



**DISCUSSION PAPER 125**

**STATUTORY LAW REVISION**

**(LEGISLATION ADMINISTERED BY THE  
DEPARTMENT OF BASIC EDUCATION)**

**PROJECT 25**

**MAY 2011**

**CLOSING DATE FOR COMMENTS:**

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## Introduction

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

The members of the SALRC are –

The Honourable Madam Justice Y Mokgoro (Chairperson)  
The Honourable Mr Justice W Seriti (Vice Chairperson)  
Professor C Albertyn  
The Honourable Mr Justice DM Davis  
Mr T Ngcukaitobi  
Advocate DB Ntsebeza SC  
Professor PJ Schwikkard  
Advocate M Sello

The Secretary of the SALRC is Mr Michael Palumbo. The project leader responsible for this investigation is the Honourable Mr Justice Dennis Davis. The Researcher assigned to this investigation is Mr Linda Mngoma. The SALRC's offices are on the 5th Floor, Die Meent Building, 266 Andries Street, Pretoria.

On 30 July 2008, the Honourable Ms MS Mabandla, the then Minister of Justice and Constitutional Development, appointed the following advisory committee members who assisted the SALRC to, firstly, develop the Consultation Paper and, secondly, the Discussion Paper, namely:

Prof Boyce Philip Wanda, University of Fort Hare  
Ms Simla Budhu, University of South Africa  
Ms Waruguru Kaguongo, University of Pretoria  
Dr Rika Joubert, University of Pretoria  
Professor Elmene Bray, University of South Africa  
Professor Rassie Malherbe of the University of Johannesburg and Dr Marius Smit of the North-West University resigned due to other commitments that prevented their participation in the project

Correspondence should be addressed to:

The Secretary  
South African Law Reform Commission  
Private Bag X668  
Pretoria  
0001

Telephone: (012) 392-9550 or (012) 392 9563  
Fax: 086 501 9217 or (012) 323-4406  
E-mail: LMngoma@justice.gov.za  
Website: <http://salawreform.justice.gov.za/>

## Preface

This Discussion Paper has been prepared to elicit responses and to serve as a basis for the SALRC's further deliberations. It contains the Commission's **preliminary** recommendations. The views, conclusions and recommendations which follow should not be regarded as the SALRC's final views.

The Discussion Paper (which includes a draft Bill entitled Basic Education General Laws Amendment and Repeal Bill which, if enacted, will repeal redundant, obsolete and unconstitutional legislation or provisions in legislation) is published in full so as to provide persons and bodies wishing to comment with sufficient background information to enable them to place focused submissions before the SALRC. A summary of the preliminary recommendations and questions for comment appear on page (iv). The proposed Basic Education General Laws Amendment and Repeal Bill is contained in Annexure A. The Schedule to the Bill indicates the five statutes that are proposed for repeal in whole and also specific provisions in six additional statutes that are proposed for repeal. Annexure B contains list of statutes (including those recommended for repeal in this document) currently administered by the Department of Basic Education which were enacted between 1963 and 2005. Annexure C lists the statutes that were assigned to the provincial departments of education.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments of and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the SALRC may in any event be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000.

Respondents are requested to submit written comment and representations to the SALRC by 31 August 2011 at the address appearing on the previous page. Comments can be sent by post or fax, but comments sent by e-mail in electronic format are preferable.

This Discussion Paper is available on the internet at <http://salawreform.justice.gov.za/>. Any inquiries should be addressed to the Secretary of the SALRC or the researcher allocated to the project, Mr Linda Mngoma. Contact particulars also appear on the previous page.

## Preliminary recommendations and questions for comments

1. The SALRC has been mandated with the task of revising the South African statute book with a view to identifying and recommending for repeal or amendment legislation or provisions in legislation that are inconsistent with the Constitution, particularly the equality clause thereof, and those that are redundant or obsolete. Pursuant to this mandate, the SALRC has established that there are 2800 national statutes in the Statute book. Furthermore, the SALRC has identified 19 Acts as being statutes that are administered by the Department of Basic Education (DBE) (see Annexure B) and 38 Acts being statutes that were assigned to the Provincial Departments of Education (see Annexure C). After careful and thorough analysis of the Acts administered by the DBE, the SALRC proposes that:

- (i) The provisions in the six statutes referred to in the Schedule to the proposed Basic Education General Laws Amendment and Repeal Bill (the proposed Bill), contained in Annexure A of this Discussion Paper, be repealed to the extent set out in the fourth column of the Schedule, and the five statutes referred to in the Schedule to the proposed Bill contained in the same Annexure, be repealed in whole for the reasons set out in Chapter 2 of this Discussion Paper; and
- (ii) The SALRC's advisory committee recommended that a task team, consisting of persons with expertise in basic education legislation and administration, be appointed to investigate and review all basic education legislation, and that the team should be mandated, among other matters, to align education legislation with the spirit and purport of all the provisions of the Constitution to harmonise education legislation with legislation in other government departments.

2. Furthermore, it is possible that some of the statutes provisionally proposed for repeal are still useful, and thus should not be repealed. Moreover, it is also possible that there are statutes or provisions in statutes not identified for repeal in this Discussion Paper which are of no practical utility anymore and which could be repealed as they are redundant or obsolete. The SALRC would appreciate if these could be identified and brought to the attention of the SALRC.

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**Chapter 1**  
**Project 25: Statutory Law Revisions**

**DISCUSSION PAPER**

**A INTRODUCTION**

**(a) The objects of the South African Law Reform Commission**

1.1 The objects of the SALRC are set out as follows in the South African Law Reform Commission Act 19 of 1973: to do research with reference to all branches of the law of the Republic and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernisation or reform thereof, including:

- (a) the repeal of obsolete or unnecessary provisions;
- (b) the removal of anomalies;
- (c) the bringing about of uniformity in the law in force in the various parts of the Republic; and
- (d) the consolidation or codification of any branch of the law.

1.2 In short, the SALRC is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.

**(b) History of the investigation**

1.3 Shortly after its establishment in 1973, the SALRC undertook a revision of all pre-Union legislation as part of its project 7 that dealt with the review of pre-Union legislation. This resulted in the repeal of approximately 1 200 ordinances and proclamations of the former Colonies and Republics. In 1981 the SALRC finalised a report on the repeal of post-Union statutes as part of its project 25 on statute law: the establishment of a permanently simplified, coherent and generally accessible statute book. This report resulted in Parliament adopting the Repeal of Laws Act, 1981 (Act No 94 of 1981) which repealed approximately 790 post-Union statutes.

1.4. In 2003 Cabinet approved that the Minister of Justice and Constitutional Development co-ordinates and mandates the SALRC to review provisions in the legislative framework that would result in discrimination as defined by section 9 of the Constitution. This section prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

1.5 In 2004 the SALRC included in its law reform programme an investigation into statutory law revision, which entails a revision of all statutes from 1910 to date. While the emphasis in the previous investigations was to identify obsolete and redundant provisions for repeal, the emphasis in the current investigation will be on compliance with the Constitution. However, all redundant and obsolete provisions identified in the course of the current investigation will also be recommended for repeal. Furthermore, it should be stated right from the outset that the constitutional inquiry is limited to statutory provisions that blatantly violate the provisions of section 9 (the equality clause) of the Constitution.

1.6 With the advent of constitutional democracy in 1994, the legislation enacted prior to that year remained in force. This has led to a situation where numerous pre-1994 provisions are constitutionally non-compliant. The matter is compounded by the fact that some of these provisions were enacted to promote and sustain the policy of apartheid. A recent provisional audit by the SALRC of national legislation remaining on the statute book since 1910, established that there are in the region of 2 800 individual statutes, comprising principal Acts, amendment Acts, private Acts, additional or supplementary Acts and partially repealed Acts. A substantial number of these Acts serve no useful purpose anymore, while many others still contain unconstitutional provisions that have already given rise to expensive and sometimes protracted litigation.

## **B. WHAT IS STATUTORY LAW REVISION?**

1.7 Statutory law revision ordinarily focuses on the identification and repeal of statutes that are no longer useful in practice. As the Law Reform Commission for England and Wales explains, the purpose of statute revision is to modernise and simplify statutes that need updating, and to reduce the size of the statute book to the benefit of legal professionals and

other people who use it.<sup>1</sup> Revision lessens the chance of people being misled by redundant laws that still appear in the statute book and seem to be relevant or “live”. If statutory provisions appear in the statute book and are referred to in legal textbooks, readers may reasonably assume they still serve a purpose.

1.8 As is the case in other jurisdictions (and will be evident in this review), once legislation is deemed no longer to apply, the question arises whether it should remain in the statute book or be repealed.<sup>2</sup> Usually such legislation no longer has any legal effect and is considered obsolete, redundant, or spent. A statutory provision may be identified for repeal because the grounds for which it was passed have lapsed or are presently remedied by another measure or provision.

1.9 In the context of this investigation, the statutory law revision primarily targets statutory provisions that are obviously at odds with the Constitution, particularly section 9.

1.10 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that are candidates for repeal:<sup>3</sup>

- (a) references to bodies, organisations, etc. that have been dissolved or wound up or which have otherwise ceased to serve any purpose;
- (b) references to issues that are no longer relevant as a result of changes in social or economic conditions (e.g. legislation about tithes or tin mines);
- (c) references to Acts that have been superseded by more modern (or EU) legislation or by international Convention;
- (d) references to statutory provisions (i.e. sections, schedules, orders, etc.) that have been repealed;
- (e) repealing provisions e.g. “Section 33 is repealed/shall cease to have effect”;

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<sup>1</sup> See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 1 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

<sup>2</sup> See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 6 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

<sup>3</sup> See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 7 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

- (f) commencement provisions once the whole of an Act is in force;
- (g) transitional or savings provisions that are spent;
- (h) provisions that are self-evidently spent - e.g. a one-off statutory obligation to do something becomes spent once the required act has duly been done;
- (i) powers that have never been exercised over a period of many years or where any previous exercise is now spent.

1.11 The Law Commission of India notes that in England the terms “expired”, “spent”, “repealed in general terms”, “virtually repealed”, “superseded”, and “obsolete” were defined in memoranda to Statute Law Revision Bills as follows:<sup>4</sup>

- Expired – that is, enactments which having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had as their object the continuance of previous temporary enactments for periods now gone by effluxion of time
- Spent – that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required
- Repealed in general terms – that is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts which it is to operate
- Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one
- Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise
- Obsolete – where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.

<sup>4</sup>

Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March 1984; p 3 of Chapter 2 (p 6 of 21) accessed from <http://lawcommissionofindia.nic.in/51-100/Report96.pdf> on 29 August 2007.

1.12 Statutory provisions usually become redundant as time passes.<sup>5</sup> Generally, the redundancy of legislation is not signalled by a single occurrence; rather, legislation is often simply overtaken by social and economic changes. Inevitably some provisions fade away more quickly than others. Relatively short-lived provisions include commencement and transitional provisions and those that confer powers to be exercised during the period between the passing of legislation and its implementation (in some jurisdictions known as “pump-priming” provisions). Provisions that provide for delegated legislation-making powers might also become unnecessary over time, or a committee or board established by a statute might no longer be required.

1.13 Substantial revision of statutory law is possible in South Africa because of the general savings provisions of section 12(2) of the South African Interpretation Act. The South African Interpretation Act, 1957 (Act 33 of 1957) mirrors section 16(1) of the Interpretation Act of 1978 of England and Wales.<sup>6</sup> Section 12(2) of the South African Interpretation Act provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

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<sup>5</sup> *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 9 and 10 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

<sup>6</sup> *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 8 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 28 May 2008.

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

1.14 The methodology adopted in this investigation is to review the statute book by Department – the SALRC identifies a Department, reviews the national legislation administered by that Department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper and consults with that Department to verify the SALRC's preliminary findings and proposals. The next step that the SALRC undertakes is the development of a discussion paper in respect of the legislation of each Department, and upon its approval by the SALRC, it is published for general information and comment. Finally, the SALRC develops a report in respect of each Department that reflects the comment on the discussion paper and contains a draft Bill proposing amending legislation.

### **C. THE INITIAL INVESTIGATION**

1.15 In the early 2000s the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies (CALs) of the University of the Witwatersrand to conduct a study to determine the feasibility, scope and operational structure of revising the South African statute book for constitutionality, redundancy and obsolescence. CALs pursued four main avenues of research in their study conducted in 2001:<sup>7</sup>

- (a) First, a series of role-player interviews were conducted with representatives of all three tiers of government, Chapter 9 institutions, the legal profession, academia and civil society. These interviews revealed a high level of support for the project.
- (b) Second, an analysis of all Constitutional Court judgments until 2001 was undertaken. Schedules reflecting the nature and outcome of the cases, and the statutes impugned were compiled. The three most problematic categories of legislative provision were identified, and an analysis made of the Constitutional Court's jurisdiction in relation to each category. The three categories were:

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<sup>7</sup> "Feasibility and Implementation Study on the Revision of the Statute Book" prepared by the Law & Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand.

reverse onus provisions; discriminatory provisions; and provisions that infringe the principle of the separation of powers. Guidelines summarising the Constitutional Court's jurisprudence were compiled in respect of each category.

- (c) Third, sixteen randomly selected national statutes were tested against these guidelines. The outcome of the test was then compared against a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. A comparison of the outcomes revealed that a targeted revision of the statute book, in accordance with the guidelines, produced surprisingly effective results.
- (d) Fourth, a survey of five countries (United Kingdom, Germany, Norway, Switzerland and France) was conducted. With the exception of France, all the countries have conducted or are conducting statutory revision exercises, although the motivation for and the outcomes of these exercises differ.

1.16 The SALRC finalised the following reports, proposing reform of discriminatory areas of the law or the repeal of specific discriminatory provisions –

- 1) the Recognition of Customary Marriages (August 1998);
- 2) the Review of Marriage Act 25 of 1961 (May 2001)
- 3) the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);
- 4) Traditional Courts (January 2003);
- 5) the Recognition of Muslim marriages (July 2003);
- 6) the Repeal of the Black Administration Act 38 of 1927 (March 2004);
- 7) Customary Law of Succession (March 2004); and
- 8) Domestic Partnerships (in March 2006)

#### **D. SCOPE OF THE PROJECT**

1.17 This investigation focuses not only on obsolescence or redundancy of provisions but also on the question of the constitutionality of provisions in statutes. In 2004 Cabinet endorsed that the highest priority be given to reviewing provisions that would result in discrimination as

defined in section 9 of the Constitution which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

1.18 The constitutional validity aspect of this project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In practical terms this means that this leg of the investigation will be limited to those statutes or provisions in statutes that:

- (a) differentiate between people or categories of people, and which are not rationally connected to a legitimate government purpose; or
- (b) unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or
- (c) unfairly discriminate on grounds which impair or have the potential to impair a person's fundamental human dignity as a human being.

