23 September 2016

To: Adv. Lynn Coleridge-Zils
Director
Western Cape Education Department

Re: Draft Western Cape Provincial School Education Amendment Bill, 2016

Submitted by: Equal Education (EE)

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EQUAL EDUCATION SUBMISSION ON THE DRAFT WESTERN CAPE PROVINCIAL SCHOOL EDUCATION AMENDMENT BILL, 2016

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Executive Summary

1. In August 2016 the Western Cape Education Department (WCED) released for public comment a draft bill to amend the Western Cape Provincial School Education Act 12 of 1997 ("the Western Cape Schools Act" or "principal Act").

2. The proposed amendments included the addition of certain definitions that were not in the principal Act, the deletion of references to the South African Schools Act 84 of 1996 ("SASA"), the introduction of the Western Cape Schools Evaluation Authority ("WCSEA"), the introduction of collaboration and donor-funded schools, amending the composition of School Governing Bodies (SGB) in these schools, the introduction of intervention facilities, and finally the allowance of alcohol at schools.

3. This submission is made by Equal Education (EE) in response to the call for public comment. It is EE's view that the proposed amendments are variously unlawful, contrary to the spirit of democracy and redress in education, redundant, unlikely to improve educational outcomes and potentially directly harmful.

The introduction of the Western Cape Schools Evaluation Authority

4. The proposed establishment of the WCSEA appears to create overlapping, and potentially conflicting, roles for the Head of Department and the WCSEA. Within the context of the extant national Whole Schools Evaluation framework, EE is of the view that the creation of an additional bureaucratic structure for monitoring and evaluation does not seem justified.

5. Rather than enhancing monitoring and evaluation beyond WSE by introducing independent accountability that runs through all levels of the education system, the WCSEA will effectively act as the personal inspectorate of the Provincial Minister. The comprehensive power and extraordinary wide discretion afforded to the political head to hire and fire and determine the duties of the CE and assessors, undermines the WCSEA's purported independence. The danger of establishing the WCSEA under the sole direction of the political head is that this could result in an abuse of power that targets certain categories of schools.

6. While not denying the importance of holding schools accountable, it is striking that the proposed amendments describe monitoring and evaluation in detail at the expense of a very thin description of the most significant need – support mechanisms for schools that require improvement. This again highlights that the establishment of the WCSEA fails to "fill the gaps" in existing frameworks and is, at best, redundant. Rather than introducing additional monitoring and evaluation

structures, the focus of reform initiatives should be to to strengthen districts' supportive role and internal accountability frameworks.

7. The WCSEA may well be the tool through which schools are classified as "underperforming" and are subsequently compelled to become collaboration schools.

The establishment of collaboration schools and donor-funded public schools

8. By allowing private operating partners or donors to constitute a majority on School Governing Bodies of collaboration schools, the proposed amendments run directly contrary to SASA, and compromise democratic school governance. However, national legislation must prevail over provincial in cases such as this: SASA is a key legislative instrument through which uniformity in education can be achieved following years of racially segregated education administrations. It is similarly important for equality and redress, and the parental role in school governance is well established in jurisprudence.

9. Further, collaboration schools do not present a systemic solution to improve education outcomes. Notwithstanding individual successes, the overall effects of this kind of school model internationally are decidedly mixed.

10. Huge questions remain about the form both collaboration schools and donor funded schools will take, as well as the vetting and oversight of the donors, and the broad grounds on which a school can be compelled to become part of this project.

11. This is compounded by the fact that the amendments differ from the pilot in several key aspects, including SGB buy-in and admissions. Several of the assurances and safeguards present in the pilot are not present in the Amendment Bill. Nor is the pilot complete: legislating based on this is premature and irrational.

12. This scheme is touted as an innovative plan to improve the worst off schools. But at heart, it undermines poor and working class parents' say over their children's education. It also represents the state giving up on improving these schools itself.

The establishment of intervention facilities

13. The proposed intervention facilities are extremely vaguely described. There is a risk that such facilities will:

    a) Contravene the suggestions of the 1995 Inter-Ministerial Committee on Young People at Risk (IMC) and South African Law Commission (SALC)

review of the Child Care Act by diverting the focus on preventative and community-centred care for youth at risk to a model of isolated and exclusionary care that has been proved ineffective.

b) Stigmatize youth that are sent to such facilities

c) Violate national legislation relating to schools suspension and expulsion; and,

d) Unfairly submit Western Cape learners to prolonged disciplinary interventions that their peers in the rest of the country do not have to face.

14. Given the lengthy process of transforming the highly problematic system of Reform Schools of the Apartheid era, EE is of the view that the introduction of intervention facilities would be a regressive step. Resources should instead be spent on ensuring the establishment of a proper functioning inclusive education system that supports all learners, without having to isolate and exclude learners at risk from their families and communities, or to deny them the opportunity to have a normal schooling experience.

The allowance of alcohol on school premises

15. The proposed amendments allow principals and SGBs full discretion to permit the use and sale of alcohol at schools or at school activities for *any* purpose without restrictions relating to the time of day that alcohol is sold or used, or any other criteria.

16. Both the DBE and the Western Cape Government have taken heed of statistics that show the devastating effects of drug and alcohol abuse in South Africa, and *especially* in the Western Cape. Their policy documents and safety guides repeatedly emphasize the need to keep schools as alcohol and drug free zones, and to take proactive steps to promote healthy behavior and lifestyles and prevent alcohol and drug abuse.

17. The proposed section 45(B)(i) does not further this mandate and should be removed in its entirety.

Introduction

18. In August 2016 the Western Cape Education Department (WCED) released for public comment a draft bill[1] to amend the Western Cape Provincial School Education Act 12 of 1997 ("the Western Cape Schools Act" or "principal Act").

19. The proposed amendments include the addition of certain definitions that were not in the principal Act, the deletion of references to the South African Schools Act 84 of 1996 ("SASA"), the introduction of the Western Cape Schools Evaluation Authority ("WCSEA"), the introduction of collaboration and donor-funded schools, amending the composition of School Governing Bodies (SGB) in these schools, allowance of alcohol at schools, and finally the introduction of intervention facilities.

20. Equal Education (EE) is a membership-based democratic movement of learners, teachers, parents and community members. It is a registered non-profit organisation. Its core objective is to work for and campaign to achieve quality and equality in education in South Africa. Equal Education conducts a broad range of activities to advance this objective, including advocacy, research, policy analysis and, where necessary, litigation.

21. This submission is in response to the call for public comment and will focus on the policy and legal concerns that EE has in respect of the following areas:

    a. The introduction of the Western Cape Schools Evaluation Authority
    b. The establishment of collaboration schools and donor-funded public schools
    c. The establishment of intervention facilities
    d. The allowance of alcohol on school premises

[1] Western Cape Provincial School Education Amendment Bill, 2016 ("the Draft Bill").

A. The Western Cape Schools Evaluation Authority

22. The draft Bill intends to amend the principal Act by creating an independent body to monitor and evaluate various aspects of education in schools, and advise the provincial Minister of Education on these.

23. The WCSEA's main function will be advisory but it will also have inspection, research and reporting functions.

The proposed amendments

24. Clause 6 of the draft Bill proposes to amend the principal Act through the introduction of sections of 11A to 11H.

25. In terms of the proposed section 11A of the draft Bill, the Provincial Minister is empowered to establish a purportedly independent evaluation authority known as the WCSEA. The evaluation authority will be headed by the Chief Evaluator ("CE") who shall work together with school assessors.

26. Significantly, in terms of the proposed section 11A, the Provincial Minister has the power to appoint and remove the CE and school assessors. The CE is appointed for a term of three years, with the option of reappointment for one further term.

27. Proposed section 11B provides eligibility criteria for the appointment of the CE and school assessors.

28. The removal of office of the CE or any school assessor is provided for in proposed section 11C. The provincial Minister is empowered to remove the CE or school assessor - after following due process - if they no longer meet the eligibility criteria in 11B above or for any other reasonable ground which includes misconduct, incapacity or incompetence.

29. The CE and school assessor's remuneration and allowances are subject to a determination by the Provincial Minister from the provincial education budget, in terms of proposed section 11E.

30. General administrative and infrastructure support for the CE's office and WCSEA will be sourced from the provincial department. The Head of Department is mandated by proposed section 11F of the draft bill to designate department officials to assist the WCSEA in the performance of its function. It is unclear whether these officials will be the same officials who currently play the evaluation function in districts in the provincial department.

31. In terms of proposed section 11D the CE as head of the WCSEA has the responsibility to inform the Minister of the following:

a. The quality of education in schools;
b. The extent to which education meets learners' needs through a holistic approach;
c. Educational standards achieved in the school;
d. The quality of leadership and management in the school;
e. The management of financial resources in the school;
f. The development of internal procedures of self-evaluation and the production of school improvement plans;
g. The behaviour and attendance of learners and staff;
h. Social and cultural development in the school;
i. Performance management and development of educators in the school;
j. The relationship between parents, the community and the school.

32. In addition to these specific functions, the CE has an additional advisory function in terms of proposed section 11D(2) of the draft Bill of advising the Minister on any matter that the Minister requests in writing (including inspection of a school or class in a school as may be specified in the request).

33. Furthermore, in terms of proposed section 11D(6), the Provincial Minister is empowered to authorize additional duties and powers of the CE, and to revoke any such authorization.

34. Proposed section 11D empowers the CE to give effect to their functions through conducting inspections of schools, research and reporting on his/her findings.

35. We will now proceed to set out our concerns with the proposed WCSEA.

No clear alignment with existing frameworks for monitoring and evaluation

36. In order to assess the import and value of the proposed introduction of the WCSEA in the Western Cape, it bears emphasis that there is an extant national framework for monitoring and evaluation of schools. EE is of the view that the establishment of a separate bureaucratic structure for monitoring and evaluation, in the form of the WCSEA, is at best redundant, and at worst fails to align with national frameworks and established structures for monitoring and evaluation.

