COMMENTS:

Clause *(Indicate clause/ regulation Number)*	**Comment** *(State why the clause/regulation or proposed amendment is not supported or what the problem is with the provision)*	**Suggestion** *(Suggested deletion/amendment/ addition)*
General	The stated intention in the Memorandum on the Objects of the The Basic Education Laws Amendment Bill ("the Draft Amendment Bill") is to ensure that "*systems of learning and excellence are put in place in a manner which respects, protects, promotes and fulfils the right to basic education enshrined in section 29(1) of the Constitution*". The Western Cape Government ("WCG") wholeheartedly supports this intention. Certain of the amendments proposed by the Draft Amendment Bill however constitute a material shift in the policy underlying the legislative framework governing education in South Africa. These relate, inter alia, to the provisions which will have the effect of transferring the responsibility for the selection and appointment of post level 2 to 4 educators to the Head of Department as well as the provisions which, on the face of it, appears may have the effect of transferring the power to <u>approve</u> the admission policies and language policies of a public school to the Head of Department. Before raising specific concerns, it is convenient to revisit the core policy components which underlie the current legislative framework. The South African Schools Act, 1996 (Act 84 of 1996) ("SASA") in its preamble states that, the achievement of democracy in South Africa has consigned to history, the past system of education which was based on racial inequality and segregation and that the country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our peoples talents and capabilities to advance the democratic transformation of society. Section 4*(m)* of the National Education Policy Act, 1996 (Act 27 of 1996) stipulates that broad public participation in the development of education policy should be acknowledged as one of the guiding principles in education and that all interested	

stakeholders should be represented in the governance of all aspects of the education system.

The policy considerations which preceded these enactments were set out in the White Paper 1 on Education and Training of 1995, which provided that the principle of democratic government should increasingly be reflected in the entry level of the education system by the involvement in consultation in appropriate forms of decision making of elected representatives of the main stakeholders, interest groups and role players.

The preamble of SASA provides that the national system for schools will uphold the rights of all learners, parents and educators, and promote the acceptance of responsibility for the organisation, governance and funding of schools in partnership with the state. Therefore, the role of the school governing body and the parent community, in the creation of security within the educational environment is paramount.

The consequence of the policy of democratisation of school governance has been that many functions and powers have been devolved to school governing bodies by national and provincial legislation. These functions pertain particularly to the rights to recommend appointment and transfer of educators, to suspend and recommend expulsion of learners and to determine language and school rules for public schools.

The policy of decentralisation of education has become a key aspect of educational restructuring in many countries including South Africa. Educational decentralisation redistributes shares and extends power and enhances parent participation by removing centralised control over educational decision making. By decentralising power to those who have to pay for the schooling coupled with parental choice of the individual enhances the efficiency, effectiveness and quality of education.

Education White Paper 2 proposed that the new structure of school organisation, governance and funding must aim to –

- Enable representatives of the main stakeholders of the school to take

responsibility for school governance, within a framework of regulation and support by the provincial education authorities;

- Ensure that the involvement of government authorities in school governance is at the minimum required for legal accountability, and is based on participative management;
- Ensure that the decision-making authority assigned to school governing bodies is coupled with the allocation of an equitable share of public (budgetary) resources, and the right to raise additional resources, for them to manage;
- Recognise that a governing body's right of decision-making is not linked to the ability of its community to raise resources;
- Improve efficiency in school education through the optimum use of public financial (budgetary) allocations, and publicly-funded staff resources.

In SASA school governance refers to the specific functions prescribed and allocated to governing bodies. Parents were accordingly conferred with increased responsibility for the governance of schools including financial management and maintenance of fixed assets owned by the state. All the other functions not specifically mentioned in SASA remain the functions of the National and Provincial Departments, and in particular the principal of the school as professional manager.

The WCG does not believe that it is in the best interest of education to remove the rights of SGB's in relation to the recommendation of candidates for appointment or by providing for the approval of the admission and language policies of a public school by the Head of Department in the wholescale manner proposed in the Draft Amendment Bill.

While there are some valid concerns that are sought to be addressed in the Draft Amendment Bill, it is important to identify the root causes of the problems. In several cases, which will be elaborated on under the relevant clauses, it is submitted that the Minister is seeking the wrong solutions for the right problems. This cannot be supported.

