 made up only 47.4% of the more than 1.2 million pupils who had enrolled in Grade 1 in 2012. More than half the original Grade 1 class thus left school in 2023 without even a matric. These 635 000 or so youngsters will battle to find jobs in a struggling economy with an official unemployment rate of 31% and a youth jobless rate standing at 58%.[127]

In 2023, moreover, only about 283 000 pupils – or 23% of the Grade 1 total – obtained 'bachelor' passes enabling them to proceed to university. Worse still, only around 41 300, a mere 3% of the Grade 1 total, passed maths with a mark of 60% or more.[128] In addition, requirements for NSC passes have been set far too low, for pupils can 'pass' with as little as 30% in three subjects and 40% in three others. Requirements for 'bachelor' passes are not much higher. [129]

International assessments of the quality of South Africa's education system are generally dismal. In its global competitiveness index for 2017/18, for example, the World Economic Forum ranked the quality of South Africa's education system at 114th out of 137 countries. It also ranked South Africa's maths and science education at 128th out of 137 nations, or 9th worst in the world.[130]

In 2021 the Progress in International Reading Literacy Study (PIRLS) found that 81% of Grade 4s in South Africa cannot read for meaning in any language. This outcome placed the country last among 50 participating nations.[131] South African pupils also do badly on the Trends in International Mathematics and Science Study (TIMMS). In 2017 some 60% of Grade 5 pupils were unable to add and subtract whole numbers. These outcomes are far worse than those obtained in many far poorer countries.[132] Overall, as civil society organisation the Centre for Development and Enterprise reported in 2023, 'the typical Grade

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[127] *School Realities 2012*, September 2012, Table 4, https://www.education.gov.za/LinkClick.aspx?fileticket=KQB1AFSaSOk%3d&tabid=462&portalid=0&mid=1327; https://techcentral.co.za/matric-results-improve-maths-attention/238240/; Statistics South Africa, *Quarterly Labour Force Survey*, 3rd Quarter 2023, p25

[128] https://www.businesslive.co.za/bd/opinion/columnists/2023-01-31-claire-bisseker-misleading-matriculants-about-their-competence-is-short-sighted; 2023 NSC Exam Results Technical Report, January 2024, Table 6.1.3, p37, https://www.education.gov.za/LinkClick.aspx?fileticket=-7rYx9S_APE%3d&tabid=92&portalid=0&mid=4359; CRA, Email communication with the DBE

[129] John Kane-Berman, *Achievement and Enterprise in School Education*, IRR special report, December 2017, p3

[130] Centre for Risk Analysis, *2018 Socio-Economic Survey*, p555

[131] https://www.dailymaverick.co.za/article/2023-05-16-from-bad-to-worse-new-study-shows-81-of-grade-4-pupils-in-sa-cant-read-in-any-language/; see also Centre for Development and Enterprise (CDE), *The Silent Crisis, South Africa's Failing Education System*, 2023, pp1, 3

[132] Business Day 6 December 2017, Sunday Times 14 January 2018, 6 January 2019; see also CDE, *The Silent Crisis, South Africa's Failing Education System*, p3

6 child in Kenya is around two to three years of learning ahead of Grade 6 learner in the Eastern Cape'.[133]

Increasingly, public schooling is seen as having deteriorated since the apartheid era. As renowned journalist Barney Mthombothi has written: 'With no shortage of resources, fixing the education system could have been low-hanging fruit for a new government. But the ANC has made an absolute shambles of our education system. Education under an ANC government is producing students of a far poorer quality than education under apartheid.'[134]

The quality of teaching in many schools is often very poor. Under-qualified black teachers from the pre-1994 period supposedly had their skills upgraded in the late 1990s so that they could earn the same salaries as better qualified whites. However, the short courses they were expected to attend did little to improve either their subject knowledge or their pedagogical skills. This left many of them unable to understand or teach much of the curriculum. This problem has persisted, moreover, among more recent entrants to the profession, who continue to come from poorly performing schools and are then pushed through the training process with inadequate regard for how much (or little) they have grasped.[135]

The upshot, as many similar studies have shown, is that 'teachers commonly do not complete the curriculum, teach too slowly, do not develop concepts, set insufficient written work, and provide pupils with few opportunities to read. Many teachers come late to school, leave early, spend only 46% of their time teaching each week, and hardly teach at all on Fridays'.[136]

In 2018, moreover, a study conducted by the government's monitoring and evaluation department found that only five out of 22 primary school teachers were able to identify the main idea in a simple paragraph, while only six were able to do a simple arithmetical calculation. Examples of these calculations were multiplying 53.03 by 100 and expressing 0.4 as a fraction. [137]