37. The legislative framework that currently applies to the monitoring and evaluation process in schools is as follows:

a. The Constitution of the Republic of South Africa, 1996 ("the Constitution") designates that the provision of basic education is a concurrent function between National and Provincial Government, in terms of Schedule 4.
b. Section 61(e) of SASA empowers the National Minister of Basic Education to make regulations to prescribe a national process for the monitoring and evaluation of education in public and independent schools.
c. Section 3(4) of the National Education Policy Act, 1996 ("NEPA") furthermore grants the National Minister the power to determine a

national policy for, amongst other things, monitoring and evaluation of the entire education system.

d. The Whole School Evaluation (WSE) policy published in Government Gazette No 22512 of July 2001 is such a national policy. The WSE policy provides for a national framework for evaluation of the entire education system. The framework comprises self-evaluation in schools supported by external evaluation by the provincial education department. In terms of the WSE policy, provinces are responsible for appointing a competent, well-trained and accredited supervisory unit, with appropriate administrative support. Significantly, the WSE Policy provides that provincial supervisory units (responsible for the day-to-day operations of whole-school evaluation) must function under the direction of the Head of the Provincial Department, within a nationally co-ordinated framework.

e. In addition to this, section 9 of the Western Cape School Education Act empowers the provincial Head of Department the power to authorize, in writing, a person to inspect a school or hostel, in consultation with the principal of the school concerned, for the purpose of evaluating performance or monitoring compliance with national norms and standards.

38. Accordingly, the function of provincial monitoring and evaluation is subject to the standards and structures set out in national policy, which generally identifies the Head of Department as primarily responsible for coordinating this role.

39. Against this background, it is unclear to what extent the functions of the proposed WCSEA overlap or conflict with those already granted to the Head of Department. Indeed, as envisaged in the current proposed amendments, the introduction of an additional bureaucratic structure to perform evaluation and monitoring of schools (at the behest of the Provincial Minister) does not appear justifiable.

40. The confusion regarding overlapping roles is compounded by the proposed section 11F which requires the Head of Department to provide general support and resources to the WCSEA to perform its functions, and shall designate officials from the Department to “assist” the WCSEA. However, the proposed amendments do not detail any substantive relationship between the Head of Department and WCSEA, so as to ensure alignment of their monitoring and evaluation functions (and the most efficient use of resources).

41. It is EE’s view that national frameworks regarding monitoring should be properly implemented rather than establishing additional, parallel structures whose responsibilities duplicate or otherwise potentially conflict with that of existing structures.

Lack of support for schools

42. To the extent that the proposed WCSEA is aimed at establishing a separate bureaucracy capable of “filling gaps” in existing structures, the proposed

amendments are silent on the most significant need – supportive mechanisms to assist schools that require improvement[2].

43. In this regard, it is striking that the proposed amendments deal at length with how schools will be monitored and evaluated, but hardly mention what kind of support is envisaged for schools. At best, the CE is empowered to publish reports and make recommendations for improvement.

44. In addition to duplicating bureaucratic functions, the WCSEA is likely to experience the same pitfalls as the existing WSE Policy. Complaints about the WSE's approach centre on the tendency of district officials to visit schools only to monitor the implementation of policies and rarely to provide the support schools need in order to do that. Therefore, rather than introducing more monitoring and evaluation structures, what is necessary is for districts to recognise the essential nature of their support role and revise their own accountability structures.[3]

45. As researchers have noted, there is a need for "reciprocity of accountability"[4] and ensuring that "[f]or every increment of performance I require of you, I have a responsibility to provide you with the additional capacity to produce that performance". Thus, the department needs to provide adequate support before it can enforce accountability measures.

46. Absent this component of support, there is a risk that the WCSEA will function solely as a "policing" and "punitive" structure rather than a constructive evaluation mechanism for schools and communities.

The WCSEA operates under the whim of the Provincial Minister and lacks independence

47. The proposed amendments purport to establish an "independent" evaluations authority.

48. However, in substance, the Provincial Minister has a broad discretion to hire, fire and establish the powers of the WCSEA as follows:

    a. The power to establish the WCSEA is entirely at the discretion of the Provincial Minister (proposed section 11A(1)).
    b. The power to appoint the CE and assessors vests solely with the Provincial Minister (proposed section 11A(2)).

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[2] De Clercq, F. (2007). School monitoring and change: a critical examination of Whole School-Evaluation. *Education as Change*, 11(2), 79-113.
Shalem, Y. (2003). Do we have a theory of change? Calling change models to account. *Perspectives in Education*, *21*(March), 29–49.

[3] De Clercq, F. (2007).

[4] Elmore, R. F. (2006). *School Reform from the Inside Out: Policy, Practice, and Performance*. Cambridge, Mass.: Harvard Education Press, 89.

c. The CE and assessors may be removed by the Provincial Minister prior to completion of their term on, amongst others, the broad basis of "*any* reasonable ground" (proposed section 11C(b)).

d. In addition to the powers and duties of the CE specifically set out in the proposed sections, the Provincial Minister may authorise the CE to perform *any* additional duties and exercise additional powers if the Minister believes that the CE has the requisite capacity, and it would be in the public interest to do so. The Provincial Minister may similarly revoke such authority if she believes that the CE no longer has the capacity or it is no longer in the public interest for the CE to perform these additional functions (proposed section 11D(6)).

e. The Provincial Minister is also empowered, in terms of the proposed secion 11D(6)(e), to revoke certain of the duties and powers of the CE specifically listed in the legislation (subject to consultation with the CE). This in essence means the Provincial Minister can have the final say on which duties and functions the CE and school assessors perform.

49. Furthermore, the Provincial Minister is empowered to direct the CE to advise the Provincial Minister on *any matter* specified in a written request, and to inspect and report on any school or any class in any school. The scope of this power is breathtaking, as the Provincial Minister would be entitled to direct the CE to utilise his/her invasive powers of inspection to advise and report to the Provincial Minister on any matter (without any limiting criteria).

50. In addition, the extraordinarily wide discretion afforded to the Provincial Minister to, amongst others, (a) revoke statutorily determined powers and duties, and (b) determine additional powers and duties of the CE, and (c) ; direct the CE to advise, inspect and report on *any* matter whatsoever offends the principle of legality.[5]

51. When read together, it is apparent that the purported independence of the WCSEA is severely undermined as the political head wields considerable discretion in determining the duties, powers and functions of the CE and school assessors. The Constitutional Court has emphasized in numerous cases that independent bodies charged with investigative functions must have sufficient institutional and operational independence to shield them from actual or perceived political influence.[6] Leaving the Minister with wide discretion to add or subtract to the functions of the WCSEA beyond those enumerated in the statute is inimical to the entity's independence.

52. Similarly, the Provincial Minister's power to remove the CE and school assessors prior to the completion of their term on a broad basis including that of "reasonable grounds" may undermine the WCSEA's independence. The Constitutional Court

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[5] See *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 200 (3) SA 936 (CC); *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC)

[6] See *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) ("*Glenister II*")*Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC)

has recently emphasised once more that the power of the political or executive authority in removing the head of an independent investigative entity must be circumscribed by clear guidelines in order to safeguard the entity's independence.[7]

53. If the WCSEA is to play any role of value in effectively enhancing monitoring and evaluation beyond existing frameworks, then the necessity for accountability should run through all levels of the system – from the classroom, through the districts to the provincial department itself.

54. Disappointingly, however, rather than enhancing independent accountability at all levels, the current proposed structure of the WCSEA will effectively act as the personal inspectorate of the Provincial Minister, operating entirely under his/her behest and influence. As elaborated below, this has the potential to result in an abuse of power and the targeting of specific categories of schools.

The use of the WCSEA to identify potential "collaboration schools"

55. Although not stated clearly, it is telling that the introduction of the WCSEA is being proposed alongside the proposal to introduce collaboration schools.

56. Proposed section 12C empowers the MEC to declare a collaboration school "if he or she is satisfied that such declaration is in the interests of education at the school, *having regard to relevant reports on the school, including reports on the performance of the school*".

57. As noted above, proposed section 11D(2) empowers the Provincial Minister to direct the CE to prepare a report on any school.

58. Read alongside each other, a worrying picture emerges from the proposed amendments. On the current provisions, with their broad scope, it is at least possible that the WCSEA will be used as part of the process of identifying schools that will then be compelled to become collaboration schools.

Using the WCSEA to create competition between schools will not improve performance

59. Section 11D (3) of the proposed amendment states that "*the Chief Evaluator shall publish reports, including empirical findings and, where applicable, recommendations for improvement.*"

60. In the press statement that accompanied the release of the proposed amendments, Western Cape Minister of Education, Debbie Shafer, stated that the new assessments will focus on "*a smaller set of criteria… especially the*

[7] See *McBride v Minister of Police* [2016] ZACC 30 (6 September 2016)

quality of teaching and learning in the classroom."[8] She then added that the tools and criteria for measurement have yet to be finalised.

61. According to MEC Debbie Shafer, the idea of the Schools Evaluation Authority is "to publicize results so that parents can have a look at them and see how their schools are performing and hopefully also by making things more transparent it will also enforce more accountability at the school, so the schools will have a bit of healthy competition between each other to see that they can… that they actually improve."[9]

62. Taken together, the refinement of the evaluation criteria and the publication of evaluation results for parents to use in the choice of their children's schools, points to a policy objective of promoting school competition as a means to increase school performance.

63. While an increase in school accountability and transparency is an appealing idea, research is at best mixed on whether competition amongst schools increases education quality.[10] A report published by the OECD in 2011 provides a systematic review of evidence from school choice programs in OECD countries. It cites various empirical studies that "find no significant benefit in terms of achievement in attending another public school than their local one for transferring students."[11] Furthermore, the report shows that across the board, "more affluent parents are more likely to exercise school choice."[12] This is because, "information acquisition has very high costs, especially for parents who lack the needed social capital, the resources, the time, the connections or the cultural resources to effectively choose."[13] As such, the poorest students will be left at the worst performing schools. And while those schools might have a publicity-oriented response to school competition, they rarely have a performance-oriented response to competition.[14] School choice programs in England, the USA and Chile resulted in an increase in educational inequality and stratification.[15]

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[8] Western Cape Government. Department of Education. (2016) *Proposed Amendments to Western Cape Provincial School Education Act, 1997*. 24 August. 2016. Web.

[9] SABC News and Current Affairs. (2016) *W Cape Proposes Amendments to Education Act.* SABC. 26 Aug. 2016. Radio.