1.19 Consequently, a law or a provision in a law which appears, on the face of it, to be neutral and non-discriminatory but which has or could have discriminatory effect or consequences will be left to the judicial process.

1.20 The SALRC decided that the project should proceed by scrutinising and revising national legislation which discriminates unfairly.<sup>8</sup> However, even the section 9 inquiry is fairly limited, dealing primarily with statutory provisions that are blatantly in conflict with section 9 of the Constitution. This is necessitated by, among other considerations, time and capacity. It is not foreseen that the SALRC and government departments will have capacity in the foreseeable future to revise all national statutes or the entire legislative framework to determine whether they contain unconstitutional provisions.

1.21 For the purposes of this report, the following needs to be noted:

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<sup>8</sup> Cathi Albertyn prepared a 'Summary of Equality Jurisprudence and Guidelines for Assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution', specifically for the SALRC in February 2006.

- (a) On 11 May 2009, the President of the Republic of South Africa, by way of the President's Act 126 of 2009, determined that education will be delivered through both the Minister of Higher Education and Training and the Minister of Basic Education;
- (b) By way of Proclamation 44 of 1 July 2009 and in terms of section 97 of the Constitution, the President of the Republic of South Africa transferred the administration and powers and functions entrusted by legislation specified in paragraph 1.2 of the Proclamation to the Minister of Basic Education and those specified in paragraph 1.7 of the Proclamation to the Minister of Higher Education and Training.

1.22 In addition, the SALRC is aware of recent developments affecting some of the Acts administered by the Department of Basic Education. Within this context, the SALRC has taken note of the contents of, and the parliamentary procedure in respect of, the Higher Education Laws Amendment Bill [2010] and the Higher Education and Training Laws Amendment Bill [2010]. The main object of both the Bills is to align the laws specified in each Bill with the new education dispensation that came about during 2009 when the former Department of Education was split into the Department of Basic Education and the Department of Higher Education and Training.<sup>9</sup>

#### **E. ASSISTANCE BY GOVERNMENT DEPARTMENTS AND STAKEHOLDERS**

1.23 In 2004, Cabinet endorsed the proposal that government departments should be requested to participate in and contribute to this investigation. In certain instances, legal researchers cannot decide whether to recommend a provision for repeal unless they have access to factual information that might be considered "inside" knowledge – of the type usually accessible within a specific department or organisation. Examples include savings or transitional provisions that are instituted to preserve the status quo until an office-holder ceases to hold office or until a loan has been repaid. In such cases, the consultation paper drafted by the SALRC invited the department or organisation being consulted to supply the necessary

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<sup>9</sup> The laws that the Higher Education Laws Amendment Bill, 2010 seeks to align are the Higher Education Act, 1997; the National Student Financial Aid Scheme Act, 1999 and the National Qualifications Framework Act, 2008. The laws that the Higher Education and Training Laws Amendment Bill, 2010 seeks to align are the Adult Basic Education and Training Act, 2000 and the Further Education and Training Colleges Act, 2006.

information. The aim of the publication of discussion papers in this investigation is likewise to determine whether departments and stakeholders agree with and support the proposed findings and legislative amendment or repeal proposals. Any assistance that can be given to fill in the gaps will be much appreciated. It is important that the departments concerned take ownership over this process. This will ensure that all relevant provisions are identified and dealt with responsively and without creating unintended negative consequences.

## **F. CONSULTATION WITH THE DEPARTMENT OF BASIC EDUCATION**

1.24 As stated above, the SALRC has reviewed 19 statutes administered by the DBE, as well as 38 statutes that were assigned to the Provincial Departments of Education. In May 2010 and in accordance with its policy to consult widely and to involve the Department likely to be affected by the proposals made, the SALRC developed and submitted to DBE its Consultation Paper. The Consultation Paper explains the background to statutory law revision, sets out the guidelines utilised by the SALRC to test the constitutionality and redundancy of statutes administered by DBE, and provided detailed findings and proposals for legislative reform in respect of legislation found wanting. Appended to the Consultation Paper was a Draft Basic Education General Laws Amendment and Repeal Bill setting out statutes which needed to be repealed, and the extent of such repeal, and invited DBE to peruse the preliminary findings, proposals and questions for comment and submit comments to the SALRC. On 26 October 2010, the DBE submitted comments to the SALRC. In a nutshell, the DBE supports the preliminary findings as contained in the Consultation Paper referred to above. The SALRC wishes to express its appreciation to the DBE, and in particular to the officers in the Legal Services Directorate, for their support and participation in all the stages of this review leading to the development of this Discussion Paper.

## Chapter 2

### Repeal of Legislation Administered by the Department of Basic Education

#### A. Introductory summary

2.1 According to the 2009/2010 *Annual Report* of the Department of Education, “Government has made Education the key priority. In doing so, it placed education and skills development at the centre of this administration’s priorities. This required the creation of two Ministries with clear responsibilities. Basic Education will focus primarily on schools in order to achieve the goal of a quality basic education system. The Ministry of Higher Education and Training will deliver an improved higher education and training system which will provide a diverse range of learning opportunities for youth and adults.

2.2 Since 1994, a number of policies have been implemented and legislation promulgated to create a framework for transformation in education and training. These include, inter alia, the following:

- 1) The Constitution of the Republic of South Africa, which guarantees access to basic education for all, with the provision that everyone has the right to basic education, including adult education;
- 2) The National Education Policy Act (NEPA) (1996);
- 3) The South African Schools Act (SASA) (1996);
- 4) A whole spectrum of legislation, including the Employment of Educators Act (1998);
- 5) The National Curriculum Statement (Grades R to 12);
- 6) The Education White Paper on Early Childhood Development (2000); and
- 7) Education White Paper 6 on inclusive Education (2001).<sup>10</sup>

2.3 In this Discussion Paper, the statutes which were assigned to a competent authority within the jurisdiction of a provincial government<sup>11</sup> and which are provisionally proposed for repeal by the relevant provincial legislatures on the basis of discrimination and obsolescence include the following:

<sup>10</sup> Department of Education Annual Report 2009/10, pg 12; 16-18

<sup>11</sup> In terms of Proclamation R151 in Government Gazette 16049 of 31 October 1994

- 1) Coloured Persons Education Act, 1963 (Act No. 47 of 1963);
- 2) Coloured Persons Education Amendment Act, 1967 (Act No. 76 of 1967);
- 3) Coloured Persons Education Amendment Act, 1973 (Act No. 53 of 1973);
- 4) Coloured Persons Education Amendment Act, 1976 (Act No. 29 of 1976);
- 5) Second Coloured Persons Education Amendment Act, 1976 (Act No.95 of 1976);
- 6) Coloured Persons Education Amendment Act, 1979 (Act No.50 of 1979);
- 7) Coloured Persons Education Amendment Act, 1980 (Act No. 15 of 1980);
- 8) Coloured Persons Education Amendment Act, 1983 (Act No. 85 of 1983);
- 9) Coloured Persons Education Amendment Act (House of Representatives), 1985 (Act No. 76 of 1985);
- 10) Coloured Persons Education Amendment Act (House of Representatives), 1992 (Act No. 112 of 1992);
- 11) Coloured Persons Education Amendment Act (House of Representatives), 1992 (Act No.113 of 1992);
- 12) Education Amendment Act (House of Delegates) 1986 (Act No. 100 of 1986);
- 13) Education Affairs Act (House of Assembly) 1988 (Act No. 70 of 1988);
- 14) Education Affairs Amendment Act (House of Assembly), 1991 (Act No. 88 of 1991);
- 15) Education Affairs Amendment Act (House of Assembly), 1992 (Act No. 39 of 1992);
- 16) Education Affairs Amendment Act (House of Assembly), 1993 (Act No 36 of 1993);
- 17) Education Affairs Second Amendment Act (House of Assembly), 1993 Act No. 162 of 1993);
- 18) Education Laws Amendment Act, (House of Assembly) 1973, (Act No. 139 of 1973);
- 19) Education and Training Act, 1979 (Act No. 61 of 1979);
- 20) Education and Training Amendment Act, 1980 (Act no. 52 of 1980);
- 21) Education and Training Amendment Act, 1981 (Act No.10 of 1981);
- 22) Education and Training Amendment Act, 1984 (Act no. 74 of 1984);
- 23) Education and Training Amendment Act, 1989 (Act No 35 of 1989);
- 24) Education and Training Amendment Act, 1990 (Act No. 42 of 1990);
- 25) Education and Training Amendment Act, 1991 (Act no. 100 of 1991);
- 26) Education and Training Amendment Act 1992 (Act No.55 of 1992);

- 27) Education and Training Second Amendment Act, 1992 (Act No. 106 of 1992);
- 28) Indians Education Act, 1965 (Act No. 61 of 1965);
- 29) Indians Education Amendment Act, 1967 (Act No. 60 of 1967);
- 30) Indians Education Amendment Act, 1979 (Act No. 39 of 1979);
- 31) Indians education Amendment Act, 1981 (Act No. 9 of 1981);
- 32) Indians Education Amendment Act, 1984 (Act No. 78 of 1984);
- 33) Indians Education Amendment Act (House of Delegates), 1985 (Act No. 64 of 1985);
- 34) Indians Education Amendment Act (House of Delegates), 1992 (Act No. 114 of 1992);
- 35) Indians Education Amendment Act (House of Delegates), 1993 (Act No.50 of 1993);
- 36) Private Schools Act (House of Assembly), 1986 (Act No.104 of 1986);
- 37) Private Schools Amendment Act (House of Assembly), 1990 (Act No.60 of 1990) and
- 38) Education Ordinances Amendment Act (House of Assembly), 1992 (Act No. 67 of 1992).

2.4 The statutes which are provisionally proposed for repeal on the basis of their obsolescence or redundancy include the following:

- 1) National Education Policy Amendment Act, 1982 (Act No. 25 of 1982);
- 2) National Education Policy Amendment Act (House of Assembly) 1991 (Act No.90 of 1991);
- 3) National Education Policy Amendment Act, (House of Assembly), 1986 (Act No. 103 of 1986);
- 4) Correspondence Colleges Amendment Act (House of Assembly), 1990 (Act No. 102 of 1990); and
- 5) Correspondence Colleges Amendment Act (House of Assembly), 1992 (Act No.34 of 1992).

2.5 The statutes which are provisionally proposed for partial repeal on the basis of the obsolescence of specific provisions contained in these statutes include the following:

- 1) Education Laws Amendment Act (House of Assembly), 1993 (Act No. 139 of 1993);
- 2) Education Laws Amendment Act, 1997 (Act No 100 of 1997);
- 3) Education Laws Amendment Act, 2000 (Act No. 53 of 2000);
- 4) Education Laws Amendment Act, 2001 (Act No. 57 of 2001);
- 5) Education Laws Amendment Act, 2002 (Act No 50 of 2002); and
- 6) Education Laws Amendment Act, 2004 (Act no. 1 of 2004).

2.6 The statutes which are proposed for retention without any amendment include the following:

- 1) Education Laws Amendment Act, 1999 (Act No. 48 of 1999);
- 2) Education Laws Amendment Act, 2005 (Act No. 24 of 2005);
- 3) National Education Policy Act, 1996 (Act No. 27 of 1996);
- 4) South African Schools Act, 1996 (No. 84 of 1996);
- 5) Employment of Educators, 1998 (No. 76 of 1998);
- 6) South African Council for Educators Act, 2000 (Act No. 31 of 2000); and
- 7) General and Further Education and Training Quality Assurance Act, 2001 (Act No.58 of 2001).

## **B. Statutes administered by the Department of Basic Education**

2.7 The SALRC has identified in this review 19 statutes which are administered by the DBE (see Annexure B) and 38 statutes which were assigned to the Provincial Departments of Education<sup>12</sup> (see Annexure C to this Discussion Paper). The SALRC, after conducting an investigation to determine whether any of these Acts or provisions therein may be repealed as a result of redundancy, obsolescence or unconstitutionality in terms of section 9 of the Constitution, has identified provisions in six statutes that may be partially repealed and five statutes that may be repealed in whole. These Acts are referred to in the second column of the Schedule to the proposed Bill (See annexure A).

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<sup>12</sup> Footnote 6 ibid

### **C. General observations**

2.8 Bearing in mind the importance of education to the people of South Africa and the inevitable impact of the successful implementation of education legislation on the people's rights to education, it is to be made clear that this Discussion Paper forms part of a narrowly based and text-based statutory review process as is outlined above. Where a statute administered by the DBE seems to be free of any provisions that contradict or violate section 9 of the Constitution, it is accordingly not to say that the execution of such statute takes place in line with the protection afforded by the section 9 equality clause. Therefore, the Discussion Paper does not reflect on any consequential and/or operational effects of the execution of the powers in terms of the legislation reviewed.

2.9 An evaluation of most of the post-1994, and in particular the post 1996 legislation, reveals that when enacting most of these laws, the legislature has been conscious not only of the constitutional prescriptions against discrimination, but generally of the need to respect provisions of the Bill of Rights. Discriminatory provisions wherever they appear, have been carefully justified. Nevertheless, there are a number of instances where the right to be heard is either totally ignored or only indirectly observed. Thus, in our view, is contrary to the provisions of sections 33 of the Constitution and the Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000), among others.

2.10 The SALRC's advisory committee recommended that a task team, consisting of persons with expertise in basic education legislation and administration, be appointed to investigate and review all basic education legislation, and that team should be mandated, among other matters, to align education legislation with the spirit and purport of all the provisions of the Constitution in order to harmonize education legislation with legislation in other government departments.

### **D. Recommendations for the repeal and amendment of legislation currently administered by the Department of Basic Education**

2.11 For the purposes of this report, the analysis of legislation administered by the DBE has indicated the need to make a distinction between the following categories of legislation:

- (i) Legislation or provisions in legislation the administration of which vests in the national Department of Basic Education or which was transferred to the Minister of Basic Education;<sup>13</sup>
- (ii) Legislation or provisions in legislation the administration of which vests in the national Department of Higher Education and Training or which was transferred to the Minister of Higher Education and Training;<sup>14</sup>
- (iii) Legislation or provisions in legislation the administration of which vests in the relevant provincial legislatures or which has been assigned to the relevant provincial legislatures by national legislation; and
- (iv) Amendment Acts which are in principle included in the latest version of the principal legislation concerned. However, where relevant, the analysis contained in this report focuses on the review of the principal legislation and amendment Acts separately with a view to identify, among others, if there are any existing amendment acts that may need to be amended, repealed or retained as the case may be. An example of this is the Correspondence Colleges Amendment Act (House of Assembly) 102 of 1990 which remains on the statute book despite the fact that the principal legislation, that is, Correspondence Colleges Act 59 of 1965, was repealed by the Further Education and Training Act 98 of 1998.

