

To: The Portfolio Committee on Basic Education  
Committee Secretary Mr Llewellyn Brown  
By email  
[lbrown@parliament.gov.za](mailto:lbrown@parliament.gov.za)

14 June 2022

Dear Mr Llewellyn Brown,

## **COMMENTS ON THE BASIC EDUCATION LAWS AMENDMENT BILL [B2-2022]**

### **INTRODUCTION**

1. The Scalabrini Centre of Cape Town (SCCT) is a registered NPO that perceives migration as an opportunity and is committed to fostering integration between migrants, asylum seekers, refugees, and South Africans. Our mission is to welcome, to protect, to promote and integrate mobile populations in local society. In providing assistance to mobile populations, we advocate respect for human rights and use a holistic approach that considers all basic needs. The SCCT works with asylum seekers, refugees and other migrants on a daily basis with obstacles many face to meaningfully contributing to society. We draw on this experience, along with relevant and contemporary research on migration to offer our input on the Basic Education Laws Amendment Bill [B2-2022] (hereafter 'the Bill').
2. While we agree with much of the Bill's aims and proposals, our comments in this submission are focused on the impact some of the proposals will have on children whose documentation status is precarious. This is often the case with non-citizen children but also impacts large numbers of children who are South African citizens. Our submission first discusses the need to orient the proposed legislation to clarify that all children have the right to education, regardless of their documentation status. It then discusses the realities of documentation in South Africa and the very significant obstacles facing many non-citizens, and how this would impact the ability of their children to realise their right to education under some of the proposed amendments. It then provides input on specific proposals of the Bill.

## GENERAL COMMENTS

### All children have the right to education regardless of their documentation status

3. While Section 29 of the South African Constitution states that everyone has the right to a basic education, access to education for undocumented learners – whether undocumented foreign children or undocumented SA citizens – has often been a contentious issue. Accessing the required documentation is often not easy for learners who depend on their parents or care givers to secure documentation on their behalf, such as birth certificates for South African children or visas and permits in respect of learners born to foreign nationals. Through no fault of their own, undocumented learners have been facing numerous challenges as schools have demanded identifying documents from learners as a prerequisite for enrolment.<sup>1</sup>
4. The above issues and barriers were the subject of a legal challenge regarding the legality of Clauses 15 and 21 of a school Admission Policy. A judgment was handed down in that matter on 12 December 2019 reported as *Centre for Child Law and Others v Minister of Basic Education<sup>2</sup> and Others* (‘the Phakamisa judgment’) clarifying that everyone has the right to basic education regardless of their status or their ability to provide proof of identity through the production of a birth certificate or other official documentation. The court scrutinized clauses 15 and 21 of the Admission Policy and found that these clauses unjustifiably limited numerous constitutional rights including the right to equality,<sup>3</sup> the right to dignity,<sup>4</sup> the right of children to have their best interest considered paramount,<sup>5</sup> and the right to basic education<sup>6</sup> by excluding undocumented learners from public schools.
5. The Phakamisa judgment is an important reference for this Bill as it clearly establishes that all children, regardless of documentation status, have the right to education and to enroll in schools. Furthermore, the Circular from the Department of Basic Education Circular 1 of 2020 states that Sections 39 and 42 of the Immigration Act (No 13 of 2002) do not prohibit the admission of undocumented and provision of basic education to undocumented foreign children. As such, the Minister and other respondents are interdicted and restrained from, in any manner whatsoever, removing or excluding from schools, children, including undocumented foreign children, already admitted, purely by reason of the fact that the children have no identity document number, permit or visa, passport, or have not produced any identification documents.

### The Realities of Documentation in South Africa

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<sup>1</sup> For a comprehensive overview of the issues, see for example the South African Human Rights Commission’s *Position Paper – Access to a Basic Education for Undocumented Learners in South Africa* (September 2019) at <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf>

<sup>2</sup> (2840/2017) [2019] ZAECGHC 126.

