14 June 2022

Mrs B.P. Mbingo-Gigaba MP
Chairperson
Parliamentary Committee on Basic Education

Attention: Mr. Llewellyn Brown
Secretary
Parliamentary Committee on Basic Education

Per email: belabill02@parliament.gov.za; lbrown@parliament.gov.za

Dear Chairperson

WRITTEN SUBMISSION BY AFRIFORUM ON THE BASIC EDUCATION LAWS AMENDMENT BILL [B2-2022]

1.

INTRODUCTION AND SYNOPSIS

1.1. This document contains the written submission by **AfriForum NPC** ("AfriForum") on the Basic Education Laws Amendment Bill published in the Government Gazette No. 45601 of 6 December 2021 (hereinafter referred to as "the Bill").

1.2. Over and above this written submission, **AfriForum would like to make oral submissions** in this regard at any appropriate time in future.

1.3. This written submission focuses on certain clauses and proposed amendments to the South African Schools Act, 1996 ("SASA"). Where the submission does not refer to the remainder of the clauses in the Bill, it can be accepted that the proposed amendments in such clauses are deemed to be in order.

1.4. From the outset, AfriForum emphasises that certain of the proposed amendments (in particular with reference to the admissions and language policies) which will be dealt with *infra,* go against the very core of the public school model and foundational principles and objectives on which SASA is founded in respect of public schools.

1.5. As such they are not rationally linked to the overall purpose and objectives of SASA, therefore certain of the proposed amendments (that will be dealt with later) will undoubtedly run the risk of being declared to be constitutionally unlawful.

1.6. Should the proposed amendments aimed at eroding the policymaking powers and other powers of governing bodies ("SGBs"), be enacted by Parliament, it will be a regrettable and regressive step towards more state control over public schools, thereby subverting the fundamental partnership model envisaged by SASA between school communities (consisting of parents, educators and learners), provincial departments and the national Department of Basic Education.

1.7. It will be destructive of the fundamentals of such a partnership model which evolved from the apartheid era of complete state control into the new constitutional order characterised by more community involvement and participation, and the decentralisation of powers to SGBs in respect of the governance of public schools.

1.8. It will be destructive of the advantages which are inherently part of a decentralised and community-participation model in partnership with the state (national and provincial) as it exists in its current form in terms of the SASA, which are all aimed at the provision of education of progressively high quality.

1.9. The proposed amendments, if adopted by Parliament, will subvert core elements of the grassroots democracy principles of school governance by means of democratically elected SGBs which have also been described thus by the Constitutional Court in various judgments on basic education.

1.10. It would also be contrary to stated objectives of the SASA where it is stated in the preamble that the aim of the SASA and the National Department of Basic Education is to set national norms and standards for the education of learners and the organisation, governance and funding of public schools.

1.11. This means that the state is involved at macro level and should not interfere at the grassroots micro level of the existing functioning and powers of SGBs, unless where such national norms and standards, including those of the SASA and the Constitution, are not complied with. In this regard, the existing provisions of the SASA, read together with key judgements of South African courts, coupled with the constitutional principles of cooperative governance provide adequate safeguards, checks and balances to intervene where necessary.

1.12. It is by no means clear which changes in policy by the National Executive motivate the proposed introduction of amendments to the SASA which would erode the previous policymaking powers of SGBs in terms of admission policy and language policy.

1.13. There is no constitutional difference in terms of section 29(2)[1] of the Constitution between public schools and public universities. In the latter case there is only a broad national ministerial language policy framework with the power to adopt a language policy vesting in the democratically elected council of a university. In this regard, the same powers exist through the SASA in its present form with a SGB having powers similar to those of an organ of state. Why should this change and be any different?

1.14. AfriForum urges the Parliamentary Committee to carefully rethink the proposed amendments dealt with *infra* and rather to focus on ways and means through which less state control can be introduced and the decentralisation model can even be further strengthened and improved. By rather increasing community participation, with parents and educators in partnership with the state, the quality education of children would be strengthened, thereby promoting the best interest of children and their rights to access quality basic education to an even greater degree.

1.15. Where school communities are less resourced and have less capacity (for example the no fee schools), the national state and provincial authorities should rather direct their involvement and support towards such public schools in accordance with the constitutional principles of cooperative governance in terms of section 41 of the Constitution, and concentrate their efforts on promoting and fulfilling the rights in the Bill of Rights as required by section 7(2) of the Constitution – rights which in this context are in the best interest of children and the right to quality basic education.

