



Centre for Applied Legal Studies

**Education Law Project
Law and Transformation Programme**

**SUBMISSION TO THE PORTFOLIO COMMITTEE
HEARINGS ON THE CHILDREN'S BILL**

JULY 2004

(A) INTRODUCTION

This submission is made by the Education Law Project ('ELP') which falls under the auspices of the Law and transformation Programme at the Centre for Applied Legal Studies ('CALs'). The submission is endorsed by the Alliance for Children's Entitlement to Social Security ('ACCESS') that is an alliance of almost 1000 children's sector organisations. It is also endorsed by the following organisations in their individual capacity, the Children's Institute ('CI'); Resources Aimed at the Prevention of Child Abuse and Neglect ('RAPCAN') and South African Society for the Prevention of Child Abuse and Neglect ('SASPCAN').

The focus of this submission is Chapter 3 of the Children's Bill ('Bill') which is the chapter dealing with Children's Rights. The ELP is of the view that the removal of the key rights clauses from Chapter 3 of the current draft of the Bill, which formed part of South African Law Commission ('SALRC') draft, undermines the original intent, purpose and effect of Chapter 3. The original intent, purpose and effect of Chapter 3 was to elaborate on, and give content to the rights in the Bill of Rights insofar as they relate to children. In particular, the ELP is concerned that the removal of the clause dealing with the right to education will impede the potential for the state to provide access to a basic education of an adequate standard to all children living in South Africa. As such it will undermine the potential for especially poor children, to realise their full potential.

CALS is an independent, grant-funded research unit attached to the School of Law at the University of the Witwatersrand. CALS' mission statement is committed to promoting democracy, justice, equality and peace in South Africa and to addressing and undoing our country's legacy of oppression and

discrimination through the realization of human rights for all South Africans under a just constitutional and legal order by:

- undertaking rigorous research, writing, analysis and briefings;
- teaching and providing public education and training;
- the collection and dissemination of information and publications;
and
- legal advice and litigation, participation in policy formulation, law reform, dispute resolution and institutional development co-ordination.

The ELP was established in 2002 to assist parents and children from predominantly poor communities by providing legal services to these communities to enable them to access their rights to a basic education. In its two and a half years of operation, the ELP has adopted a wide approach to the provision of legal services, including applied research in support of litigation, legal literacy training, paralegal services and litigation.¹

(B) THE PURPOSE OF CHAPTER 3

General

The intent and purpose of Chapter 3 as a specific chapter dealing with Children's Rights is to provide that:

- South Africa fulfil its obligations in terms of international law.

¹ ELP interventions to date have focused on pursuing cases of unfair discrimination in public schools against children whose parents are unable to pay school fees, and litigating against unfair or arbitrary state action in withdrawing or refusing to provide education services to communities. The ELP has succeeded in securing school access for hundreds of children in the Johannesburg area and beyond who would otherwise have been excluded for lack of adequate transport and money to pay school fees. Research work has included investigating the implications of international human rights instruments for understanding the South African state's duty to provide basic education; quantifying the impact of the costs of education on poor households; and investigating the political dynamics of rights-driven education reform processes. The ELP's advocacy work has included submissions to government on the costs of education and school governance.

- Chapter 3 elaborate on and give content to the children's rights in the Bill of Rights.
- Chapter 3 serves as a benchmark against which the various state departments may be able to measure their rights-based obligations in respect of children's rights.

This understanding of its role and purpose may be derived from a reading of some of the general provisions contained in the Bill.

Section 2 which sets out the objectives of the Bill states that:

...

(e) To give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic; and;

(f) generally, to promote the protection, development and well-being of children.

Section 7 which deals with the application of Chapter 3 states that

(1) The rights which a child has in terms of this Chapter supplement the rights which a child has in terms of the Bill of Rights.

Section 8 provides that provisions of chapter 3 take precedence over other all. Its states that:

In the even of a conflict between a provision of this Chapter and any other legislation, the provision of this Chapter prevails...