<sup>3</sup> Section 9.

<sup>4</sup> Section 10.

<sup>5</sup> Section 28(2).

<sup>6</sup> Section 29(1)(a).

6. The reality of documentation in South Africa is that the practices of officials vary across provinces, offices, and divisions resulting in a patchwork of visa-related documentation (such as stamps on expired permits, hand-written appointment notes with stamps, ATM-style receipt slips for appointments months in advance, irregular and error-ridden visas, and 'blocked' ID books). Even gaining access to Refugee Reception Offices (RRO) is an arduous task, with research consistently demonstrating systematic barriers to accessing these offices over the past 15 years.<sup>7</sup> Researchers have labelled this a 'burgeoning culture of bureaucratic informality' and it is an institutionalised aspect of the DHA's migration management practices.<sup>8</sup> A number of studies over an extended period of time have found high levels of corruption within the refugee system with officials exploiting the vulnerability of asylum seekers and refugees.<sup>9</sup> The ubiquity of corruption is so severe that individuals applying for refugee status are likely to 'encounter corruption at every point of the process'.<sup>10</sup> What this means practically is that school administrators will encounter a variety of configurations of documentation, and clear-cut distinctions between 'legal' / 'illegal', 'valid' / 'expired', or 'legitimate' / 'fraudulent' may not be so straight-forward. It also means that asylum seekers and refugees are subjected to inconsistent practices and endure severe hardship in trying to acquire and maintain their documentation.
  
7. The Covid-19 pandemic has severely impacted the operations of the immigration and refugee systems. Due to the closure of refugee reception offices during the pandemic and a slow-down in visa processing, large numbers of non-citizens have found themselves with 'expired' documentation but have been covered by blanket extensions issued by the DHA. While this is a reasonable response to a global pandemic causing massive disruptions, the reality is that it has further muddied already murky waters of legality in relation to immigration status. The headline of a recent article by *GroundUp* spells this out clearly: 'Chaotic Home Affairs system leaving immigrants living legally in SA undocumented'. The article details how DHA officials – i.e. those best situated to understand the current policies and practices – are having difficulty administering the system with significant negative outcomes for those trying to regularise their documentation.<sup>11</sup>
  
8. We reference this here as we are concerned that some of the provisions of the Bill fail to take this reality into consideration. We therefore recommend the Bill spells out clearly that all children are entitled to attend school or access their right to education. We are concerned that many provisions in the Bill give the impression that those

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<sup>7</sup> See for example, D. Vigneswaran (2008) 'A Foot in the Door: Access to Asylum in South Africa', *Refuge: Canada's Journal on Refugees*, 25(2), 41–52, available at: <https://doi.org/10.25071/1920-7336.26030>; 'R. Amit (2012) 'No way in: barriers to access, service and administrative justice at South Africa's refugee reception offices', University of the Witwatersrand Research Report, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3274020](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274020).

<sup>8</sup> D. Vigneswaran et al (2010) 'Criminality or Monopoly? Informal Immigration Enforcement in South Africa'. *Journal of Southern African Studies* vol. 36.

<sup>9</sup> See for example: R. Amit (2015) 'Queue here for corruption: measuring irregularities in South Africa's asylum system', Lawyers for Human Rights and the African Centre for Migration & Society Report; Lawyers for Human Rights (2020) 'Costly Protection: Corruption in South Africa's Asylum System', available at <https://www.lhr.org.za/wp-content/uploads/2020/09/Corruption-Report-V4-Digital.pdf>.

<sup>10</sup> Lawyers for Human Rights, 'Costly Protection: Corruption in South Africa's Asylum System', at p. 33.

<sup>11</sup> See for example T. Washinyira, 'Chaotic Home Affairs system leaving immigrants living legally in SA undocumented', 4 April 2022, at <https://www.dailymaverick.co.za/article/2022-04-04-chaotic-home-affairs-system-leaving-immigrants-living-legally-in-sa-undocumented/>

lacking documentation will be unable to attend school and that schools may become sites of immigration control.