The WCG wishes to note the following fundamental issues in general:

1. The encroaching state interference in schools across the board. Whilst the

state must obviously have some control over public schools, some of these amendments seek to take away powers of schools governing bodies ("SGB's") in a wholescale manner for the reason that some SGB's do not function properly. Punishing all schools for the behavior of some is not supported. The behavior of those that are not performing adequately in whatever respect should rather be addressed. The same goes for government officials.

2. This Draft Amendment Bill proceeds from the premise that officials in the education departments are somehow more competent and/or objective than parents. We have seen first-hand that this is certainly not always the case.

3. The main contentious issues that the Draft Amendment Bill seeks to address, it is submitted by the incorrect means, arise due to:

   (a) Corruption in the appointments process;
   (b) Incapacity of many SGB's which do not have people with the relevant skills and expertise;
   (c) Failure of education departments to manage their staff effectively, and of officials to manage their schools effectively; and
   (d) Inadequate appointment processes of staff.

The WCG believes that if these issues are improved, a fundamental shift in the education system will be seen, and that it is these issues that will largely achieve the stated outcomes of the Draft Amendment Bill, not the removal of the powers of the very parents whose assistance is needed in the governance of schools.

The Draft Amendment Bill also must be looked at from the starting point of "fix what is not working" and not "fix what is not broken".

It is unclear whether a Socio-Economic Impact Assessment ("SEIA") was undertaken prior to the commencement of the preparation of the Draft Amendment Bill. A SEIA is critical in order to fully assess the impact and implications of the Bill. A copy of the SEIA is requested in the event that same has been prepared.

	Comments on individual clauses are provided below. If a specific clause is not addressed, it is supported.	
Clause 2*(a)*	This clause proposes to amend section 3(6) of the South African Schools Act, 1996 (Act 84 of 1996) ("SASA") to increase the penalty provision in respect of parents who, without just cause, fail to comply with subsection (1) (the requirement for compulsory attendance) or a person who, without just cause, prevents a child from attending school from a maximum of six months to a maximum of six years.	This proposed new maximum penalty is supported in respect of people other than parents. As regards parents, consideration must be given to the welfare of the child in the event of the imprisonment of his or her parents for such a long period, and as such, may be too harsh.
Clause 2*(b)*	This clause proposes to insert a new subsection 3(7) to make it an offence to willfully interrupt or disrupt a school activity and imposes a maximum penalty of six years.	It is proposed that the words "*and without just cause*" be inserted after the word "*wilfully*".
Clause 3	The clarification that the Head of Department has the final say with regard to admissions, subject to the appeal to the MEC, is supported. This proposed amendment is in line with the case law. It is also necessary, given the Constitutional and legislative obligations to ensure that every child of school-going age has a place in a school. The proposed amendment which provides for admission policies and any amendments to be submitted to the HOD for approval is not supported. From a purely administrative point of view this is nigh impossible. The HOD will not personally look at each policy. The function will be delegated, which will necessitate a dedicated member of staff who must be properly legally qualified in order to ensure that the policy is compliant with case law and legislation. There are likely to be more legally qualified people on some governing bodies than in education	The clarification that the Head of Department has the final say with regard to admissions, subject to the appeal to the MEC, is supported. This proposed amendment is in line with the case law. It is also necessary, given the Constitutional and legislative obligations to ensure that every child of school-going age has a place in a school. The regular review of policies <u>by the school</u> is supported, but not the requirement for approval by the HOD. The

	departments. Secondly, this amendment takes away responsibility from the school and is part of a thread running through the Draft Amendment Bill, namely increasing state interference which appears to be a thinly disguised attempt at social engineering. The power to determine admissions policies was given to schools when SASA was first enacted. If the intention were to say that all schools must take learners on a "first come first served" basis, then there would have been no need for admission policies. Schools should be able to retain this power, and, as is currently the case, if there are contraventions or unfair discrimination, the policies should then be challenged on an individual basis. Also, what would be the interim position while schools are waiting for their policies to be approved? This could leave the school in limbo until such time as the policy is approved, and render them vulnerable to legal attacks by disgruntled parents. The provision for the MEC to respond to an appeal within 21 days is unrealistic. It is often necessary to obtain information from the school and this adds to the time period. We propose 45 days.	factors mentioned in (d) should be retained to be taken into account by the <u>school</u> when formulating or amending their policy. The HOD should retain the right to declare when a school is full, as is currently the case. We propose that 45 days for a MEC to decide an appeal is more realistic.
Clause 4	The proposed amendment requiring that the language policy of a school be <u>approved</u> by the HOD is not supported. Schools should retain their right to determine the language policy. The factors mentioned in proposed subsection (7)*(a)-(c)* are valid and could be retained in the Draft Amendment Bill, to be taken into account by the governing body when	Schools should retain their right to determine the language policy. The factors mentioned in proposed subsection (7)*(a)-(c)* are valid and should be retained in the Draft