Though this study had only a small sample, another analysis that same year confirmed its findings. According to education expert Professor Jonathan Jansen, 'this study found that at one university the final year teacher education students were functionally illiterate.' Added Jansen: 'These are the graduates who will be teaching pupils in schools and future students in universities. How...did this happen? Simple, really: in many of our universities getting a degree has become far too easy. [Many] universities have adapted to the poor quality of incoming students by lowering the bar for academic excellence.'[138]

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[133] CDE, *The Silent Crisis, South Africa's Failing Education System*, p3
[134] Sunday Times 11 June 2017
[135] Anthea Jeffery, *BEE: Helping or Hurting?* Tafelberg, Cape Town, 2014, pp56-57; businessnesslive.co.za, 3 May 2018; CDE, *The Silent Crisis, South Africa's Failing Education System*, p7
[136] Jeffery, *BEE: Helping or Hurting?* pp56-57
[137] Sunday Times 11 March 2018
[138] businesslive.co.za, 3 May 2018

Poor basic education has (predictably) put great pressure on universities to lower their standards. Universities largely depend on state subsidies – and this funding in turn depends on their having high enrolments, improved pass rates, and more published research. Yet academics cannot teach properly in overcrowded undergraduate classes with 600 students or more. They are nevertheless expected to find ways to keep their student pass rates up. Hence, as Jansen writes, they use multiple choice questions, rather than asking for analytical essays. Some give in to the pressure from students and the funding formula and say too much about the 'scope of the exam', so allowing students to focus on only a portion of the curriculum. In this situation, students do not need the ability to analyse or even to write coherently, while universities often push them through in any event.[139]

Adds Jansen: 'The low standards of the school system have infiltrated universities. It was inevitable, for students who have to scale a low passing hurdle [can relatively easily] obtain a so-called Bachelors pass. It should not surprise therefore that more than half of first-year enrolments fail or drop out, and only a third of funded students graduate in five years. The main reason for this state of affairs is the poor academic preparation of incoming students.'[140]

Since early 2020, Covid-19 lockdown damage to schooling has also been severe. Pupils lost between 50% and 70% of their schooling in 2020, when schools were often completely closed. Most suffered further disruption in 2021, when a rotational system obliged them to attend school on alternative days or weeks.[141]

About 20% of schools, mostly private and former Model C ones, successfully managed the transition from contact to remote learning, but most schools had limited internet access and online capacity and could not follow suit.[142]

Pupils affected by full or partial closures have missed out on work normally covered in a given year, as well as the foundations for future learning. Many teachers warn of 'significant declines in understanding' in all grades, along with considerable decreases 'in work ethic, study skills, concentration, and ability to work to deadlines'. Overall lockdown damage to schooling has been so severe that education expert Nic Spaull thinks 'it will take ten years to get back to pre-pandemic education outcomes'.[143]

These are the pressing problems on which the government needs to focus. Instead, the Bill seeks to give yet more power to an inept and inefficient state, which has signally failed to improve the quality of schooling over close on 30 years – yet is now intent on subjecting parents and their elected SGBs to dirigiste dictates unlikely to help improve the quality of schooling in any meaningful way.

[139] businessnesslive.co.za, 3 May 2018
[140] Ibid
[141] Financial Mail 14 October 2021, Business Day 26 January 2022
[142] Financial Mail 14 October 2021
[143] Ibid, Daily Maverick 30 August 2021

6 The way forward

The damaging amendments in the Bill – as earlier identified in this submission – serve no constructive purpose and should simply be withdrawn. Positive changes, as outlined above, are worth retaining. However, given the overall legislative overload in recent years, the NCOP should carefully consider all the ramifications of these changes before endorsing them. Every effort must also be made to ensure that all damaging changes are excised and that only the positive ones go forward.

The government's overall aim must also be to embrace real reforms aimed at effectively improving the quality of schooling and ensuring that the nation gets real value for the vast sums allocated to schooling and other aspects of education.

The most effective real reform would be to end the centralised and top-down way in which schooling is currently delivered. This can be achieved redirecting much of the revenue now being badly spent by the government into tax-funded vouchers for schooling for low-income households.[144]

Families empowered in this way would have real choices available to them. Schools would then have to compete for their custom, which would help to keep costs down and push quality up. Dysfunctional public schools would have to improve the quality of their delivery, while many more independent schools would be established to help meet burgeoning demand.

This would truly empower the poor, give them the same choices that the middle class enjoy, and bring about a rapid increase in the quality of schooling – as other countries and cities that have introduced school vouchers have already experienced.

South African Institute of Race Relations NPC **31st January 2024**

[144] https://irr.org.za/reports/occasional-reports/overcoming-the-odds-why-school-vouchers-would-benefit-poor-south-africans