## **SPECIFIC COMMENTS**

### **Clause 4 – Establishment of National Intergovernmental Committee and Provincial Intergovernmental Committee**

9. We recognise the potential of the proposed National and Provincial Intergovernmental Committees to address some of the issues surrounding documentation described above, but we remain concerned that children will be excluded from accessing education for significant periods of time if legislation or policy is unclear or unresponsive. Equally concerning is the possibility that the Committees and the documentation cases that they assess could function as a form of immigration control, especially with representatives on the Committees, such as the South African Police Services, that are not mandated to assist with documentation issues. Recent jurisprudence has clarified that when devising policy or legislation, the State is obligated to ensure it does not ‘unwittingly fuel xenophobia’,<sup>12</sup> and we caution against any policy or legislation that may harden societal borders or utilise the school system as a tool of immigration control.
10. It is submitted that the establishment of these Committees is unlikely to resolve documentation issues that are largely due to structural issues within the Department of Home Affairs. A more effective approach would be to address the barriers through reform of law and policy within DHA, which would allow for the Department of Education to focus on educational issues. The SCCT recommends that the establishment of intergovernmental committees be carefully considered in regards to their function, potential effectiveness, and use of finite resources.

### **Clause 1 – Insertion of ‘required documents’ definition**

11. The proposed insertion of the ‘required documents’ definition in at subsection 1(m) seeks to introduce a range of categories of documentation requirements for learners to be admitted to school depending on the specific documentation the child possesses as well as the documentation status of their parents. The SCCT is concerned that this may lead to the exclusion of learners who cannot access documentation through no fault of their own, and that this may introduce immigration control efforts into the educational system, an outcome that is highly undesirable and would infringe on the rights of all children to be able to access education, a core right protected under international law<sup>13</sup> as well as through domestic law.<sup>14</sup>

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<sup>12</sup> *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014) at para 44.

<sup>13</sup> See for example the statement of the Committee on Economic, Social and Cultural Rights on the duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights (E/C.12/2017/1) in which the Committee stated that ‘protection from discrimination cannot be made conditional upon an individual having a regular status in the host country’ and that ‘all children within a State, including those with an undocumented status, had a right to receive education’. South Africa is a signatory to the Convention and thus its provisions are binding. Available at: <https://digitallibrary.un.org/record/1484074?ln=en>

<sup>14</sup> As clarified in the Phakamisa judgment, above n 2.

12. The Bill as drafted does state, in compliance with the Centre for Child Law -Phakamisa Judgement,<sup>15</sup> that the absence of required documents will not prevent a learner from applying for admission and attending school in the proposed section 5 (1G) stating:

Section 5 of the South African Schools Act, 1996, is hereby amended— (a) by the substitution for subsection (1) of the following subsection: “(1) A.... (1G) Any learner whose parent or guardian has not provided any required documents, whether of the learner or such adult person acting on behalf of the learner, during the application for admission, shall nonetheless be allowed to attend school, and the principal of the school must advise the parent or guardian to secure the required documents and alert the Provincial Intergovernmental Committee thereof.” (Emphasis added)

13. However, when the plain and ordinary meaning of the term in the term ‘required documents’ is considered in terms of the standard rules of interpretation of statutes the Bill suggests to the contrary suggesting that documentation is required. This position is further supported by the Clause by Clause analysis of the amendments in referring to ‘Clause 1: Amendment of section 1’ stating:

Finally, the clause proposes the insertion of a definition for “required documents” in order to provide clarity in respect of the documents which must be submitted for the purpose of the admission of learners to schools.(emphasis added)

