



## **EQUAL EDUCATION LAW CENTRE’S COMPLEMENTARY REPORT ON SOUTH AFRICA’S STATE PARTY REPORT TO THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS OF THE CHILD**

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### **INTRODUCTION**

1. This submission is made by the Equal Education Law Centre (“EELC”). The EELC is a registered law clinic. Its staff of social justice lawyers specialize in education law and policy, through conducting legal research and advocacy, community lawyering and public interest litigation. The EELC’s overriding goal is to use the law to ensure the realization of every learner’s right to equitable, safe and quality basic education regardless of the learner’s circumstances.

2. This submission will consider whether the South African government has fulfilled its obligations as they relate to the right to basic education in terms of the ACRWC will and provide an alternative account based on the evidence and experience of the EELC’s work on the ground. It will make recommendations on how the South African government can better the realisation of the right to a basic education. The following rights contained in the ACRWC will be considered in this submission:

- i. Article 3- Non-discrimination
- ii. Article 11-Education
- iii. Article 13- Handicapped children/ children with disabilities
- iv. Article 16 -Protection against child abuse and torture
- v. Article 23-Refugee children

#### **GENERAL PRINCIPLES: NON-DISCRIMINATION**

3. At paragraph 105 of the state party report, the government submits that there are no barriers in accessing basic services, including education for migrant and undocumented learners. According to the South African government, basic services are available to children in the Republic, regardless of their race, nationality, ethnicity or legal status, regardless of their citizenship status.

**In view of the government’s submission, EELC notes the following:**

### ***The Phakamisa judgment***

4. Lack of documentation has acted as a barrier to accessing education for thousands of children in South Africa. The Department of Basic Education (DBE) has required a birth certificate or ID number in order to apply for and be registered for school. In 2019 a landmark ruling in the *Centre for Child Law and Others v Minister for Basic Education and Others*,<sup>1</sup> (Phakamisa judgment) case addressed the right of undocumented learners to access basic education and provided much needed legal clarity on the regulatory framework.

5. The court ruled that everyone has the right to education regardless of their ability to provide proof of identity by providing of a birth certificate or other documentation. The policy on admissions was declared unconstitutional in so far as it excluded undocumented learners from public schools. The court ruled that these clauses unjustifiably limit children's right to education, dignity, equality and their right to have their best interests considered paramount.

6. The effect of the judgment is that ordinary public schools must admit all learners, regardless of whether they are able to produce an official birth certificate. School's must accept alternative proof of identity such as an affidavit or sworn statement deposed to by the child's guardian, parent, or caregiver. Despite this judgement and subsequent Circular issued by the DBE, in practice discriminatory practices, and barriers to accessing basic education still exists for migrant learners and in some instances, South African learners due to non-compliance. Perhaps more concerning is the recent Basic Education Laws Amendment Bill (BELA Bill) processes which introduces further documents for school admissions. The said provisions are discussed below.

### ***Introduction of the Basic Education Laws Amendment Bill and possible implications***

7. The Basic Education Laws Amendment Bill (BELA Bill) is a legislative process which the South African government has introduced to reform education policy. The BELA Bill has introduced a section in which certain documents are required from learners during school admissions processes. If this is passed as law, it will create several problems for both South African learners and undocumented learners. For example, in the case of a South African learner the required documents are an unabridged birth certificate, immunisation certificate and South African identity documents for the learner's parents (or death certificates where applicable). The section also lists the required documents for non-national learners who hold permanent or temporary residence permits, learners who are refugees and asylum seekers, and lastly, documents for learners who are in alternative care.

8. If learners do not produce the required documents, they will still be allowed to attend school, but the principal must advise the parent of the learner to secure the required documents and must alert the "Provincial Intergovernmental Committee" to the fact that the learner does not have them. The Minister is required to establish a National Intergovernmental Committee ("NIC") and the respective MECs to establish a Provincial Intergovernmental Committee ("PIC"), both within 12 months of the commencement of the BELA Bill. According to the Bill, the function of the NIC and PIC is to provide

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<sup>1</sup> [2020] 1 All SA 711 (ECG) The case involved two separate applications. The first application concerned the lawfulness of a policy by the Eastern Cape Department of Education to withdraw funding for undocumented learners. In this regard, the Department issued Circular 6 of 2016 informing schools that they would be withholding funding for learners who did not have valid South African identity numbers or passport numbers. The result of the circular was that schools were now either unwilling to continue providing education to those learners who were already admitted to schools, or schools were no longer willing to admit these learners in the first instance. The second application concerned the lawfulness of clauses 15, and 21, of the Admission Policy and sections 39 and 42 of the Immigration Act.

assistance to public schools that refer cases of learners who have not submitted the required documentation and includes assisting the learner to obtain the missing required documentation. The NIC and PIC include representatives from the Department of Education, Department of Social Development, Department of Home Affairs, Department of Justice and Constitutional Development, South African Police Services, Department of Employment and Labour, Department of International Relations and Cooperative Affairs, Department of Health, National Treasury, and Department of Statistics South Africa. Furthermore, the BELA Bill states that any parent, guardian or caregiver who refuses to cooperate in securing the “required documentation” is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