[10] See, for example, Cullen, J., B. Jacob and S. Levitt. (2006) The Effects of School Choice on Participants: Evidence from Randomized Lotteries. *Econometrica*. 74(5).
Hastings, J., T. Kane & D. Staiger. (2005) Parental Preferences and School Competition: Evidence from a Public School Choice Program. *NBER Working Paper n°11805.* National Bureau of Economic Research

[11] Musset, P. (2012). School Choice and Equity: Current Policies in OECD Countries and a Literature Review. *OECD Education Working Papers*. 66. OECD Publishing. 25.

[12] Ibid. 32.

[13] Ibid. 33.

[14] Hess, Frederick M. (2002) *Revolution at the Margins: The Impact of Competition on Urban School Systems*. Washington, D.C.: Brookings Institution Press. 5.

[15] Ball, S.J. (2006). *Education Markets, Choice and Social Class: the market as a class strategy in the UK and the USA.*

64. Furthermore, since it is the worst-performing schools that will be affected most by the recommendations of WCSEA, it is these schools that are most likely to spend a disproportionate amount of time focusing on the new, narrower evaluation criteria. In the United States, this has meant that students at underperforming schools are disadvantaged further as their schools focus on limited evaluation criteria and neglect, "those learning possibilities that emphasize the development of a critical intelligence, the stimulation of our imagination, [and] the quest to make meaning out of our own experience."[16]

Conclusion

65. Within the context of the extant national WSE monitoring and evaluation framework, EE is of the view that the creation of an additional bureaucratic structure for monitoring and evaluation does not seem justified. The proposed establishment of the WCSEA appears to create overlapping, and potentially conflicting, roles for the Head of Department and the WCSEA.

66. Rather than enhancing monitoring and evaluation beyond WSE by introducing independent accountability that runs through all levels of the education system, the WCSEA will effectively act as the personal inspectorate of the Provincial Minister. The comprehensive power and extraordinary wide discretion afforded to the political head to hire and fire and determine the duties of the CE and assessors, undermines the WCSEA's purported independence. The danger of establishing the WCSEA under the sole direction of the political head is that this could result in an abuse of power that targets certain categories of schools.

67. While not denying the importance of holding schools accountable, it is striking that the proposed amendments describe monitoring and evaluation in detail at the expense of a very thin description of the most significant need – support mechanisms for schools that require improvement. This again highlights that the establishment of the WCSEA fails to "fill the gaps" in existing frameworks and is, at best, redundant. Rather than introducing additional monitoring and evaluation structures, the focus of reform initiatives should be to strengthen districts' supportive role and internal accountability frameworks.

Hsieh, C., Urquiola, M. (2006) The effects of generalized school choice on achievement and stratification: Evidence from Chile's voucher program*. Journal of Public Economics*. 90. 8-9. 1477-1503.

Whitty, G. (1997). Creating Quasi-Markets in Education: A Review of Recent Research on Parental Choice and School Autonomy in Three Countries. *Review of Research in Education. 22. 12-21.*

[16] Shapiro, S. (2005). Public school reform: The mismeasure of education. In H. Shapiro & D. Purpel, (Eds.), *Critical social issues in American education: Democracy and meaning in a globalizing world, 3rd edition.* Mahwah, NJ: Lawrence Erlbaum Associates. 289.

B. Collaboration Schools and Donor Schools

Description of the proposed amendments

68. The Draft Bill seeks to introduce two categories of schools:

    a. Collaboration schools (proposed section 12C); and
    b. Donor funded public schools (proposed section 12D).

69. These categories specifically enable the formal introduction of private actors into the public schooling system, namely:

    a. A "*donor*" defined as a person "who provides funds or property to a collaboration school or donor funded public school for the purposes of improving education delivery in the province"; and
    b. An "operating partner" defined as "a person or an organisation that places their capacity, skills or resources at the disposal of a school to empower the governing body, school management team and educators at the school to develop systems, structures, cultures and capacities necessary to deliver quality education".[17]

70. Proposed section 12C reads:

    Collaboration Schools

    (1) The [MEC] may identify a public school contemplated in section 12(1)(a) to (f) for declaration as a collaboration school if he or she is satisfied that such declaration is in the interests of education at the school, having regard to relevant reports on the school, including reports on the performance of the school.

    (2) Subject to subsection(1), the [MEC] may enter into an agreement with—

    (a) a donor;
    (b) an operating partner; and
    (c) the governing body of a public school,

    in terms of which an existing public school contemplated in section 12(1)(a) to (f) is to be declared a collaboration school.

    (3) The [MEC] may enter into an agreement with a donor and an operating partner for the establishment of a new collaboration school and establish the school.

[17] It should be noted that this definition suggests that an operating partner may be an individual natural person or an organisation. It is unclear how an individual natural person can function as an operating partner.

(4) The agreements contemplated in subsections (2) and (3) shall contain the minimum requirements prescribed by the [MEC].

(5) On conclusion of an agreement contemplated in subsection (2), the [MEC] may, by notice in the Provincial Gazette, declare the public school concerned to be a collaboration school.

(6) On conclusion of an agreement with a donor and an operating partner as contemplated in subsection (2)(a) and (b), and notwithstanding that the [MEC] has not entered into an agreement with the governing body as contemplated in subsection (2)(c), the [MEC] may, by notice in the Provincial Gazette, declare the public school concerned to be a collaboration school

(7) The [MEC] may not make a declaration contemplated in subsection (5) or (6) unless he or she has called for public comment in respect of the intended declaration and given due consideration to any comments received.

(8) In the event of the termination of an agreement contemplated in subsection (2) or (3)—

(a) the school concerned shall cease to be a collaboration school;
(b) the [MEC] shall, by notice in the Provincial Gazette, declare the school to be the applicable type of public school contemplated in section 12(1)(a) to (f); and
(c) a new governing body shall be composed in the prescribed manner.

(9) The membership of the governing body of a collaboration school shall comprise a majority of representatives of the operating partner with voting rights: Provided that the [MEC] may, on good cause shown, declare that the governing body of a particular collaboration school shall comprise 50% of representatives of the operating partner and 50% of the other members of the governing body.

(10) The Western Cape Education Department may make transfer payments to a collaboration school for the purposes of funding the allocation of new posts and the filling of vacant posts as contemplated by the Employment of Educators Act and the Public Service Act, 1994 (Proclamation 103 of 1994).

(11) The governing body of a collaboration school may, subject to the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law, appoint educators and non-educators to fill the posts contemplated in subsection (10) in accordance with the staff establishment as determined by the governing body.

71. Whilst detail remains unclear from the proposed amendments, it appears that collaboration schools, in essence, involve the formal introduction of two private actors - a donor and "operating partner" - into the school's system. This may involve agreement by the SGB, but the proposed amendments also empower the Provincial Minister to impose the introduction of donors and operating partners in a school without agreement by the SGB. Once declared a "collaboration school", representatives of the operating partner are afforded majority representation on the SGB as the default position.

72. It should be noted that collaboration schools have already been implemented by the WCED as part of a pilot project initiated at the beginning of the 2016 academic year. EE has raised concerns about the pilot project, which do not bear repetition here. Significantly, however, the purported aim of the pilot programme was to test and evaluate the efficacy of collaboration schools in order to determine its viability as a type of public school. However, despite the pilot project only being in its early phases and without significant results, the proposed amendments seek to codify the model into law.

73. Section 12D reads:

"Donor funded public schools
(1)
(2) The [MEC] may enter into an agreement with—

(a) a donor; and
(b) the governing body of a public school,

in terms of which an existing public school contemplated in section12(1)(a) to (f) is to be declared a donor funded public school if he or she is satisfied that such declaration is in the interests of education at the school.

(3) The [MEC] may enter into an agreement with a donor for the establishment of a new donor funded public school and establish the school.

(4) The agreements contemplated in subsections (1) and (2) shall contain the minimum requirements prescribed by the Provincial Minister.

(5) On conclusion of an agreement contemplated in subsection (1),the [MEC] may, by notice in the Provincial Gazette, declare the public school concerned to be a donor funded public school.

(6) The MEC may not make a declaration contemplated in subsection (4) unless he or she has called for public comment in respect of the intended declaration and given due consideration to any comments received.

(7) In the event of the termination of an agreement contemplated in subsection (1) or (2)—

(a) the school concerned shall cease to be a donor funded public school; (b) the [MEC] shall, by notice in the Provincial Gazette, declare the school to be the applicable type of public school contemplated in section 12(1)(a) to (f); and
(c) a new governing body shall be composed in the prescribed manner.

(8) The membership of the governing body of a donor funded public school— (a) may include representatives of the donor with voting rights; and (b) may comprise a majority of representatives of the donor with voting rights."

74. The category of "*donor funded public schools*" is a new introduction with no precedent in law. In essence, it seems that where there is a donor of some form contributing to a public school, the Provincial Minister may enter into an agreement with the donor and SGB to declare the school a "*donor funded public school*". The only criteria is that the Provincial Minister must be satisfied that such declaration is "in the interests of education at the school". Representatives of donors at such schools are entitled to be voting members on the SGB and may comprise the majority of members on the SGB.

75. We now proceed by setting out policy and legal concerns regarding the introduction of these two new forms of – in effect – privately run public schools.

No criteria guiding discretion of Provincial Minister to declare collaboration and donor-funded public schools

76. It is concerning that the Provincial Minister may declare a school as a collaboration school or donor-funded public school guided only by their subjective satisfaction that such declaration is "*in the interests of education at the school*". This exceptionally broad and subjective assessment opens the door to abuse of decision-making powers.

77. In the case of donor-funded public schools, the Provincial Minister is not even required to have regard to relevant reports on the school (as in the case of collaboration schools). This deepens the potential for abuse and decision-making based primarily on subjective assessment.

78. In both cases, there are no clear guiding criteria which limit the type of public schools which would qualify for such extreme measures as introducing private parties into the schooling environment.

79. The proposed amendments thus fail at the outset to articulate a lawful basis upon which public schools can be declared to fall within these new categories of privately influenced schools.

Proposed composition of SGBs conflicts with national legislation and is unconstitutional

80. Once declared a collaboration school, representatives of the operating partner shall comprise a majority of the members of the SGB (with voting rights). The Provincial Minister may, on good cause shown, declare that the SGB must comprise 50% of representatives of the operating partner and 50% of other SGB members.

81. Once declared a donor funded school, representatives of the donor are entitled (apparently merely as a result of their funding contribution) to include representatives as voting members on the SGB, and may even comprise a majority of SGB representatives.