	formulating the language policy. However, the WCG does acknowledge that there are some schools that abuse this power to exclude learners. The proposed amendment that would empower the HOD, in appropriate circumstances, to direct the school to adopt more than one language of instruction is thus supported. The factors to be taken into account and the fact that a process must be followed by the HOD are also supported, and necessary if this course is to be followed. However, what is the meaning of "the community" in clause 4(12)? It is too vague for the HOD to be able to identify who must be communicated with. In addition, a provision should be added that, in the event of the HOD directing a school to adopt an additional language, the school must be provided with the additional resources necessary to be able to do so.	Amendment Bill, to be taken into account by the governing body when formulating the language policy. The amendment that would empower the HOD, in appropriate circumstances, and after following specified processes, to direct the school to adopt more than one language of instruction is supported. However, in addition, a provision should be added that, in the event of the HOD directing a school to adopt an additional language, the school must be provided with the additional resources necessary to be able to do so. The concept of "the community" is too vague and should either be removed or defined.
Clause 7	The DBE is aware that the WCG is proposing in the Draft Western Cape Provincial School Education Amendment Bill, 2017 that alcohol be prohibited from school premises or during school activities, UNLESS an application has been made to the HOD for permission, subject to conditions. It is proposed that this is a better way to regulate the consumption or sale of alcohol at events on school premises or during school activities.	It is submitted that a better way to regulate the consumption or sale of alcohol at events on school premises would be by providing that alcohol is prohibited UNLESS an application has been made to the HOD for permission, subject to conditions. In the

	It is an open secret that many schools across the country allow alcohol at school events. They go to great lengths, in some cases, to ensure that an outside agency procures a liquor license, in the belief that this will absolve them from breaking the law. It is common knowledge that schools are facing increasing financial pressures. One way of making money is to allow for hiring out school premises over weekends or during school holidays for private functions such as birthday parties, parking for sporting events, or even for camping. This provision will prevent that from happening. In addition, the definition of "school activity" in SASA is: **"school activity"** means any official educational, cultural, recreational or social activity of the school within or outside the school premises; This thus even prevents teachers from having a function OFF school premises and consuming alcohol. In terms of this amendment they cannot even have it in the possession off school premises, if it is a school recreational or social function. The WCG completely supports the responsible use of alcohol and the restriction of children's exposure to its abuse. We are in agreement that there should be conditions in place that will prevent underage learners from consuming or being exposed to it. But to have a wholesale ban on alcohol on school premises is, in our view, not going to achieve what we want to	event that conditions are not complied with, a criminal offence should be created, as well as provision for the permission to be revoked. If the above proposal is not accepted it is recommended that a provision be included that provides that for the purposes of this section, the definition of school activity excludes social activities off school premises where no learners are present.

	achieve, and is not going to be complied with anyway. There is little point in legislating for something that one knows will not be complied with, or enforced. It is furthermore noted that no provision is made in the proposed amendment for a breach of the prohibition to be a criminal offence.	
Clause 10	This is one of the most contentious clauses in the Draft Amendment Bill. In the stated motivation in the Memorandum, two aims are spoken of. The first is "*the requirements of transformation*", and the second is the importance of the leadership and management of a school. There can be no question that leadership and management of a school are crucial, which is exactly why it is important to get the very best people to fill those positions. The motivations of the Minister for these amendments are: 1. The current system relies to a large extent on the existence of a functional SGB with the necessary skills. Many schools do not have these. 2. The Minister regards it as a weakness that the HOD is currently restricted in terms of whom s/he can appoint insofar as the SGB has the right to make recommendations and the HOD has to justify deviating from the SGB's	There should be no change in schools' powers to recommend appointments of senior staff. SGB's should be better capacitated with skills by way of partnerships with the private sector. Existing legislation should be used to deal with SGB's that are not functioning properly. There should be a bigger emphasis on managing staff effectively. No educator who is at a post level below that of the position being interviewed for should be part of the shortlisting or interviewing panel. If they are to serve on such panels at all, it must only be a post level of equivalent or senior level.