### **EELC’s recommendations**

- i) We reiterate the Committee of Expert’s concluding observations to place strong focus on the eradication of structural inequality and discrimination in all legislative, policy and programmatic measures to advance the rights of the child, in that there are still barriers in accessing basic services including education for migrant and undocumented learners.
- ii) We recommend that the introduction of “required” documents in the 2022 BELA Bill be removed in its entirety. The Admissions Policy read with the *Phakamisa* judgment sufficiently regulates the admission of children to school.
- iii) It is important to ensure that the *rights* related to admission (for example the right to be admitted to school free of discrimination and regardless of documentation status) are contained in legislation so that they are adequately protected, but that the finer details surrounding the admission of children to school are regulated through policy. This ensures flexibility. In line with this, and in order to adequately protect undocumented learners’ right to education, there should be confirmation within the 2022 Bill that undocumented learners are unequivocally ensured access to education.
- iv) In the event that the DBE persists with the regulation of documentation as proposed in BELA, at the very least the DBE ought to do away with additional burdensome documentation requirements which are unnecessary for school and education administration. Careful consideration ought to be given to which documents are helpful and which are for the purpose of immigration control. Where certain documents are requested within the legislation (such as birth certificates or permits), it must be absolutely clear that the failure to produce those documents does not in any way prevent children from accessing school. Lastly, in the event that the DBE persists with establishing National and Provincial Intergovernmental Committees to do the work of the Department of Home Affairs, then there must be a balance that is struck to ensure that the risks associated with referral to the Committees are explained. The risks include arrest and deportation, loss of employment, etcetera (in the event that those considerations apply), and potential criminalisation, imprisonment and/or imposition of a fine, if construed as failing to cooperate with the Committees. In light of those risks, consent should be obtained in line with the Protection of Personal Information Act and only then should one be referred to the Committees.

### **ON VIOLENCE, CHILD ABUSE, TORTURE AND SEXUAL EXPLOITATION**

9. At paragraph 171 of South Africa's state party report, the South African government provides that safety standards in schools have been enhanced through the Protocol on the Management of Incidences of Corporal Punishment that was approved in March 2019. This protocol aims to reduce and ultimately eliminate incidences of corporal punishment in schools and violent behaviour at large and is intended to create a national framework to standardise the education sector's response to corporal punishment.

**In view of the government's provision, the EELC submits that:**

***Corporal punishment in schools in general***

10. The Protocol on the Management of Incidences of Corporal Punishment has not been enforced and schools have not been made aware of it.<sup>2</sup> Despite its abolishment, corporal punishment continues to be administered in schools. In 2019, a learner attending grade two at a primary school in Gauteng was hit on the back of his head with a PVC pipe by his teacher. In the same year, a teacher at a primary school in Limpopo struck a grade five learner on her cheek and then on her head. The learner experienced a lasting bleed from her ears which required her to visit several doctors, resulting in her absenteeism from school. Consequently, the learner was forced to repeat grade five.<sup>3</sup>

11. Corporal punishment continues at high rates in South African schools - nationally, approximately 50% of learners had experienced physical punishment by teachers with no difference between 2008 and 2012.<sup>4</sup> The Equal Education Law Centre (EELC), through its advice clinic, is frequently approached by many concerned parents/caregivers whose children have experienced corporal punishment at school. In a recent case referred to us in 2022, Thando\* was assaulted by the school principal due to his parent's inability to pay the school fees. Thando was summoned to the principal's office and physically attacked. A lack of implementation of existing laws and policies, such as, the South African Schools Act, National School Safety Framework, the Educators Employment Act, South African Council of Educators Act, the Protocol to deal with instances of corporal punishment in schools issued by the Department of Basic Education, results in the continuous use of corporal punishment in South African schools. In many cases corporal punishment incidents are left unchecked at school-level. School management often fails to take action and no recourse is taken against perpetrators. We have also seen very inconsistent sanctions being meted out where cases are dealt with and a failure to utilise rehabilitative approaches. Learners are often left scarred with no psychological, medical or other support services being offered.

***Corporal punishment and abuse and neglect in special schools and special school hostels***

12. Reports of abuse and neglect continue to be raised regarding the care and education of children at special schools and special school hostels. Common problems include:

- i) Poor living conditions and physical and emotional abuse of children in hostels.
- ii) Overcrowding and no adequate security.

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<sup>2</sup> See the Protocol here

<https://www.education.gov.za/Portals/0/DoE%20Showcase/Launch%20of%20protocol/Protocol%20to%20Deal%20with%20Incidences%20of%20Corporal%20Punishments%20in%20Schools.pdf?ver=2019-03-13-094227-190>.