2.12 Some related observations follow in the discussion below. All the relevant Acts were categorized in the following categories:

- (a) Legislation which was assigned to the provinces and which is recommended for repeal by the relevant provincial legislatures on the basis of partly discriminatory nature in contravention of section 9 of the Constitution, on the one hand, and on the basis of obsolescence, on the other hand, e.g. Coloured Persons Education Act, 1963 (Act No. 47 of 1963);
- (b) Legislation proposed for repeal as a whole on the basis of redundancy and obsolescence. These are mainly Amendment Acts that amend Acts which were later repealed, e.g. all the sections of the Correspondence Colleges Amendment

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<sup>13</sup> In terms of Proclamation 44 of 1 July 2009

<sup>14</sup> In terms of Proclamation 44 of 1 July 2009 and Proclamation 56 of 4 September 2009

Act (House of Assembly) 34 of 1992 amend the Correspondence Colleges Act 59 of 1965. However, the latter Act was repealed by the Further Education and Training Act 98 of 1998 which, in turn, was subsequently repealed by the Further Education and Training Colleges Act 16 of 2006;

- (c) Legislation proposed for partial repeal on the basis of certain provisions in the statute concerned being redundant or obsolete; and
- (d) Legislation proposed for retention without any amendment.

**1. Legislation which was assigned to the provinces and which is recommended for repeal by the relevant provincial legislatures on the basis of partly discriminatory nature and obsolescence**

(a) Coloured Persons Education Act, 1963 (Act No. 47 of 1963)<sup>15</sup>

- (i) Provisional proposal

2.13 It is provisionally proposed that the Coloured Persons Education Act No. 47 of 1963 be repealed.

- (ii) Evaluation of the Coloured Persons Education Act 47 of 1963

2.14 The purpose of the Coloured Persons Education Act 1963 was to provide for the control of education for Coloured Persons by the Department of Internal Affairs, to amend the Republic of South Africa Constitution Act, 1961; and to provide for matters incidental thereto. In terms of Proclamation R151 in Government Gazette 16049 of 31 October 1994, the whole of the administration of Act 47 of 1963, excluding sections 1A, 8 to 20, 26 and 28 to 31, was assigned to a competent authority within the jurisdiction of the government of a province mentioned in section 124(1) of Act 200 of 1993 designated by the Premier of the province concerned.

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<sup>15</sup> The administration of the whole of this Act, excluding sections 1A, 8 to 20 inclusive (which had been previously repealed), 26 and 28 to 31, has under Proclamation R151 of 1994, been assigned to Limpopo, Mpumalanga, North-West and Eastern Cape Provinces with effect from 31 October 1994.

2.15 The Act made provision for the education of Coloured persons. Coloured persons were defined by the Population Registration Act, 1950 (Act No. 30 of 1950). Coloured persons in terms of the Population Registration Act included members of the Cape Coloured, Malay, Griqua and other Coloured groups.

2.16 However, all the retained sections mentioned in paragraph 2.21 above were subsequently repealed<sup>16</sup>. The remaining sections deal with the control of education for Coloured persons (section 2); establishment, erection and maintenance of schools for Coloured persons (section 3); making grants-in-aid and loans for the education of Colored persons (section 4); transfer of management and control of State-aided schools to the provincial Department of Education (section 5); the registration of private schools only authorized to admit Coloured persons (section 6); the admission of persons to and their discharge from State schools and State- aided schools (section 7); granting of power to the Minister of Education to institute courses in schools for Coloured persons (section 21); the inspection of schools, hostels, teachers' quarters and school clinics (section 22); compulsory school attendance for Coloured persons (section 23); financial assistance for the education and training of Coloured persons (section 24); payment of school and boarding fees (section 25); passing of property and obligations to the State on the transfer of State-aided schools to the Department of Education (section 27); establishment of boards, committees or other bodies for participating in the management of schools (section 32); delegation of powers to officers in the Department of Education (section 33); empowers the Minister to make regulations (34); short title and commencement (section 38).

2.17 Although not all sections of the Act specifically refer to the education of Coloured persons, it is noted that the main purpose of the Act was to provide for the establishment and control of education of Coloured persons only. Thus, in so far as the Act is still in force and remains on the Statute book it is discriminatory on the grounds of race and is therefore in conflict with section 9 of the Constitution. Furthermore, most of the provisions of the Act are covered by the South African Schools Act No 84 of 1996.

2.18 Accordingly, it is provisionally recommended that the entire Coloured Persons Education Act, 1963 (Act No. 47 of 1963), and the Amendment Acts discussed below, be repealed on the

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<sup>16</sup> Sections 1A, 26 and 28-30 respectively were repealed by section 63(1) of Act 84 of 1996, whereas sections 8 to 20 respectively were repealed by Proclamation 138 of 2 September 1994.

grounds firstly, that it is unconstitutional as being contrary to section 9 of the Constitution, and secondly, since most of its provisions are covered by the South African Schools Act 1996.

2.19 As stated in paragraph 2.11(iv) above, all the Amendment Acts discussed below are in principle included in the latest version of the Coloured Persons Education Act 47 of 1963.

2.20 However, the purpose of the analysis of all the Amendment Acts is to identify, among others, if there are any existing Amendment Acts that may need to be amended, repealed or retained as the case may be.

(i) Coloured Persons Education Amendment Act, 1967 (Act No. 76 of 1967)

(i) Provisional proposal

2.21 It is provisionally proposed that the Coloured Persons Education Amendment Act 76 of 1967 be repealed.

(ii) Evaluation of the Coloured Persons Education Amendment Act 76 of 1967

2.22 The purpose of the Coloured Persons Education Amendment Act 76 of 1967 was to amend the Coloured Persons Education Act, 1963, to provide for the granting of financial aid to private hostels attached to State schools, and for the retention of certain benefits by certain persons transferred to the service of the Department of Coloured of Affairs or deemed to have been appointed under the provisions of the said Act. Sections 1 to 4 of Act 76 of 1967 amended sections 1, 4, 13 and 34 respectively of the principal Act 47 of 1963. Since Act 47 of 1963 is recommended for repeal, Act 76 of 1967 is also recommended for repeal for the same reasons as stated in paragraph 2.18 above.

(ii) Coloured Persons Education Amendment Act, 1973 (Act No. 53 of 1973)

(i) Provisional proposal

2.23 It is provisionally proposed that the Coloured Persons Education Amendment Act 53 of 1973 be repealed.

- (ii) Evaluation of the Coloured Persons Education Amendment Act 53 of 1973

2.24 The purpose of the Coloured Persons Education Amendment Act 53 of 1973 was to amend the Coloured Persons Education Act, 1963, so as further to define 'vocational education'; to regulate further the admission of persons to training-colleges, the registration of private schools and the granting of assistance for education and training; and to provide for matters connected therewith.

2.25 All the provisions of Act 53 of 1973 provided for the amendment of the principal Act 47 of 1963. Since Act 47 of 1963 is recommended for repeal, Act 53 of 1973 is also recommended for repeal for the same reasons as stated in paragraph 2.18 above.

- (iii) Coloured Persons Education Amendment Act, 1976 (Act No. 29 of 1976)

- (i) Provisional proposal

2.26 It is provisionally proposed that the Coloured Persons Education Amendment Act 29 of 1976 be repealed.

- (ii) Evaluation of the Coloured Persons Education Amendment Act 29 of 1976

2.27 The purpose of the Coloured Persons Education Amendment Act 29 of 1976 was to amend the Coloured Persons Education Act, 1963, so as to provide for the establishment of primary, junior secondary and senior secondary schools; and to provide for incidental matters.

2.28 Sections 1 and 2 of Act 29 of 1976 amended sections 1(1) and 3(1) respectively of the principal Act 47 of 1963. Since Act 47 of 1963 is recommended for repeal, Act 53 of 1973 is also recommended for repeal for the same reasons as stated in paragraph 2.18 above.

(iv) Second Coloured Persons Education Amendment Act, 1976 (Act No.95 of 1976)

(i) Provisional proposal

2.29 It is provisionally proposed that the Second Coloured Persons Education Amendment Act 95 of 1976 be repealed.

(ii) Evaluation of the Second Coloured Persons Education Amendment Act 95 of 1976

2.30 The purpose of the Second Coloured Persons Education Amendment Act 95 of 1976 was to amend the provisions of the Coloured Persons Education Act, 1963, so as to provide for the continued provision of education to certain Coloured persons; and to provide for incidental matters.

2.31 Section 1 of Act 95 of 1976 amended section 1 of the principal Act 47 of 1963. Since Act 47 of 1963 is recommended for repeal, Act 95 of 1976 is also recommended for repeal for the same reasons as stated in paragraph 2.18 above.

(v) Coloured Persons Education Amendment Act, 1979 (Act No.50 of 1979)

(i) Provisional proposal

2.32 It is provisionally proposed that the Coloured Persons Education Amendment Act 50 of 1979 be repealed.

(ii) Evaluation of the Coloured Persons Education Amendment Act 50 of 1979

2.33 The purpose of the Second Coloured Persons Education Amendment Act 50 of 1979 was to amend the Coloured Persons Education Act, 1963, in order to increase the fine which may be imposed in a case of misconduct.

2.34 Section 1 of Act 50 of 1979 amended section 1 of the principal Act 47 of 1963. Since Act 47 of 1963 is recommended for repeal, Act 50 of 1979 is also recommended for repeal for the same reasons as stated in paragraph 2.18 above.

(vi) Coloured Persons Education Amendment Act, 1980 (Act No. 15 of 1980)

(i) Provisional proposal

2.35 It is provisionally proposed that the Coloured Persons Education Amendment Act 15 of 1980 be repealed.

(ii) Evaluation of the Coloured Persons Education Amendment Act 15 of 1980

2.36 The purpose of the Coloured Persons Education Amendment Act 15 of 1980 was to amend the Coloured Persons Education Act, 1963, regarding the definition of 'nursery school'; and to provide for the establishment, erection and maintenance of nursery schools for the education of Coloured persons; and for matters connected therewith.

2.37 Like Act 29 of 1976, sections 1 and 2 of Act 15 of 1980 also amended sections 1(1) and 3(1) respectively of the principal Act 47 of 1963. Since Act 47 of 1963 is recommended for repeal, Act 50 of 1979 is also recommended for repeal for the same reasons as stated in paragraph 2.18 above.

(vii) Coloured Persons Education Amendment Act, 1983 (Act No. 85 of 1983)

(i) Provisional proposal

2.38 It is provisionally proposed that the Coloured Persons Education Amendment Act 85 of 1983 be repealed.

(ii) Evaluation of the Coloured Persons Education Amendment Act 85 of 1983

2.39 All the provisions of Act 85 of 1983 amended the principal Act 47 of 1963. Since Act 47 of 1963 is recommended for repeal, Act 50 of 1979 is also recommended for repeal for the same reasons as stated in paragraph 2.18 above.

(viii) Coloured Persons Education Amendment Act (House of Representatives), 1985  
(Act No. 76 of 1985)

(i) Provisional proposal

2.40 It is provisionally proposed that the Coloured Persons Education Amendment Act (House of Representatives) 76 of 1985 be repealed.

(ii) Evaluation of the Coloured Persons Education Amendment Act (House of Representatives) 76 of 1985

2.41 The purpose of the Coloured Persons Education Amendment Act (House of Representatives) 76 of 1985 was, among others, is to amend the Coloured Persons Education Act, 1963 so as to replace certain obsolete expressions in consequence of the assignment of the administration of the provisions of the said Act to the Minister of Education and Culture: House of Representatives.

2.42 Sections 1 to 4 of Act 76 of 1985 amended the principal Act 47 of 1963. Sections 5(1)-(3) of Act 76 of 1985 repealed provisions of the Children's Act 33 of 1960 with regard to the establishment, erection and maintenance of schools of industries and reform schools for Coloured persons. However, the whole of Act 33 of 1960 has been repealed by section 313 of the Children's Act 38 of 2005, which renders sections 5(1) - (3) of Act 76 of 1985 redundant. Since Act 47 of 1963 is recommended for repeal, Act 50 of 1979 is also recommended for repeal for the same reasons as stated in paragraph 2.18 above.

(ix) Coloured Persons Education Amendment Act (House of Representatives), 1992  
(Act No. 112 of 1992)

(i) Provisional proposal

2.43 It is provisionally proposed that the Coloured Persons Education Amendment Act (House of Representatives) 112 of 1992 be repealed.

- (ii) Evaluation of the Coloured Persons Education Amendment Act (House of Representatives) 112 of 1992

2.44 The purpose of the Coloured Persons Education Amendment Act (House of Representatives) 112 of 1992 was to amend the Coloured Persons Education Act, 1963, so as to make provision for the establishment of certain professional posts and for the appointment of persons in those posts; and to amend a certain expression; and to provide for matters connected therewith.

2.45 All the provisions of Act 112 of 1992 amend the principal Act 47 of 1963. Since Act 47 of 1963 is recommended for repeal, Act 112 of 1992 is also recommended for repeal for the same reasons as stated in paragraph 2.18 above.

- (x) Coloured Persons Education Amendment Act (House of Representatives), 1992 (Act No.113 of 1992)

- (i) Provisional proposal

2.46 It is provisionally proposed that the Coloured Persons Education Amendment Act (House of Representatives) 113 of 1992 be repealed.

- (ii) Evaluation of the Coloured Persons Education Amendment Act (House of Representatives) 113 of 1992

2.47 The purpose of the Coloured Persons Education Amendment Act (House of Representatives) 113 of 1992 was to amend the Coloured Persons Education Act, 1963, so as to further regulate the retirement of certain persons; and to provide for matters connected therewith.

2.48 Section 1 of Act 113 of 1992 amended section 12 of Act 47 of 1963. Since Act 47 of 1963 is recommended for repeal, Act 112 of 1992 is also recommended for repeal for the same reasons as stated in paragraph 2.18 above.