International law

In terms of the Section 2 (e) of the Bill, one of the central objectives of the Bill is to ensure South Africa's compliance with the rights guaranteed in the international and regional instruments in respect of children's rights. South Africa has ratified both the Convention on the Rights of the Child ('CRC') and the African Charter on the Rights and Welfare of the Child. Each of these instruments contains extensive provisions detailing many of the rights to which children ought to be entitled.

In respect of a child's right to an education: Article 28 of the CRC sets out the particular entitlements to be guaranteed by the right and which make up the content of the right to an education, Article 29 sets out objectives to achieved by the right guarantee. Similarly, Article 11 of African Charter on the Rights and Welfare of the Child sets out the content of the education guarantee Article 11(2) sets out objectives to achieved by the right guarantee and Article 11(3) sets out the particular entitlements to be guaranteed by the right and which make up the content of the right to an education.

The formulation and structure of the education clause in the SALRC draft Bill followed – albeit not exactly in terms of wording – the formulation and structure of its international counterparts.² It contained a sub - clauses that

² Section 21 of the SALRC Draft Bill

(1) Every child has the right to-
have access to education on the basis of equal opportunities for all;
have access to educational and vocational information and guidance; and
receive education and information through a medium which makes education and information accessible to the child having regard to the child's personal circumstances and any disability from which the child may suffer.

(2) The education of the child must be directed towards-
the development of the child's personality and talents and intellectual and physical abilities to their fullest potential;
the development of respect for their democratic values of human dignity, equality and freedom enshrined in our Constitution;
the development of respect for the child's parents, cultural identity and values, and language;
the preparation of the child for a responsible life in free society, in the spirit of peace, friendship, humanity, tolerance and national unity among cultural , religious and linguistic communities on the basis of equality, non-discrimination and free association; and
the development of respect for our natural and cultural heritage.

set out the entitlements guaranteed by the right and the objectives to be achieved by the realisation of the right. The intention of the SALRC process appears therefore to have been to fulfil its international obligations by the codification of these obligations into South African law through the Children's Bill.

Supplementing the rights in the Bill of Rights

In terms of Section 7 of the Bill, one of the objectives of the Chapter is to 'supplement' the rights in the Bill of Rights. This suggests that the purpose of the Chapter is to elaborate on, or give content to the rights in the Bill of Rights. It should provide guidance on the exact meaning and content of the children's rights in the Bill of Rights, as well as the obligations of the state, through a process of identifying and defining the content of the various rights. This must occur with reference to international law, and with particular relevance to South Africa's history of apartheid and the need to redress apartheid education. In *Government of the RSA and Others V Grootboom and Others* ('Grootboom') the Constitutional Court recognised the importance of interpreting rights in 'their social and historical context'³.

Adopting such a purposive approach to elaborating on the rights in the Bill of Rights is particularly important in the context of the right to basic education.

Section 29 (1) (a) states:

'Everyone has the right to a basic education, including adult basic education'

This is a broad and general provision. Thus the function of Chapter 3 is to identify and define the entitlements that make up the right.

³2001 (1) SA 46 para 22

The right to basic education is a socio-economic right. The manner in which it is entrenched in the Bill of Rights is very different from that of the entrenchment of the other socio-economic rights in the Bill of Rights. These rights – such as the rights of access to housing and health care services, and the rights to food, water and social security – are qualified to the extent that they are made subject to the adoption of ‘reasonable legislative and other measures’, and ‘progressive realisation’, ‘within [the state’s] available resources’, the right to basic education is by contrast unqualified and is therefore an absolute right.

This means that the government approach to providing for education must also be different. With regard to the qualified socio-economic rights, the constitutional court has held in the *Grootboom*⁴ and *TAC*⁵ cases that for government programme to give effect to these socio-economic rights the programme must be reasonable only. It then sets out certain criteria for evaluating reasonableness, one of which is evaluating the extent to which the programme caters for the needs of the most vulnerable members of society. In the case of unqualified rights, its important to determine, firstly what entitlements are guaranteed by the right and secondly, whether or not the state has provided adequately in terms of the right.

