



Comment on the Education Laws Amendment Bill, 2007

General Notice 553/207

1. Introduction

The South African Human Rights Commission ('Commission') is concerned about the high levels of violence in schools. The Commission's *Report of the Public Hearing on the Right to Basic Education* highlights that the high levels of violent crime experienced in our society has spilled over into school classrooms and playgrounds¹. During this public hearing it was brought to the Commissions' attention that some schools are infiltrated with gangsterism, vandalism and drugs. After the release of this Report and following a number of highly publicized incidents of violence in schools around the country, the Commission, in September 2006, held public hearings on school-based violence. These hearings attempted to understand the manifestation and impact of violence in schools². School based violence is a matter of national concern and there is a need for clear measures to be put in place to ensure that learners are in a safe environment at school. The Commission welcomes the Education Laws Amendment Bill (the "Amendment Bill") as a step towards ensuring that an environment is created at schools where learners and educators are safe.

1.1. The South African Human Rights Commissions' mandate

The Commission's mandate is set out in Section 184 of the Constitution. Section 184 (1) states that:

- " The South African Human Rights Commission must-
- a) Promote, respect of human rights and a culture of human rights;
 - b) Promote the protection, development and attainment of human rights; and
 - c) Monitor and assess the observance of human rights in the Republic."

¹ SAHRC, "Report of the Public Hearings on the Right to Basic Education", 12- 14 October 2005, 22

² Jody Kollapen (Chair person of the South African Human Rights Commission) 'School Violence' accessed at www.sahrc.org.za/sahrc_Cms October 2006 This report will be released in the second half of 2007

1.2. The Right to Education

Section 29(1) of the Constitution guarantees the right to basic education and adult education. In terms of this section:

“Everyone has the right-

- a) to a basic education, including adult basic education; and
- b) to further education, which the state through reasonable measures must make progressively available and accessible.”

The right to basic education is a central facilitative right, the realization whereof is key to the enjoyment of other rights. The fulfillment of this right is a precondition that creates conditions for the attainment of substantive equality and social justice. The right to education is negatively impacted upon and compromised where learners are exposed to a hostile and violent environment at school. In extreme cases, the fear or experience of violence may even result in a child being denied access to basic education due to her or his fear to attend school.

It must also be borne in mind that South Africa is a signatory to the Convention on the Rights of Child (CRC) and that this Convention reiterates many of the rights protected in South African Constitution. Thus at an international level South Africa has obligations in order to ensure that legislation is in conformity with its international human rights law obligations. UN General Comment 2 on the CRC places a duty on national human rights institutions (such as the Commission) to engage with all legislation that seeks to advance the best interest of the child³.

2. Proposed Amendments

The Education Laws Amendment Bill (‘Amendment Bill’) seeks to amend a number of pieces of education legislation⁴. This submission will look at the amendments to the South African Schools Act (SASA)⁵.

³ General Comment No. 2 (2002), The Role of independent and national human rights institutions in the promotion and protection of the rights of the child”, Committee on the Rights of the Child, CRC/GC/2002/2.

⁴ National Education Policy Act 27/1996 (NEPA); South African Schools Act 84/1996 (SASA); National Student Financial Aid Scheme Act 59/1996 (NSFASA); South African Council for Educators Act 31/2000

⁵ Act 84 of 1996

2.1. Random search and seizure and drug testing at school

The Amendment Bill seeks to address issues that the 2006 Regulations for Safety Measures at Public Schools did not adequately address. The purpose of these clauses in the Amendment Bill is to strengthen the regulations by allowing random search and seizure and drug testing at schools. The proposed amendments seek to “stop the proliferation of dangerous objects and drugs at school.”⁶

General Comment

a) There is a need to proceed with caution when limiting rights.

The presence of dangerous objects and drugs on school premises is not conducive towards creating an acceptable environment in which learning can take place. More poignantly, there is a need to ensure that dangerous objects and drugs are not on school premises in order to prevent serious acts of violence being perpetrated against learners and educators. The proposed amendments seek to provide principals with the necessary powers to intervene in narrow circumstances where there is reasonable suspicion that the learner is carrying a dangerous object or drug.