82. The irresistible inference to be drawn is that donors and other private actors are being empowered to literally buy influence and control over school governing bodies.

83. This strikes a chord contrary to the fundamental tenets of the provisioning of public education that is primarily about the best interests of learners and the public good.

84. This model is also evidently unlawful as it conflicts with national legislation which determines the national framework for SGB composition.

85. Section 23 of SASA sets out the composition of SGBs. It stipulates that SGBs are made up of the principal (as a representative of the HoD) and elected and co-opted members. Members must comprise parents of learners, educators and non-educators and learners who are at least in the eighth grade. Learners are to be elected by the Representative Council of Learners. To avoid conflict of interest, section 23(3) prohibits parents employed at the school from representing parent interests on the SGB.

86. Through section 23(6) a SGB is entitled to co-opt members who, with one exception, are not entitled to vote. Parents are to constitute the majority on the SGB. If the number of parents drop below majority representation, then the SGB must temporarily co-opt parent(s) who will have voting rights. Where members are no longer learners, parents of learners or staff at the school they cease to be a representative on the SGB.

87. Section 23 of SASA reads:

> "*(1) Subject to this Act, the membership of the governing body of an ordinary public school comprises—*
> *(a) elected members;*
> *(b) the principal, in his or her official capacity;*
> *(c) co-opted members.*
>
> *(2) Elected members of the governing body shall comprise a member or members of each of the following categories:*

(a) Parents of learners at the school;
(b) educators at the school;
(c) members of staff at the school who are not educators; and
(d) learners in the eighth grade or higher at the school.

(3) A parent who is employed at the school may not represent parents on the governing body in terms of subsection (2) (a).

(4) The representative council of learners referred to in section 11 (1) must elect the learner or learners referred to in subsection (2) (d).

(5) The governing body of an ordinary public school which provides education to learners with special needs must, where practically possible, co-opt a person or persons with expertise regarding the special education needs of such learners.

(6) A governing body may co-opt a member or members of the community to assist it in discharging its functions.

(7) The governing body of a public school contemplated in section 14 may co-opt the owner of the property occupied by the school or the nominated representative of such owner.

(9) Subject to subsection (10), co-opted members do not have voting rights on the governing body.

(10) The number of parent members must comprise one more than the combined total of other members of a governing body who have voting rights.

(11) If the number of parents at any stage is not more than the combined total of other members with voting rights, the governing body must temporarily co-opt parents with voting rights.

(12) If a parent is co-opted with voting rights as contemplated in subsection (10), the co-option ceases when the vacancy has been filled through a by-election which must be held according to a procedure determined in terms of section 28 (d) within 90 days after the vacancy has occurred.

(13) If a person elected as a member of a governing body as contemplated in subsection (2) ceases to fall within the category referred to in that subsection in respect of which he or she was elected as a member, he or she ceases to be a member of the governing body."

88. There is nothing in the provisions of section 23 of SASA which would allow a third party entity to control a SGB. In fact, there is no basis in section 23 for any person who is not a parent, educator, learner or member of staff to vote in matters to be determined by the SGB.

89. Section 28 of SASA deals with election processes. This provision gives provincial MEC's the power, by notice in the government gazette, to determine the following:

> *"(a) the term of office of members and office-bearers of a governing body;* [though subject to the maximum terms contained in section 31 of SASA]
> *(b) the designation of an officer to conduct the process for the nomination and election of members of the governing body;*
> *(c) the procedure for the disqualification or removal of a member of the governing body or the dissolution of a governing body, for sufficient reason in each case;*
> *(d) the procedure for the filling of a vacancy on the governing body;*
> *(e) guidelines for the achievement of the highest practicable level of representativity of members of the governing body;*
> *(f) a formula or formulae for the calculation of the number of members of the governing body to be elected in each of the categories referred to in section 23 (2), but such formula or formulae must provide reasonable representation for each category and must be capable of application to the different sizes and circumstances of public schools; and*
> *(g) any other matters necessary for the election, appointment or assumption of office of members of the governing body."*

90. SASA therefore sets out a detailed national framework in respect of the essential composition of school governing structures and how they are to be composed. Whilst provincial regulation is allowed on certain practicalities, this is merely in relation to election processes rather than fundamental composition.

91. The composition of SGBs in the proposed new types of schools clearly conflict with the provisions of SASA. The Constitution provides guidance in such circumstances on which system will prevail.

<u>National legislation on composition of SGBs prevails</u>

92. The Constitution provides that the national and provincial legislature have concurrent competence to legislate on matters concerning education.[18]

93. The Constitution also makes provision for when conflicts arise between national and provincial legislation. Section 146(2) of the Constitution states that in the event of a conflict national legislation that applies uniformly across South Africa (like SASA) will prevail over provincial legislation if:

> *"(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.*

[18] Republic of South Africa. (1996). Schedule 4. *The Constitution of the Republic of South Africa, Act No. 108 of 1996.* Pretoria: Government Printers.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for—

(i) . . .

(v) the promotion of equal opportunity or equal access to government services …"

94. An examination of the Preamble to SASA indicates that the Act was introduced because it was:

"necessary to set uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa".

95. Parliament therefore envisaged SASA as legislation that would set uniform norms and standards for education delivery in public schools across the country, including the manner in which schools were to be governed, and had expressed as much.

96. The necessity for introducing norms and standards and a national framework for school governance is understandable given that SASA's preamble states that South Africa *"requires a new national system for schools which will redress past injustices in educational provision"*. In other words, the setting of norms and standards was needed to move away from the codified segregationist schooling model of the past (in which education was managed fragmentally) and towards a more equitable model in which learners, parents and educators at all schools accept *"responsibility for the organisation, governance and funding of schools"*[19] in partnership with the State.

97. As a reputable research professor in education explained while discussing the policy environment surrounding the enactment of SASA:

"in rethinking school governance and management, the Ministry of Education sought to create a united and integrated system of school governance and one that facilitated extensive participation in schools, particularly by parents. The key implication of the policy surrounding school governance and organisation was the need to devolve educational control to the schools through the statutory

[19] Republic of South Africa (RSA). (1996). Preamble. *South African Schools Act No. 84 of 1996*. Pretoria: Government Printer.

recognition of school governing bodies that were, in the main, composed of parents."[20]

98. Or put differently by another eminent South African professor in education:

"the 17 odd racialised education departments in the country were dissolved into a single national education department which assumed responsibility for developing a set of signature policies of which the most important was the South African Schools Act (SASA) of 1996 (Department of Education 1996). In terms of this Act, the schooling system was redefined as a single non-racial and equitable system. Significantly, also, the SASA made an attempt to bring disaffected parents back into the schooling system through the establishment of school governing bodies which gave parents considerable power over how their children's schools were to function"[21]

99. These interpretations are further confirmed by legal commentators:

"In order to democratize school governance and transform schools into democratic institutions, membership of SGBs comprises democratically elected parents, educators, non-teaching staff and learners in the case of all mainstream secondary schools. This composition of SGBs, as representatives of the community, provides, as per the Supreme Court of Appeal in the matter of Hoërskool Ermelo, for the broad participation in decision-making processes with emphasis on the contributions by parents. Governance is, as such, based on the core democratic values of representation, participation, openness, tolerance, rational discussion, collective decision-making and accountability which, accordingly are paramount in the quest for the realization of the best interests of schools and the provision of quality education"[22]

100. SASA was intended to inculcate a spirit of community participation and ownership in the running of schools. A cornerstone of this legislation is the introduction of a governance structure that brought together all the main stakeholders: parents, learners and teachers. As the *White Paper on Education and Training,* published in 1995, explains:

"the principle of ownership of the school by the community it serves is therefore a foundation for the successful implementation of the policy and the provision of quality basic general education for all."[23]

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[20] Yusuf Sayed. (2001) *Changing patterns of education management development in South Africa - Implementing education policies: The SA experience*. Cape Town: UCT Press. 191.

[21] Soudien, Crain. (2006) *'Enhancing our Freedoms': Education and Citizenship in South Africa*. UCT. 8-9.

[22] Serfontein, E. (2010). Liability of school governing bodies: a legislative and case law analysis. *TD The Journal for Transdisciplinary Research in Southern Africa*, 6(1), 93 - 112.

[23] Department of Education. (1995b). *White Paper on Education and Training, Notice 196*. Pretoria: Government Printers.

101. *The White Paper on the Organisation, Governance and Funding of Schools* (White Paper 2), released just nine months before the enactment of SASA, explains that a new "*national pattern"* for schooling was *"absolutely necessar*y" to move beyond the apartheid inherited education system:

"The new structure of the school system must deal squarely with the inheritance of inequality and ensure an equitable, efficient, qualitatively sound and financially sustainable system for all its learners. A coherent national pattern of school organisation, governance and funding is therefore absolutely necessary in order to overcome the divisions and injustices which have disfigured school provision throughout South Africa's history."[24]

102. White Paper 2 reveals SASA's purpose of ensuring a national, uniform and cohesive framework for education delivery in the country. Describing the principles underlying this new framework, White Paper 2 states:

"The new structure of school organisation should create the conditions for developing a coherent, integrated, flexible national system which advances redress, the equitable use of public resources, an improvement in educational quality across the system, democratic governance, and school-based decision making within provincial guidelines. The new structure must be brought about through a well-managed process of negotiated change, based on the understanding that each public school should embody a partnership between the provincial education authorities and a local community."[25]

103. White Paper 2 further places significant emphasis on parental rights in respect of children's education and shows the value which the legislature placed on parent involvement in school governance.

"1.10 The Ministry of Education has strongly endorsed parental rights in their children's education:

"Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by the state authorities with respect to the form that education should take and to take part in its governance. Parents have the inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling, whether provided by the state or not, subject to reasonable safeguards which may be required by law. The parents' right to choose includes choice of the language, cultural or religious basis of the child's education, with due regard to the rights of others and the rights of choice of the growing child." (Education White Paper 1, p. 21).

[24] Department of Education. (1996). The Organisation, Governance and Funding of Schools. White Paper 2. *Government Gazette*, *169*(16987). 10.

[25] Ibid. Principles Underlying a New Framework. 10.