<sup>3</sup> The matter was taken to court in the matter of *Centre for Child Law and Others v South African Council of Educators and Others*. In cases of corporal punishment, children are often not afforded latitude to make representation in disciplinary hearings of their educators. More so, these educators are often permitted to return to classes without undergoing any corrective discipline or rehabilitative process. The High Court in *CCL v SACE* ruled that children have a right to express their views on matters that concern their interests, and that SACE, as a custodian of educators, must incorporate measures that will recognise this principle.

<sup>4</sup> Patrick Burton and Lezanne Leoschute "School violence in South Africa: Results of the 2012 national school violence study" Cape Town: Centre for Justice and Crime Prevention (2013).

- iii) Sexual abuse, corporal punishment and neglect in special school hostels.

13. Despite numerous civil society and media reports no regulations have been enacted by the state to ensure the safety, adequate resourcing, care and support of learners with disabilities in special school hostels.

### ***Safety in Schools***

14. The African Charter on the Rights and Welfare of the Child places a duty on signatories to put measures in place to ensure that the child is protected against all forms of discrimination or punishment. Despite this international obligation and the domestication thereof in national laws and policies aimed at ensuring that learners are free from abuse and violence while at school, many learners are exposed to abuse and violence in-and-around the school environment. We call on the South African government to ensure the urgent implementation of existing laws in order for schools to be a place of safety for our learners.<sup>5</sup>

### ***Bullying in Schools***

15. The 2019/20 Annual Crime Statistics report indicates that nine murders and 19 attempted murders which were recorded by the police between April 2019 and March 2020 were as a result of bullying in schools. Further, statistics indicated that 345 assaults with the intent to cause grievous bodily harm and 546 common assault cases were opened as result of bullying in the country's schools.<sup>6</sup> We note further that LGBTQI learners continue to face victimisation in the form of bullying and discrimination, both from teachers and fellow learners in schools despite South Africa's commitment to Resolution 275 on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity. While we acknowledge the efforts of the Department of Education to combat bullying in schools, there is an urgent need for the implementation of the existing law and policy framework to combat all forms of bullying in schools.<sup>7</sup>

### ***Sexual Assault***

16. In the 2019/2020 Annual Crime Statistics report, more than 24,000 children were sexually assaulted in South Africa. In April 2019, the EELC was approached by a Community Advice Office based in the Western Cape, seeking legal assistance for parents whose minor children were victims of a traumatic rape incident that took place at a primary school on 19 November 2018. In this matter the school and the relevant provincial education department did not only fail to follow the proper procedures in terms of reporting but failed to provide the learners with adequate psychological, medical and academic support services.

17. We recommend that a live platform that would be accessible for learners to report sexually related offences be created, and that the government should make adequate provision for psychosocial support for those who may have been sexually harassed. Also, sexual violence policies should be implemented and monitored in schools.

## **EELC's recommendations**

### ***Need for alternatives to corporal punishment and positive discipline***

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<sup>5</sup> These are: the National School Safety Framework, the South African Schools Act, the Employment of Educators Act, and the South African Council of Educators Act.

<sup>6</sup> The Sunday Times 31 July 2020 <https://www.timeslive.co.za/news/south-africa/2020-07-31-crimestats-school-bullying-sees-murders-hundreds-of-serious-assaults/>.

<sup>7</sup> Included in these policies are the National School Safety Framework, The South African Schools Act, the Employment of Educators Act, and the South African Council of Educators Act.

- i) We welcome the inclusion of a definition for corporal punishment in section 1 of the BELA Bill which provides for, “any deliberate act against a child that inflicts pain or physical discomfort, however light, to punish or contain the child...” This definition broadly aligns with the definition of corporal punishment provided for by the UN Committee on the Rights of the Child (CROc) in General Comment 8.<sup>8</sup> However, in its definition the Committee also refers to, “other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.”
- ii) We note that corporal punishment is abolished, and no person may inflict or impose corporal punishment on a learner at a school, during a school activity, or in a hostel accommodating learners of a school, and that any persons who do this would be guilty of an offence and liable on conviction to a fine or to imprisonment.
- iii) There is an urgent need for Provincial Education Departments to support schools with alternative discipline programmes aimed at upskilling educators on alternative discipline strategies, and the importance of incorporating these strategies. Alternatives to corporal punishment in schools are proven to work. Evidence-based approaches to classroom behaviour management have been shown to skill educators and equip them with the necessary tools to practice non-violent ways of discipline in the classroom.<sup>9</sup>
- iv) The principles of community and humanity “ubuntu” is a theme in the new constitutional dispensation.<sup>10</sup> Restorative justice “believes that the offender also needs assistance and seeks to identify what needs to change to prevent future re-offending.”<sup>11</sup> In fact, legislation such as the Child Justice Act,<sup>12</sup> which is a crucial piece of legislation pertaining to children in conflict with the law prefers restorative justice to a punitive approach.<sup>13</sup>

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<sup>8</sup> General Comment No. 8, ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’, by the Committee on the Rights of the Child, Forty-second session, Geneva (15 May-2 June 2006), paragraph 11. Corporal punishment – The Committee defines “corporal” or “physical” punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting (“smacking”, “slapping”, “spanking”) children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children’s mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.