Search and seizure and random drug testing have been introduced in schools in a number of countries around the world. These provisions inevitably lead to much debate and even legal challenge as they result in the limitation of children’s rights. There is a need to consider the competing rights of learners and educators South Africa, whilst having unacceptably high levels of crime is not in a unique situation when it comes to considering search and seizure and drug testing provisions. The context however, of high levels of violence within our schools will influence a determination as to what a reasonable limitation of a learners right would be.

It is the obligation of the Department of Education to ensure that a learners’ right to basic education is delivered in an environment that is safe. This is not a right that is subject to progressive realization. In assessing whether the proposed amendments would be in line with our constitutional obligations it needs to be

⁶ Memorandum to the Bill, Clause 5

considered holistically whether there are other steps that would be more effective and infringe rights to a lesser degree. The limitation of rights is not a matter to be taken lightly and requires careful consideration. It would also be preferable that the limitation of rights seeks to have a rehabilitative rather than a punitive effect and outcome on the learner.

b) Broader preventative strategies need to be put in place

More and broader preventative strategies are needed to address violence in schools and drug abuse. There is an urgent need for the Children's' Amendment Bill, the Child Justice Bill, the Sexual Offences Bill and the Prevention of and Treatment of Substance Abuse Bill to be finalized and implemented in order that there is framework legislation in place that will address these issues. These strategies do not all fall within the mandate of the Department of Education, however there is a need for the relevant government department to play their respective roles once these pieces of legislation are finalized.

2.1.1. The circumstances in which a body search or drug test may occur

Clause 5 of the Amendment Bill provides for the insertion of Section 8A (1) into SASA and reads as follows:

Random search and seizure and drug testing at schools

"8A (1) No person may bring a dangerous object or illegal drug into school premises or have such object in his or her possession in school premises or during any school activity within or outside school premises.

8A (2) The principal or his delegate may, at random, search any learner or property of the learner for dangerous objects and illegal drugs, after taking into account all relevant factors, including-

- a) the best interest of the learner or any other learner at the school;
- b) the safety and health of the learner or any other learner at the school;
- c) reasonable evidence of illegal activity;
- d) all relevant evidence received; and
- e) the fact that it must be conducted in a manner that is reasonable and proportional to the suspected illegal activity."

Comments

a) The Bill provides for narrow grounds in which search and seizure and drug testing may be carried out. Clause 8A(2)

The clause limits search and seizure and drug testing to specific narrow circumstances. It is therefore not random in the sense that it does not provide for spot random testing being carried out on school premises or that general searching and drug testing may be conducted on an ad hoc basis. The use of the word random is thus somewhat misleading⁷. If the intention of the drafter is that only one of these factors needs to be present then this must be made more specific.

If it is the case that search and seizure may only take place in very limited circumstances then this begs the question as to why it is not possible to call the relevant and more appropriate authorities to the school. For example, if all the requirements set out in clause 8A(2) are met then a police official could be called to the school. This would counter the situation wherein educators are expected to carry out police-type functions.

b) The provisions could negatively impact on the culture of learning within a school environment

The Commission is of the view, that it would not be conducive to a learning environment to have educators carrying out police functions. Use of the provisions could damage the trust relationship between educators and learners. Youth at risk and in conflict with the law may be less inclined to approach an educator for support and guidance if there is the possibility that this could lead to the educator using his or her other search and drug testing powers.

b) The extent of the search is unclear

The proposed section 8A(2)(e) states that the body search “must be conducted in a manner that is reasonable and proportional to the suspected illegal activity”.

⁷ The insertion of a definition of the word “random” into SASA as proposed in Clause 3 of the Amendment Bill does little to clarify the meaning of the word and in fact, contradicts the test set out in the proposed section 8A(2).