1.16. With all of this in mind, AfriForum takes the opportunity to propose other conceptual amendments to the SASA of which the detail can be worked out. These proposals are made in order to achieve the following constitutional objectives:

1.16.1. The improvement of quality basic education through increased decentralisation, in order to unlock more potential amongst school communities, parents and educators in partnership with the state towards the improvement of quality basic education for learners;

---

1. The right of everyone to receive education in the language of choice.

1.16.2. To free up state resources in respect of certain public schools by making certain public schools more independent and enabling the state to better concentrate its financial resources and other support on those schools in communities that are less privileged.

1.17. AfriForum submits that this total rethink should culminate in the following categories of schools, which would require amendments to the legislation quite different from those currently proposed in the Bill:

1.17.1. A category of public schools where the optimal capacity of governance and funding of the schools by the school community are lacking and which requires greater state support, involvement and control. Such schools exist in practice through the categories of quintile 1 to 3 schools, which are no fee-paying schools, which are fully state funded and resourced. For the sake of description, AfriForum proposes that they be referred to as Category 1 public schools. As these schools progress, the mechanism should exist to encourage and advance such schools to Category 2 public schools, in consultation with the school community;

1.17.2. Public schools where there is active community participation by parents and where SGBs are governing schools in a proper manner in compliance with the existing legislation and where those schools are significantly funded by the school community with relatively little contribution by the state, can be referred to as Category 2 schools. These schools have fulfilled the legislative design and objectives in terms of the SASA, and also in terms of expected outcomes of quality education. No inroads should be made on existing functions and powers of the SGBs of these schools in terms of the SASA. In fact, there should be less state involvement, except for requiring compliance with national norms and standards, and the monitoring of such compliance as envisaged by the SASA;

1.17.3. Schools where the potential exists, as a result of the exemplary governance of the public school, where a significant financial contribution towards the budget of the school is made by the school community, the community takes care of the improvement of school buildings and infrastructure, and where it would be beneficial for the school community to allow such public schools to convert to an independent school on a public–private partnership model, are referred to as Category 3 schools. In this instance a qualifying public school that meets certain criteria of greater self-management should be able to convert to an independent school. This would unlock significant financial resources for the state through the leasing of the school buildings and property on a long-term basis to the converted independent school's management, as well as by removing the burden of the appointment of educators and other staff, in addition to the payment of their renumeration.

Such significant savings could then be used by the state to the benefit of Category 1 schools;[2]

1.17.4. The existing SASA model of independent schools, usually situated on private property, can be referred to as Category 4 schools.

1.18. A parliamentary committee itself has the constitutional power to introduce a Bill in the National Assembly in terms of section 73 (2) of the Constitution, to recommend that other amendments to the SASA be initiated, and not to recommend that the Bill be passed in its current form where the proposed amendments are objectionable as will be dealt with further herein.

1.19. Before dealing with the specific clauses in the Bill, AfriForum wishes to provide a brief overview of its interest in quality education in South Africa, as well as language rights in education and accordingly its interest in the proposed amendments in the Bill to the SASA and the EEA.

2.

INTERESTS OF AFRIFORUM

2.1. AfriForum NPC is a non-profit company registered as such in terms of the company laws of the Republic of South Africa.

2.2. It is an active role player in civil society, with primarily stated objectives including the promotion of democracy, the activation of civil society to participate in public life and also the promotion of constitutional rights in South Africa.

2.3. AfriForum has 302 457 active members (number confirmed on 14 June 2022). It is one of the largest civil rights organisations in South Africa. A significant number of its members fall within the age group of parents who have children in primary and secondary public schools throughout the Republic.

2.4. As an organisation that promotes constitutional rights, AfriForum has a direct interest in the proposed amended legislation which has far-reaching implications for the existing powers and functioning of SGBs through which parents of learners are represented in a model of public school democracy.

---

2. Without considering any contribution towards existing buildings and land which the State will gain through rental or the selling of the buildings and land, and only considering remuneration of staff employed by the provincial department which on average in large secondary schools in Pretoria with approximately 1 200 learners number approximately 45 staff members, the saving for the State in respect of one school only would amount to several million Rand per annum.