(b) Education Affairs Act (House of Assembly), 1988 (Act No. 70 of 1988)<sup>17</sup>

(i) Provisional proposal

2.49 It is provisionally proposed that the Education Affairs Act (House of Assembly) 70 of 1988 be repealed.

(ii) Evaluation of the Education Affairs Act (House of Assembly) 70 of 1988

2.50 The purpose of the Education Affairs Act (House of Assembly) 1988 was to provide for the provision and control of education in schools, and matters connected therewith.

2.51 In terms of Proclamation R151 in Government Gazette 16049 of 31 October 1994, the whole of the administration of Act 47 of 1963, excluding sections 3 and 65 and Chapter 7, was assigned to a competent authority within the jurisdiction of the government of a province mentioned in section 124(1) of Act 200 of 1993 designated by the Premier of the province concerned.

2.52 Education is defined in section 1 as “instruction, teaching, or training provided to White pupils in terms of this Act.” The basic aim of the Act is thus to provide and control education of White pupils. The Act was enacted under the 1983 Republic of South Africa Constitution Act, No. 110 of 1983 which made provision for segregated education for different population groups categorized according to race. On the face of it, the Act appears to be value neutral and the only direct discrimination occurs in the definition of the term “education” which means instruction, teaching or training provided to White pupils. However, in essence, this Act gives effect to the 1983 Constitution which differentiated between persons in education on the basis of race and

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<sup>17</sup> The administration of the whole of this Act, excluding sections 3 and 65, and Chapter 7 (sections 66 to 100 inclusive, which had been previously repealed) has under Proclamation R151 of 1994, been assigned to North-West and Eastern Cape Provinces with effect from 31 October 1994.

created separate institutions and structures for the education of different racial groups in the country.

2.53 Several sections of this Act have been repealed, mostly by the South African Schools Act 84 of 1996 (hereinafter “the Schools Act”) and by Proclamations. Thus sections 3 and 65 were repealed by the Schools Act, while section 4 and the entire chapter 7 (ss. 66-71) were initially repealed by Proclamation R151 of 31 October 1994 and later by the Schools Act. The Act, in sections 5-11, provides for the practical functioning and management of education, including the functions of the Minister, the Head of Education and the Department responsible for the management of schools and hostels. The sections also deal with important provisions such as submission of information by schools, inspection of schools and hostels and the appointment and functions of school attendance officers. All these provisions are value free and race neutral.

2.54 Chapter 3 of the Act (ss.12 and 13) confers power on the Minister to establish and maintain public schools out of moneys appropriated for this purpose by the defunct House of Assembly and to close the same after consultation with relevant councils established under section 15. These provisions no longer apply under the new dispensation. They have largely been overtaken by the provisions of section 12 of the Schools Act and have consequently fallen into disuse and are irrelevant. Chapter 4 of the Act (ss. 14-20) provides for the establishment of regional councils and school boards. These provisions no longer apply because they have been overtaken by sections 16-32 of the Schools Act 84 of 1996 which provides for the establishment and functions of democratically elected school governing bodies for all public schools. The nine provinces are responsible for dividing their provinces into regions or districts. The provisions of this Chapter therefore serve no useful purpose.

2.55 Chapter 5 of the Act (ss. 21-40) provides for private schools and state-aided schools. The Schools Act 1996 provides for only two categories of schools, namely, public and independent schools. These sections thus serve no purpose.

2.56 Chapter 6 of the Act addresses different aspects of pupils in education. Sections 41-48 specifically provide for specialized education for handicapped children. Currently, the education of children with special needs is not addressed in any statute. White Paper 6 deals with inclusive education.

2.57 Sections 50-54 deal with age requirements for admission to particular schools and restrictions on attendance of such particular schools, feeder areas for admission of children to schools, powers of school boards in relation to admission of children, compulsory school attendance and exemption thereof. Most of these matters are sufficiently covered by the Schools Act 1996 and their existence on the Statute book serves no useful purpose. It is recommended that these sections should be repealed.

2.58 Sections 55-61 provide for the determination of medium of instruction in schools. Section 55 states that when a child is admitted to a school for the first time the principal of the school must ascertain in which official language the child is more proficient and determine that language to be the mother tongue of the child, and if "*the child has equal command of both official languages, or cannot speak or understand either official language*", the parent of the child may be required to choose which official language should be determined by the principal as the mother tongue of the child. If the parent fails to make a choice, the principal must determine which official language will be the mother tongue of the child, and failing the determination by the principal, the matter has to be referred to the Head of Education who must designate a person to determine the mother tongue of the child. A person designated by the Head of Education may, after an investigation into the language ability of the child, withdraw the determination made by the principal and instead "*determine that the other official language shall be the mother tongue of the child.*" [Emphasis added].

2.59 Section 56 entitles the parent of a child to appeal against the choice of the mother tongue of the child as determined by the principal or the Head of Education, as the case may be, to the Minister. Section 57 provides that the official language determined in terms of sections 55 and 56 will be the medium of instruction for the child until, in the case of a handicapped child, he leaves the school and in the case of any other child up to and including the ninth level. Section 58 empowers the Minister to designate a public school as a public school in which Afrikaans or English must be the medium of instruction for all pupils in the school, or in which the medium of instruction is to be Afrikaans for some pupils and English for others. Section 59 prescribes that the official language determined as the mother tongue of a child must be offered to him as a subject in the school and the official language not determined as the mother tongue must be offered to the child as a subject instructed through the medium of that language. Section 60 deals with instruction of a foreign language as a subject in a school

and prescribes that the official language determined as the mother tongue must be the medium of instruction until the child has made such progress in the foreign language that it can be used as the medium of instruction. Section 61 empowers the Minister to exempt a school or principal from the application of the provisions of sections 55, 57, 59 and 60 in respect of any parent who is not a South African citizen.

2.60 It is clear from the provisions of sections 55-61 that the Act has in mind the recognition of only two languages as official languages, namely, Afrikaans and English. This is particularly clear from section 55 which speaks of child having equal command of “*both official languages*” and the principal having to “determine that *the other official language* shall be the mother tongue”. This is in accordance with the spirit and purport of the dispensation prevailing under the Constitution of 1983 in terms of which the Act was enacted, and prior to that date. It is also apparent that the provisions relating to instruction in the mother tongue were aimed at White children whose education the Act was intended to regulate and the majority of whom had either Afrikaans or English as their mother tongue. The Act also employs the term “Head of Education”, a term which has been overtaken by the Schools Act 1996 which employs the term “Head of Department”. In so far as the Act does not recognize or cater for the other nine official languages as well as the sign language which are recognized under the present constitutional dispensation, it excludes a great majority of children from its embrace to be instructed in their mother tongue, if their parents so choose, and such exclusion amounts to unfair discrimination in terms of section 9 of the Constitution.

2.61 The whole issue of language in schools is now governed by section 6 of the Schools Act 1996. Subsection (1) of this section empowers the Minister, subject to the Constitution and after consultation with the Council of Education Ministers, to determine the norms and standards for language policy in public schools. Subsection (2) places the responsibility of determining the language policy of a public school on the governing body of the school subject to the Constitution, the Act and any applicable provincial law. Under the Schools Act, it is no longer the responsibility of the principal of the school or the Head of Department to determine the language policy of the school, and thus the language of instruction of any child in the school.<sup>18</sup> In so far

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<sup>18</sup> The Courts have clearly emphasized this position in the two leading cases of *Governing Body, Mikro Primary School v Minister of Education, Western Cape* 2005 (3) SA 504 (C), a decision of the Cape High Court and affirmed by the Supreme Court of Appeal in *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 (1) SA 1 (SCA). See also *Hoërskool Ermelo and Another v The Head of Department of Education: Mpumalanga* [2009]

as a school's governing body comprises a majority of representatives elected by parents in terms of section 23(1), the arrangement under the Schools Act is more democratic than the one provided for and prevailing under the Education Affairs Act (House of Assembly) 1988.

2.62 Section 55 of the Education Affairs Act (House of Assembly) 1988 in effect placed the responsibility of determining the language of instruction for the child in the school on the shoulders of the principal through his initial determination or choice of the mother tongue since, once the mother tongue has been determined, that becomes the language of instruction for the child throughout his school career. There is no provision under this Act for broader participation by a parents' representative body such as the school governing body provided for under the Schools Act. Subsection (3) of section 6 of the Schools Act prohibits any form of discrimination to be practiced in the implementation of the policy under this section. Thus, a school governing body may not discriminate against any pupil, expressly or indirectly, under the guise of implementing a language policy that it has adopted for the school.<sup>19</sup> Finally, subsection (4) recognizes Sign Language to have the status of an official language for purposes of learning at a public school. It should also be noted that in terms of section 29 of the Constitution every child has the right to be taught in any of the official languages or a language of his choice where the same is practicable.

2.63 As observed in the foregoing paragraphs, the purpose of the Education Affairs Act (House of Assembly) 70 of 1988 was to provide and control the education of White pupils. However, as noted, a number of its sections have been repealed and others have either been overtaken or rendered obsolete or irrelevant by the provisions of the Schools Act. In particular sections 12 to 40 and 50 to 54 (which deal with public schools, establishment of regional councils, private schools and state aided schools, age of admission to school, powers of school boards, compulsory attendance, etc) have been overtaken and/or rendered obsolete by the Schools Act.

2.64 Sections 41 to 48 of the Act provide for specialized education for handicapped children. Currently, the education of children with special needs is not addressed in any statute. There thus seems to be some justification to recommend that there would be great advantage in

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ZASCA 22; 2009 (3) SA 422 (SCA) affirmed by the Constitutional Court in *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo* [2009] ZACC 32 (CC).

<sup>19</sup> See, for instance, *Matukane and Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T).

retaining these sections, with only necessary amendments to bring them in line with provisions of the Schools Act and the Child Care Act 2005, until specific provisions dealing with the education of handicapped children and children with special education needs are formally enacted. However, this inclination is outweighed by considerations militating against retention of the Act as a whole, or parts of it. It would be odd to recommend retention of these 8 sections out of the 114 sections which originally comprised the Act. The retention of these sections under the present title of the Act would also be out of keeping with the present constitutional dispensation. Parliament is no longer divided into various legislative assemblies for the different races of the country, but simply into a National Assembly and a National Council of Provinces. The emphasis of the present constitutional dispensation is on the creation of national, provincial and local legislative institutions, rather than racially segregated legislatures catering for the different racial communities of the country.

2.65 Sections 55-61, which deal with the issue of language, are couched in neutral language and are, *prima facie*, not discriminatory. However, as pointed out in paragraph (ii) above, these provisions have been overtaken by the provisions of the Schools Act the policy orientation of which is fundamentally different from the Act under consideration. Under the Schools Act, the responsible functionary for the choice of a language policy, and thus, the determination of the medium of instruction in the school, is the school governing body and not the principal of the school or Head of Department. Whereas the emphasis of these sections is on the mother tongue, under the Schools Act, the governing body is not confined to the mother tongue in choosing a language policy, although the mother tongue is a very important consideration in the whole process of choosing a language policy. It is common knowledge that many black (African) schools in the country have English as the medium of instruction rather than the (African) mother tongue. The choice of English as the medium of instruction by black schools, controlled by black school governing bodies, is not only dictated by considerations of mother tongue, but also by considerations of opportunity made available by and through this language in the wider world of commerce and business after school.

2.66 Accordingly, it is provisionally recommended that the entire Education Affairs Act (House of Assembly) 1988 (Act No. 70 of 1988), and the Amendments Acts discussed below, be repealed on the grounds firstly, that it is premised on the provision of racially segregated education and thus contravenes section 9 of the Constitution and, secondly, that most of the

provisions and terms used in the Act have been overtaken or rendered obsolete by the South African Schools Act 1996.

2.67 All the Amendment Acts discussed below are in principle included in the latest version of the Education Affairs Act (House of Assembly) 70 of 1988. However, the purpose of analyzing all the Amendment Acts separately is to identify, among others, if there are any existing Amendment Acts that may need to be amended, repealed or retained as the case may be.

(i) Education Affairs Amendment Act (House of Assembly), 1991 (Act No. 88 of 1991)

(i) Provisional proposal

2.68 It is provisionally proposed that the Education Affairs Amendment Act (House of Assembly) 88 of 1991 be repealed.

(ii) Evaluation of the Education Affairs Amendment Act 88 of 1991

2.69 The purpose of the Education Affairs Amendment Act 88 of 1991 was to amend the Education Affairs Act (House of Assembly), 1988. All the sections of Act 88 of 1991 amended the principal Act 70 of 1988. Since Act 70 of 1988 is recommended for repeal, Act 88 of 1991 is also recommended for repeal for the same reasons as stated in paragraph 2.66 above.

(ii) Education Affairs Amendment Act (House of Assembly), 1992 (Act No. 39 of 1992)

(i) Provisional proposal

2.70 It is provisionally proposed that the Education Affairs Amendment Act (House of Assembly) 39 of 1992 be repealed.

(ii) Evaluation of the Education Affairs Amendment Act 39 of 1992

2.71 The purpose of the Education Affairs Amendment Act 39 of 1992 was to amend the Education Affairs Act (House of Assembly), 1988. All the sections of Act 39 of 1992 amended the principal Act 70 of 1988. Since Act 70 of 1988 is recommended for repeal, Act 88 of 1991 is also recommended for repeal for the same reasons as stated in paragraph 2.66 above.

(iii) Education Affairs Amendment Act (House of Assembly), 1993 (Act No 36 of 1993)

(i) Provisional proposal

2.72 It is provisionally proposed that the Education Affairs Amendment Act (House of Assembly) 36 of 1993 be repealed.

(ii) Evaluation of the Education Affairs Amendment Act (House of Assembly), Act 36 of 1993

2.73 The purpose of the Education Affairs Amendment Act 36 of 1993 was to amend the Education Affairs Act (House of Assembly), 1988. All the sections of Act 36 of 1993 amended the principal Act 70 of 1988. Since Act 70 of 1988 is recommended for repeal, Act 36 of 1993 is also recommended for repeal for the same reasons as stated in paragraph 2.66 above.

(iv) Education Affairs Second Amendment Act (House of Assembly), 1993 (Act No. 162 of 1993)

(i) Provisional proposal

2.74 It is provisionally proposed that the Education Affairs Second Amendment Act (House of Assembly) 162 of 1993 be repealed.

(ii) Evaluation of the Education Affairs Second Amendment Act (House of Assembly) 162 of 1993

2.75 The purpose of the Education Affairs Second Amendment Act (House of Assembly) 162 of 1993 was to amend the Education Affairs Act (House of Assembly), 1988. All the sections of

Act 162 of 1993 amended the principal Act 70 of 1988. Since Act 70 of 1988 is recommended for repeal, Act 162 of 1993 is also recommended for repeal for the same reasons as stated in paragraph 2.66 above.