14. The use of the phrase ‘must be submitted’ and ‘required’ contradicts the view that these are not required for and will not preclude admission and attendance at schools as referred to in the proposed section 5(1G) and this further contradicts the finding of the High Court in the Centre for Child Law Case<sup>16</sup>. Even the nuance of 5(1G) is not included within the Clause by Clause analysis of the amendments although denying admission and attendance of learners on the basis of documentation would clearly be discriminatory which the amendment seeks to guard against:

2.4 Clause 4: Amendment of section 5 2.4.1 This clause seeks to amend section 5 of the SASA. Section 5(1) is amended to provide that a public school must admit and provide education to learners and must serve their educational requirements for the duration of their school attendance without unfairly discriminating in any way. In order to ensure that no learner is discriminated against in any way, the clause proposes the insertion of subsections (1A) to (1G) which provides for the establishment of the National Intergovernmental Committee and the Provincial Intergovernmental Committee, the main purpose of which will be to provide assistance to schools in obtaining the required documentation for those learners who are admitted without such documentation. (emphasis added)

15. We submit that the Bill be revised to make it clearer that documentation will be required for admission and attendance at schools and would suggest that the required

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

documents provision is amended to be referred to as 'supporting documentation' or 'assisting documentation' instead of 'required documentation'.

16. There are further challenges with the required documents definition. Subsection c(iv) of the proposed definition states that for those situations where the parents of the learner are asylum seekers, that a 'refugee or long term study visa must be provided within three years of admission of the learner'.

17. It is submitted that this aspect of the definition is problematic as it fails to consider the rights of refugees as well as the realities of the asylum process.

18. The South African courts have clarified that a core principle of refugee law is that asylum seekers must be treated as presumptive refugees. In the case of *Saidi and Others v Minister of Home Affairs and Others* ('*Saidi*'), the Constitutional Court (CC) held 'a person does not become a refugee because of recognition, but is recognised because he or she is a refugee'.<sup>17</sup> The CC in the *Abore v Minister of Home Affairs* citing the CC case of *Ruta v Minister of Home Affairs*<sup>18</sup> elaborated that refugee protection under international and domestic law and protection applies to asylum seekers, stating that:

the 1951 Convention protects both what it calls 'de facto refugees' (those who have not yet had their refugee status confirmed under domestic law) or asylum seekers, and 'de jure refugees' (those whose status has been determined as refugees). The protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure.<sup>19</sup>

19. The CC in the *Saidi* case further stated that in practice, this means that extending protections to asylum seekers during the adjudication process ensures that refugees are not denied crucial rights:

She or he is not exposed to the possibility of **undue disruption of a life of human dignity**. That is, a life of: enjoyment of employment opportunities; having access to health, **educational** and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and **communing in ordinary human intercourse without undue state interference**. [emphasis added].<sup>20</sup>

20. The proposed requirement of the submission of a refugee or study visa would therefore infringe the rights of children who are mired in a protracted asylum process through no fault of their own. This is critically important given the extremely protracted nature of South Africa's asylum process which takes years for many to navigate.<sup>21</sup> To force children in this situation to acquire a study visa would be equally problematic as the most recent legislative amendments to the Refugees Act state that

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<sup>17</sup> *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333, para 34.

<sup>18</sup> *Ruta v Minister of Home Affairs* (CCT02/18) [2018] ZACC 52, para 27.

<sup>19</sup> *Abore v Minister of Home Affairs* [2021] ZACC 50, para 42.

<sup>20</sup> *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333, para 18.

<sup>21</sup> According to the DHA's most recent statistics, '60% of Section 22 permits (i.e. asylum seeker permits) have been active for more than five years based on the 2019-midyear statistics'

those refugees who approach their embassy are subject to losing their refugee status through the exclusions clause,<sup>22</sup> which would be a necessary step in attaining a passport for the study visa application.