In the case of *In Re School Education Bill of 1995 (Gauteng)*⁶ the constitutional court acknowledged that the state is not only required to not interfere with an individual’s enjoyment of the right but the state is also obliged to provide basic education. Save for acknowledging this positive obligation in the provision of basic education, our courts have to date not had the opportunity to comment on the scope and content of the right to basic education and the extent of the state’s obligations in respect thereof. It is

⁴ See note 3 above

⁵ 2002 (5) SA 721 (CC)

⁶ 1996 (4) BCLR (CC)

therefore very important for the Bill to begin provide guidance as to the content of the right.

Precedence over any other law

Chapter 3 must elaborate on, and give content to the children's rights in the Bill of Rights. Section 8 further states that this Chapter takes precedence over any other law. Thus, to the extent that the various state departments may develop law and policy that has an impact on children's rights, such law and policy must comply with the rights in the Bill of rights and the meaning attributed to those rights in Chapter 3 of the Bill.

This suggests that a further purpose of Chapter 3 is to guide or serve as a benchmark to the various state departments when formulating law and policy. In respect of education, the Department of Education had developed the South African Schools Act ('SASA')⁷ and the National Education Policy Act⁸ together with their accompanying notices and regulations. These laws together regulate the department's commitment to meeting its obligations in respect of the right to a basic education. The role of the Bill in this context would not be to replace this regulatory framework rather it would guide the regulatory framework to ensure that the laws and policies in place do in fact give in effect to the right to basic education. To the extent that the regulatory framework fails to do this, the relevant laws and policies must be revised.

Commentary

The commitment to children in the specialised international instruments and Section 28 of the Bill of Rights recognises their role as a vulnerable group whose needs ought to be prioritised in policy and planning in every sphere of government. The original SALRC draft Bill attempted to do this by identifying and elaborating on those rights that have particular relevance for children in

⁷ Act 84 of 1996

⁸ Act 27 of 1996

accordance with South Africa's international law obligations, and in accordance with the particular needs of South African children. The current draft of the Bill either omits key rights totally⁹, or merely restates rights already in the Bill of Rights¹⁰. This *status quo* fails to enhance the full realisation of children's rights and defeats the purpose that the inclusion of Chapter 3 in the Bill was meant to serve. Instead it makes the inclusion of Chapter 3 as a chapter dealing with children's rights meaningless since it in its current form it is unable to fulfil the objectives that it was meant to serve.

Recommendation

It is therefore recommended that a comprehensive list of children's rights be re-instated in Chapter 3 in accordance with South Africa's obligations in international law and in accordance with the particular needs of South African children. In particular it is recommended that the education clause be re-instated in Chapter 3.

(C) MAKING THE CASE FOR DEFINING THE RIGHT TO A BASIC EDUCATION

Background

The right to education is probably the most widely recognised socio-economic right in international instruments and in the Constitutions of individual countries.¹¹ The underlying rationale for the worldwide recognition of the right to education has been described as its importance in enabling individuals to develop and realise their full potential, and to learn good values and thereby make good citizens.¹² This right is also viewed as an 'empowerment right',

⁹ The rights that have been omitted totally include rights in respect of social security, education, refugee and undocumented migrant children; children with disabilities and chronic illnesses; leisure and recreation; unfair discrimination and property.

¹⁰ Rights that have been merely restated include: social services, basic health care services; basic nutrition; shelter; name and nationality; family care and alternative care; to be protected from maltreatment, neglect or abuse; to be protected from exploitative labour practices; not to be permitted to perform inappropriate work; not to be detained except as a measure of last resort and to legal representation.

¹¹ The right to education is entrenched in at least 58 national Constitutions.

¹² Nowak M 'The right to education' in Eide A *et al* (eds) *Economic, social and cultural rights* 2nd edition (2001) 245-271. Netherlands: Martinus Nijhoff Publishers.

because through education individuals are able to exercise their enjoyment of other rights.¹³

The unique history of apartheid education requires that constitutional drafters recognise the legacy of inequality and the need for redress through the entrenchment of the right to basic education. That is, prior to 1994 education was structured along racial lines so as to prepare learners of different race groups for the roles they were expected to serve in apartheid society. The main characteristics of apartheid's education system were, *inter alia*, gross inequality in the financing of education,¹⁴ differentiated curricula and standards of education and restricted access of black people to higher education. This legacy persists today despite government efforts to redress apartheid education.