(c) Education and Training Act, 1979 (Act No. 90 of 1979)<sup>20</sup>

(i) Provisional proposal

2.76 It is provisionally proposed that the Education and Training Act, No. 90 of 1979 be repealed.

(ii) Evaluation of the Education and Training Act

2.77 The purpose of this Act was to provide for the control of education for Black people by the Department of Education and Training and to provide for other incidental matters. It is clear from its long title and name that the Act was enacted solely to control education for the Black population, that is, persons who were then referred to as Bantu as defined in the Population Registration Act 30 of 1950. The Act effected and carried out the apartheid policy of racial segregation by providing separate educational facilities for each racial group.

2.78 In terms of Proclamation R151 in Government Gazette 16049 of 31 October 1994, the whole of the administration of Act 47 of 1963, excluding sections 3 and 65 and Chapter 7, was assigned to a competent authority within the jurisdiction of the government of a province mentioned in section 124(1) of Act 200 of 1993 designated by the Premier of the province concerned.

2.79 Although the majority of its remaining provisions or sections are *prima facie* non-discriminatory and race-neutral and, therefore, do not directly contravene section 9 of the Constitution nevertheless, there are a number of provisions in the Act which are remnants from the country's past dispensation. These provisions reveal the real original intent of the legislation and run counter to the spirit of the present constitutional dispensation based on the values of

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<sup>20</sup> The administration of the whole of this Act, excluding sections 1A, 3, 4, 11 to 29 inclusive (which had been previously repealed), 31, 32, 43 and 44(1)(h), has under Proclamation R151 of 1994, been assigned to Limpopo, Mpumalanga, North-West and Eastern Cape Provinces with effect from 31 October 1994.

human dignity, equality and non-racialism as enshrined in the Preamble and sections 1, 9 and 10 of the Constitution. Thus, section 1 of the Act, which is the definition section, still retains such expressions as “independent state” which refers to a territory which formed part of the Republic and which became an independent state in terms of an Act of Parliament, and “self-governing territory” which meant a self-governing territory as defined in section 38 of the Self-Governing Territories Constitution Act, 1971 (Act 21 of 1971). These definitions embody the past concept of racial and ethnic segregation and separate development which have since been overtaken by new constitutional values. The Act was intended to carry out the apartheid policy of racial segregation and the provision of separate facilities for each racial group in the area of education.

2.80 Further, as noted above, its definition of ‘Black’ or ‘Black person’ is with reference to the Population Registration Act 1950 (Act No 30 of 1930) which categorized people in the country according to their racial groups. The definition of ‘training’ is with reference to the Black Employees’ In-service Training Act, 1976 (Act 86 of 1976). The latter Act was repealed by the Manpower Training Act 56 of 1981.

2.81 Secondly, section 2, apart from having been overtaken by the South African Schools Act 84 of 1996 regarding matters of school administration and control, makes reference in subsection (1) to ‘the general administration of education for Blacks’. Section 2A empowers the Minister to authorize the council or committee ‘to admit to the school persons belonging to a population group other than the one referred to in section 2(1).’

2.82 Thirdly, section 8(1) of the Act, which regulates registration and management of private and state-aided schools, is similarly racially oriented when it provides that ‘Any person who wishes to provide education to a Black person . . .’ Further, within the same section there are similar references to ‘Black person’, namely, in subsection (3) (d), i.e., ‘a school registered . . . and providing education to a Black person . . .’ and in subsection (5) ‘... or any person who admits any Black person to a school which is not registered . . .’ These definitions, being based on racial classification are discriminatory and therefore contrary to section 9 of the Constitution.

2.83 There are three other aspects of this Act which are inconsistent with the present constitutional dispensation. Firstly, section 38 (a) states that:

“The Minister may . . . grant financial or other material assistance . . . to-  
 (a) a pupil who is resident in the Republic and who has been admitted to a public school, a state-aided school or school situated in a *national state* designated by the Minister for the purpose of this section.”

2.84 As we all know, in terms of section 1 of the Constitution, the Republic of South Africa is one, sovereign, democratic state founded on the values stated therein and on the principle of supremacy of the Constitution. There are no longer the so-called national states within the territorial bounds of the Republic.

2.85 Secondly, section 44(1) (g) provides as follows:

“The Minister may make regulations-  
 (g) as to the medium of instruction in schools and the manner in which parents shall be consulted”

2.86 This section has been overtaken by section 6 of the South African Schools Act 84 of 1996 and the *Norms and Standards for the Language Policy in Public Schools* (published under Government Notice 1701, *Government Gazette* 18546 of 19 December 1997).

2.87 Thirdly, section 44(k) provides:

“The Minister may make regulations-  
 (k) as to the religious instruction and religious ceremonies at schools;”

2.88 Again here, subject to the overarching provisions of section 9 of the Constitution, this provision has also been overtaken by section 7 of the South African Schools Act 84 of 1996 and the policy on religion in schools.

2.89 The Act has a number of sections which are value-neutral. However, it must be remembered that the Act was enacted in pursuance of the policy of apartheid based on racial segregation and inequality. It is also interesting to note that at least two provincial legislatures have repealed this Act in whole. (See the KwaZulu-Natal Education Act 3 of 1996, Schedule of the Repealed Acts; and the Gauteng General Amendment Act 4 of 2005, First Schedule).

2.90 Accordingly, it is provisionally recommended that the entire Education And Training Act, 1979 (Act No 90 of 1979), and the Amendments Acts discussed below, be repealed on the grounds firstly, that it is unconstitutional as being contrary to section 9 of the Constitution, and

secondly, because most of its provisions are covered by the South African Schools Act, 84 of 1996.

2.91 All the Amendment Acts discussed below are in principle included in the latest version of the Education and Training Act 90 of 1979. However, the purpose of analyzing all the Amendment Acts separately is to identify, among others, if there are any existing Amendment Acts that may need to be amended, repealed or retained as the case may be.

(i) Education and Training Amendment Act, 1980 (Act No. 52 of 1980)

(i) Provisional proposal

2.92 It is provisionally proposed that the Education and Training Amendment Act 52 of 1980 be repealed.

(ii) Evaluation of the Education and Training Amendment Act 52 of 1980

2.93 The purpose of the Education and Training Amendment Act 52 of 1980 was to amend the Education and Training Act, 1979. All the sections of Act 52 of 1980 amended the principal Act 90 of 1979. Since Act 90 of 1979 is recommended for repeal, Act 52 of 1980 is also recommended for repeal for the same reasons as stated in paragraph 2.90 above.

(ii) Education and Training Amendment Act, 1981 (Act No.10 of 1981)

(i) Provisional proposal

2.94 It is provisionally proposed that the Education and Training Amendment Act 10 of 1981 be repealed.

(ii) Evaluation of the Education and Training Amendment Act 10 of 1981

2.95 The purpose of the Education and Training Amendment Act 10 of 1981 was to amend the Education and Training Act, 1979. All the sections of Act 10 of 1981 amended the principal

Act 90 of 1979. Since Act 90 of 1979 is recommended for repeal, Act 10 of 1981 is also recommended for repeal for the same reasons as stated in paragraph 2.90 above.

(iii) Education and Training Amendment Act, 1984 (Act No. 74 of 1984)

(i) Provisional proposal

2.96 It is provisionally proposed that the Education and Training Act (House of Assembly) 74 of 1984 be repealed.

(ii) Evaluation of the Education and Training Amendment Act 74 of 1984

2.97 The purpose of the Education and Training Amendment Act 74 of 1984 was to amend the Education and Training Act, 1979. All the sections of Act 74 of 1984 amended the principal Act 90 of 1979. Since Act 90 of 1979 is recommended for repeal, Act 74 of 1984 is also recommended for repeal for the same reasons as stated in paragraph 2.90 above.

(iv) Education and Training Amendment Act, 1989 (Act No. 35 of 1989)

(i) Provisional proposal

2.98 It is provisionally proposed that the Education and Training Amendment Act 35 of 1989 be repealed.

(ii) Evaluation of the Education and Training Amendment Act 35 of 1989

2.99 The purpose of the Education and Training Amendment Act 35 of 1989 was to amend the Education and Training Act, 1979. All the sections of Act 35 of 1989 amended the principal Act 90 of 1979. Since Act 90 of 1979 is recommended for repeal, Act 35 of 1989 is also recommended for repeal for the same reasons as stated in paragraph 2.90 above.

(iv) Education and Training Amendment Act, 1990 (Act No. 42 of 1990)

(i) Provisional proposal

2.100 It is provisionally proposed that the Education and Training Amendment Act 42 of 1990 be repealed.

- (ii) Evaluation of the Education and Training Amendment Act 42 of 1990

2.101 The purpose of the Education and Training Amendment Act 42 of 1990 was to amend the Education and Training Act, 1979. All the sections of Act 42 of 1990 amended the principal Act 90 of 1979. Since Act 90 of 1979 is recommended for repeal, Act 42 of 1990 is also recommended for repeal for the same reasons as stated in paragraph 2.90 above.

- (v) Education and Training Amendment Act, 1991 (Act No. 100 of 1991)

- (i) Provisional proposal

2.102 It is provisionally proposed that the Education and Training Amendment Act 100 of 1991 be repealed.

- (ii) Evaluation of the Education and Training Amendment Act 100 of 1991

2.103 The purpose of the Education and Training Amendment Act 100 of 1991 was to amend the Education and Training Act, 1979. All the sections of Act 100 of 1991 amended the principal Act 90 of 1979. Since Act 90 of 1979 is recommended for repeal, Act 100 of 1991 is also recommended for repeal for the same reasons as stated in paragraph 2.90 above.

- (vi) Education and Training Amendment Act 1992 (Act No.55 of 1992)

- (i) Provisional proposal

2.104 It is provisionally proposed that the Education and Training Amendment Act 55 of 1992 be repealed.

- (ii) Evaluation of the Education and Training Amendment Act 55 of 1992

2.105 The purpose of the Education and Training Amendment Act 55 of 1992 was to amend the Education and Training Act, 1979. All the sections of Act 55 of 1992 amended the principal Act 90 of 1979. Since Act 90 of 1979 is recommended for repeal, Act 55 of 1992 is also recommended for repeal for the same reasons as stated in paragraph 2.90 above.

(viii) Education and Training Second Amendment Act, 1992 (Act No. 106 of 1992)

(i) Provisional proposal

2.106 It is provisionally proposed that the Education and Training Second Amendment Act 106 of 1992 be repealed.

(ii) Evaluation of the Education and Training Second Amendment Act 106 of 1992

2.107 The purpose of the Education and Training Second Amendment Act 106 of 1992 was to amend the Education and Training Act, 1979. All the sections of Act 106 of 1992 amended the principal Act 90 of 1979. Since Act 90 of 1979 is recommended for repeal, Act 106 of 1992 is also recommended for repeal for the same reasons as stated in paragraph 2.90 above.

(d) Indians Education Act 1965 (Act No. 61 of 1965)<sup>21</sup>

(i) Provisional Proposal

2.108 It is provisionally proposed that the Indians Education Act No. 61 of 1965, be repealed.

(ii) Evaluation of the Indians Education Act 61 of 1965

2.109 The purpose of the Indians Education Act was to provide for the control of education (other than education provided by a university or by an institution for advanced technical education) of Indians by initially the Department of Indian Affairs, but after 1993 by a provincial

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<sup>21</sup> The administration of the whole of this Act, excluding sections 1B, 3B, 8 to 20 inclusive (which had previously been repealed), 26, 28, 29, 31 and 33(1)(g), has under Proclamation R151 of 1994, been assigned to Limpopo, Mpumalanga, North-West and Eastern Cape Provinces with effect from 31 October 1994.

education department or the national Department of Education<sup>22</sup> and to provide for matters incidental thereto.

2.110 In terms of Proclamation R151 in Government Gazette 16049 of 31 October 1994, the whole of the administration of Act 61 of 1965, excluding sections 1A, 3B, 8 to 20, 26, 28, 29, 31, and 33(1)(g) was assigned to a competent authority within the jurisdiction of the government of a province mentioned in section 124(1) of Act 200 of 1993 designated by the Premier of the province concerned.

2.111 The Act has been amended seven times since it first appeared on the statute book in 1965, the last amendment being the Indians Education Amendment Act (House of Delegates) No 50 of 1993, and several of its sections have been either amended or repealed. The remaining sections of the Act cover various matters including definition of terms used in the Act and application of the Act (s. 1); control of education for Indians (s. 2); the establishment, erection and maintenance of schools and colleges of education and their councils (ss. 3 & 3A); the granting of access to Indian students by the Councils of the Universities of South Africa, Durban-Westville or other college of education to be trained as teachers (s. 3B), the award of grants-in-aid, subsidies and loans for schools and hostels (s. 4), the transfer of management and control of State-aided schools and the registration and management of private schools(ss. 5 and 6), the admission of persons to State school and State-aided schools (s. 7) and certain matters relating to the institution and examination of courses in schools, inspection of the schools and hostels, compulsory attendance (ss. 21,22 &23), financial and other assistance to pupils and the payment of school and boarding fees (ss. 24 & 25), passing of property and obligations from governing body to the State etc, (s. 27) and the making of regulations by the minister (s. 33).

2.112 Several cases have been decided on the provisions of this Act; however, most of the provisions on which these cases were decided have now been repealed.

2.113 Although there are a number of sections in the Act which, on their face value, appear to be race neutral, nevertheless, it must be appreciated that the Act as a whole, as can be deduced from its long title, was enacted within the context of the policy of providing racially

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<sup>22</sup> The Act also amended the Special Education Act, 1948, the Vocational Education Act, 1955 and the Republic of South Africa Act, 1961.

segregated education and educational facilities. Indeed, there are still a few sections which reveal the essentially racial character of the Act. Thus, in section 1 of the Act, which is the definition section, the term "Indian" is defined in terms of the classification under Population Registration Act No 30 of 1950, an Act which classified people according to their racial category. Section 3B provides for the training of Indian students as teachers. Further, section 6(2), which regulates the registration and management of private schools states that "Any school *for the education of Indians* which at the commencement of this Act is registered with a provincial administration or the Department of National Education under any law shall be deemed to have been registered with the Department under subsection (1)". Finally, section 33, which empowers the Minister to make regulations, authorizes the Minister in paragraph (h) to make regulations "*providing for the registration of Indians qualified as teachers.*" (Emphasis added.) While some provisions of the Act have been repealed, the remaining provisions still bear this heritage and seek to regulate education for Indians. The intention to regulate education on the basis of race still permeates these provisions. In addition to this general orientation of the legislation, specific provisions identify Indians as the subject of the legislation.

