Provisional comments on the draft Basic Education Laws Amendment Bill, 2015

Introduction

These provisional comments are submitted in response to the letter from the Deputy Minister dated 22 September 2017. We reserve the right to comment more comprehensively later and these comments must therefore not be seen to be our full or only response to the draft bill.

FEDSAS reiterates and wishes to record its stance taken at the meeting with the Deputy Minister on 21 September 2017 to the effect that it has serious objections to the process that has been followed regarding this draft bill.

Substantive issues

We deal briefly with some of the most important issues contained in the draft biil.

1. **Clause 1(g)**

The present prohibition against loans has caused numerous problems for schools. The proposed definition of a loan with the proposed insertions is still too wide to create certainty. The words “but are not limited to” creates even more uncertainty against the absence of a clear and common understanding of what “the day-to-day operational costs” of a school would be. Would purchasing of food for hostels and school feeding schemes, cleaning services where this has been sub-contracted, be regarded as day-to-day operational costs, and if so, who would be the arbiter to make this decision? “Day-to-day operational costs” would also need to be defined to remove such uncertainty.

2. **Clause 2(b)**

The wording of this clause is problematic. It requires much more attention. It is conceivable that a person may have to wilfully disrupt or interrupt a school activity for a just cause.

3. **Clauses 3 and 4**

We have serious reservations about these proposed amendments. These will be discussed more comprehensively in further submissions. FEDSAS is regularly inundated with complaints from members where no response is received from Heads of Departments to correspondence, requests, applications and submissions to them. In our own experience it is rare to receive any response from officials to even such serious matters as recommendations for expulsion at all, let alone within the prescribed 14 days.

At the very least, provision must be made for a default position where officials fail to respond to submissions made to them.

4. **Clause 6(b)**

(a) "Just cause" should be replaced by "religious, cultural or medical grounds". Just cause is simply too wide and may lead to frivolous applications for exemption.

(b) There is no time limit within which the Head of Department must dispose of the appeal.

5. **Clause 7**

"Legitimate educational purposes" as a concept is not defined. Our courts have ruled that "educational purposes" includes schools' fundraising activities. Liquor can be extremely important for fundraising activities for schools, such as wine auctions. Fundraising is in terms of section 36 a function of the SGB. This then begs the question why the principal should be the authorising functionary and not the SGB.

6. Clauses 10(a), 32, 33 and 35

FEDSAS is strongly opposed to this proposed amendment. Whether the motive for this proposed amendment is the arguments contained in the Memorandum on the Objects (the Memorandum) or the statement by the DG in his address on 4 September at the SAELA conference, both arguments are without any merit. We will deal with this more comprehensively during the meeting of 4 October and in our further submission. Suffice for present purposes to refer to the judgement of the Northern Cape High Court delivered on 1 September 2017 in the matter between Johnson v The Head of Department of Education Northern Cape and Others, case no. 11/2017.

7. Clause 10(b)

No explanation for this proposed insertion and amendment is provided in the Memorandum. Any use of facilities of a school necessarily implies financial implications for the school, e.g. overtime payment to SGB employed staff to make facilities available, higher water and electricity consumption and very often also refreshments. It can never be justifiable that the school fund must foot the bill for such expenses and it would in any event be a contravention of section 37(6) of SASA.

8. Clause 11

In its present form this provision sounds sensible. It is the practice that is problematic. Increasingly provincial departments are witholding funds payable to schools in terms of the National Norms and Standards for School Funding on the basis that the departments will then centrally procure LTSM for schools. Schools then either do not receive such LTSM or the quality of the LTSM that is supplied is of such an inferior quality that it cannot be utilised at all.

9. Clause 13

This clause is particularly strange as the power to dissolve a governing body is not conferred upon the Head of Department in any of the provisions of SASA. This section and proposed amendment does not confer such power on the Head of Departement, yet it deals with decisions the HOD may take after dissolution. The proposed wording also now does not match the heading of the section.

10. Clause 16

The proposed amendment is problematic. It is necessary for the chairperson of the finance committee of a school to have at least some financial expertise. It must therefore be made clear that the chairperson of the finance committee may be an elected parent member of the SGB or a member co-opted for his/her expertise in financial management. It does happen that no such parent member is elected to the SGB or that there is no such a person in the parent body of the school. Independent oversight in accordance with the principles of the KING reports will be improved if provision is specifically made for the fact that such a chairperson can also be a co-opted person not specifically attached to the school in any way.

11. Clause 21(6) and (7)

We have serious reservations with regard to this provision. It has happened that just below 15% of parents have turned up for such meetings constituting some 200 people and then only 20 persons turn up for the second meeting. The budget is then discussed and approved by a significantly smaller number of parents. The provision is therefore counter-productive.