<sup>9</sup> DeVries, K. M., Knight, L., Child, J. C., Mirembe, A., Nakuti, J., Jones, R., Sturgess, J., Allen, E., Kyegombe, N., Parkes, J., Wala-kira, E., Elbourne, D., Watts, C., & Naker, D. (2015). The Good School Toolkit for reducing physical violence from school staff to primary school students: A cluster-randomised controlled trial in Uganda. *The Lancet Global Health*, 3, e378–e386

<sup>10</sup> Ann Skelton “Restorative justice as a framework for juvenile justice reform: A South African perspective” *BRIT.J.CRIMINOL* (2002) 42, 496-513, 496.

<sup>11</sup> <https://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf> Accessed 30 October 2021. In *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at paras 114-5, Sachs J’s concurrence notes that the elements of restorative justice are encounter, reparation, reintegration and participation. The CJA defines restorative justice to mean— “an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation”.

<sup>12</sup> 75 of 2008.

<sup>13</sup> See the Preamble of the Child Justice Act and Section 73 of same which is dedicated to the restorative justice sentences of dealing with a child offender.

- v) We reiterate the Committee of Experts' concluding observations that the South African Government should expedite adoption of the draft Protocol developed to reduce Incidences of Corporal Punishment in Schools and ensure its implementation in order to fully eliminate this practice in schools. To promote positive discipline through awareness creation, training those who are working for and with children such as teachers and care givers and to criminalise and hold accountable educators and caregivers who still inflict corporal punishment.

## **EDUCATION, LEISURE, AND CULTURAL ACTIVITIES - CHILDREN WITH DISABILITIES**

18. At paragraph 377 of the state party report, the government describes various legislation to protect the rights of children with disabilities, including section 27 of the Constitution, 1996, Education White Paper 6 and the South African Schools Act, 1996.

**Based on the above, the EELC submits that:**

### ***Lack of legislation to giving full effect to the right to inclusive education for all children with disabilities***

19. Despite a constitutional guarantee of the right of everyone to a basic education, the current legislative and policy framework regulating the right to education for children with disabilities remains fragmented and outdated. Children with disabilities remain the most marginalised by our education system with no guarantees of an inclusive, equitable and quality education within the general education system.

### **EELC's recommendation**

20. Given that the 20-year implementation plan in White Paper 6 came to an end in 2021 and that many of the targets remain unmet, we recommend that the government must create clear legal entitlements through legislation.

21. On reasonable accommodation, the South African government has provided at paragraph 282 of its state party report that in 2008, it published Guidelines for Schools ICT Hardware and Software in adherence to the DBE's commitment to the implementation of inclusive education. And further that it aims to provide access and reasonable accommodation for all learners with disabilities through the effective provisioning and use of ICTs and other assistive technologies or facilities particular to their specific needs.

**The EELC notes that:**

### ***Reasonable Accommodation***

22. The idea of reasonable accommodation has not been clearly articulated in our education system since 2018. This is problematic in that the concept cannot be properly and effectively applied without a clear articulation of what it means. White Paper 6 advocates for access to inclusive learning opportunities for persons with disabilities and it highlights the necessity of the provision of reasonable accommodation. The SIAS,<sup>14</sup> policy echoes White Paper 6 by requiring a shift from the system in which learners are referred to a specialised setting other than the schools nearest to their homes. The

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<sup>14</sup>SIAS stands for Screening, Identification, Assessment and Support. The purpose of the Policy on Screening, Identification, Assessment and Support (SIAS) is to provide a policy framework for the standardisation of the procedures to identify, assess and provide programmes for all learners who require additional support to enhance their participation and inclusion in school.

concept of reasonable accommodation as required by both the White Paper and the SIAS policy cannot be achieved without a clear articulation of what it means in our education system.

23. The SIAS policy defines reasonable accommodation as “necessary and appropriate modification and adjustments not imposing a disproportionate and undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”<sup>15</sup> Whilst the SIAS policy adopts a definition on reasonable accommodation in line with international instruments, a clear definition – consistent across policies, with guidance as to how reasonable accommodation can be achieved in schools and who is responsible for funding and providing it – is needed.

24. In addition, funding for reasonable accommodation in ordinary schools must be provided. At present the school either refuses admission on the basis that there are no funds from reasonable accommodations, or these costs are born by parents. Once again it is learners from the poorest homes who suffer the most and the lack of reasonable accommodation acts as a barrier to access and participation.

### **Recommendations**

25. In light of the above, the EELC requests the South African government to show progress made in enacting legislation to clarify the meaning of:

- i) ‘Reasonable practicability’, as contained in section 12(4) of the South African Schools Act and clause 22 of the Admission Policy, which requires additional clarification.<sup>16</sup>
- ii) A comprehensive definition of ‘reasonable accommodation’ which must be adopted consistently across relevant legislation and policy.  
And finally, to provide a plan to:
- iii) Comply with its duty under the PEPUDA to ‘develop codes of practice ... in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation’. These guidelines should include education-specific guidance to schools and parents outlining the scope of reasonable accommodation as well as the duty to provide such accommodation in ordinary schools.
- iv) Outline plans to fund reasonable accommodations in ordinary schools.