21. We submit that Subsection c(iv) of the proposed definition should be amended to state that for those situations where the parents of the learner are asylum seekers or refugees, that *'their asylum visa/permit or refugee status will suffice as and be the assisting documentation'* and the deletion of the balance of the section that *'a refugee or long term study visa must be provided within three years of admission of the learner'*.
22. Lastly, subsection (d) of the definition states that where the learner is placed in alternative care, the following documents would be required:
  - (i) the relevant court order granting guardianship or custody; and
  - (ii) the learner's unabridged birth certificate.
23. The requirement to produce an unabridged birth certificate by children placed in alternative care could be problematic as in most cases foreign children placed in Child and Youth Care Centres often do not have a birth certificate or any kind of identification documents. These could be foreign children born in South Africa whose birth was not registered due to abandonment or other birth registration challenges. In some cases, unaccompanied children born outside South Africa often arrive in the country without birth certificates, passports or any other relevant identity documents. Even in some instances where social workers have attempted to contact the appropriate embassy to obtain the birth certificate for these children, they are not successful if the birth of the child was never registered in country of origin. The South African state cannot issue birth certificates to non-citizen children born outside South Africa. It is submitted that an order of the Children's Court placing the child in alternative care should suffice until such time that the child caregiver is able to obtain the birth certificate or some identity document for the child. We suggest that a birth certificate must not be a mandatory requirement for children in alternative care.

### **Clause 32 – Recognition of affidavits as proof of family circumstances for fee exemption applications**

24. The SCCT supports the proposed insertion of subsections 41(2A) and 41(2B) which allows for the submission of affidavits from single parent households when submitting applications for school fees exemptions.
25. Currently, when applying for a school fees exemption, both parents are required to declare their income and the percentage of discount is calculated based on the total income. This has proven to be a significant hurdle for separated parents, especially when only one parent is financially involved, or the other one refuses to show proof of income. In the event where the one parent is unavailable or unwilling to provide the required information, the application would be deemed incomplete and the

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<sup>22</sup> Section 5(1)(a) of the Refugees Amendment Act (No 11, 2017).

application for school fees exemption would be unsuccessful. This puts pressure on the single parent who is not in a position to pay the full amount in school fees.

26. It is submitted that acceptance of affidavits from one parent where the other is unwilling or unavailable will protect the right to education of all learners whose parents find it hard to finance their education.

### **Clause 39 – Insertion of offences for submission of misleading information, forged documentation, or false copies of documentation**

27. The SCCT appreciates the need to ensure that information submitted to public schools is true and accurate. However, given the realities of documentation issued within the immigration and refugee system as discussed above, we are concerned that the proposal could ensnare well-meaning parents and could also lead to children being excluded from schools or from fee exemptions due to confusion over documentation.
28. More over the potential imposition of imprisonment for a period not exceeding 12 months would have a devastating impact on the learner and family unit not to mention that this may arise in instances in which the individual submitting the documentation is not aware that it is not authentic, lawfully obtained documentation. See in relation to Section 59 the proposed addition of :

(3) If, when applying for admission to a public school or for exemption from the payment of school fees, the parent of a learner, or any other person— (a) submits or provides information which he or she knows to be false or misleading; (b) submits a document which he or she knows to be forged; or (c) submits a document and claims that it is a true copy of the original when in fact it is not a true copy, such person is guilty of an offence and liable, upon conviction, to a **fine or to imprisonment for a period not exceeding 12 months, or to both a fine and such imprisonment.** (Emphasis added).

29. This proposal could have the outcome of fining or imprisoning parents who cannot meet requirements that are impossible for them to comply with. It also does not resolve the structural issues surrounding documentation. The SCCT submits this does not take into account the best interests of the child and is excessive. We recommend the provision be removed.

### **CONCLUDING REMARKS**

30. In summary, it is our submission that the Bill is positive in a number of respects but require some significant revision in relation to documentation and penalisation. We remain extremely concerned about the consequences to the best interests of the child if the proposed bill is signed into law and implemented. We thank the portfolio committee for the opportunity to provide our insight on these important issues.

### **Submissions of the Scalabrini Centre of Cape Town.**

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