This may be largely attributed to the failure of the regulatory framework to sufficiently create an education system that is of an adequate standard and that is both physically and economically accessible to all. A full analysis of the current regulatory framework is too lengthy for the purposes of this submission, however some of the most compelling issues within the schooling system are highlighted briefly below.

The current status quo in South African Schools

The previous Minister of education, Prof Kader Asmal in parliament in May 2001 described the current *status quo* in South African schools, in terms of which, at that time 45% (12 257) of the country's 27 148 schools were without electricity, 27% (7 409) are without clean water, 66% (17 907) of schools were

¹³ Coomans F 'The Core content of the right to education' in Brand D & Russel S (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 160. Pretoria. Protea Bookhouse.

¹⁴ Until 1994 South Africa had 15 ministries of education, including in the TBVC states. *Per capita* expenditure was as follows: R5 403 for white children; R4 687 for Indian children children; R3 691 for coloured children and between R2 184 and R1 053 for African children.

without adequate sanitation, 11,7% (3188) did not have any sanitation at all and 34 % did not have telephones. In the same address, the Minister also noted that none of the nine provinces had completed the delivery of learning materials by the first day of the 2001 school year, and that by early May 2001 most provinces had not yet completed delivery of learning materials. He also stated that in 2000 there were 67 000 unqualified or underqualified teachers in South African schools.¹⁵

Thus, provisioning for basic education in terms of the regulatory framework appears to have failed to sufficiently address the disparities between the historically advantaged (white) and disadvantaged (black) schools and hence to provide an adequate standard of education in the latter schools. According to commentators, this is because non-personnel expenditure, which although equity driven, constitutes only 8-10% of state spending, while personnel provisioning that constitutes 85-90% of state spending is said to continue to favour historically advantaged schools.¹⁶

School Fees

Contrary to South Africa's obligations in terms of the international law, school fees are charged at both primary and secondary schools. In terms of the regulatory framework individual school governing bodies may determine the amount of school fees to be charged at a school.¹⁷ The framework attempts to alleviate the burden of school fees for the poorest parents by setting a mandatory means test for the granting of full and partial exemptions that individual schools are obliged to abide by when determining their exemption policies.¹⁸

¹⁵ *Mail & Guardian* (2002-01-11).

¹⁶ For an overview of the relevant policy see National Norms and Standards for School Funding General Notice 2362 (Government Gazette 19347) October 1999. For a critique of the regulatory framework in respect of school funding see RA Wildeman 'School funding norms 2001: Are more learners benefiting?' (2001) *IDASA Budget Information Service*.

¹⁷ See Sections 34, 36 & 39 of SASA

¹⁸ The Exemption of Parents from the Payment of School Fees Regulations Government Notice 1293 (Government Gazette 19347) October 1998. In terms of Regulation 3(1)(a) as read with 5(3), in terms of which a school must fully exempt parents whose incomes are less

This exemption policy is widely acknowledged as inadequate, evidenced by the fact that many schools are failing to implement the exemption policy and to grant exemptions.¹⁹ The cases received by the ELP and initiatives of civil society attest to the fact that in many instances poor learners are discriminated against by being sent home from school until fees are paid or by having reports withheld because they have not paid school fees.²⁰

Schools fees also entail other access costs such as transport, uniforms and textbooks. Exemptions provide no relief from such costs. These costs, especially uniform and transport costs, can present an absolute barrier to school access.²¹ The means test is also problematic in several respects. For example, it fails to adequately take into account the number of children a family has at school, it also fails to provide relief for those families who narrowly miss qualifying for an exemption but who are nevertheless poor.

Thus, the charging of school fees excludes many poor families from educational access, or otherwise directs income that ought to be spent on basic necessities such as food or clothing for such families to the payment of school fees.

than ten times the annual school fee, and partially exempt those whose incomes are less than 30 times but more than 10 times the annual school fees. Partial exemptions are subject to the discretion of the school governing body.