1.11 The Ministry's proposals include a major role for parents in school governance, to be exercised in the spirit of a partnership between the provincial education department and a local community."[26]

104. Parents are considered best placed to have majority representation on school governing bodies not only because the stakes are highest for them but also because they are ordinarily the most in tune with the educational needs of their children. The Constitutional Court has characterised the school governing body structure designed by SASA as a *"beacon of grassroots democracy":*

"It accords well with the design of the legislation that, in partnership with the state, parents and educators assume responsibility for the governance of schooling institutions. A governing body is democratically composed and is intended to function in a democratic manner. Its primary function is to look after the interest of the school and its learners. It is meant to be a beacon of grassroots democracy in the local affairs of the school."[27]

105. The Constitutional Court has also described school governing bodies as *"vital lifeblood"* to a wholesome education. The Court reasoned that parents *"must be meaningfully engaged in the teaching and learning of their children"* and the presence of parent representatives on SGBs would ordinarily work to *"advance the legitimate interests of learners at a school."*

"It remains important to recognise that school governing bodies are a vital lifeblood to proper and fulsome learning and teaching. Parents must be meaningfully engaged in the teaching and learning of their children. The Schools Act carves out an important role for parents and other stakeholders in the governance of public schools. School governing bodies are made up in a democratic and participatory manner and ordinarily would advance the legitimate interests of learners at a school."[28]

106. As to the democratic and participatory nature of SGBs, the Constitutional Court has described SGBs as being *"akin to a legislative authority"* in which checks and balances are set out in detail in SASA:

"To my mind, therefore, a governing body is akin to a legislative authority within the public-school setting, being responsible for the formulation of certain policies and regulations, in order to guide the daily management of the school and to ensure an appropriate environment for the realisation of the right to education.[29]

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[26] Ibid. Parental Rights. 12.

[27] Head of Department of Education: Mpumalanga v *Hoerskool Ermelo ("Ermelo")* [2009] ZACC 32 at para 57.

[28] *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) at para 47.

[29] *Head of Department, Free State Province v Welkom High School and Another; Harmony High School and Another* ("*Welkom*") [2013] ZACC 25 at para 63. See also *Ermelo*, above*: School*

. . .

Second, the interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by the Act.

…

Parliament has elected to legislate on this issue in a fair amount of detail in order to ensure the democratic and equitable realisation of the right to education. That detail must be respected by the Executive and the Judiciary."[30]

107. In the Pillay case the Constitutional Court stressed that collective ownership of a school by parents, teachers and learners was a necessity if schools are to prosper:

"It needs to be emphasised however, that the strength of our schools will be enhanced only if parents, learners and teachers accept that we all own our public schools and that we should all take responsibility for their continued growth and success."[31]

108. The proposed amendments undermine the essential features of accountable, and grassroots governance within the national public education system by allowing for the possible control of Western Cape public schools by private actors.

109. The extreme revision to the fundamental nature and purpose of SGBs envisaged by the proposed amendments will not withstand constitutional scrutiny, as the national legislative framework is clearly necessary for establishing uniformity and must prevail.

Forced conversion to collaboration schools

110. The undermining of the essential feature of community participation and grassroots governance in schools is deepened by the startling proposal that agreement by SGBs to the collaboration school model will not necessarily be required.

111. In this regard, the proposed amendments make it possible for the Provincial Minister to declare a school to be a collaboration school without entering into an agreement with the school governing body (proposed section 12C(6)).

112. Significantly, in its project proposal for the introduction of a collaboration schools pilot programme, the WCED identified voluntary participation as a fundamental

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governing bodies are a vital part of the democratic governance envisioned by the Schools Act. The effective power to run schools is indeed placed in the hands of the parents and guardians of learners through the school governing body."

[30] *Welkom*, above at para 49.

[31] *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 185.

principle, saying "[b]uy-in to the concept as one of multiple improvement strategies is critical". It is not clear why buy-in would be considered critical in the pilot phase but not when the actual programme is rolled-out.

113. Research also makes it clear that buy-in on a school level is necessary for any improvement plan to have effect. Fullan[32] identifies stakeholder motivation as the most important aspect of educational change. McLaughlin[33] maintains that policies cannot "mandate what matters" in the classroom. She points out that the successful implementation of policies depends on both the capacity and will of teachers. While building capacity is hard, it is even more difficult and unlikely to influence implementers' will, beliefs and motivation through policy intervention. These are often a reflection of implementers' perspective of the value or suitability of the intervention. It is therefore imperative to get the buy-in from teachers and SGBs as it seems unlikely that they will be motivated to bring about change without buying into to the project.

114. Both mandatory conversion to collaboration schools and the private takeover of school governing bodies go directly against the democratic spirit in which SGBs were initially envisioned.

Teacher appointment processes in collaboration schools conflict with national legislation

115. Proposed section 12C(10) of the draft Bill permits the Western Cape Education Department to *"transfer"* payments to a collaboration school to be applied towards the filling of vacant posts and the allocation of new ones. The SGBs of these schools are empowered to appoint educators and non-educators to fill these posts (section 12C(11)).

116. Operating partners (in majority control of SGBs) are therefore given the authority to make public teacher appointments on behalf of government and with public funds. No other school governing bodies in the country have this kind of power, yet collaboration schools transfer such power to governing bodies where private partners have the majority say.

117. This also conflicts with sections 20(1)(i) and (j) of SASA. These sections merely allow SGBs to recommend the appointment of educators and non-educators to the HOD respectively. These sections read:

20. (1) Subject to this Act, the governing body of a public school must-

[32] Fullan, M. (2006). Change theory. A force for school improvement. *Centre for Strategic Education Seminar Series Paper No. 157, November 2006.* 8.

[33] McLaughlin, M. W. (1986). Learning From Experience: Lessons From Policy Implementation. *Education Evaluation and Policy Analysis*, *9*(2), 171–78.

(i) recommend to the Head of Department the appointment of educators at the school, subject to the Educators Employment Act, 1994 (Proclamation No. 10 138 of 1994), and the Labour Relations Act, 1995 (Act No. 66 of 1995);

(j) recommend to the Head of Department the appointment of non-educator staff at the school, subject to the Public Service Act, 1994 (Proclamation No. 103 of 1994), and the Labour Relations Act, L995 (Act No. 66 of 1995

118. This process is further affirmed by section 6 of the Employment of Educators Act, 1998.

119. The collaborative school model introduced by the Western Cape Bill clearly conflicts with SASA and related national legislation insofar as it creates a skewed process of teacher appointments in "privately-run" public schools.

No minimum requirements and obligations

120. The proposed amendments are disturbingly thin on any minimum requirements that agreements regarding collaboration schools and donor funded public schools would need to contain. The legislature defers this wholesale to a determination by the Provincial Minister in regulations.

121. The proposed amendments provide no guidance and criteria to key issues, such as:

a. What are the respective obligations of the donor and operating partner in a collaboration school?
b. What type of donors will be identified or accepted?
c. Are there limits to the type of contributions that donors may make to schools?
d. Will the operating partners and donors be required to operate on a non-profit basis?
e. Will admission criteria in collaboration schools and donor-funded public schools be selective?
f. Will operating partners in collaboration schools be required to be non-profit entities?
g. Will operating partners or donors be entitled to levy fees on learners?
h. Will collaboration schools and donor funded schools be subject to regular monitoring and assessment?
i. Who will ultimately be responsible for maintaining oversight and accountability over donors and operating partners?

122. These are fundamental lacunae which cannot be delegated in an open-ended way to determination in regulations. Furthermore, the vagueness of the proposed amendments undermines the rationality of the introduction of these types of schools, as the very nature and purpose of the proposed schools is left open-ended.

123. The omissions are also revealing, as it suggests a deliberate attempt to leave some essential features of collaboration and donor-funded public schools open. EE is particularly concerned about the potential for selective admission criteria and profit-making incentives to become accepted features of the collaboration school model.

124. During presentations about the pilot collaboration schools project, one of the key aspects repeatedly highlighted was that there would be no selective admissions to these schools. Selective admissions would not only ruin any chance to make claims about the effect of these schools, but will also lead to serious equity concerns as these privately run and publicly funded schools cream off the top students in their areas.

125. Despite numerous assurances that no new admissions criteria would be implemented at collaboration schools involved in the pilot project, this significant feature and requirement has not been specifically included in the proposed amendments.

126. Similarly, the proposed amendments give no guarantee that operating partners might not in future be for-profit companies. It would be seriously concerning if these models – even if initially well-intentioned – are used to open the way for public money to be transferred to private companies to run schools. If the intention is for this model to continue working with non-profit partners, this should be a requirement in the empowering legislative instrument.

127. Research on academies - the UK school model that seems to have inspired the collaboration school model - emphasises the important role of central government to ensure that "the selection of sponsors is open, fair and rigorous, and supported by clear criteria".[34] The silence of the proposed amendments on this is concerning and susceptible to legal challenge.

No convincing evidence that the proposed models will result in better educational outcomes

128. In light of the vagueness and ambiguity on the purpose and nature of collaboration and donor funded schools, it is difficult to glean any basis upon which these proposed models are expected to improve educational outcomes.

129. Significantly, research on similar school models in other parts of the world, most notably academies in the UK, but also Charter schools in the US and Swedish friskolor, shows that the evidence on the effect of such models is, at best, mixed.[35]

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[34] Academies Commission. (2013). Unleashing Greatness: Getting the Best from an Academised System. *The Report of the Academies Commission*. 12.

[35] House of Commons Education Committee. (2015). *Academies and free schools*. London: The Stationery Office Limited.

130. According to the Academies Commission, a UK commission established to consider the impact of the academies school programme, evidence available "*does not suggest that improvement across all academies has been strong enough to transform the life chances of children from the poorest families*"[36]. The Commission emphasises that "academy status alone is not a panacea for improvement" and while there are inspiring individual cases, almost half of all sponsored academies were judged by the school inspectorate, Ofsted, as inadequate or requiring improvement.

131. Analyses[37] of school outcomes have shown that although underperforming schools in disadvantaged areas that became Academies did show some improvement in outcomes, these improvements did not differ from the improvement shown by similar schools that did not embark on the same route. The Sutton Trust further warns that "[f]ar from providing a solution to disadvantage, a few chains may be exacerbating it."[38]

132. It bears emphasis that EE is not dogmatically opposed to developing and testing alternative models so as to achieve better educational outcomes for learners, particularly in disadvantaged schools. However, legislative amendments that seek to introduce such models can only be rationally defended if, in the least, there is a proven basis of achieving those aims (not to mention the principle that they should not require dispensing with democratic school governance structures). In the case of the ambiguous and poorly defined collaboration and donor-funded schools, there does not appear to be any justifiable link between the introduction of these schools and the improved educational outcomes envisioned.