However, its comments are also made in the interest of its members who are parents of learners.

2.5. Certain of the proposed amendments threaten the success and optimal functioning of especially public schools that provide quality education to learners and have proven to be successful through major and additional expenses borne by the parents of such learners in order to maintain the public infrastructure of such public schools through the SGBs, besides appointing additional educators from own financial resources in order to improve the educator to learner ratio of a public school in the interest of quality basic education.

2.6. AfriForum is concerned that the objectionable amendments would result in the discouragement of parents of learners to be involved and committed, and to assume responsibility for the organisation, governance and funding of public schools in partnership with the state, should the very same SGB which they had elected no longer be able to perform its functions in partnership with the state, but instead find that its functions and powers have been taken over by increased state control. It would potentially serve to undermine the trust and confidence in the public school system to continue providing quality education in those schools which have thus far been able to do so by means of proper management and governance.

2.7. AfriForum's criticisms are based on a careful consideration of the educational impact on all members of society dependant on education in public schools. It is also based on consideration of judgements of the Constitutional Court in their full context.

2.8. The comments are also based on educational research by leaders in education who have published on the subject and on the importance of rather strengthening the participation of parents and communities in public schools, instead of eroding the powers and functions of SGBs.[3]

2.9. Before AfriForum proceeds to comment on specific provisions, it is appropriate to refer to certain key decisions of our courts, including the Constitutional Court, with reference to basic education and public schools, the specific design and model of public schools, as well as the different roles and responsibilities of the various role players, namely the state, SGBs, parents, principals and provincial departments.

---

3. See for instance the following academic research and contributions: Nombasa Ncediwe Soga, *Self-managing schools in Gauteng: challenges and opportunities for school-based managers* (submitted in partial fulfilment of the requirements for the degree of Master of Education in the subject Education Management, University of South Africa, 2004).

2.10. The judgments of the Constitutional Court and its pronouncement on the balancing of the rights, powers and functions of the various role players, already serve as a pronouncement of the law on the existing provisions in a balanced and guiding manner.

2.11. This begs the question why certain key amendments are proposed at all in particular in relation to the interference with policymaking powers of SGBs. It begs the question what the underlying political agenda is of the National Executive with certain of the proposed amendments and what it seeks to achieve.

2.12. The courts have not identified shortcomings in the legislation which would necessitate or prompt amendments regarding the policymaking powers and other functions of SGBs. On the contrary, as we shall see, where shortcomings had been pointed out on the side of the Minister, the shortcomings in question have still not received any attention and in fact, seem to be ignored.[4]

3.

RELEVANT EXTRACTS FROM THE JUDGMENTS OF OUR COURTS

3.1. In **The Head of the Mpumalanga Department of Education & Another v. Hoërskool Ermelo & Another**, 2010(2) SA 415 (CC) the Constitutional Court per Moseneke DCJ, with reference to the overall design of the legislation and the role of governing bodies, said the following in paragraph [57]:

> *"… 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 intended to function in a democratic manner. Its primary function is to look after the interests of the school and its learners. It is meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily the representatives are parents of learners and of the local community and are better qualified to determine the medium best suited to impart education in all the formative utilitarian cultural goodness that comes with it."*

3.2. In paragraph [79] of the ***Ermelo*** judgment, the Constitutional Court also said the following with reference to language policy:

4. For instance, the determination of uniform norms and standards in relation to capacity as envisaged in section 5A(2)(b) of the Act, which shortcoming was pointed out in the **Rivonia** case at par [38].

"School 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. For that reason the starting point of our understanding of the role of the governing body and of the State in relation to language rights and public education is section 29 of the Constitution. Section 6(2) must be construed in line with the constitutional warranty."

3.3. The Constitutional Court in **Ermelo** also pointed out that in the scheme of the existing legislation, the powers of the SGBs are not absolute and that in certain circumstances prescribed in the Act, the function or functions of a SGB are not immune from intervention by the HOD. That is the current position. There is no good reason to devise more provisions and mechanisms to curtail or override powers of SGBs by affording the authority to the HOD to approve admission policies and language policies.