### **In addition to the above, the EELC notes the following in respect of learners with disabilities**

#### ***Barriers to access***

26. White Paper 6 describes an inclusive education and training system as a system which is about maximising the participation of all learners in the culture and the curricula of educational institutions and identifying and mitigating barriers to learning. ‘One of the most significant barriers to learning for learners in special and “ordinary” schools is the curriculum. In this case, barriers to learning arise from different aspects of the curriculum, such as:

- i) The content (i.e., what is taught).

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<sup>15</sup> This definition is in line with the Convention on the Rights of Persons with disabilities.

<sup>16</sup> Section 12 of the South African Schools Act provides that the member of the executive council must where **reasonably practicable**, provide education for learners with special education needs at ordinary public schools and provide relevant education support services for such learners.



- ii) The language or medium of instruction.
- iii) How the classroom or lecture is organised and managed.
- iv) The methods and processes used in teaching.
- v) The pace of teaching and the time available to complete the curriculum.
- vi) The learning materials and equipment that is used.
- vii) How learning is assessed. We note that the most important way of addressing barriers arising from the curriculum is to make sure that the process of learning and teaching is flexible enough to accommodate different learning needs and styles.

### **EELC's recommendations**

27. We reiterate the committee of experts' recommendations that the government must:

- i) Ensure Inter-departmental and inter-sectoral coordination and collaboration to ensure that existing barriers preventing children with disabilities from accessing needed services are removed.
- ii) Focus on the early identification of barriers to learning and intervene with appropriate support in the earlier years.

### ***Early identification and intervention***

28. Early identification is absolutely critical to ensure access to early intervention services to support optimal development. More often than not disabilities are identified through access to health services or whilst young children are included in ECD Centres. It is essential that information as to the child's learning and developmental needs be transferred seamlessly and that referrals for assessment can occur easily. In South Africa, despite the recommendation of the CRC Committee to "Improve inter-sectoral coordination to provide integrated services to children with disabilities and their families and caregivers", the lack of effective integration and coordination of service across different departments remains a significant challenge.

### **EELC's recommendations**

29. We reiterate the committee's recommendation that the government must:

- i) Amend the Screening, Identification and Assessment and Support (SIAS) Policy to allow for a more streamlined school placement procedure of children currently not in the education system.

### ***Lack of budgetary allocations for the promotion of inclusive education***

30. Funding remains one of the greatest obstacles to the implementation of inclusive education. An analysis of current budgets reveals little to no evidence of funding dedicated to the expansion of inclusive education. Funding for inclusive education is conflated with funding for special schools. The persistent lack of funding for the implementation of inclusive education in general and SIAS in particular is one of the most significant barriers to the effective implementation of inclusive education.

Implementation without funding is simply not possible. It also hinders the right to inclusive, equitable and quality education for hundreds of thousands of learners who require support in order to learn on an equal basis with their peers.

### **EELC's recommendation**

31. We reiterate the committee of experts' recommendation that the government should:

- i) Fund and resource, implement, monitor and evaluate inclusive education policies and guidelines to address learner diversity and provide appropriate support to teachers and learners to achieve quality learning outcomes.

### **Statistics and data collection**

32. Without accurate disaggregated data on the number of learners with disabilities in schools and on the number of children with disabilities that are out of school, effective planning for education for all within an inclusive education system cannot and does not take place. Wide variances in data demonstrate a dire need for thorough, scientifically gathered disability-disaggregated data.

### **District Based Support Teams (DBSTs)<sup>17</sup>**

33. Effective support structures at both a school and district level are essential components in ensuring support for inclusive education is available to mainstream schools. Despite policy obligations and guidelines in place detailing how these structures should function, research shows implementation is extremely poor. District Based Support Teams (DBST): The 2018/19 Auditor-General's report revealed that '77% of the selected Inclusive Education directorates and DBST's at the education districts did not adequately support the educators and SBST'.<sup>18</sup>

34. Significant deficits have been identified in relation to the availability of personnel, transport and other necessary resources. Insufficient human resources have been cited by schools and DBSTs as a significant contributor to the inability of DBSTs to perform their support role efficiently.<sup>19</sup> An analysis of the 2017 School Management Survey shows that only '47% of principals reported [that] their schools had received a visit from a psychologist, therapist, members of the district-based support team, learning support official or health official in 2017'.<sup>20</sup>

35. The ratio of specialised support staff at district level to the number of schools and individual learners they are required to service is far too high to translate into efficiency or efficacy, nor is it in line with international standards.<sup>21</sup>

36. The DBE 2015 report on inclusive education summed up the situation by stating that if the DBST is continued to be seen as existing only of the Inclusive Education Directorate and does not ensure

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<sup>17</sup> DBSTs are responsible for providing a full range of education support services to the SBST and to the school. The Conceptual and Operational Guidelines for the Implementation of Inclusive Education: District-Based Support Teams (DBST Guidelines) (2005) states that the primary function of the DBST is to 'assist education institutions to identify and address barriers to learning and promote effective teaching and learning'

<sup>18</sup> Parliamentary Monitoring Group (PMG), 'Auditor-General's briefing to the Portfolio Committee on Basic Education on the Budgetary review and Recommendations Report: PFMA 2018–19', available at [https://static.pmg.org.za/191008AGSA\\_Presentation](https://static.pmg.org.za/191008AGSA_Presentation).