133. Indeed, the WCED no doubt recognised this need when it introduced the Collaboration Schools Pilot Project in early 2016. It is astonishing, however, that the WCED has already sought to introduce legislative amendments to establish collaboration schools on a permanent basis when the pilot project has only just begun. Significantly, the introduction of donor funded schools is entirely new and without any known precedent of piloting or testing.

134. EE notes that it has raised concerns regarding the methodology and lawfulness of the pilot programme itself, which was purportedly introduced as an experiment through which the collaboration school model can be tested and valuable insights can be gained about its feasibility, scalability and impact. EE has pointed out that it is unclear how the impact of this project will be measured and that outcomes cannot be viewed as scaleable.

National Foundation for Educational Research (NFER). (2015). *A Guide to the Evidence on Academies*. Slough: NFER. Wiborg, S. (2010). Swedish Free Schools: Do they work? *LLAKES Research Paper.* 18.

[36] Academies Commission. (2013). 4.

[37] Stewart, H. (2012). Non-academies do just as well as academies. *LeftFootForward*. Retrieved from www.leftfootforward.org/2012/04/non-academies-do- just-as-well-as-academies/

[38] Hutchings, M., Francis, B., & Vries, R. De. (2014). *Chain Effects*. The Sutton Trust. 54.

135. Furthermore, there are important and unexplained differences between commitments in the pilot project and the proposed amendments. For instance, and as described earlier, the requirement that schools participate voluntarily in the pilot project is ousted in the proposed amendment. Differences such as these between how the pilot project has been formulated and how the project will eventually materialise, cast serious doubts over the aims of the proposed amendments.

136. In at least two of the five pilot schools the project was met with resistance and had to be suspended at least temporarily. A news report from March 2016 about the project suspension at one school quoted a former SGB chairman as saying, "As a community we feel that we have not been suitably informed about the collaboration programme."[39] The resistance in both schools led to the withdrawal of the operating partner, which removed the equipment and assistants it had paid for as it left.[40]

137. The withdrawal of operating partners highlights the potential educational consequences of introducing private entities into public schooling. A private group's responsibility to learners ends when their contract does. Further, their short term contracts may not provide an incentive to lay down the foundations for long term success which schools need.

138. The resistance faced in these two schools also shows that the power to compel schools to become collaboration schools is likely to prove highly contentious. The fact that two of the five pilot schools have already faced such immense difficulties suggests a not-unqualified success. It is not clear that the pilot warrants an extension of the model.

139. Nevertheless, even on the WCED's own expectations of the pilot project, it has not waited for the outcomes of it to be evaluated. Instead, in the midst of the pilot project, it seeks an extensive and invasive overhaul of core features of public schools through an enabling statutory framework. This is counterintuitive and irrational.

Conclusion

140. By allowing private operating partners or donors to constitute a majority on School Governing Bodies of collaboration schools, the proposed amendments run directly contrary to SASA, and compromise democratic school governance. However, national legislation must prevail over provincial in cases such as this: SASA is a key legislative instrument through which uniformity in education can be achieved following years of racially segregated education administrations. It is similarly important for equality and redress, and the parental role in school governance is well established in jurisprudence.

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[39] Du Preez, Yolande. (2016) *School partner uproar.* Sentinel News.

[40] Zille, Helen. (2016) *How self interest can scupper school reform*. Inside Government

141. Further, collaboration schools do not present a systemic solution to improve education outcomes. Notwithstanding individual successes, the overall effects of this kind of school model internationally are decidedly mixed.

142. Huge questions remain about the form both collaboration schools and donor funded schools will take, as well as the vetting and oversight of the donors, and the broad grounds on which a school can be compelled to become part of this project.
143. This is compounded by the fact that the amendments differ from the pilot in several key aspects, including SGB buy-in and admissions. Several of the assurances and safeguards present in the pilot are not present in the Amendment Bill. Nor is the pilot complete: legislating based on this is premature and irrational.

144. This scheme is touted as an innovative plan to improve the worst off schools. But at heart, it undermines poor and working class parents' say over their children's education. It also represents the state giving up on improving these schools itself.

C. Intervention facility

145. The insertion of section 12E of the Western Cape Bill aims to establish an *"intervention facility"* for learners who are subject to compulsory attendance and are found guilty of serious misconduct.

146. This proposed section reads:

> *(1) Subject to the available resources of the Western Cape Education Department, the Provincial Minister may establish an intervention facility for learners who are subject to compulsory attendance and who have been found guilty of serious misconduct.*
> *(2) An intervention facility shall provide for therapeutic programmes and intervention strategies, in addition to curriculum delivery, in order to address the serious misconduct.*
> *(3) A learner who has been referred to an intervention facility shall be given access to education in the manner determined by the Provincial Minister."*

Background and Context

147. The creation of "intervention facilities" echoes the past establishment of "reform schools".

148. Historically, reform schools cared for students with serious disciplinary problems and students in trouble with the law. Following the Children's Act of 1913 reform schools were oriented towards "reforming" destitute and neglected white children prone to crime as well as the "immorality" associated with mixing with other races in urban slums.[41] . The objective of these schools was to "resocialise" students into accepting the social and cultural norms of the dominant society.

149. The few reform schools that were in existence for black children functioned very differently from those for white children, with the former existing alongside the prison as a means to control movement and labour, and the latter existing alongside the school as a means of re-socialisation.[42]

150. Although Reform Schools became racially integrated, the apartheid legacy remained apparent in the stark difference in the quality of infrastructure, style of

[41] Badroodien, N. (2001) *A History of the Ottery School of Industries in Cape Town: Issues of Race, Welfare and Social Order in the period 1937 to 1968.* Faculty of Education, UWC. 19.

[42] Chisholm, L. (1989). *Reformatories and Industrial Schools in South Africa: A Study in Class, Colour and Gender in the period 1882 to 1939.* Johannesburg, University of the Witwatersrand: unpublished doctoral thesis. 25.

care, the quality of care afforded, the experience level and race of the educators, and the omnipresence of Afrikaans as the language of instruction.[43]

151. In 1995 an Inter-Ministerial Committee on Young People at Risk (IMC) was set up to investigate the availability and suitability of places of safety, schools of industry and reform schools.[44] The committee discovered serious human rights abuses including the widespread use of isolation,[45] as well as sexual, physical and emotional abuse.[46] It concluded that, "too many children were going into residential care and recommended that the system facilitate the provision of services at an earlier stage to allow more children to stay with their families."[47]

152. The IMC noted that many of the problems it unearthed arose from a lack of inter-sectoral planning. It recommended the transfer of the management of the facilities to the Department of Social Development, but emphasised the importance of inter-sectoral cooperation.[48]

153. The interim policy recommendations to come out of that investigation, as well as recommendations emanating from a South African Law Commission (SALC) review of the Child Care Act, prioritized, "corrections within the community as is evidenced by developments elsewhere in the world"[49] and cautioned that residential facilities, "should be the last resort in children's matters."[50] It stated that, not only does residential care expose the child to others "who may exhibit even worse antisocial behaviour than the child himself or herself" but it also requires removing the child from his/her home community, "which impedes family contact and reintegration of the child back into the community."[51]

154. The IMC and SALC's focus on prevention and early intervention at the school and community level, their commitment to "keeping children in the community as far as possible"[52] and their designation of residential facilities as "the last resort"[53] is in line with international best practices for supporting at-risk youth.[54]

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[43] Gast, M. (2001) *Education and the South African Juvenile Justice System.* CYC-Net. *34.*

[44] South African Law Commission ed. *Juvenile Justice*. Pretoria: South African Law Commission, 1999. Print. Discussion Paper / South African Law Commission 79. 21.

[45] Ibid.

[46] Tadesse, A. (1997). Reforming Juvenile Justice Legislation and Administration in South Africa: A Case Study. *Paper presented at the International Seminar on Juvenile Justice at the UNICEF International Child Development Centre, Florence, Italy.*

[47] Courtney, Mark E., and Iwaniec, Dorota, eds. *Residential Care of Children: Comparative Perspectives.* New York, US: Oxford University Press, 2009. 11.

[48] Ibid. 35.

[49] South African Law Commission. 242.

[50] Ibid. 242.

[51] Ibid. 245.

[52] Courtney, Mark E., and Iwaniec, Dorota, eds. 115.

[53] Ibid.

[54] See, for example, Bemak, F., Keys, S. (2000) Violent and Aggressive Youth: Intervention and Prevention Strategies for Changing Times. Thousand Oaks, Calif: Corwin Press, 2000. Print. Practical Skills for Counselors Series.

155. These policy recommendations were brought into being by the Child Care Amendment Act 96 of 1996 and later by the South African Children's Act of 2005.[55]

156. Beginning in 2000, the Western Cape government closed all former Reform Schools and Schools of Industries, but re-established three of these schools as Public Special Schools, allowing them to continue to perform the same function until 2013, when they repurposed the remaining centres into schools for children with special education needs.[56]

157. On 1 April 2010, the Children's Act came into force. Under this Act, former Reform Schools and Schools of Industries would be renamed and transferred to the authority of the Department of Social Development.

158. The Children's Act allows for the establishment of Child and Youth Care Youth Centres (CYCCs), which are facilities providing residential care to more than 6 children outside of the family environment. Establishments which are maintained "mainly for the tuition and training of children" are generally excluded from the scope of CYCCs. However, all children in CYCCs must be provided access to education.

Ambiguity on the role and nature of the intervention facilities

159. According to Section 12 E (3), the intervention facilities will provide students with "*therapeutic programmes and intervention strategies, in addition to curriculum delivery, in order to address the serious misconduct.*" Learners in the intervention facilities will be given access to education "*in the manner determined by the Provincial Minister*."