3.4. In **Head of Department, Department of Education, Free State Province v Welkom High School and Others** 2014(2) SA 415 (CC) at paragraph [36] the Constitutional Court said the following with reference to the partnership model and balance of duties of the various role players:

"Given this legacy, the state's obligations to ensure that the right to education is meaningfully realised for the people of South Africa are great indeed. The primary statute setting out these obligations is the Schools Act.[5] *That Act contains various provisions governing the relationships between the Minister, Members of Provincial Executive Councils responsible for education (MECs), HODs, principals and the governing bodies of public schools. It makes clear that public schools are run by a partnership involving school governing bodies (which represent the interests of parents and learners), principals, the relevant HOD and MEC, and the Minister. Its provisions are carefully crafted to strike a balance between the duties of these various partners in ensuring an effective education system."*

3.5. In paragraph [49] in the **Welkom** case, the Court also said:

"Under the Schools Act, two things are perspicuous. First, public schools are run by a partnership involving the state, parents of learners and members of the community in which the school is located. Each partner represents a particular set of relevant interests and bears corresponding rights and obligations in the provision of education services to learners. Second, the interactions between the partners – the checks, balances and accountability

5. ***Hoërskool Ermelo*** above n 8 at para 55. The Preamble to the Schools Act states that the statute's purpose is to provide for a uniform system for the "organisation, governance and funding of schools".

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. The nature of the statutory partnership for the running of public schools was succinctly summarised in Hoërskool Ermelo as follows:

'An overarching design of the [Schools Act] is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school.'" [Footnotes omitted.]

3.6. In paragraph [63] in the **Welkom** case, the Court also said:

"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. By contrast, a principal's authority is more executive and administrative in nature, being responsible (under the authority of the HOD) for the implementation of applicable policies (whether promulgated by governing bodies or the Minister, as the case may be) and the running of the school on a day-to-day basis. It is this understanding of a governing body's governance obligations which must inform our interpretation of the Schools Act."

3.7. And in paragraph [67]:

"Any policy promulgated by the Minister could only be general in nature and would have to be particularised by school governing bodies in order to provide a systematic set of rules and norms that are accommodating of a particular school's circumstances."

3.8. And further in paragraph [123] in the **Welkom** case, the Court said:

"The importance of cooperative governance cannot be underestimated. It is a fundamentally important norm of our democratic dispensation, one that underlies the constitutional framework generally and that has been

concretised in the Schools Act as an organising principle for the provision of access to education. Neither can we ignore the vital role played by school governing bodies, which function as a "beacon of grassroots democracy" in ensuring a democratically run school and allowing for input from all interested parties."

3.9. From the above it can be seen that policymaking and its adoption and rulemaking are integral parts of the functions of democratically elected SGBs. The approval of any policy cannot be placed in the hands of the HOD or provincial officials. It would then afford a final veto power to the HOD, which is against the entire scheme of the SASA. Policymaking is not absolute and if the provincial executive is of the view that the policy does not comply with the Constitution or the legislation, there could be intervention as had been stated in the **Ermelo** case. The provincial HOD or MEC could then interact with the SGB by following principles of cooperative governance and other procedures prescribed by the legislation.

3.10. To pass constitutional muster, laws (including amendment to statutes) must be compliant with the *rationality standard*. In this regard the Constitutional Court in **Law Society of South Africa v. The Minister of Transport & Another,** 2011(1) SA 400 (CC) at par. [32] said the following:

"… The constitutional requirement of rationality is an incident of the law which in turn is the founding value of our Constitution. The rule of law requires that that all public power must be sourced in law. This means that State actors exercise public power within the formal bounds of the law. Thus, when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrary. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. The requirement is meant to 'promote the need for governmental action to relate to a defensible vision of the public good' and 'to enhance the coherence and integrity' of legislative measures."

3.11. In **MEC for Education Gauteng Province & Others v Governing Body of Rivonia Primary School & Others,** 2013(3) SA 582 (CC) the following was also stated:[6]

"The Schools Act envisages that public schools are run by a three-tier partnership consisting of: (i) national government; (ii) provincial government; and (iii) the parents of the learners and the members of the community in which the school is located."[7]

6. Paras [36] and [37].
7. Again emphasised because it is either being ignored or overlooked in the proposed amendments.

Following the three-tier approach when the Schools Act addresses this issue of admission and capacity, it does so with reference to national government, provincial government and school governing bodies."