12. Clause 22

We also have serious reservations on the restrictions being placed on SGBs with regard to information that can be obtained concerning the gross income of parents. This will be discussed at the proposed meeting and in more comprehensive submissions. In any event, a decree of divorce or a divorce agreement is irrelevant for the purposes of determining whether parents are entitled to exemption.

13. Clause 23(4)(a)

What or who is meant by “officers”? Any officer as defined in section1? Whatever is meant by the expression, such investigation can only be done by competent persons with financial knowledge and expertise. The question also arises why such a wide discretion is given to the HOD whereas in other sections the words “reasonable” and “good cause” often defines the discretion of the HOD. We argue for the removal of sub-clause (a), at the very least. An investigation by the AG or forensic auditors should suffice. More often than not, officials of the departments of education who have attempted – unlawfully so – to conduct such investigations have had no or extremely limited understanding of financial accounting and affairs.

14. Clause 23(5)(a)

We are opposed to the insertion and will explain our opposition in the meeting and in more comprehensive submissions.

Proposed insertions

FEDSAS proposes the following insertions and/or amendments to SASA:

15. Amendment of definition of loan

The definition of loan should be amended to make provinsion for all transactions below a determined percentage of a school’s budget to be exempted from the approval envisaged in section 37(1) of SASA.

16. Amendment of definition of parent

This definition needs to be re-examined. More specifically, the “c” part of this definition needs closer inspection. As SASA grants parents certain rights and privileges, it is important to have certainty about who is regarded as a parent and who is not. During the 2015 school governing body elections much uncertainty arose as to who qualifies as a parent in terms of part “c” of the definition. This section of the

definition makes allowance for a person to be regarded as a parent of a learner who, for example, has two biological parents, but lives with a family member who has been assigned care or guardianship over the learner by the biological parent. This provision does however also create room for abuse by a person who does not really have a learner's or the school's interest at heart but who wants to interfere in the functioning of the governing body and the school for personal or political reasons. This paragraph can result in a learner having numerous "parents" which will lead to administrative and practical difficulties.

We recommend that a restriction is included in this part of the definition in order to prevent any and every person from obtaining certain rights and privileges. We suggest the following amendment: "(c) the person who formally undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at school and where a parent as defined in paragraphs (a) and (b) is not able to fulfil his or her obligations towards the learner."

17. Amendment of section 21 (and insertion of section 12B)

SASA created a "one-size-fits-all" public schooling system especially with regards to the funding model and the functions of SGBs. We propose the inclusion of a new funding regime for public schools. This will include the creation of a new "category of public schools" namely "**section 12B schools**". This category will allow those schools that are functioning optimally to apply for this status. This will allow these schools to receive additional functions or powers, such as increased power to determine which publicly paid educators become appointed in the school. Treasury can transfer the funds directly to schools. It will certainly have a significant effect in terms of efficiency and reduction of costs and bureaucratic red-tape. From a system point of view it will undoubtedly also lead to improved accountability, transparency and oversight. It simply is much easier to track wasteful expenditure, inefficiency and proper compliance when the chain of supply is significantly shortened. There is no reason why, if the necessary capacity and expertise exists, all the funding of the

school cannot be handled at school-level. This also includes remuneration of all teachers and other staff employed at the school.

18. Amendment of section 24 and 28

The need for a single set of national Governing Body Election Regulations became once again apparent during the 2015 governing body elections. Some provinces did not publish their regulations in time and other provinces, like the Eastern Cape and Limpopo did not even publish regulations which caused quite some confusion. There are many discrepancies between the different sets of provincial regulations and the national guidelines. The governing body elections are, along with the national elections, one of the biggest elections that take place in the country, it is incomprehensible why these elections cannot be regulated by a single set of national regulations. We propose that section 24(2)-(4) is amended to allow the Minister and not the MEC, to determine the number of members in each category referred to in subsection (1) and the manner of election or appointment of such members at every public school for learners with special education needs and an amendment to section 28 to allow the Minister to may make regulations with regards to the election of governing body members.

19. Amendment of section 31

With regards to the term of office of governing body members, we propose considering making provision for staggered terms of office for certain governing body members to make provision for the retention of expertise and experience and for the introduction of new blood.

20. Amendment of secton 32

FEDSAS requests an amendment to this section to the effect that learners should also not be allowed to participate in the process of appointment of staff of the school.

21. Alignment of section 20(2) and 36(4)

Section 20(2) allows an SGB to make available facilities of the school for various purposes "which may include the charging of a fee . . ." However, section 36(4) forbids a lease without the permission of the MEC. These sections create problems for schools that receive request for very short term use of school facilities on short notice. "Lease" as used in section 36(4) should therefore defined to mean extended lease contracts for specified periods.

22. Section 41(4) and (5)

Section 41(4) should be removed form SASA and section 41(5) appropriately amended.

Paul Colditz
CEO: FEDSAS
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