160. These provisions are vague and fail to provide adequate guidance on the nature of the contemplated role that intervention facilities will play. The nature of the intervention that will "address" the learner's misconduct remains unclear. A press release, explaining the proposed amendments, spoke only of "various appropriate interventions for their situation."[57]

161. Some questions that arise in relation to the contemplated nature of the interventions are:

Greene, M. B. (1993) *Chronic Exposure to Violence and Poverty: Interventions That Work for Youth.* Crime & Delinquency 39.1: 106–124.
Ungar, M., Teram, E., Picketts, J. (2001) *Young Offenders and Their Communities: Reframing the Institution as an Extension of the Community.* Canadian Journal of Community Mental Health = Revue Canadienne De Santé Mentale Communautaire 20.2. 29–42.
Bazemore, G., Terry, W.C. (1997) *Developing delinquent youths: A reintegrative model for rehabilitation and a new role for the juvenile justice system.* Child Welfare, 76 (5). 665 - 716.

[55] Courtney, Mark E., and Iwaniec, Dorota, eds. 111.

[56] Villette, F. (2015) *Move 'infringes on kids' rights'.* Cape Times. 2 September 2015.

[57] Western Cape Government. Department of Education. (2016)

a. What model of care will be used to rehabilitate/discipline students?
b. Will the intervention facilities be residential?
c. What will the quality assurance process be?
d. Will there be a pilot programme for these institutions first?

162. As currently formulated, the proposed amendment is entirely unclear as to whether the primary purpose of the intervention facilities will be to offer therapeutic programmes for children with behavioural difficulties, or whether the primary purpose will be the provision of education and training.

163. This distinction is significant, as the Department of Social Development is tasked with ensuring the provision of child support services and, in the case of residential programmes, Child and Youth Care Centres. Furthermore, to the extent that the "intervention facility" is primarily aimed at the provision of education then this raises questions as to whether the Provincial Minister is lawfully empowered to establish education provisioning in such facilities at all.

164. At present, the nature, extent and criteria for the provisioning of education at the proposed intervention facilities is left entirely unclear. Rather, it is envisioned that the provision of education will take place in "*a manner determined by the Provincial Minister*". This lack of clarity and wide discretion is wholly unsatisfactory.

Prolonged disciplinary interventions in conflict with national legislation

165. The establishment of intervention facilities must be read in conjunction with proposed amendments to section 45 of the principal Act.

166. These proposed amendments ultimately empower the Head of Department to refer a learner who is found guilty of serious misconduct to an intervention facility for a specified period (not exceeding 12 months). A parent must consent to the referral. At the lapse of the specified period, the learner must be admitted to the same public school he or she attended prior to referral.

167. Section 9 of SASA regulates the suspension and expulsion of learners from public schools. In terms of SASA, a learner who has been found guilty of serious misconduct during disciplinary proceedings may either be (a) suspended for a period not longer than 7 days; or (b) expelled.

168. Where a learner who is of compulsory school-going age has been expelled from a public school, the HOD must make an alternative arrangement for his or her placement at a public school.

169. SASA thus limits the period of suspension of a learner to a maximum of 7 days; or expulsion subject to a duty on the HOD to ensure the learner's placement at another public school.

170. The diversion of learners to intervention schools contemplated in the proposed amendments conflict with this framework by establishing, in effect:

    a. A period of *de facto* suspension that can extend to a period of up to 12 months (as opposed to a mere 7 days);
    b. *De facto* expulsion of a learner without ensuring immediate access to an alternative public school.

171. If the proposed amendments are to avoid contravening SASA, the intervention facilities must be considered a type of public school. However, there is no clarity on this in the Draft Bill. At no stage in the draft Bill are they even referred to as "schools".

172. In addition to the potentially unlawful conflict of laws, the discriminatory effect of having learners in the Western Cape subject to prolonged disciplinary interventions which varies from that of other learners across the country will also be subject to potential challenge.

Exclusion and isolation of learners is ineffective as a rehabilitative mechanism

173. There is established research confirming that punitive and exclusionary discipline is not effective.[58] Interventions that segregate students with poor disciplinary histories have been linked to worse behavioral outcomes.[59] These unintended consequences arise from affiliation with delinquent peers, identification with deviancy, and changing attitudes toward anti-social behavior.[60] One review of the literature on juvenile delinquency concludes that "*the greater the number of adolescents with the same type of problems who are grouped in the same place, the higher the likelihood that their undesirable behavioural patterns will be reinforced*."[61]

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[58] Osher, D. et al. (2010) How Can We Improve School Discipline? *Educational Researcher* 39(1). 48–58.
Mayer, G. R. (1995). Preventing antisocial behavior in the schools. *Journal of Applied Behavior Analysis.* 28. 467–478.
Skiba, R. J., Peterson, R. L., & Williams, T. (1997). Office referrals and suspension: Disciplinary intervention in middle schools. *Education and Treatment of Children*.20. 1–21.

[59] Gottfredson, G., Gottfredson, D., Payne, A., & Gottfredson, N. (2005). School climate predictors of school disorder: Results from a national study of delinquency prevention in schools. *Journal of Research in Crime and Delinquency*, 42, 412–444.
Mayer, G. R., & Butterworth, T. (1995). A preventive approach to school violence and vandalism: An experimental study. *Personnel and Guidance Journal*. 57(9). 436–441.

[60] Arnold, Margery E., & Hughes, Jan N. (1999) First Do No Harm: Adverse Effects of Grouping Deviant Youth for Skills Training. *Journal of School Psychology.* 37 (1). 99 - 115.
Elliott, D. S., Huizinga, D., & Ageton, S. S. (1985). *Explaining delinquency and drug use*. Beverly Hills, CA: Sage Publications
Romig, D. A. (1978). *Justice for Our Children: An Examination of Juvenile Delinquent Rehabilitation Programs*. Lexington, Mass: Lexington Books.

[61] Cécile, M., & Born, M. (2009) Intervention in juvenile delinquency: Danger of iatrogenic effects? *Children and Youth Services Review.* 31(12). 1217–1221.

174. EE is of the view that establishing a separate external facility for the rehabilitation of perceived "deviant learners" is both unnecessary and a waste of state resources. There currently exist programmes precisely to ensure that learners in psychological need, including learners with behavioural problems, receive the necessary assistance.

175. For instance, the *Integrated School Health Policy* (ISHP)[62] must ensure the implementation of intervention programmes to promote a learner's lifelong health and well-being including mental health (mental health is inclusive of alcohol and drug abuse – conditions associated with 'serious misconduct'). However, the ISHP must operate in an environment where potential barriers include staff shortages, a lack of transport and insufficient public sector psychologists to provide follow up services.[63] It makes little sense to expend resources to create an entire new system for the managing of learners with behavioural problems when existing programmes are struggling and in need of funds.

176. In addition, programmes such as the ISHP have the potential to reach a far wider number of learners than a system that focuses solely on a core group of learners.

177. Intervention facilities serve as "half-way houses" and essentially amount to introducing the old reform schools albeit in a different name. This is a regressive step and goes against the establishment of a proper functioning inclusive education system. It makes little sense to remove a learner from the formal public school system and place them in a separate facility where they will be surrounding by other *"deviant learners"* away from the positive influence of many of their schooling peers.

178. Sending learners away to intervention facilities will also have the effect of ostracizing learners and pushing them to the periphery of society as they will be perceived as "juvenile delinquents". This is contrary to the best interest of learners and would violate their constitutional rights in a myriad of ways.

179. These learners are subsequently treated as unwanted outcasts in the education system and unfairly discriminated against when applying for admissions to schools. This reality was recently acknowledged by the Constitutional Court in *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14, As the court noted: "*[s]chools that are told in advance of admission that a learner has learning or remedial difficulties or is troublesome, tend to refuse that learner's admission. Schools would rather have higher achieving learners and better results.*"[64]

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[62] Department of Basic Education & the Department of Health. (2012) Integrated School Health Policy.

[63] Proudlock, P., Lake, L., Jamieson, L., & Draga, L. (2013). Part one: Children and Law Reform. Legislative and Policy Developments 2012/2013. In L. Berry, L. Biersteker, H. Dawes, L. Lake, & C. Smith (Eds.), *South African Child Gauge 2013*. Cape Town: Children's Institute, University of Cape Town.

[64] Para 32

180. Whilst the proposed amendments require that learners be readmitted to their original public school (a point we return to below), the effect of being removed and treated as an outcast will inevitably result in ostracization.

Serious Misconduct is overly broad

181. It is particularly concerning that clause 12D(4) allows for the diversion of learners found guilty of *"serious misconduct"* to these interventionist facilities without providing any further criteria in terms of the degree of *"serious misconduct"* concerned.

182. The Regulations Relating to Serious Misconduct of Learners at a Public School[65] define serious misconduct to include a broad range of conduct, including conduct which in the opinion of the SGB is "disgraceful, improper or unbecoming".

183. It is EE's experience that learners are often expelled for minor infractions deemed to be serious misconduct, at the whim of overzealous SGBs and with the approval of HODs. This has also come to the fore recently in a wave of student protests around racist policies and codes of conduct at schools, resulting in black learners being disciplined for, amongst other reasons, wearing their hair naturally.

184. The proposed amendments are not limited to specific types of offences which are particularly serious in nature, but can include any range of "serious misconduct". This is an overly broad provision and reveals the lack of clarity and coherent planning on the role and purpose of intervention facilities.

No discretion to account for best interests of the child

185. It is an established constitutional principle that the best interests of the child should be paramount in all matters concerning children. This requires decision-makers to apply discretion on determining what the best interests of the child requires in any particular situation.

186. The current wording of the proposed amendment states that,

> "*A learner who has been referred to an intervention facility in terms of subsection (60)(a) or (14A) shall, after the lapse of the specified period contemplated in those subsections, be admitted to the same public school that he or she attended prior to the referral.*"

[65] Western Cape Education Department. (1997).Regulations Relating To Serious Misconduct Of Learners At Public Schools (Excluding Public Schools For Learners Sent Or Transferred Thereto In Terms Of The Child Care Act, 1983 (Act 74 Of 1983), And/Or The Criminal Procedure Act, 1977 (Act 51 Of 1977)) In The Province Of The Western Cape And The Disciplinary Procedures That Must Be Followed In Such Cases, *Western Cape Provincial Gazette. (Vol. 5190)* 2-4.

187. The use of the word “shall” indicates that learners will have to return to their former school in all cases. However, there are many possible cases when this would not be to the best benefit of the learner or the school community he/she left behind. For instance, the learner may face a hostile school body ready to victimise and exact retribution for their misconduct. In cases where the learner was removed for perpetrating bullying on another learner, this provision may require a victim to come into contact with the person who intimidated and bullied them.