3.12. The Constitutional Court in **Rivonia** also with reference to the function of a SGB regarding capacity stated in paragraph [40]:

"It is immediately clear from section 5(5) that a governing body of a school determines the admission policy and this may include a determination as to capacity of the school is no longer a contentious point between the parties. Indeed, as the Supreme Court of Appeal pointed out, having regard to section 5A(3) of the Schools Act, governing bodies' admission policy may include the determination as to capacity and it is significant that school governing bodies are afforded this role. As the Onderwysersunie emphasised before us, the governing body is in a position to have regard, in an admission policy, to arrange interconnected factors relating to the planning and governance of the school as a whole."

3.13. Referring to the function at national level in paragraph [38] of the judgment in **Rivonia**, the Constitutional Court said the following:

"At a national level, the Minister of Basic Education may prescribe minimum norms and standards for the capacity of a school in respect of the numbers of learners a school can admit, including norms and standards relating to class size, the number of teachers and the utilisation of classrooms. Those norms and standards have to date not been prescribed, and, regrettably, this case demonstrates the difficulties that may arise in their absence."

3.14. AfriForum now turns to refer to the individual proposed amendments in the Bill which require comment.

4.

CLAUSE 4(d) AND CLAUSE 4(e) (AMENDMENT TO SECTION 5(5) SASA– ADMISSIONS AND ADMISSION POLICY

4.1. There are several difficulties with the proposed amendments. The list of difficulties and objections to the proposed amendment listed hereunder is not exhaustive. Clause 4(d) read with clause 4(e) should not be adopted at all.

4.2. There appears to be no rational reasoning why the existing section 5(5) of the SASA should be amended at all, and why the HOD *must approve* an admission policy determined by the SGB.

4.3. The existing sub-section (5) complied with the spirit of the partnership model and legislative function of a democratically elected SGB envisaged by the SASA and pronounced in judgments of the Constitutional Court in **Ermelo**, **Welkom** and **Rivonia** referred to above in section 3. The three-tier approach has been pointed out in the **Rivonia** case, namely that the admission policy of a public school is determined by the SGB, but subject to the Act and applicable provincial law.

4.4. It is not clear why, given the Constitutional Court judgment in **Rivonia**, the existing provisions of the SASA and existing provincial laws are not sufficient to regulate admission and enrolment of learners.

4.5. For instance, section 58C(2) of the SASA provides that the MEC must ensure that the policy determined by the SGB in terms of section 5(5) and 6(2) complies with the norms and standards. There are adequate supervisory powers in the SASA to enable the HOD or the MEC to liaise with a SGB, should the admission policy not comply with any national norms and standards, the Constitution, the SASA, or applicable provincial law.

4.6. AfriForum again refers with specific reference to these clauses in the Bill to what has been submitted above in paragraphs 1.4 to 1.12 and 2.11.

4.7. There is also an enormous practical difficulty with the proposed amendments. Nationwide there are approximately 22 700 public schools (according to figures provided by the Director General of Basic Education). In Gauteng alone there are more than 2 000 public schools. It has been the experience in practice where policies had to be submitted to the HOD in terms of the provisional legislation that such policy submissions (in particular in Gauteng), are left unattended for months or are not attended to at all – despite proper submission by SGBs.

4.8. Given the number of schools in each of the provinces, and problems with the capacity in provincial education departments, it is inconceivable how HODs will be able to properly give effect to this provision.

4.9. More importantly, the proposed amendments do not respect the partnership model as envisaged in the preamble of the SASA and as pronounced in cases such as **Welkom**, **Ermelo** and **Rivonia**. In fact, it undermines the spirit of the model. The amendments clearly seek to effectively place the making of admission policy in the hands of the provincial department and the state, which would render the function of the SGB meaningless.

4.10. Where the proposed amendment to sub-section 5(5) of SASA seeks to provide the HOD with the final authority to admit a learner to a public school,

the proposed provision not only conflicts with the existing section 5 (1) of the SASA and the proposed amendment in clause 4 (a) of the Bill, but also conflicts with the scheme of the SASA and the court judgements which envisage a cooperative partnership between the SGB, the HOD and the Minister of Basic Education. The SGB of the school is the most appropriate stakeholder to determine the school's admission policy, including whether a learner meets the requirements for admission in terms of such policy and other criteria in terms of the SASA and provincial legislation, and in particular also considering the capacity of the school as determined by the SGB and the approved feeder zone of the school.