This does not indicate whether the body search will include a 'patting down', strip-searching or internal cavity searches. The more invasive the search the more concerning the proposed amendments become. The Commission would find it difficult to support body searches that include physical contact between educators and learners as the potential for a violation of rights becomes too high. (See comments in 2.1.2(b) below)

c) It will be difficult to implement in schools where gangsterism is rife.

In those schools where gangsterism is rife it may place an educators safety at risk if he or she were to carry out search and seizures and drug testing. Gang members may threaten the educator. This could render these provisions futile in such schools. This is however a strong argument for why it would be more suitable for the police to carry out searches.

2.1.2. Identifying who may carry out body searches and the conditions under which a body search may be carried out

Section 8 (3) " A learner may be subjected to a random body search only if-

- a) it is conducted by -
 - (i) the principal, if he or she is of the same gender as the learner; or
 - (ii) the principal's delegate, who must be of the same gender as the learner.
- b) it is done in a private area, and not in the view of another learner; and
- c) one witness, who is of the same gender as the learner is present"

Comments

a) Will educators be willing to take on this 'police role'?

The Commission is concerned about the practical implementation of the above provisions. The implementation of this provision depends on the capacity of schools. In some schools there is already a shortage of teachers and overcrowding. It is questionable whether teacher unions would respond positively to these proposed amendments. Educators will be expected to perform duties that are outside their employment contracts and core responsibilities.

b) More limited random searching would be preferable

The Commission would argue that random searching of learners possessions, requesting them to remove their outer clothing such as blazers and jerseys and turning out their pockets may be acceptable. However, any search that goes beyond this ought to be carried out by police officials. The risk and probability of violating learners' rights (to privacy, bodily integrity and dignity) are considerably increased in the proposed amendments. It is questionable whether the proposed amendments would survive a challenge and meet the requirements of the limitations clause set out in section 36 of the Constitution⁸.

c) The provision is potentially discriminatory

Section 9(1) of the Constitution guarantees the right to equality⁹. There is the possibility that the provisions could be implemented in a discriminatory fashion. For example, a learner may by way of dress and hairstyle appear to be part of a culture of violence and become a target for search and seizure.

2.1.3. Random Drug Testing

There is a clear need in South Africa to take decisive measures in combating the scourge of drugs that is destroying the potential and lives of many of our children. Whilst, we should not shy away from such decisive measures, it needs to be ensured that the measures are in compliance with the constitutional rights of learners and that they will contribute positively to the enjoyment of the right of access to basic education.

In the proposed Clause 5, Section 8A (7) provides for the circumstances in which a urine test for drugs may be administered, the provision states as follows:

“The principal or his or her delegate may at random administer a urine test to a learner who is reasonably suspected of using illegal drugs, after taking into account all relevant factors, as contemplated in subsection (2).”

⁸ Section 36 (1) provides that: The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including;

- a) the nature of the right
- b) the importance of the purpose of the limitation
- c) the nature and extent of the limitation
- d) the relation between the limitation and its purpose and
- e) less restrictive means to achieve the purpose

⁹ Section 9 (1) of the Constitution provides that: ‘Everyone is equal before the law and has the right to equal protection and benefit of the law.’

Comments

a) **The clause provides for targeted drug testing of children**

Again, it must be noted that it is in narrow circumstances in which a urine test may be administered. The testing is not random in that the proposed section 8A(2) limits the circumstances in which a test may occur. The provision does not provide, for example, for *suspicionless* random testing of an entire school or grade at a school. Rather, it is clearly targeted at learners who have come to the attention of educators as being at risk and partaking in drugs.

b) **It needs to be determined what the most effective intervention would be**

The Commission is not aware of research that has been conducted in South Africa on models of combating drug usage amongst children. It is therefore difficult to assess the impact of the proposed clause on the fight against drug use in schools. This makes it difficult to support the violation of learners right to privacy, dignity, equality and security of the person, which would necessarily be violated in terms of these random drug-testing provisions. There is a need for empirical research to demonstrate whether random drug testing would act as a deterrent to children who are using drugs or whether there may be other unintended consequences that may flow from the knowledge that a random drug test may occur such as: leading to non-attendance at schools; impacting negatively on relationships with parents and caregivers; picking up non-problematic drug use, etc.¹⁰.

c) **More appropriate authorities should carry out drug tests**

It would be preferable for the appropriate authorities such as the Department of Social Development, the Department of Health and/or the South African Police Services being called in to address a situation where the provisions of the proposed section 8A(2) come to the attention of school authorities. A person specifically trained in administering such a test should administer a drug test.