2.114 Some matters dealt with in the Act are regulated by the South African Schools Act No 84 of 1996 and as such these provisions would appear to be redundant. Examples of such provisions are section 6 on the registration and management of private schools; section 23 on the compulsory attendances; sections 24 and 25 on financial assistance to pupils and the payment of school and boarding fees.

2.115 The Act makes reference to redundant institutions such as House of Delegates and to repealed legislation such as the Constitution of the Republic of South Africa 1993 (Act No.200 of 1993) and the Population Registration Act 1950, among others.

2.116 Accordingly, it is provisionally recommended that the Indians Education Act 1967 (Act 61 of 1967), and the Amendment Acts discussed below, be repealed on the grounds firstly, that it is premised on the basis of segregation of races in education and as such contravenes section 9 of the Constitution and, secondly because most of its provisions are covered by the South African Schools Act 1996.

2.117 All the Amendment Acts discussed below are in principle included in the latest version of the Indians Education Act 61 of 1965. However, the purpose of analyzing all the Amendment

Acts separately is to identify, among others, if there are any existing Amendment Acts that may need to be amended, repealed or retained as the case may be.

(i) Indians Education Amendment Act, 1967 (Act No. 60 of 1967)

(i) Provisional proposal

2.118 It is provisionally proposed that the Indians Education Amendment Act 60 of 1967 be repealed.

(ii) Evaluation of the Indians Education Amendment Act 60 of 1967

2.119 The purpose of the Indians Education Amendment Act 60 of 1967 was to amend the Indians Education Act, 1965. Section 1 of the Indians Education Amendment Act 60 of 1967 amended section 13 of the principal Act 61 of 1965. Since Act 61 of 1965 is recommended for repeal, Act 60 of 1967 is also recommended for repeal for the same reasons as stated in paragraph 2.116 above.

(ii) Indians Education Amendment Act, 1979 (Act No. 39 of 1979)

(i) Provisional proposal

2.120 It is provisionally proposed that the Indians Education Amendment Act 39 of 1979 be repealed.

(iii) Evaluation of the Indians Education Amendment Act 39 of 1979

2.121 The purpose of the Indians Education Amendment Act 39 of 1979 was to amend the Indians Education Act, 1965. All the sections of the Indians Education Amendment Act 39 of 1979 amended the principal Act 61 of 1965. Since Act 61 of 1965 is recommended for repeal, Act 39 of 1979 is also recommended for repeal for the same reasons as stated in paragraph 2.116 above.

(iii) Indians Education Amendment Act, 1981 (Act No. 9 of 1981)

- (i) Provisional proposal

2.122 It is provisionally proposed that the Indians Education Amendment Act 9 of 1981 be repealed.

- (iv) Evaluation of the Indians Education Amendment Act 9 of 1981

2.123 The purpose of the Indians Education Amendment Act 9 of 1981 was to amend the Indians Education Act, 1965. All the sections of the Indians Education Amendment Act 9 of 1981 amended the principal Act 61 of 1965. Since Act 61 of 1965 is recommended for repeal, Act 9 of 1981 is also recommended for repeal for the same reasons as stated in paragraph 2.116 above.

- (iv) Indians Education Amendment Act, 1984 (Act No. 78 of 1984)

- (i) Provisional proposal

2.124 It is provisionally proposed that the Indians Education Amendment Act 78 of 1984 be repealed.

- (ii) Evaluation of the Indians Education Amendment Act 78 of 1984

2.125 The purpose of the Indians Education Amendment Act 78 of 1984 was to amend the Indians Education Act, 1965. All the sections of the Indians Education Amendment Act 78 of 1984 amended the principal Act 61 of 1965. Since Act 61 of 1965 is recommended for repeal, Act 78 of 1984 is also recommended for repeal for the same reasons as stated in paragraph 2.116 above.

- (v) Indians Education Amendment Act (House of Delegates), 1985 (Act No. 64 of 1985)

- (i) Provisional proposal

2.126 It is provisionally proposed that the Indians Education Amendment Act (House of Delegates) 64 of 1985 be repealed.

- (v) Evaluation of the Indians Education Amendment Act (House of Delegates) 64 of 1985

2.127 The purpose of the Indians Education Amendment Act 64 of 1985 was to amend the Indians Education Act, 1965. Section 1 of the Indians Education Amendment Act (House of Delegates) 64 of 1985 amended section 3 of the principal Act 61 of 1965. Since Act 61 of 1965 is recommended for repeal, Act 64 of 1985 is also recommended for repeal for the same reasons as stated in paragraph 2.116 above.

- (vi) Indians Education Amendment Act (House of Delegates), 1992 (Act No 114 of 1992)

- (i) Provisional proposal

2.128 It is provisionally proposed that the Indians Education Amendment Act (House of Delegates) 114 of 1992 be repealed.

- (vi) Evaluation of the Indians Education Amendment Act (House of Delegates) 114 of 1992

2.129 The purpose of the Indians Education Amendment Act (House of Delegates) 114 of 1992 was to amend the Indians Education Act, 1965. Section 1 of Act 114 of 1992 amended section 15 of the principal Act 61 of 1965. Since Act 61 of 1965 is recommended for repeal, Act 114 of 1992 is also recommended for repeal for the same reasons as stated in paragraph 2.116 above.

- (vii) Indians Education Amendment Act (House of Delegates), 1993 (Act No.50 of 1993)

- (i) Provisional proposal

2.130 It is provisionally proposed that the Indians Education Amendment Act (House of Delegates) 50 of 1993 be repealed.

- (ii) Evaluation of the Indians Education Amendment Act (House of Delegates) 50 of 1993

2.131 The purpose of the Indians Education Amendment Act (House of Delegates) 50 of 1993 was to amend the Indians Education Act, 1965. All the sections of the Indians Education Amendment Act (House of Delegates) 50 of 1993 amended the principal Act 61 of 1965. Since Act 61 of 1965 is recommended for repeal, Act 50 of 1992 is also recommended for repeal for the same reasons as stated in paragraph 2.116 above.

(e) Private Schools Act (House of Assembly), 1986 (Act No.104 of 1986)<sup>23</sup>

- (i) Provisional proposal

2.132 It is provisionally proposed that the Private Schools Act (House of Assembly) 104 of 1986 be repealed.

- (ii) Evaluation of the Private Schools Act (House of Assembly), 104 of 1986

2.133 The purpose of the Private Schools Act (House of Assembly) 104 of 1986 was to provide for the registration of, the control over, and the making of financial grants to, private schools, and for matters connected therewith.

2.134 In terms of Proclamation R151 in Government Gazette 16049 of 31 October 1994, the whole of the administration of Act 104 of 1986, excluding section 1A, was assigned to a competent authority within the jurisdiction of the government of a province mentioned in section 124(1) of Act 200 of 1993 designated by the Premier of the province concerned.

2.135 Education is defined in section 1 of the Act to mean:

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<sup>23</sup> The administration of the whole of this Act, excluding section 1A, has under Proclamation R151 of 1994, been assigned to Limpopo and North-West Provinces with effect from 31 October 1994.

“Education provided in terms of the Education Affairs Act (House of Assembly), 1988 (Act 70 of 1988), but does not include pre-primary education or specialized education”

2.136 In terms of section 1 of Act 70 of 1988, Education is defined to mean:

“Instruction, teaching, or training provided to White pupils in terms of this Act.”

2.137 As stated in paragraph 2.72 above, the basic aim of Act 70 of 1988 was to provide and control education of White pupils. Both these Acts<sup>24</sup> were enacted under the 1983 Republic of South Africa Constitution Act, No. 110 of 1983 which made provision for segregated education for different population groups categorized according to race. In essence, Act 104 of 1986 gave effect to the 1983 Constitution which differentiated between persons in education on the basis of race and created separate institutions and structures for the education of different racial groups in the country.

2.138 Section 2 of the Act provides for the establishment, conduct or maintenance of private schools. Sections 3 to 5 provide for the registration of private schools whereas section 6 provides for subsidies to registered private schools. These matters were taken over by sections 45 to 48 of the South African Schools Act 1996 which makes provision for two categories of schools, namely public and independent schools. However, only section 1A of the Act was repealed by the Schools Act which means that the remaining sections of the Act remain in force until repealed by a competent authority. Accordingly, it is recommended that the Private Schools Act (House of Assembly) 104 of 1986 be repealed.

(i) Private Schools Amendment Act (House of Assembly), 1990 (Act No.60 of 1990)

(i) Provisional proposal

2.139 It is provisionally proposed that the Private Schools Amendment Act (House of Assembly), 60 of 1990 be repealed.

(ii) Evaluation of the Private Schools Amendment Act (House of Assembly), 60 of 1990

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<sup>24</sup> Private Schools Act (House of Assembly) 104 of 1986 and Education Affairs Act (House of Assembly) 70 of 1988

2.140 The purpose of the Private Schools Amendment Act (House of Assembly), 60 of 1990 was to amend the Private Schools Act (House of Assembly), 1986, so as to bring certain definitions and certain provisions into line with the wording of the Education Affairs Act (House of Assembly), 1988; and to redefine the prohibition of unregistered private schools; and to provide for matters incidental thereto.

2.141 All the sections of the Private Schools Amendment Act (House of Assembly), 60 of 1990 amended the principal Act 104 of 1986. Since Act 104 of 1986 is recommended for repeal, Act 60 of 1990 is also recommended for repeal for the same reasons as stated in paragraph 2.138 above.

## **2. Statutes which are provisionally proposed for repeal on the basis of obsolescence**

(a) Correspondence Colleges Amendment Act (House of Assembly), 1990 (Act No. 102 of 1990)

(i) Provisional proposal

2.142 It is provisionally proposed that the Correspondence Colleges Amendment Act (House of Assembly), 1990 (Act No. 102 of 1990) be repealed as a whole.

(ii) Evaluation of the Correspondence Colleges Amendment Act (House of Assembly), 102 of 1990

2.143 The purpose of the Correspondence Colleges Amendment Act (House of Assembly) 102 of 1990 was, among others, to amend the Correspondence Colleges Act 59 of 1965.

2.144 Sections 1, 2 and 3 of Act 102 of 1990 amended sections 1, 4 and 26 respectively of the Correspondence Colleges Act 59 of 1965. However, the latter Act was repealed by the Further Education and Training Act 98 of 1998 which, in turn, was repealed by the Further Education and Training Colleges Act 16 of 2006. This means therefore that sections 1, 2 and 3 of Act 102 of 1990 are redundant.

2.145 The DBE is of the view that the Correspondence Colleges Amendment Act (House of Assembly), 102 of 1990 no longer serve any purpose. Accordingly, it is recommended that sections 1, 2 and 3 of the Correspondence Colleges Amendment Act (House of Assembly) 102 of 1990 be repealed since they are redundant.

(b) Correspondence Colleges Amendment Act (House of Assembly), 1992 (Act No.34 of 1992)

(i) Provisional proposal

2.146 It is provisionally proposed that the Correspondence Colleges Amendment Act (House of Assembly) 34 of 1992 be repealed as a whole.

(ii) Evaluation of the Correspondence Colleges Amendment Act (House of Assembly), 34 of 1992

2.147 The purpose of the Correspondence Colleges Amendment Act 34 of 1992 was to amend the Correspondence Colleges Act 59 of 1965, and to provide for matters connected therewith.

2.148 Section 1 of Act 34 of 1992 amended section 3(4) of the Correspondence Colleges Act 59 of 1965. However, the latter Act was repealed by the Further Education and Training Act 98 of 1998 which, in turn, was repealed by the Further Education and Training Colleges Act 16 of 2006. This means therefore that section 1 of Act 34 of 1992 is redundant.

2.149 Accordingly, it is recommended that the Correspondence Colleges Amendment Act (House of Assembly) 34 of 1992 be repealed since the Act is redundant.

(c) National Education Policy Amendment Act, 1982 (Act No. 25 of 1982)

(i) Provisional proposal

2.150 It is provisionally proposed that the National Education Policy Amendment Act 25 of 1982 be repealed as a whole.

(ii) Evaluation of the National Education Policy Amendment Act 25 of 1982

2.151 The purpose of the National Education Policy Amendment Act 25 of 1982 was to amend the National Education Policy Act, 1967 (Act No. 39 of 1967), and to provide for incidental matters.

2.152 All the sections of Act 25 of 1982 amended the National Education Policy Act 39 of 1967. However, the latter Act was repealed in its entirety by section 76 (6) of the Higher Education Act 101 of 1997, which renders the whole Act 25 of 1982 redundant.

2.153 Accordingly, it is recommended that the National Education Policy Amendment Act 25 of 1982 be repealed.

(d) National Education Policy Amendment Act, (House of Assembly), 1986 (Act No. 103 of 1986)

(i) Provisional proposal

2.154 It is provisionally proposed that the National Education Policy Amendment Act, (House of Assembly) 103 of 1986, including the Schedule to the Act, be repealed as a whole.

(ii) Evaluation of the National Education Policy Amendment Act (House of Assembly) 103 of 1986

2.155 The purpose of the National Education Policy Amendment Act (House of Assembly) 103 of 1986 was to amend the National Education Policy Act, 1967 (Act No. 39 of 1967), to repeal certain Acts and to provide for matters connected therewith.

2.156 Sections 1 to 16 of Act 103 of 1986 amended the National Education Policy Act 39 of 1967. However, the latter Act was repealed in its entirety by section 76 (6) of the Higher Education Act 101 of 1997, which renders all the sections of the Act, including the Schedule, redundant.

2.157 Accordingly, it is recommended that the National Education Policy Amendment Act, (House of Assembly) 103 of 1986 only sections 1 to 16 of the Act, excluding the Schedule to the Act, be repealed as a whole.

(e) National Education Policy Amendment Act (House of Assembly) 1991 (Act No.90 of 1991)

(i) Provisional proposal

2.158 It is provisionally proposed that the National Education Policy Amendment Act (House of Assembly) 90 of 1991 be repealed as a whole.

(ii) Evaluation of the National Education Policy Amendment Act (House of Assembly) Act No.90 of 1991

2.159 The purpose of the National Education Policy Amendment Act 90 of 1991 was to amend the National Education Policy Act, 1967 (Act No. 39 of 1967), and to provide for incidental matters.

2.160 All the sections of Act 90 of 1991 amended the National Education Policy Act 39 of 1967. However, the latter Act was repealed in its entirety by section 76 (6) of the Higher Education Act 101 of 1997, which renders the whole of Act 90 of 1991 redundant.