4.11. Over and above, the proposed consideration of the HOD when he/she is given the power to approve an admission policy to take into account the *needs in general of the broader community in the education district in which the school is situated*, makes the provision vague and uncertain. It also negates the designated feeder zone of the particular school and negates the specific school community of the school which has democratically elected the SGB.

4.12. In respect of other criteria to be considered by the HOD for the approval of the admission policy, there is reference to the fact that one of the factors that he/she has to consider, is the *space available at the school for learners*. This also gives the HOD the power to consider whether there is space available without any reference to the capacity of the school as determined by the SGB. As was stated in the **Rivonia** case, however, the power to determine the capacity of a school vests in the SGB.

4.13. The powers afforded to the HOD becomes, in this regard with reference to space, vague and arbitrary, especially in view of the fact that the norms and standards for capacity of a school in terms of section 5A(2)(b) has not been determined, as had been pointed out by the Constitutional Court in the **Rivonia** case. There are therefore no objective norms and standards determined as envisaged by the legislation by means of which a HOD can determine whether there is space available at a school for learners and to do so in consultation with the SGB in the spirit of the partnership model as emphasised in the **Rivonia** case.

4.14. The existing section 5 of the SASA and its subsections clearly and intentionally provide principles along which a HOD has certain functions and powers for purposes of admission to public schools. This is amplified by provincial regulations. It has never been intended that the policymaking powers of SGBs should be undermined by way of national legislation with new criteria. That is why section 5(5) invokes also the applicability of

provincial law which in fact, in terms of the Constitution, enjoys preference above national legislation.

4.15. It is also unconstitutional to conflate the *best interests of the child* which is catered for separately in the Constitution and then also emphasise equality in the same sentence with the proposed introduction of the amendment in sub-section 5(d(i).

4.16. The wording *with emphasis on equality* and equity makes the meaning vague and uncertain. Any policy, as well as the SASA, is subject to the provisions of the Constitution as a whole. It is not rational to legislate and emphasise certain aspects only.

4.17. It is further vague and uncertain what is meant by *available resources* of the school in the factors to be considered by the HOD in the approval of the policy in the proposed amendment of section 5(5) of the SASA. For instance, how do these requirements relate to requirements pertaining to school infrastructure, capacity, as well as learning and teaching support material, including electronic equipment, furniture, other school equipment and the number of educators at the school. Where does quality basic education come into play?

4.18. Again, the entire scheme of the SASA envisages that a SGB is best suited to consider the capacity of the school and its available resources for purposes of admission policy and the admission of learners in order to promote quality education. It is best suited at grassroots level to consider the circumstances of the school and to consider and determine such factors. The function of the SGB cannot be substituted by the HOD. It undermines the entire purpose, objective and scheme of the SASA and is not rational.

5.

CLAUSE 5 (SECTION 6 OF SASA) – LANGUAGE POLICY

5.1. As with the position of the diminishing of the powers of a SGB in relation to admission policy, this proposed amendment intends to diminish and make serious further inroads upon the powers of a SGB in respect of one of the key powers of policymaking afforded in the SASA to a SGB.

5.2. Affording the power of approval of a language policy to the HOD in clause 5(c) of the Bill, with concomitant introduction of subsections in relation to such approval by the HOD, is destructive of the entire scheme of the SASA and the judgments of the Constitutional Court in this regard.

5.3. Again, as with the admission policy, AfriForum refers to what has been submitted above in paragraphs 1.4 to 1.12 and 2.11.

5.4. There is neither any rational basis nor reason why the existing provisions of the SASA should be amended at all. The existing provisions have been interpreted in the **Ermelo** case against the existing provisions of Section 6 of the Act and in particular also against section 29(2) of the Constitution. The existing provisions in the SASA in section 6 provide for norms and standards for language policies in public schools which have been determined by the Minister of Basic Education, as well as the powers of the SGB to determine language policy which are subject to the Constitution, the Act and applicable provincial law to prevent any form of racial discrimination in relation to language policy and the implementation thereof.