	recommendations which is subject to challenge in court as administrative action in terms of PAJA. 3. Reference is made to two cases where it is seemingly implied that racial "transformation" was thwarted by the court. 4. It is a weakness that educators, as members of the SGB, form part of the interview committee, and can conceivably be in a position to recommend their supervisor. 5. The HOD does not have a say in the shortlisting of his/her employees. In respect of 1, as stated in the general comment at the beginning of this submission, taking away powers of all because some cannot function is unjustified, and can only have the effect of disincentivising well-functioning schools. If schools function well and are governed well, there is no legitimate reason to interfere with their current powers. If SGB's do not function well, the existing legislation provides sufficient safeguards to address this in s22 of SASA. This section does not appear to be well utilised, and should be, rather than changing the law. In addition, the education departments should work with SGB's to improve their competency. The partnership with SAICA in the Western Cape is assisting to empower SGB members, and partnerships with other similar bodies, and legal	The Department should have representation on the shortlisting and interview panel. This representation should be at the level of Circuit Manager or above. The Departmental representation should be full representation and not only an observer or resource person. This will provide the department with some input, whilst not removing the power from the SGB. This should serve as a good counter-balance between the educational expertise as well as the parents' knowledge of the school and educator community. Competency tests should be required for senior appointments. It is proposed that an amendment be made to section 6 of the Employment of Educators Act, 1998 (Act 76 of 1998) providing that in the event that the HOD makes an appointment which is not the SGBs first choice that reasons must be provided.

	professional associations, should be forged in an attempt to uplift the skills of SGB's. In addition, certain competency standards should be developed. In the Western Cape, competency assessments are used in the appointment of principals, by agreement with the SGB's, but if anything is going to be imposed on schools it should be competency assessments for senior leadership appointments. In respect of points 2 and 3, an appointment by a HOD will also amount to administrative action in terms of PAJA, and thus also subject to review by any interested party, including the SGB. It will still have to be rational and comply with all the requirements of the law. We have no doubt that if a SGB is not satisfied with the appointment, they will challenge the appointment. This amendment will therefore not resolve the problem identified in this regard. Secondly, the cases referred to in the Memorandum do not support the Minister's arguments. In *The Point* case, the HOD appointed a "White male" who scored second, purportedly on the basis that this would open up a vacancy at the school for a "historically disadvantaged individual". The court overturned it. The Minister's argument is, seemingly, that this is inhibiting "transformation". Which brings us to the issue of what exactly is meant by transformation. In this case, the number one candidate was	

	identified as the best for the school. The HOD then decided to take the second. His motivation in doing so assumes that a "historically disadvantaged person" will then fill the vacancy created by the appointment of the then deputy. This firstly presumes that whoever applies for the newly vacant post will include at least one historically disadvantaged candidate. How could he possibly know that? Secondly, it assumes that that candidate will be the best person for that position. The only alternative interpretation is that the HOD would have appointed a historically disadvantaged person no matter what, and with no regard to the best interests of the school. This surely cannot be what the Minister is intending, given her stated objective of putting in place "systems of learning and excellence". In the *Jan Kriel* case, the appointment of a "Brown" candidate who scored second but was appointed by the HOD on the grounds of employment equity, was set aside. Again, this appears to assume that, just because a person of colour was nominated, even though he was not regarded as the best candidate, he should have been appointed. Employment Equity should be applied on the basis that if there are two people of similar competence and/or potential, and one is a historically disadvantaged individual and the other is not, then the historically disadvantaged individual should be appointed. This is the current law, which binds schools. So what	