<sup>19</sup> Thabo Makhalemele & Mirna Nel, 'Challenges experienced by district-based support teams in the execution of their functions in a specific South African province' International Journal of Inclusive Education (2015). See also Doreen Zulu, Experiences of District-Based Support Team with Regard to Screening Identification Assessment and Support (PhD thesis, UNISA: 2019).

<sup>20</sup> Nicola Deghaye, 'Disability support & accessibility in mainstream schools in South Africa' Research on Socioeconomic Policy (RESEP) Stellenbosch University (2021) 33.

<sup>21</sup> Johnnie Hayes, 'Educational and psycho-social service rendering by district-based support teams in two provinces of South Africa: Supporting inclusive education' Inclusion in Education: Perspectives on Inclusive Education in South Africa Journal (2018).

transversal responsibility in delivering inclusive education mandates (including especially Curriculum, Education Management and Governance and other systems units), inclusive education can never be successfully implemented.<sup>22</sup>

### ***School Based Support Teams (SBSTs)***

37. The current policy requirement that every school have an SBST plays an important role in the ability of ordinary schools to function as inclusive schools. As a support structure at institutional level, the SBST is essential in ensuring that a coordinated basket of support services is available at schools and that the support needs of the school, teachers and learners are identified and planned for. However, some significant implementation challenges have been reported. The 2018/19 Auditor-General's report found that '78% of School Based Support Teams at full-service schools audited were not established and/or did not adequately function to ensure that inclusive education is planned, implemented, recorded and reported'.<sup>23</sup> Challenges to the effective functioning of SBSTs include infrequent meetings and limited understanding of the extent of their role, lack of support from the DBST, lack of skills and training, and an overburdened workload.

### ***Full-Service Schools (FSS)***

38. In 2019, the Auditor-General of South Africa issued a damning report detailing the findings of an audit conducted at FSS across the country. The audit looked at a number of indicators aligned to the FSS Guidelines to assess their functioning and found that the majority of FSS across all provinces were not functioning as they should. The report stated that 77 per cent of education districts were not sufficiently resourced and/or did not properly plan to support FSS, and that 79 per cent of schools lacked adequate resourcing in terms of infrastructure, assistive equipment and funding.

39. As a result of this the DBE issued a circular on the Temporary Suspension of the Designation of Full-service Schools, asking provinces to consider suspending the designation of FSS for three years to "ensure that those that have been designated are adequately capacitated to fulfil their roles and responsibilities...." FSS were intended to serve as examples of good practice and to "chart the way for all schools to ultimately become inclusive institutions". The target set by White Paper 6 of establishing 500 FSS (representing 3,6% of all ordinary public schools) was far too low to realise this aim. Despite reports of government having exceeded this number, the effectiveness of these schools in achieving their intended outcomes has, as has been shown, come into question.

### ***Special School Resource Centres (SSRCs)***

40. Maintaining or perpetuating a system of segregated education, even for the purposes of converting special schools to special school resources centres, is incompatible with full inclusion as articulated in the CRPD. However, the reality in the South African education context, as is the case in many other countries, is that special schools have come to fulfil an important role in providing access to specialised education that is not available in under resourced ordinary public schools.

41. According to South Africa's Baseline Country Report to the United Nations on the Implementation of the CRPD (which was approved by Cabinet in 2013 – that is, 12 years after the publication of White Paper 6), only 95 special schools had been designated as SSRCs. The report acknowledges that there are major disparities in distribution of the SSRCs between provinces as well as between rural and

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<sup>22</sup> DBE, General Household Survey Focus on Schooling 2018 (2019), available at <https://bit.ly/3v7VNR0>.

<sup>23</sup> Parliamentary Monitoring Group (PMG), 'Auditor-General's briefing to the Portfolio Committee on Basic Education on the Budgetary review and Recommendations Report: PFMA 2018–19', available at [https://static.pmg.org.za/191008AGSA\\_Presentation.pdf](https://static.pmg.org.za/191008AGSA_Presentation.pdf).

urban areas. For example, the Eastern Cape had only three designated resource centres.<sup>24</sup> By 2020, the total number of special schools designated as special school resource centres had risen to only 142,<sup>25</sup> which indicates that in the eight years since the Country Report, only a further 47 schools had been designated as special school resource centres. Less than one-third of special schools have been designated and converted into special school resource centres, which reflects a poor percentage of conversions over a 20-year period. This number of 142 indicates a failure to meet even half of the target set by SIAS, namely converting 300 special schools into SSRCs by 2019.