5.5. The proposed amendment seeks to override the judgment of the Constitutional Court in the **Ermelo** case and the outcome of the judgment in the **Overvaal Hoërskool** case.[8]

5.6. The proposed amendment is contrary to the judgment of the Constitutional Court in **Ermelo** where the following was said in paragraph [57]:

"*Its primary function* [i.e. that of the SGB] *is to look after the interests of the school and its learners. It is meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily the representatives are parents of learners and of the local community and are better qualified to determine the medium best suited to impart education in all the formative utilitarian cultural goodness that comes with it."*

5.7. It would appear that these amendments are introduced by the Department in order to focus on Afrikaans medium schools in order to overcome the lack of ability of the national department and provincial departments to fulfil their statutory obligations pertaining to the improvement of infrastructure of other schools (especially schools where infrastructure is lacking) and the imperative provision in section 12(1) of the Act that the MEC of a province has to provide public schools.

5.8. This pressure has in recent times especially been placed on single medium Afrikaans schools and even parallel medium schools in order to accommodate more English-speaking learners.[9] This despite the fact that Afrikaans single medium public schools have decreased to a mere 1 187 nationally according to figures established in 2021 by the Federation of

8. **Governing Body, Hoërskool Overvaal and another v Head of Department of Education Gauteng Province and others** [2018] 2 All SA 157 (GP).
9. **Hoërskool Overvaal** is one example.

Associations of Governing Bodies of South African Schools (FEDSAS). This represents a decrease of 87 schools and 6.8% since 2016.

5.9. The powers that are now afforded to the HOD in respect of the proposed amendments on language policy is to be seen against this background and these circumstances, and is aimed at concentrating more powers in the state, especially with reference to Afrikaans single medium schools.

5.10. Where the factors which the HOD has to consider in respect of the approval of the language policy, refer to and include *emphasis on equality* with reference to section 9 of the Constitution, it is misguided.

5.11. The authors Woolman & Bishop (in the well-known work *Constitutional Law of South Africa, Volume 4* at page 57) express the view that section 29(2) of the Constitution does not possess a structure of an affirmative action provision as section 9 does, and state the following re section 29(2) of the Constitution, with reference to the right to be educated in the language of choice:

"As we have consistently been at pains to point out, the final Constitution as a liberal political document does not view all social, legal and economic arrangements through the prism of equality and reparations."

5.12. This is precisely what the amendment in the Bill seeks to do and AfriForum submits that it would not pass constitutional muster. It seeks to introduce factors outside of the requirements of section 29(2) of the Constitution.

5.13. According to the abovementioned authors, section 29(2) has its own specific criteria that have to be considered in the language of instruction of public educational institutions.

5.14. As has already been pointed out in paragraph 1.13 above, there is no constitutional difference in terms in terms of section 29(2)[10] of the Constitution between public schools and public universities. In the latter case there is only a broad national ministerial language policy framework with the power to adopt a language policy vesting in the democratically elected council of a university. In the case of public schools, there are the national norms and standards on language policy. Why should the power of a SGB of a school to determine and adopt its language policy and in accordance with section 29(2) of the Constitution be conceptually any different from that of a council of a university?

10. The right of everyone to receive education in the language of choice.

5.15. With reference to the practicability requirement it is also noteworthy that additional criteria are introduced without the interpretation that was given by the Court in the **Ermelo** case with reference to section 29(2) to the practicability requirement.

5.16. As is the case with the admission policy, again the reference to *the language needs in general, of the broader community in the education district in which the school is located* is vague. It lends to arbitrary interpretation and the application of vague and inappropriate criteria.

5.17. In the **Ermelo** case the broader community had a specific meaning in the context of the facts and circumstances of that particular case. It cannot be meaningfully applied in all cases. What, for instance, is the broader community in a district where a school is located in a city?

5.18. The requirement pertaining to the use of classroom *space* and *resources* is also vague in that it is not defined or determinable with any reference to norms and standards. It lends to arbitrary interpretation and application.

5.19. In a nutshell – the proposed amendments seek not to give effect to the judgments in the **Ermelo** and **Overvaal** cases, but rather seek to destroy the balanced approach pronounced by them and their effect.

5.20. There is no reason to interfere with the existing provisions, as it will only result in interference with the careful and proper initial design of the legislation. It ignores what had been stated in paragraph [57] of the **Ermelo** case, namely that SGBs are meant to be a beacon of grassroots democracy in the local affairs of the school and that the representatives of parents and learners and of the local community are better qualified to determine the need, and are best suited to impart education in all the *formative utilitarian and cultural goodness* that comes with it. There is, for example, no reference in the legislation to the formative utilitarian and cultural goodness that goes along with language policy.

6.