¹⁹ On 16 September 2002, the Minister of Education, Kader Asmal, initiated a review of the current regulatory framework on the basis of, amongst other issues, the failure by individual schools to implement the exemption policy and the discrimination being experienced by poor learners. Press Statement, Department of Education (16 September 2002).

²⁰ Testimonies of parents and children during the Poverty Hearings conducted throughout South Africa as well as the South African Human Rights Commission (SAHRC) investigation into racism in schools both reflect the differential treatment accorded to learners who cannot afford to pay school fees. For example, learners who have not paid school fees are forced to sit on stairs as opposed to desks in classrooms.

²¹ ELP research conducted in the Sol Plaatje Settlement in Gauteng attests to this burden: 'Education access costs in Sol Plaatje are regressive. The proportion of household income spent on costs normally associated with sending a child to school is inversely proportional to the level of household income. Except in the very poorest households, transport costs make up between 50 and 70 percent of the access burden.' Wilson S Relocation and access to schools in Sol Plaatje' Law and Transformation Programme, Centre for Applied Legal Studies, University of the Witwatersrand (2003) 26.

Commentary

The regulatory framework provided by SASA and the Education Policy Act appears not to provide for an education that is of an adequate standard and that is economically accessible to all. Given the generality of the basic education guarantee in the Bill of Rights, an education clause in the Bill that defines the entitlements that ought to form part of the right to basic education could serve as a benchmark to the Department of Education requiring, that they re-evaluate their existing regulatory framework in accordance with these entitlements.

An education clause contained in the Bill must take cognisance of its obligations in terms international law particularly as regards the free education guarantee. Article 28(1)(a) of the CRC requires that state parties 'make primary education compulsory and available free to all'. Article 28(1)(b), by contrast, provides that state parties should make secondary education 'available and accessible to every child, and take appropriate steps such as the introduction of free education and offering financial assistance in the case of need', thus suggesting that state parties take steps such as the current means test only in secondary education. Primary education should be completely free. It is therefore clear that South Africa is not meeting its obligations in terms of international law.

It is also necessary for an education clause to respond to the particularities of South Africa's need to address apartheid disparities. This would require both an entitlement that requires that education be free at least at the level of primary education, as well as an entitlement that requires that the state provides educational facilities of a reasonable standard.²²

²² A good example of such a clause is Article 20 (2) of the Namibian Constitution that states that: 'Primary education shall be compulsory and the State shall provide reasonable facilities

The inclusion of an entitlement relating to free education as well as an entitlement requiring that the state provide educational facilities of a reasonable standard is not exhaustive of the entitlements that ought make up the education clause in the Bill. They do however reflect some of the most significant challenges in the context of redressing apartheid education. A more comprehensive list of the entitlements that make up the education clause may be determined in consultation with civil society and through a thorough scrutiny of the international instruments that are binding on South Africa.

Recommendation

It is therefore recommended that the education clause in the Bill contain an entitlement requiring that the state provide educational facilities of a reasonable standard for an adequate education. It is further recommended that the clause also contain an entitlement defining South Africa's obligations in term of the free education guarantee. Other entitlements that ought to form part of the education clause may be determined in consultation with civil society and a thorough scrutiny of the international instruments that are binding on South Africa.

(D) SUMMARY OF RECOMMENDATIONS

- A comprehensive list of children's rights must be re-instated in Chapter 3 of the Bill.
- Such a comprehensive list must take cognisance of South Africa's obligations in international law.
- Such a comprehensive list must also take cognisance particular needs of South African children.
- The education clause must be re-instated into Chapter 3.

to render effective this right for every resident within Namibia, by establishing and maintaining state schools at which primary education will be provided free of charge.'

- The entitlements that make up the education clause may be determined through consultation with civil society and a thorough scrutiny of the international instruments that are binding on South Africa.
- The education clause must contain an entitlement requiring the provisioning of educational facilities of a reasonable standard to ensure an adequate education for all South African children.
- The education clause must contain an entitlement defining South Africa's obligation in respect of the free education guarantee to ensure that all South African children have access to an education.

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