42. Despite 142 special schools having been converted into resource centres, there is scant data on the level of functioning of these resource centres. There is little monitoring evidence from the DBE to demonstrate and evaluate how the SSRC criteria in the SSRC Guidelines have been met. With the only available data being the number of special schools that have been converted to SSRCs, we are unable to accurately assess the implementation of this strategy in White Paper 6.

### **ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: EDUCATION**

43. At paragraph 235 of South Africa's state party report, the government submits that it provides subsidies and funding of R17 for 264 days to registered or conditionally registered ECD programmes countrywide to supplement the costs associated with providing quality ECD services such as nutrition, stimulation, practitioner salaries and administration.

#### ***Early childhood education and pre-primary schooling.***

44. The EELC submit the following in respect of the above:

- i) We note that the R17 subsidy per qualifying child, per day is insufficient.
- ii) The importance of ECD and the long-term benefits for the child have been well established. We welcome the South African government's recently promulgated policy which outlines plans to promote provisioning of ECD.<sup>26</sup> The provisioning of ECD in South Africa is however stultified by incoherent legislation and the sector is poorly funded. The incoherence in legislation makes it difficult for many ECD programmes to register which in turn results in those programmes not receiving any funding from the government. Sadly, the ECD centres who are not being subsidised are found in poorer communities, where children in need of the subsidies the most. While registration requirements are well-intentioned, they prejudice centres serving the poorest communities, hence reinforcing inequalities in early childhood care and education.

45. Moreover, The ECD sector in South Africa is fragile and is often not supported. Low-quality and socio-economic deprivation characterises much of the ECD sector. According to Parker "about 20% of programmes surveyed (in 2020) had inadequate water, 25% were overcrowded, 74% of ECD practitioners did not have any qualification in early childhood development."<sup>27</sup> More so, COVID-19 has amplified the infrastructural inadequacies in the ECD sector and inequalities across wealthier and poorer areas. In addition, ECD programmes that serve the poorest communities are often small-scale and operate out of private homes, community facilities or rented venues and consist of a few staff

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<sup>24</sup> Baseline Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa (2013) 43.

<sup>25</sup> DBE, Report to Parliament on the status of inclusive education (2019) slide 123. See also Slide 84 of DBE presentation to stakeholders on the status of inclusive education (September 2021).

<sup>26</sup> National Integrated Early Childhood Development Policy 2015 [https://www.gov.za/sites/default/files/gcis\\_document/201610/national-integrated-ecd-policy-web-version-final01-08-2016a.pdf](https://www.gov.za/sites/default/files/gcis_document/201610/national-integrated-ecd-policy-web-version-final01-08-2016a.pdf) (Accessed 23 March 2022).

<sup>27</sup> Rubeena Parker, "Education, inequality and innovation in the time of COVID-19", (2020) 7

members who earn subsistence stipends, often without a formal employment contract or any benefits.<sup>28</sup>

#### **EELC's recommendations**

46. The EELC makes the following recommendations:

- i) That the government must increase the R17 subsidy per qualifying child, per day.
- ii) That the South African government must review and simplify the processes for ECD registration, funding application and claims.
- iii) That the South African government must relax the norms and standards for ECD registration, while still ensuring minimum acceptable levels.
- iv) At paragraph 236 of the state party report, the South African government notes that a total of 410 555 children are beneficiaries of the ECD grant. The EELC submits that this represents a fraction of children under the age of 5 and recommends, the government of South Africa should provide detailed plans as to how this number will be increased significantly in the short term to ensure those most in need are benefitting.

#### ***Free and compulsory basic education.***

47. At paragraph 238 of the state party report, the government submits that the percentage of learners that attended no-fee schools increased from 21,4% in 2007 to 66,2% by 2019 and further that in 2019, 87% of the schools were no-fee schools and these accommodated 79% of learners. The basis upon which schools are declared no-fee schools is the Quintile system, which while it has allowed greater funding to schools in poorer communities requires revision to take into account not only the surrounding neighbourhood but also the socio-economic circumstances of learners attending the school. The EELC commends the government's commitment to providing no-fee schools. However, education is not free for learners with disabilities in special schools and such learners are expected to pay school fees.

#### **EELC's recommendations**

- i) On the principles of equality and non-discrimination, the EELC recommends that the government provide no-fee special schools for learners with disabilities.
- ii) We reiterate all the committee of expert's recommendations and specifically that the government:
  - A) Immediately waive education fee attached to accessing special needs schools;
  - B) Ensure that children with disabilities access free basic education in free, non-fee paying, mainstream schools."