¹⁰ A recent overview of drug testing and its impact and consequences was prepared in response to the UK implementing random drug testing provisions. See McKeganey, N, "Random drug testing of schoolchildren A shot in the arm or a shot in the foot for drug prevention?", Joseph Rowntree Foundation (2005)

It is not preferable that educators are expected to take on the role of policing the drug usage of learners. This may impact negatively on relationships and the culture of learning within the school environment.

d) More restrictive drug testing measures are needed

The Commission would find drug testing on reasonable grounds targeted against learners in very specific and narrow circumstances similar to those set out in Section 8A(2) more acceptable. However, the persons responsible for carrying out the test and the procedure needs to be carefully considered. For example, the principal should first attempt to have the local district nurse carry out the test. If this person is not available only then can trained and specifically designated, preferably administrative staff, carry out the test. Every time such a test is carried out a detailed report must be submitted within strict time periods to the Department of Education in order that a monitoring and oversight role can be played. Also, there is a need to ensure that the outcome of the testing will have a positive result and will lead to rehabilitative steps being pursued rather than punitive disciplinary steps being taken against the learner.

2.1.3. The Amendment Bill does not identify clearly who is responsible for bearing the costs associated with drug testing

The proposed Section 8(10) provides that the Minister will identify the device that may be used for the drug test. The proposed Section 8(13) provides that the schools' Code of Conduct provide for support measures or structures for counseling a learner.

Comments

a) It is unclear who will be responsible for bearing the costs associated with drug testing

Neither of these clauses indicates who will bear the costs of purchasing the drug test and providing support measures or structures for counseling. Furthermore, the proposed amendments could potentially lead to large numbers of learners being tested. If, it is to be implied that the SGB is responsible for purchasing the drug tests and paying for support measures and structures for counseling learners the Commission is concerned that this will have a disparate impact on schools in poor

and rural areas where SGB's are already, in many instances, failing to function adequately.

b) The Department of Education should rather facilitate drug testing

There is certainly a role for the Department of Education to play in combating the war against drugs. The Department could facilitate relationships with relevant government departments and in consultation with parents, caregivers and learners allow school premises to be used for purposes of random drug testing. This however, should be done, when sufficient and appropriate support services are put in place prior to the drug testing being carried out. Parents should sign consent for random drug testing. Where parents fail to sign such consent forms then the schools hands would be tied and the learner would not participate in a random test. Random drug testing that is not conducted with the purpose to punish but rather to prevent drug dependence through early identification of drug use in a confidential manner has been demonstrated to be effective¹¹.

c) Learners may develop concealment techniques

Drug testing devices only test for specific drugs. It may lead to learners exploring other drugs that will not be picked up in the drug test that is identified by the Minister. This has been demonstrated to occur in counties that have conducted drug testing. It has also led to learners abusing alcohol as this substance passes through the bodies system more quickly. Also, learners have been found to switch to prescription based drugs that are not identified by the testing device.

2.1.4. The proposed amendment does not recognize child headed households and children who are cared for by caregivers other than their parents

Clause 5 proposes the insertion of section 8A(9) in SASA and provides that the principal must-

- “(a) Within one day, inform the parents that a random test or search and seizure was done in respect of their children; and
- (b) in cases where the urine tested positive, inform the learner and his or her parents of the result within a reasonable time.”