188. The failure of the proposed amendments to afford due discretion to the best interests of the child render it susceptible to constitutional challenge.

Conclusion

189. Given the vague description of the nature and role of the proposed intervention facilities, there remains a risk that such facilities will:

    a. Contravene the suggestions of the IMC and SALC by diverting the focus on preventative and community-centred care for youth at risk to a model of isolated and exclusionary care that has been proved ineffective.
    b. Stigmatize youth that are sent to such facilities
    c. Violate national legislation relating to schools suspension and expulsion; and,
    d. Unfairly submit Western Cape learners to prolonged disciplinary interventions that their peers in the rest of the country do not have to face.

190. Given the lengthy process of transforming the highly problematic system of Reform Schools of the Apartheid era, EE is of the view that the introduction of intervention facilities would be a regressive step. Resources should instead be spent on ensuring the establishment of a proper functioning inclusive education system that supports all learners without having to isolate and exclude learners at risk from their families and communities, or to deny them the opportunity to have a normal schooling experience.

D. Allowance of alcohol on school premises

191. In a media statement concerning the release of the draft Bill, Western Cape MEC for Basic Education, Ms Debbie Schaffer explained that one of the purposes of the Bill is to *"make it easier for schools"* to have *"adult functions"* where alcohol can be consumed/sold. This notwithstanding her own acknowledgment that alcohol abuse is a *"huge problem*" in the Western Cape:

"I am obviously acutely aware of the huge problem we face of alcohol abuse, and this is not to be seen as condoning the abuse of alcohol in any way. However, I do believe that we need to make it easier for schools to be in a position to have adult functions where alcohol may be consumed and/or sold.

The proposed amendment is to allow for the principal or governing body to approve the sale or use of alcohol on school premises, but strictly subject to the provisions of the Western Cape Liquor Act and any conditions set by the governing body or principal. It will be up to the school if they wish to do this or not, and I trust it will be exercised responsibly."[66]

192. Proposed section 45B(1) of the Draft Bill is intended to allow for the use and sale of alcohol on school premises and during school activities. It reads:

''45B. (1) Notwithstanding section 45A(1), but subject to compliance with the Western Cape Liquor Act, 2008 (Act 4 of 2008), the governing body or the principal of a public school may approve the use or sale of alcoholic liquor on school premises or at a school activity."

"45B.(2) The use or sale of alcoholic liquor on school premises or at a school activity as contemplated in subsection (1) is subject to any conditions imposed by or in terms of the Western Cape Liquor Act, 2008, and any conditions set by the governing body or the principal."

193. Section 45A(1) of the Western Cape Provincial School Education Act forbids the presence of alcohol at schools unless the principal has authorised this for *"legitimate educational purposes"*.

194. Proposed section 45B(1), however, empowers the principal or a school governing body to permit the use and sale of alcohol on schools or at school activities for *any* purpose. A determination on this is left to the discretion of the principal or SGB without any provision for State involvement in and/or oversight of the process. In addition, proposed section 45B(1) does not provide any time restrictions in regard to the presence of alcohol on school premises. Worst yet,

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[66] Western Cape Education Department. (2016) *Proposed Amendments to Western Cape Provincial School Education Act, 1997*. 24 August. 2016. Web.

principals and SGBs are not limited by any criteria and therefore have a free hand in making their determination.

195. Proposed section 45B(1) is therefore left vulnerable to much abuse. Taken to its extreme a principal could, on a whim, approve the use of alcohol at her school indefinitely thereby converting the school from an alcohol free zone to one in which alcohol is freely and permanently permitted.

196. The Constitution compels the Western Cape Education Department and indeed the Western Cape Government as a whole to provide paramountcy to the best interest of children when making a determination on any matter that affects them including a decision on whether to allow for the possibility of the use/sale of alcohol on school premises.

197. The Constitutional Court in *S v Lawrence* when discussing the affidavit of an expert in this area, accepted that *"the control of the availability of alcohol is a recognised means of combating the adverse effects of alcohol consumption"* and provides a rational basis for doing so.[67]

198. The adverse impact that drugs (inclusive of alcohol) can have on learners is documented in the *DBE and UNICEF Guide to Drug Testing in South African Schools* as follows:

> *"Experimentation is a natural part of development, but unfortunately casual drug use can lead to many problems, not least becoming dependent. In schools, drug use has been linked to academic difficulties, absenteeism, and dropping out, which can have important implications for a learner's access to quality education. It is also associated with a host of high risk behaviours, such as unprotected sex, crime and violence, traffic accidents, and mental and physical health problems"*[68]

199. The Guide states that South African schools should be *"alcohol and drug free zones"*:

> *"It is our duty as families, schools and communities to ensure that schools remain safe and alcohol and drug free zones to enable quality teaching and learning. We must build strong health promotion programmes that can prevent learners from using drugs in the first place. This is the best outcome for everyone."*[69]

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[67] S v Lawrence, S v Negal; S v Solberg [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 at paras 69 and 70.

[68] Department of Basic Education (2013). *Guide to Drug Testing in South African Schools*. Pretoria: Government Printer. 7.

[69] Ibid. 15.

200. The requirement that South African schools are *"alcohol and drug free zones"* is also reflected in the *National Strategy for the Prevention and Management of Alcohol and Drug Use Amongst Learners in Schools*.[70]

201. Another national policy, the *Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutio*ns,[71] speaks of the serious need for clear and consistent messaging on the illegality of possessing or using alcohol in South Africa's schools.

202. The national position of insulating schools from the presence of alcohol is made law in section 4(4)(a) of the *Regulations for the Safety Measures at Public Schools.*[72] This section forbids educators, parents or learners or anyone else from possessing or consuming alcohol during a school activity. And section 4(2)(e) states that no inebriated person may enter school premises.

203. Ensuring that schools remains safe and alcohol free zones takes on a particular impetus in a province plagued by the adverse consequences of alcohol abuse. In this regard, the *Western Cape Government's Blue Print on the Prevention and Treatment of Harmful Alcohol and Drug Use* states:

> *"The strategic importance of addressing harmful alcohol and drug use in the Western Cape is partially illustrated by SAPS statistics showing that the Province has the highest rate of drug-related crime in South Africa (52 000 cases in the 2008/2009 financial year). The ratio per capita is over four times higher than the second nearest Province (1000 per 100 000 in the Western Cape as compared to 235 per 100 000 in KZN), and nearly twice as high in actual numbers. In fact, the Western Cape currently accounts for almost half of all South Africa's drug-related crime on the SAPS records (52 000 out of 117 000 in 2008/2009) – See tables below. The higher figures can also be linked to more effective policing and/or police information management, but the margins are too big to be attributable to this factor alone***.*[73]**

204. Data from CrimeStats SA[74] show that the Western Cape accounted for 33% of drug-related crimes in the country in 2015 and 36% in 2016. Furthermore, the Western Cape Department of Community Safety's 2012/2013 *Annual Report*[75] emphasises the significance of alcohol abuse in the province's crime statistics:

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[70] Department of Basic Education (2013)*. National strategy for the prevention and management of alcohol and drug use amongst learners in schools.* Pretoria. iv.

[71] Department of Education (2002). The National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions. *Government Gazette. (Vol. 450. No. 24172). 5.*

[72] Department of Education (2001). The Regulations for Safety Measures at Public Schools. *Government Gazette*. (Vol. 436. No. 22754.) Amended by Department of Education (2006). (Vol. 497. No. 8582)

[73] Western Cape Provincial Government. (2010). *Modernisation Programme: Workstream on the Prevention and Treatment of Harmful Alcohol and Drug Use. (Provincial Blueprint).* 3 - 4.

[74] Crime Stats SA. (2016). Retrieved September 21 2016 at http://www.crimestatssa.com/

[75] The Western Cape Department of Community Safety. (2013) *Annual Report 2012/2013.* 18.

"Substance abuse, mainly alcohol abuse, has consistently been identified as being at the forefront of causing crime, particularly violent crime, in the Province."

205. Even given the current restrictions, alcohol and drugs are easily accessible to many learners. Of the administrators surveyed in a representative sample of Western Cape secondary schools, 62.3% reported drug or alcohol use by a learner in the past three months.[76] The 2012 National Schools Violence Study (NSVS), like the 2008 NSVS, found a link between violence at school and access to alcohol and drugs.[77]

206. *The City of Cape Town's Alcohol & Other Drug Strategy 2014 – 2017* records the City's obligation to take preventative measures for the combating of alcohol and drug abuse. Prevention is defined as:

"A pro-active process that empowers individuals and systems to meet the challenges of life's events and transitions by creating and reinforcing conditions that promote healthy behaviour and lifestyles."[78]

207. Ensuring the continued existence of alcohol and drug free schools under applicable law and policy is precisely the type of action that would amount to reinforcing positive conditions that would deter children from engaging in alcohol abuse.

208. Through the introduction of proposed section 45(B)(1) the Western Cape is not only failing in its obligation to prevent alcohol abuse in schools but is pro-actively assisting with the promotion and reinforcement of the drug/alcohol problem in the Western Cape.

209. EE recommends that proposed section 45(B)(i) be removed in its entirety.

Conclusion

210. The proposed amendments allow principals and SGBs full discretion to permit the use and sale of alcohol at schools or at school activities for *any* purpose without restrictions relating to the time of day that alcohol is sold or used, or any other criteria.

211. Both the DBE and the Western Cape Government have taken heed of statistics that show the devastating effects of drug and alcohol abuse in South Africa,

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[76] Equal Education (2016). Of "Loose Papers and Vague Allegations" A Social Audit Report on the Safety and Sanitation Crisis in Western Cape Schools. 110.

[77] CJCP (2013) School Violence in South Africa: Results of the 2012 National School Violence Study. *Centre of Justice and Crime Prevention.* 47 & 58.

[78] City of Cape Town. *Alcohol and Other Drugs Strategy 2014 – 2017.* 4.

and *especially* in the Western Cape. Their policy documents and safety guides repeatedly emphasize the need to keep schools as alcohol and drug free zones, and to take proactive steps to promote healthy behavior and lifestyles and prevent alcohol and drug abuse.

212. The proposed section 45(B)(i) does not further this mandate and should be removed in its entirety.