#### ***School infrastructure***

48. At paragraph 254 of the state party report, the South African government provides that in terms of the replacement of inappropriate structures, the ASIDI programme completed 26 schools in the 2019/2020 financial year. Since its inception, a total of 241 schools have reached practical completion. Regarding sanitation, the programme provided 103 schools with sanitation facilities. A total of 877 schools have been provided with sanitation since the inception of the ASIDI

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<sup>28</sup> Ibid, page 7.

programme. To ensure the provision of water, 89 schools were provided with safe drinking water (1 010 projects completed since inception).

49. In respect of the above information, the EELC commends the government for strides in providing for school infrastructure. General Comment No.13 of the UN Convention on Economic, Social and Cultural Rights has adopted the four A scheme incorporating availability, adaptability, acceptability and accessibility as a useful benchmark against which to measure government's performance towards the realisation of the right to basic education.<sup>29</sup> A Measure of the current state of school infrastructure in South Africa against "availability" and "acceptability" will reveal that in most cases, our schools do not meet "acceptable" standards in terms of infrastructure, and in some cases, classrooms are not even "available". The right to basic education includes the provision of school infrastructure and places a positive obligation on the state to provide for classrooms, water, sanitation, and electricity in order to fully realise the right.

50. The Norms and Standards for School Infrastructure were published on 29 November 2013 and set guidelines on school infrastructure and facilities on public schools in South Africa.<sup>30</sup> They give content to the right to basic education as envisaged in section 29 of the Constitution. The Norms and Standards set deadlines for the government to provide the following to all government schools: By 29 November 2016, all structures in schools made from mud, asbestos, metal or wood should have been replaced. All schools were to have access to water, electricity and toilets and not pit latrines. This deadline has passed, and schools have still not received the upgrades that the Norms and Standards required. The implication is that backlogs are inevitable. By 29 November 2020, all schools should have had an adequate supply of electricity, water and sanitation, as well as electronic connectivity and fences. Yet again, the government missed this deadline. By 29 November 2023, libraries and laboratories should be provided for all schools. Judging from the fact that the government has missed the first and second deadlines, and the current appalling state of some of the schools in the country, it is doubtful that providing libraries and laboratories for all schools by November 2023 will be achieved.

51. Given that some schools are still made of mud, metals, wood and asbestos eight years from the publication of the Norms and Standards, we are concerned that there is little hope that school halls, sport fields, walkways and parking lots will be made available in 2030, eight years from now.

### ***Funding for School Infrastructure***

52. One of the challenges that remain in the provisioning for education is funding. Despite the extraordinary challenges that Covid-19 has presented in our already struggling education system, additional money has not been allocated to basic education. Whilst in some instances austerity measures by government has impacted negatively on the right to basic education, in other instances, funds are being mismanaged, wasted or simply underspent. In June 2020, as part of the government's austerity measures, R1.7 billion was cut from school infrastructure grants, with another R 4.4 billion of grant money used for new Covid-19 costs in the sector.<sup>31</sup>

53. South Africa's Auditor General, in a presentation to Parliament's basic education committee, highlighted that R818 million was spent 'irregularly' or in a fraudulent manner by the DBE in the 2019

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<sup>29</sup> Ann Skelton Leveraging funds for school infrastructure: The South African 'mud schools' case study (2014), 1.

<sup>30</sup> Department of Basic Education "South African Schools Act, 1996 Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure" [https://www.gov.za/sites/default/files/gcis\\_document/201409/37081rg10067gon920.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/37081rg10067gon920.pdf). (Accessed 20 March 2022).

<sup>31</sup> Equal Education "Media statement: Equal Education calls on national treasury to stop cuts to the basic education budget so that all learners can return to school safely" <https://equaleducation.org.za/2022/02/22/media-statement-equal-education-calls-on-national-treasury-to-stop-cuts-to-the-basic-education-budget-so-that-all-learners-can-return-to-school-safely/> (Accessed 23 March 2022).

financial year alone (more than double the amount from the previous year).<sup>32</sup> The impact of this is that learners continue to be denied their right to a basic education. Education receives the greatest share of government spending (5% GDP) yet, the struggle for access to safe, quality schools and education continues for many learners in South Africa- particularly those who are economically and socially disadvantaged.

### **EELC's recommendations**

54. We reiterate the committee of experts' recommendation that the government must:

- i) Strengthen implementation of Accelerated Schools Infrastructure Delivery Initiative and urgently equip schools with relevant infrastructures.
- ii) Prioritise funding for school infrastructure.

### **Conclusion**

55. The struggle for access to safe, quality schools and education continues for many learners in South Africa- particularly those who are economically and socially disadvantaged, and learners with disabilities. Considering the issues highlighted in this report, and the many other issues facing South Africa's education system, we request the South African government to show measures undertaken to eradicate the problems identified in order to fully realize the right to a basic education.

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<sup>32</sup> Equal Education "Media statement: Equal Education calls on national treasury to stop cuts to the basic education budget so that all learners can return to school safely" <https://equaleducation.org.za/2022/02/22/media-statement-equal-education-calls-on-national-treasury-to-stop-cuts-to-the-basic-education-budget-so-that-all-learners-can-return-to-school-safely/> (Accessed 14 October 2022).