	exactly is the Minister trying to achieve, if not some kind of social engineering? This cannot be in the interests of ensuring the appointment of the best people for each position in a school, and the arguments provided are not convincing in motivating the stated objective. In addition, parents at the schools are in a far better position to assess who is the best person for their school. A HOD will not possibly know that, and will not him or herself take that decision. They will have to rely on their officials. If schools are not performing well, the question has to be asked – what have the departmental officials done about it? If they have not succeeded in assisting the school to improve, or removed staff that are not performing, on what basis should they be trusted to appoint new staff at the school? Point numbers 4 and 5 are valid. It is proposed that no educator should sit on an interviewing panel. An educator of the same or higher level should be allowed to sit as an observer. Instead, it is proposed that a representative from the Department should sit on the shortlisting and interviewing panels, of the level circuit manager or higher. This would ensure a better representation of the Department without taking away the SGB's powers.	
Clause 14	It is proposed that an additional provision be added to this proposed amendment to provide for the monitoring of compliance with this provision by the Districts.	Include a provision to provide for the monitoring of compliance with this provision by the Districts.
Clause 16	A principal should also be excluded from being a member of a disciplinary committee.	It is proposed that an additional amendment be included which provides that a principal may not be

		a member of a disciplinary committee.
Clause 21	This proposed amendment needs to be clarified. Is it the intention to confer on the governing body the power to deviate from the budget as approved by the general meeting of parents contemplated in subsection (2) of SASA, but to make such deviation subject to the further approval of the general meeting of parents in accordance with the procedures set out in proposed subsections (4) to (7)? Alternatively, is the proposed amendment also intended to cover the scenario where a deviation to the budget prepared by the governing body and presented to the parent body is proposed by the parent body? This would presumably be for the purpose of giving the governing body an opportunity to rework the figures before again presenting the budget to the parent body for final approval. Furthermore, experience indicates that in many instances the additional remuneration contemplated in section 38A is often provided for as a line item in the budget. In the interests of transparency, an amendment is proposed to provide that the requirement to disclose the additional remuneration in the annual budget must include the annual allocation for additional remuneration and how such allocation is intended to be disbursed to the respective state employees.	This proposed amendment must be clarified. It is proposed that the revised provision provides the SGB with the opportunity to revise the figures pursuant to a deviation proposed by the parent body. It must however be clear that final approval lies with the parent body. The term "significant and substantial" is wide open to interpretation. There should be a % specified. In addition, In the interests of transparency, an amendment is proposed to provide that the requirement to disclose the additional remuneration in the annual budget must include the annual allocation for additional remuneration and how such allocation is intended to be disbursed to the respective state employees.
Clause 22	The new proposed section (2)*(b)* – "Statements of profits received from investments or other forms of	Amend to "statements of profits received from

	business" is too restrictive. This will allow a parent who is self-employed or doesn't receive a fixed salary, to potentially inflate their expenses with items that are not essential, to ensure that their business does not make a profit.	investments or income from any form of business"
Clause 24	In order to make an informed decision on the financial wellbeing of an independent school and that sound and effective financial management is implemented at the school, it is important to know about their true financial position and results. Provision must be made for all relevant financial information to be provide and not just relating to the subsidy amount paid to these schools.	The quarterly financial reports and audited financial reports must report on all income and expenditure and must not be limited to and relating to the subsidy only.
Clause 25	What if a home schooler is doing an overseas curriculum and writes exams online or by some other method and receives results? Will that scenario be covered by the requirement for assessment by a "competent assessor" registered by SACE or SAQA?	
Clause 29	What regulations could the Minister make regarding admissions to public schools that would not infringe on the SGB's right to determine admission policy? The provisions of (aD) and (aE) are an infringement of the rights of provinces to determine how they provide education in their province.	
Clauses 32, 33, 34 and 35	These proposed amendments are <u>not supported</u>. Refer to the detailed comment on clause 10 above. In addition, the processes for appointment to promotional posts should be prescribed by the MEC's in each province, as the employer, and not the Minister.	Change "Minister" to "MEC" in proposed s32 (b)(ii)
Clause 40	This proposed amendment which prohibits all educators from doing business with the state is very far reaching. It is proposed that the prohibition be confined to state employees, Ie departmental posts as opposed to SGB posts.	It is proposed that the prohibition be confined to state employees, Ie departmental posts as opposed to SGB posts.
Clause 42	This provision confers authority on the Minister which potentially intrudes on the management of provincial education departments.	
Clause 43	Given the resource requirements that become	

	necessary to give effect to this proposed amendment, it may be useful to include well-considered preliminary processes and procedures that can be followed to determine the need for and scope of the investigations before these investigations are launched.	
	It is proposed that an amendment be included which provides that learners are not permitted to participate in the process of appointment of staff.	