2.161 Accordingly, it is recommended that the National Education Policy Amendment Act (House of Assembly) 90 of 1991 be repealed.

### **3. Statutes which are provisionally proposed for partial repeal on the basis of obsolescence**

(a) Education and Culture Laws Amendment Act, 1983 (Act No. 28 of 1983)

(i) Provisional proposal

2.162 It is provisionally proposed that sections 1, 2 and 6 of the Education and Culture Laws Amendment Act, 1983 (Act No. 28 of 1983) be repealed.

(ii) Evaluation of the Education and Culture Laws Amendment Act 28 of 1983

2.163 The purpose of the Education and Culture Laws Amendment Act 28 of 1983 was, among others, to amend the Correspondence Colleges Act, 1965, and to amend the Technical Colleges Act, 1981.

2.164 Sections 1 and 2 of Act 28 of 1983 amended sections 1 and 25 respectively of the Correspondence Colleges Act 59 of 1965. However, the latter Act was repealed by the Further Education and Training Act 98 of 1998 which, in turn, was repealed by the Further Education and Training Colleges Act 16 of 2006. This means therefore that sections 1 and 2 of Act 28 of 1983 are redundant.

2.165 Section 6 of Act 28 of 1983 substituted section 35 of the Mentally Retarded Children's Training Act 63 of 1974. However, the latter Act was repealed in entirety by the Education Affairs Act (House of Assembly) 70 of 1988.

2.166 Accordingly, it is recommended that sections 1, 2 and 6 of Act 28 of 1983 be repealed.

(b) Education Laws Amendment Act (House of Assembly), 1993 (Act No. 139 of 1993)

(i) Provisional proposal

2.167 It is provisionally proposed that section 2 of the Education Laws Amendment Act (House of Assembly) 139 of 1993 be repealed.

(ii) Evaluation of the Education Laws Amendment Act 139 of 1993

2.168 The purpose of the Education Laws Amendment Act (House of Assembly) 139 of 1993 was to amend the Education Affairs Act (House of Assembly), 1988, so as to provide for the payment of rates by the State in respect of immovable property owned by state-aided schools;

to amend the Education Policy Act, 1967, so as to make provision for the recognition of a successor to the Teachers' Federal Council; and to provide for matters connected therewith.

2.169 Section 1 of Act 139 of 1993 amended section 31A of the Education Affairs Act (House of Assembly) 70 of 1988. However, section 31A of Act 70 of 1988 was assigned to competent authority within the jurisdiction of the government of a province mentioned in section 124(1) of Act 200 of 1993 designated by the Premier of the province concerned in terms of Proclamation R151 in Government Gazette 16049 of 31 October 1994. This means therefore that section 1 of Act 139 of 1993 may be repealed by the Eastern Cape and North West provincial legislatures.

2.170 Section 2 of Act 139 of 1993 amended section 8 of the Education Policy Act 39 of 1967. However, the latter Act was repealed in its entirety by section 76 (6) of the Higher Education Act 101 of 1997, which renders section 2 of Act 139 of 1993 redundant.

1.171 Accordingly, it is recommended that section 2 of the Education Laws Amendment Act (House of Assembly) 139 of 1993 be repealed and section 1 of Act 139 of 1993 may be repealed by the Eastern Cape and North West provincial legislatures.

(c) Education Laws Amendment Act, 1997 (Act No 100 of 1997)

(i) Provisional proposal

2.172 It is provisionally proposed that sections 14 to 20 of the Education Laws Amendment Act 100 of 1997 be repealed.

(ii) Evaluation of the Education Laws Amendment Act 100 of 1997

2.173 The purpose of the Education Laws Amendment Act 100 of 1997 was, among others, to amend the South African Schools Act, 1996; to amend the National Education Policy Act, 1996; and to provide for matters connected therewith.

2.174 Sections 14 to 15 and 17 to 20 of Act 100 of 1997 amended the Educators' Employment Act, 1994 (Proclamation 138 of 1994), whereas section 16 of the Act repealed section 3A of the Educators' Employment Act, 1994 (Proclamation 138 of 1994). However, Proclamation 138 of

1994 was repealed by section 37 of the Employment of Educators Act 76 of 1998, which renders sections 14 to 20 of Act 100 of 1997 redundant. Accordingly it is recommended that sections 14 to 20 of the Education Laws Amendment Act 100 of 1997 be repealed.

2.175 Section 21 of Act 100 of 1997 repealed the National Policy on the Salaries and Conditions of Employment of Educators Act 76 of 1984. It is considered that, for purposes of promoting legal certainty, the Education Laws Amendment Act 100 of 1997 should not be repealed as a whole, but be retained on the statute book, with the exception of the repeal of sections 14 to 20.

(d) Education Laws Amendment Act, 2000 (Act No. 53 of 2000)

(i) Provisional proposal

2.176 It is provisionally proposed that sections 5 and 7 of the Education Laws Amendment Act 53 of 2000 be repealed, whereas sections 1, 18 and 19 of the Act be considered for repeal by the Department of Higher Education and Training.

(ii) Evaluation of the Education Laws Amendment Act 53 of 2000

2.177 The purpose of the Education Laws Amendment Act 53 of 2000 was, among others, to amend the South African Qualifications Authority Act, 1995; to amend the South African Schools Act, 1996; to amend the Employment of Educators Act, 1998; to amend the Further Education and Training Act, 1998; and to provide for matters connected therewith.

2.178 Section 1 of Act 53 of 2000 amended section 4(3) of the South African Qualifications Authority Act 58 of 1995 by substituting paragraph (e). However, the latter Act was repealed as a whole by section 37 of the National Qualifications Framework Act 67 of 2008. This means therefore that section 1 of Act 53 of 2000 is redundant.

2.179 Section 5 of Act 53 of 2000 substituted section 61 of the South African Schools Act 84 of 1996. However, section 61 of Act 84 of 1996 was later substituted by section 9 of the Education Laws Amendment Act 50 of 2002. This means therefore that section 5 of Act 53 of 2000 is redundant and may be repealed.

2.180 Section 7 of Act 53 of 2000 amended section 6(3) of the Employment of Educators Act 76 of 1998 by adding paragraph (e). However, paragraph (e) of section 6(3) was later substituted by section 58(3) of the Further Education and Training Colleges Act 16 of 2006. This means therefore that section 7 of Act 53 of 2000 is redundant and may be repealed.

2.181 Sections 18 and 19 of Act 53 of 2000 amended sections 9 and 51 respectively of the Further Education and Training Act 98 of 1998. However, the latter Act was repealed as a whole by section 58(1) of the Further Education and Training Colleges Act 16 of 2006 which renders sections 18 and 19 of Act 53 of 2000 redundant.

2.182 Accordingly, it is provisionally proposed that sections 5 and 7 of the Education Laws Amendment Act 53 of 2000 be repealed, whereas sections 1, 18 and 19 of the Act be considered for repeal by the Department of Higher Education and Training.

(e) Education Laws Amendment Act, 2001 (Act No. 57 of 2001)

(i) Provisional proposal

2.183 It is provisionally proposed that sections 12 to 14 of the Education Laws Amendment Act 57 of 2001 be considered for repeal by the Department of Higher Education and Training.

(ii) Evaluation of the Education Laws Amendment Act 57 of 2001

2.184 The purpose of the Education Laws Amendment Act 57 of 2001 was, among others, to amend the South African Schools Act, 1996; to amend the Employment of Educators Act, 1998; to amend the Further Education and Training Act, 1998; and to provide for matters connected therewith.

2.185 Sections 12 to 14 of Act 57 of 2001 amended sections 8, 20 and 49 respectively of the Further Education and Training Act 98 of 1998. However, the latter Act was repealed as a whole by section 58(1) of the Further Education and Training Colleges Act 16 of 2006 which renders sections 12 to 14 of Act 57 of 2001 redundant.

2.186 Accordingly, it is provisionally proposed that sections 12 to 14 of the Education Laws Amendment Act 57 of 2001 be considered for repeal by the Department of Higher Education and Training.

(f) Education Laws Amendment Act, 2002 (Act No 50 of 2002)

(i) Provisional proposal

2.187 It is provisionally proposed that section 11 of the Education Laws Amendment Act 50 of 2002 be repealed, whereas sections 14 to 26 of the Act be considered for repeal by the Department of Higher Education and Training.

(ii) Evaluation of the Education Laws Amendment Act 50 of 2002

2.188 The purpose of the Education Laws Amendment Act 50 of 2002 was, among others, to amend the South African Schools Act, 1996; to amend the Employment of Educators Act, 1998; to amend the Further Education and Training Act, 1998; to amend the Adult Basic Education and Training Act, 2000; to amend the General and Further Education and Training Quality Assurance Act, 2001; and to provide for matters connected therewith.

2.189 Section 11 of Act 50 of 2002 amended section 8 of the Employment of Educators Act 76 of 1998 by adding subsection (7). However, subsection (7) was later substituted by section 3 of the Education Laws Amendment Act 1 of 2004, and by section 58(3) of the Further Education and Training Colleges Act 16 of 2006, which renders sections 11 of Act 50 of 2002 redundant.

2.190 Sections 14 to 26 of Act 50 of 2002 amended the Further Education and Training Act 98 of 1998. However, the latter Act was repealed as a whole by section 58(1) of the Further Education and Training Colleges Act 16 of 2006. This means therefore that sections 14 to 26 of Act 50 of 2002 are redundant and may be repealed.

2.191 Accordingly, it is provisionally proposed that section 11 of the Education Laws Amendment Act 50 of 2002 be repealed, whereas sections 14 to 26 of the Act be considered for repeal by the Department of Higher Education and Training.

(g) Education Laws Amendment Act, 2004 (Act No. 1 of 2004)

(i) Provisional proposal

2.192 It is provisionally proposed that section 1 of the Education Laws Amendment Act 1 of 2004 be repealed.

(ii) Evaluation of the Education Laws Amendment Act 1 of 2004

2.193 The purpose of the Education Laws Amendment Act 1 of 2004 was, among others, to amend the South African Qualifications Authority Act, 1995; to amend the South African Schools Act, 1996; to amend the Employment of Educators Act, 1998; to amend the General and Further Education and Training Quality Assurance Act, 2001; and to provide for matters connected therewith.

2.194 Section 1 of Act 1 of 2004 amended section 4 of the South African Qualifications Authority Act 58 of 1995. However, the latter Act was repealed as a whole by section 37 of the National Qualifications Framework Act 67 of 2008 which renders section 1 of Act 1 of 2004 redundant.

2.195 Accordingly, it is provisionally proposed that section 1 of the Education Laws Amendment Act 1 of 2004 be repealed.

#### **4. Legislation proposed for retention without any amendment**

(a) Education Laws Amendment Act, 1999 (Act No. 48 of 1999)

2.196 The Education Laws Amendment Act 48 of 1999 provides for the amendment of the National Education Policy Act, 1996; the South African Schools Act, 1996; the Employment of Educators Act, 1998; and for matters connected therewith. Accordingly, it is provisionally proposed that the Education Laws Amendment Act 48 of 1999 be retained as this amendment Act still serves a purpose to promote legal certainty.

(b) Education Laws Amendment Act, 2005 (Act No. 24 of 2005)

2.197 The Education Laws Amendment Act 24 of 2005 provided for the amendment of the South African Schools Act, 1996; the Employment of Educators Act, 1998; and for matters connected therewith.

2.198 Section 9 of the Act repealed 22 Acts which are listed in the Schedule to the Act. Since the Act is a Repeal Act, it is provisionally proposed that the Education Laws Amendment Act 24 of 2005 be retained as this amendment Act still serves a purpose to promote legal certainty.

(c) National Education Policy Act, 1996 (Act No. 27 of 1996)

2.199 The purpose of the National Education Policy Act, 1996, was to provide for the determination of national policy for education; to amend the National Policy for General Education Affairs Act, 1984, so as to substitute certain definitions; to provide afresh for the determination of policy on salaries and conditions of employment of educators; and to provide for matters connected therewith.

2.200 This principal Act was adopted to facilitate the democratic transformation of the national system of education into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights. To this effect the Act has repealed the previous National Policy for General Education Affairs Act 76 of 1984 which became obsolete in a new democratic education system. Likewise, a number of later Acts have amended the Act<sup>25</sup> to incorporate and accommodate important and necessary changes in the development of the national education policy.

2.201 The Act contains provisions such as: the determination of national education by the Minister and the directive principles of national education policy,<sup>26</sup> consultation on education policy and legislation,<sup>27</sup> the publication of the national education policy and monitoring and

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<sup>25</sup> See Education Laws Amendment Act 100 of 1997; Education Laws Amendment Act 48 of 1999; Education Laws Amendment Act 31 of 2007.

<sup>26</sup> Ss 2-4.

<sup>27</sup> Ss 5-6.

evaluation of education,<sup>28</sup> the institutions of bodies such as the Council of Education Ministers, Heads of Education Departments Committee and consultative bodies, the administrative functions of these bodies and allowances and remuneration of these bodies.<sup>29</sup>

2.202 The Act is one of the principal statutes in the education sphere; it steers the education system in the right direction as provided for in the Constitution and education legislation.

2.203 The Act does not contain any unconstitutional, redundant and obsolete provisions and should remain on the statute books.

(d) South African Schools Act, 1996 (Act No. 84 of 1996)

2.204 The purpose of the South African Schools Act, 1996, was to provide for a uniform system for the organisation, governance and funding of schools; and the repeal of a number of Acts which caused the previous education system to be fragmented and discriminatory.

2.205 The provisions of the Act *per se* are not directly in violation of section 9 of the Constitution. However, the following observations regarding a few provisions of the Act as well as the Regulations are worth noting:

- (i) Among others, sections 6, 8, and 20 of the Act place a number of obligations on the school governing body to determine policies and a code of conduct for a school. This is understandable given that it is the body that deals with governance and financial accountability at schools, and is intended to be a community based body able to promote the particular interests of a school. Such policies must be developed and exercised in line with the Constitution and relevant legislation. Where they fall short, the Department may intervene in

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<sup>28</sup> Ss 7-8.  
<sup>29</sup> Ss 9-13.

accordance with the law,<sup>30</sup> or the aggrieved learner may approach the court, as was the case in *MEC for Education: Kwazulu-Natal and Others v Pillay*.<sup>31</sup>

- (ii) Section 46(3)(b) specifically provides that the admission policy of the school cannot discriminate on the grounds of race. Whilst this was the primary cause of fragmentation pre 1993, it may give the false impression that differentiation on other grounds may be permissible despite the supremacy of the 1996 Constitution.
- (iii) Section 5(4) of the Act provides for the age at which learners may gain admission to public schools. The section makes exception for learners who are below the stipulated age requirement to gain admission if 'good cause' is shown. No similar provision is made for learners above the stipulated age. Provision for over-age learners is made in subsidiary legislation. It is recommended that the Act should provide for the admission of overage learners subject to regulations made by the Minister.