CLAUSE 7(c) AND (d) (AMENDMENT OF SECTION 8 OF SASA) – EXEMPTION FROM CODE OF CONDUCT

6.1. Sub-clause 7(c) with its present wording with reference to an application for exemption for complying with the code of conduct on the grounds of *just cause shown* is too wide and can lead to abuse, causing insurmountable difficulties for public schools in the enforcement of discipline uniformly and to SGBs to consider such applications. AfriForum proposes that the words “just

cause" should be placed with narrower grounds such as "on fully motivated bona fide religious, cultural or medical grounds".

6.2. AfriForum also does not agree with the current wording of clause 7(d). It would be sufficient to determine that the disciplinary proceedings should comply with fair administrative justice in terms of the Promotion of Administrative Justice Act ("PAJA"). PAJA is the legislation that was given effect to in section 33 of the Constitution pertaining to fairness of administrative action. Disciplinary proceedings in their nature are administrative action.

6.3. By referring to only the *best interests of the learner* the provision in clause 7(d) overemphasises one particular interest and makes it absolute, which is not what the Constitution intends. The provision ignores other factors such as the interest of other learners which could be adversely affected by a breach of the code of conduct. It also ignores the interest of the school and its education imperative.

7.

CLAUSE 14 (PROPOSED INTRODUCTION OF SUB-SECTION 4A) – DISCLOSURE OF FINANCIAL INTEREST

7.1. This proposed amendment is not only wide, far reaching and invasive of financial privacy, but completely irrational in its present formulation. It would not pass constitutional muster.

7.2. The proposed amendment in its present form should be scrapped as a whole.

7.3. Should there be any need for a disclosure of a financial interest by members of a SGB, it should be limited to financial interests pertaining to any matter to be considered at a meeting of the SGB for purposes of the decision, and in respect of any financial interest in respect of purchases or acquisitions by the school, or in any contract or any familial or other relationship in respect of appointments of educators by the SGB to the school.

8.

CLAUSE 16 – CENTRAL PROCUREMENT OF LEARNING AND TEACHING MATERIAL

8.1. The proposed amendment makes provision for centrally procured learning and teaching material by the HOD. Although the proposed amendment states that the procurement is to be done *in consultation* with the SGB, the proposed

amendment is in conflict with the entire purpose of the functions of a SGB as envisaged by section 21 of the SASA and in particular section 21(1)(c).

8.2. It would be more consonant with section 21(1)(c) of the SASA and should any additional provision be considered, that the amendment provides that notwithstanding the allocation of a function in terms of section 21 (1)(c) to a SGB to purchase textbooks, educational materials, or equipment for the school, a SGB may apply to the HOD for centrally procured identified learning and teaching support material.

9.

CLAUSE 21 – DISSOLUTION OF GOVERNING BODY

9.1. The difficulty with the proposed amendment lies in the periods of extension afforded to the HOD, who can extend the total period of an interim governing body to one year. AfriForum submits that the underlying democratic principles of the election of a governing body should be restored as soon as possible after the dissolution of the existing governing body. Therefore, the period of governance by an interim body should not be longer than three months, within which period an election for a new governing body should take place.

CONCLUSION

AfriForum would like to reiterate our standpoint as expressed in a statement published in the media on 5 June 2022, namely that a promise that language and culture would be protected in the new dispensation was made as part of the constitutional settlement in 1994. This included the undertaking that tolerance and opportunities for the preservation and development of Afrikaans, as well as other indigenous languages would be provided. The preservation of Afrikaans as academic and scientific language was presented as an asset in this settlement, along with emphasis on the necessity to develop other indigenous languages. These sentiments are entrenched in section 6 of the Constitution.

Subsequently, during the 28 years of ANC government, no serious effort has been made to give effect to this constitutional mandate to retain and develop Afrikaans as academic and scientific language, and to develop other indigenous languages too.

The amendments to the SASA as contained in this Bill, specifically those pertaining to the admission and language policies as commented on above, in our opinion amount to a calculated attack on Afrikaans education and its speakers, while offering no relief to the speakers of other indigenous languages.

Should these amendments be implemented, it will constitute an irreparable, unilateral and permanent breach by the government of the constitutional settlement reached in 1994.

Alana Bailey
Head: Cultural Affairs
Afriforum
Cell: 072 728 4541
Email: alana@afriforum.co.za