¹¹ Ibid, 3

Comment

- a) The Amendment Bill fails to recognize the existence of child headed households and children who are cared for by caregivers other than their parents. These categories of children are particularly vulnerable and it is thus necessary to state clearly what ought to be done when these children are body searched or tested positive for drug usage. For example, relevant authorities such as the local social worker could be contacted and requested to make an intervention.
- b) Parents and caregivers should also be informed when their child has tested negative in a drug test as the test on the face of it violates the rights of a child.

3. School Governing Bodies

The current democratic dispensation sought to ensure the participation of parents and communities in the governance of schools. SGB's are created in terms of SASA¹². The Commission's Report of the Public Hearing on the Right to Basic Education highlights that many schools do not have adequately functioning SGB's. Rather, SGB's bodies appear to work most effectively in economically advantaged communities whilst in poor and rural communities these structures do not appear to function effectively¹³.

Clause 9 of the Amendment Bill provides for the insertion of Section 58B into SASA. Section 58B (1) provides that:

“The Head of Department must identify schools that are under performing from the reports contemplated in section 21(A)1(b) and issue a written warning notice to those schools that are under performing.”

Section 58B (2) provides that:

“The Head of Department may give a written warning notice to the governing body of a public school where he or she is satisfied -

- (a) that the standard of performance of learners at the public school are unacceptably low, and are likely to remain so unless the Head of Department exercise his or her power in terms of this Act;

¹² Op cit note 1

¹³ Op cit note 1, p 29

- (b) That there has been a serious breakdown in the way the school is managed or governed which is prejudicing, or likely to prejudice such standards of performance; or
- (c) That the safety of learners or staff of the public school is threatened.”

Comment

- a) There has been concern expressed against the issuing of warning notices to SGB's that a school is underperforming. The Commission shares many of these concerns and notes the statement by the Minister of Education, Naledi Pandor that this provision is badly worded and hence has been misunderstood¹⁴. In the circumstances, the Commission would welcome an opportunity to comment on the correctly drafted version of these proposed amendments.

4. Norms and standards for basic infrastructure and capacity in public schools

Clause 4 of the Amendment Bill seeks to introduce a section 5A into the South African Schools Act. The clause provides that “...the Minister must prescribe by regulation minimum norms and standards for-

- (a) school infrastructure;
- (b) capacity regarding the number of learners a school can admit; and
- (c) provision of learning and teaching support material.”

The proposed clause goes further to set out in more detail the matters on which the Minister must make Regulations and that the SGB must comply with the norms and standards.

Comment

- a) The SAHRC recommended in its Report of the Public Hearing on the Right to Basic Education as follows:

“**m)** It is recommended that government ensure as urgently as possible that a minimum level of infrastructure is provided to all schools throughout

¹⁴ See 'Bill misunderstood-Pandor - Unions and governing bodies urged to calm down.' Cape Argus, 15 May 2007 pg4.

South Africa. Such a minimum level would include for example: buildings, access to water, electricity, basic electrical equipment, sufficient toilets for the number of children attending the school, fences and a library.

(n) The Department of Education should engage with the Department of Arts & Culture on the provision of adequately resourced libraries in communities, in order that outcomes based education can be more effectively taught.”¹⁵

The Commission welcomes Clause 4 of the Amendment Bill as it responds directly to the recommendation of the Commission.

5. Functions and responsibilities of Principal

Clause 7 of the Amendment Bill inserts a section 21A(4) that states:

“A principal may not, on behalf of the governing body, give evidence against the Minister, Member of the Executive Council or Head of Department in any court case where the Minister, member of the Executive Council or Head of Department is cited as a party to the case.”

The Commission is concerned that this clause could potentially violate the rights of the principal contained in section 34 (access to courts) and section 35 (arrested, detained and accused persons) of the constitution. It could also violate the rights of others who wish to have a dispute resolved “by the application of law decided in a fair and public hearing before a court” if the party is not entitled to call the principal as a witness. The Commission submits that this clause ought to be removed from the Amendment Bill.

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¹⁵ Op cit note 1, p46 par 4.3.5.