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<sup>30</sup> For a discussion on this in relation to language policy see *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another (CCT40/09) [2009] ZACC 32; 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC) (14 October 2009)*.

<sup>31</sup> 2008(2) BCLR 99 (CC) As the Constitutional Court indicates, this case raises vital questions about the nature of discrimination under the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) as well as the extent of protection afforded to cultural and religious rights in the public school setting and possibly beyond. At the centre of the storm is a tiny gold nose stud. Writing for the majority Chief Justice Langa held as follows: ". . . 112 The discrimination has had a serious impact on Sunali and, although the evidence shows that uniforms serve an important purpose, it does not show that the purpose is significantly furthered by refusing Sunali her exemption. Allowing the stud would not have imposed an undue burden on the School. A reasonable accommodation would have been achieved by allowing Sunali to wear the nose stud. I would therefore confirm the High Court's finding of unfair discrimination.

. . . .  
 114. It is worthwhile to explain at this stage, for the benefit of all schools, what the effect of this judgment is, and what it is not. It does not abolish school uniforms; it only requires that, as a general rule, schools make exemptions for sincerely held religious and cultural beliefs and practices. There should be no blanket distinction between religion and culture. There may be specific schools or specific practices where there is a real possibility of disruption if an exemption is granted. Or, a practice may be so insignificant to the person concerned that it does not require a departure from the ordinary uniform. The position may also be different in private schools, although even in those institutions, discrimination is impermissible. Those cases all raise different concerns and may justify refusing exemption. However, a mere desire to preserve uniformity, absent real evidence that permitting the practice will threaten academic standards or discipline, will not."

(iv) Section 5A (1) of the Act provides that the Minister may by regulation prescribe minimum uniform norms and standards for school infrastructure, capacity of a school in respect of the number of learners a school can admit, and the provision of learning and teaching support material. It has been observed that there are no guidelines defined in the Act that inform the list of matters referred to in subsection (2) in respect of which the norms and standards must be determined by the Minister. Although not part of the purpose and core mandate of the current investigation, however, it is proposed that consideration be given to bringing about a set of statutory guidelines underpinning the matters referred to in subsection (2) of the Act for consideration by the Minister when determining national minimum norms and standards as required in terms of section 5A(1) of the Act.

(e) Employment of Educators Act, 1998 (Act No. 76 of 1998)

2.206 Section 37 (1) of this Act repealed the Employment of Educators Act of 1994. This Act aims to provide for the employment of educators by the state, for the regulation of conditions of service, discipline, retirement and discharge of educators as well as ancillary matters thereto. In the case of *Labri-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another*,<sup>32</sup> Justice Mokgoro declared regulation 2(2) of the regulations regarding the terms and conditions of employment in education made under the Education of Employment Act of 1994 unconstitutional because it promoted unfair discrimination on the basis of citizenship or non-citizenship. Subsequent to the judgment, the current Act was passed by Parliament.

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<sup>32</sup> 1997(12) BCLR 1655 (CC): “[25] I hold that [regulation 2\(2\)](#) constitutes unfair discrimination against permanent residents, because they are excluded from employment opportunities even though they have been permitted to enter the country permanently. The government has made a commitment to permanent residents by permitting them to so enter, and discriminating against them in this manner is a detraction from that commitment. Denying permanent residents security of tenure, notwithstanding their qualifications, competence and commitment is a harsh measure. . . . [30] In my view, the appellants’ argument is too sweeping. Surely it must be a legitimate purpose for a government department to reduce unemployment among South African citizens. However the provision of quality education must be the primary aim of an education department. While reducing unemployment for citizens may in certain circumstances be a legitimate aim, particularly when thousands of qualified educators are unemployed, that must never be permitted to compromise the primary aim, especially at a time in our history when quality education is crucial in transforming our society.

2.207 In the case of *Phenithi v Minister of Education and Others*<sup>33</sup> the applicant sought direct access to the Constitutional Court to have parts of section 14(1) and section 14(2) of the Employment of Educators Act (the Act) declared unconstitutional and invalid. The Applicant had been employed by the Free State Provincial government in a permanent capacity as an educator until 18 May 2000. She stated in her affidavit that she had to be away from work for more than a month because she was ill. When the applicant returned to work, however, she was informed by the provincial Department of Education that she was deemed to have been discharged from service by reason of the provision of section 14(1) of the Act which provides as follows:

“An educator appointed in a permanent capacity who . . . is absent from work for a period exceeding 14 consecutive days without permission of the employer . . . shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct . . .”.

2.208 The Constitutional Court held at par 5 that the applicant raised a constitutional point which warranted consideration. The Court held, however, that:

“she has delayed more than eighteen months in pursuing relief, and discloses no good reason for this delay. Moreover the applicant, instead of launching proceedings in the High Court in the ordinary way, has sought to approach this Court directly. On the limited papers we have, it seems possible that factual disputes may arise between the applicant and the respondents. This Court has stated on many occasions that it is not desirable for this Court to sit as a court of first and final instance in any circumstances, but especially where disputes of fact may arise. The fact that the applicant is indigent and the fact that the ordinary procedure would take time before relief is finalised are not sufficient, in the light of these other considerations to warrant the grant of direct access.”

2.209 Sections 14(1) and (2) could give rise to a section 9 challenge on the basis of sex, gender, or pregnancy since women are definitely more affected than men given the natural and social responsibilities that are still reserved for women only. Apart from that, subsection (2) gives the employer too wide a discretion in so far as reinstatement of such educator is concerned.

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<sup>33</sup> 2003(11) BCLR 1217 (CC)

(f) South African Council for Educators Act, 2000 (Act No. 31 of 2000)

2.210 The South African Council for Educators Act 31 of 2000 provides for the continued existence of the South African Council for Educators; to provide anew for the functions of the said council; and to provide anew for the composition of the said council; and to provide for matters incidental thereto.

2.211 The Act applies to all educators, lecturers and management staff of colleges appointed in terms of the Employment of Educators Act, 1998; the South African Schools Act, 1996; the Further Education and Training Colleges Act, 2006; the Public Service Act, 1994; at an independent school and an adult learning centre.

2.212 In the context of the current investigation, it is provisionally proposed that the Act be retained as it seems in line with section 9 of the Constitution and remains essential for the purposes of achieving its objectives.

(g) General and Further Education and Training Quality Assurance Act, 2001 (Act No.58 of 2001)

2.213 The purpose of the General and Further Education and Training Quality Assurance Act 58 of 2001 is to provide for the establishment, composition and functioning of the General and Further Education and Training Quality Assurance Council; to provide for quality assurance in general and further education and training; to provide for control over norms and standards of curriculum and assessment; to provide for the issue of certificates at the exit points; to provide for the conduct of assessment; to repeal the South African Certification Council Act, 1986; and to provide for matters connected therewith.

2.214 In the context of the current investigation, it is provisionally proposed that the Act be retained as it seems to comply with section 9 of the Constitution and remains essential for the purposes of achieving its objectives.

**Annexure A**

**BASIC EDUCATION GENERAL LAWS AMENDMENT AND REPEAL BILL**

**GENERAL EXPLANATORY NOTE:**

[ ] Unless otherwise indicated words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_ Unless otherwise indicated words underlined with a solid line indicate insertions in existing enactments.

**BILL**

**To amend and repeal certain laws of the Republic pertaining to basic education containing discriminatory or obsolete and redundant provisions**

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:

**Repeal of laws**

1. The laws referred to in the second column of the Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

**Short title and commencement**

2. This Act is called the Basic Education General Laws Repeal Act, 20.. and comes into operation on a date determined by the President by proclamation in the Gazette.

**LAWS REPEALED BY SECTION 1****SCHEDULE**

<b>Item No.</b>	<b>No. and year of law</b>	<b>Title and subject</b>	<b>Extent of repeal</b>
1.	25 of 1982	National Education Policy Amendment Act 25 of 1982	The whole
2.	28 of 1983	Education and Culture Laws Amendment Act 28 of 1983	Sections 1, 2 and 6
3.	103 of 1986	National Education Policy Amendment Act, (House of Assembly) 103 of 1986	The whole
4.	102 of 1990	Correspondence Colleges Amendment Act (House of Assembly) 102 of 1990	The whole
5.	90 of 1991	National Education Policy Amendment Act (House of Assembly) 90 of 1991	The whole
6.	34 of 1992	Correspondence Colleges Amendment Act (House of Assembly) 34 of 1992	The whole
7.	139 of 1993	Education Laws Amendment Act (House of Assembly) 139 of 1993	Section 2
8.	100 of 1997	Education Laws Amendment Act 100 of 1997	Sections 14 to 20
9.	53 of 2000	Education Laws Amendment Act 53 of 2000	Sections 5 and 7
10.	50 of 2002	Education Laws Amendment Act 50 of 2002	Section 11
11.	1 of 2004	Education Laws Amendment Act 1 of 2004	Section 1

**ANNEXURE B****STATUTES ADMINISTERED BY THE DEPARTMENT OF BASIC EDUCATION**

<b>No</b>	<b>Name of Act, number and year</b>
1.	Education and Culture Laws Amendment Act, 1983 (Act No. 28 of 1983)
2.	Correspondence Colleges Amendment Act (House of Assembly), 1990 (Act No. 102 of 1990)
3.	Correspondence Colleges Amendment Act (House of Assembly), 1992 (Act No. 34 of 1992)
4.	National Education Policy Amendment Act, (House of Assembly), 1986 (Act No. 103 of 1986)
5.	National Education Policy Amendment Act, 1982 (Act No. 25 of 1982)
6.	National Education Policy Amendment Act (House of Assembly) 1991 (Act No.90 of 1991)
7.	National Education Policy Act, 1996 (Act No. 27 of 1996)
8.	Education Laws Amendment Act (House of Assembly), 1993 (Act No. 139 of 1993)
9.	Education Laws Amendment Act, 1997 (Act No 100 of 1997)
10.	Education Laws Amendment Act, 1999 (Act No. 48 of 1999)
11.	Education Laws Amendment Act, 2000 (Act No. 53 of 2000)
12.	Education Laws Amendment Act, 2001 (Act No. 57 of 2001)
13.	Education Laws Amendment Act, 2002 (Act No 50 of 2002)
14.	Education Laws Amendment Act, 2004 (Act No. 1 of 2004)
15.	Education Laws Amendment Act, 2005 (Act No. 24 of 2005)
16.	South African Schools Act, 1996 (Act No. 84 of 1996)
17.	Employment of Educators Act, 1998 (Act No. 76 of 1998)
18.	South African Council for Educators Act, 2000 (Act No. 31 of 2000)
19.	General and Further Education and Training Quality Assurance Act, 2001 (Act No.58 of 2001)

**ANNEXURE C****STATUTES ASSIGNED TO THE PROVINCIAL DEPARTMENTS OF EDUCATION**

<b>No.</b>	<b>Name of Act, number and year</b>
1.	Coloured Persons Education Act, 1963 (Act No. 47 of 1963)
2.	Coloured Persons Education Amendment Act, 1967 (Act No. 76 of 1967)
3.	Coloured Persons Education Amendment Act, 1973 (Act No. 53 of 1973)
4.	Coloured Persons Education Amendment Act, 1976 (Act No. 29 of 1976)
5.	Second Coloured Persons Education Amendment Act, 1976 (Act No.95 of 1976)
6.	Coloured Persons Education Amendment Act, 1979 (Act No.50 of 1979)
7.	Coloured Persons Education Amendment Act, 1980 (Act No. 15 of 1980)
8.	Coloured Persons Education Amendment Act, 1983 (Act No. 85 of 1983)
9.	Coloured Persons Education Amendment Act (House of Representatives), 1985 (Act No. 76 of 1985)
10.	Coloured Persons Education Amendment Act (House of Representatives), 1992 (Act No. 112 of 1992)
11.	Coloured Persons Education Amendment Act (House of Representatives), 1992 (Act No.113 of 1992)
12.	Education Amendment Act (House of Delegates) 1986 (Act No. 100 of 1986)
13.	Education Affairs Act (House of Assembly) 1988 (Act No. 70 of 1988)
14.	Education Affairs Amendment Act (House of Assembly), 1991 (Act No. 88 of 1991)
15.	Education Affairs Amendment Act (House of Assembly), 1992 (Act No. 39 of 1992)
16.	Education Affairs Amendment Act (House of Assembly), 1993 (Act No 36 of 1993)
17.	Education Affairs Second Amendment Act (House of Assembly), 1993 9ACT No. 162 of 1993)
18.	Education Laws Amendment Act, (House of Assembly) 1973, (Act No. 139 of 1973)
19.	Education and Training Act, 1979 (Act No. 61 of 1979)
20.	Education and Training Amendment Act, 1980 (Act No. 52 of 1980)
21.	Education and Training Amendment Act, 1981 (Act No.10 of 1981)
22.	Education and Training Amendment Act, 1984 (Act no. 74 of 1984)
23.	Education and Training Amendment Act, 1989 (Act No 35 of 1989)
24.	Education and Training Amendment Act, 1990 (Act No. 42 of 1990)

25.	Education and Training Amendment Act, 1991 (Act no. 100 of 1991)
26.	Education and Training Amendment Act 1992 (Act No.55 of 1992)
27.	Education and Training Second Amendment Act, 1992 (Act No. 106 of 1992)
28.	Indians Education Act, 1965 (Act No. 61 of 1965)
29.	Indians Education Amendment Act, 1967 (Act No. 60 of 1967)
30.	Indians Education Amendment Act, 1979 (Act No. 39 of 1979)
31.	Indians education Amendment Act, 1981 (Act No. 9 of 1981)
32.	Indians Education Amendment Act, 1984 (Act No. 78 of 1984)
33.	Indians Education Amendment Act (House of Delegates), 1985 (Act No. 64 of 1985)
34.	Indians Education Amendment Act (House of Delegates), 1992 (Act No 114 of 1992)
35.	Indians Education Amendment Act (House of Delegates), 1993 (Act No.50 of 1993)
36.	Private Schools Act (House of Assembly), 1986 (Act No.104 of 1986)
37.	Private Schools Amendment Act (House of Assembly), 1990 (Act No.60 of 1990)
38.	Education Ordinances Amendment Act (House of Assembly), 1992 (Act No. 67 of 1992)