AfriForum

AfriForum's comments on the draft admission policy for ordinary public schools

A BREAKDOWN OF THE DEFECTS AND SHORTCOMINGS OF THE PROPOSED POLICY

March 2021

Part of the Solidarity Movement

Content

1. Introduction

1.1 These comments are submitted by AfriForum, a non-profit organisation registered as such in terms of the Companies Act 71 of 2008.

1.2 The main purpose and objectives of the applicant, as stated in its Memorandum of Incorporation, are among others the promotion and advocacy of democracy as well as human and constitutional rights.

1.3 For purposes of advancing these objectives, the applicant is a civil rights organisation whose *locus standi* has been recognised in various judgments by courts throughout the country.

1.4 AfriForum currently has more than 270 000 members. A specific division for educational matters was established in the interests of its members, many of whom are parents of learners who attend schools in various school communities. This division of AfriForum focuses on considering draft legislation and legislation, as well as draft policies and policies, and the impact of these on school governance in the broad sense and their impact on the grassroots democracy model on which public schools function in terms of the South African Schools Act 84 of 1996 ("the SASA"), and applicable provincial legislation.

1.5 As such, AfriForum and its members have an interest in policies or legislation that may affect this democratic model, which was created to establish democratically elected representatives on school governing bodies in school communities. The division must also determine to what extent policies or legislation will impact the powers and functions of school governing bodies.

1.6 Against this background, AfriForum furnishes its comments on the draft *Admission policy for ordinary public schools* ("the draft national policy") that was published in the *Government Gazette* of 10 February 2021. AfriForum will comment on the individual paragraphs of the draft policy.

2. Comments on "Scope" and "Purpose" (paragraphs 2–4)

2.1 The draft national policy was compiled in terms of the National Education Policy Act 27 of 1996 ("NEPA"). The NEPA is a national act that applies countrywide to all education policies and that binds provincial education departments.[1]

2.2 The draft national policy states in paragraph 2 that it applies **uniformly** to all provincial education departments and all ordinary public schools.

2.3 The word *uniformly* immediately raises the question of where the draft national policy fits into the hierarchy of legislation that relates to the admission of learners.

[1] See for example section 3(3) of the NEPA.

2.4 The question becomes important, especially considering that, in the Gauteng province, regulations were made that relate to the admission of learners to ordinary public schools in Gauteng. These regulations were amended as recently as 2019.

2.5 If one considers that there are indeed differences between these regulations and the draft national policy, the question arises whether the governing bodies of ordinary public schools in Gauteng should formulate their admission policies to be consistent with the regulations, or to be consistent with the draft national policy. These differences will be pointed out in our comments, were applicable.

2.6 This question furthermore becomes important when one considers paragraph 3 of the draft national policy, which states that the admission policies of ordinary public schools must be consistent with this policy.

2.7 In contrast, section 5(5) of the SASA provides that, subject to the SASA and any applicable provincial law, the admission policy of an ordinary public school must be determined by the governing body of that school.

2.8 Paragraph 4 of the draft national policy further states that its purpose is to provide all provincial education departments and the governing bodies of all ordinary public schools with a framework in which to develop their admission policies.

2.9 Section 3(3) of the NEPA provides that, subject to the Constitution, national policy will prevail over the whole or part of any provincial policy on education in case of any conflict between the national and provincial policies.

2.10 This means that, if the provincial policy is formulated for purposes of admission policies for schools, the provincial policy must be aligned with the draft national policy to avoid any conflict and to create certainty for governing bodies of public schools.

2.11 The current situation with the Gauteng Department of Education is that, instead of formulating an admission policy to be consistent with the national policy – which should serve as a framework for the formulation of admission policies by governing bodies of ordinary public schools – the Gauteng province has sought to regulate the admission of learners itself, thereby creating legislation (instead of a framework that provides guidance to governing bodies) which differs from the draft national policy in several respects. This is reminiscent of the ruling by the Supreme Court of Appeal in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*:[2]

> In this case, however, it seems that the provincial legislature intended to elevate policy determinations to the level of subordinate legislation, but leaving its position in the hierarchy unclear: …

2.12 This state of affairs creates significant uncertainty for governing bodies (in terms of what would be applicable and what should be followed and applied) where there are material differences between the provincial subordinate legislation in the form of regulations – instead of policy – and the draft national policy.

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[2] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) at 509 (F–G).

2.13 We must state here that, to remove these uncertainties, the Minister of Basic Education must look into these matters to comply with section 41(1)(h) of the Constitution, which states among others:

> 41(1) All spheres of government and all organs of state within each sphere must –
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> …
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> (h) co-operate with one another in mutual trust and good faith by –
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> …
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> (ii) assisting and supporting one another;
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> …
>
> (iv) co-ordinating their actions and legislation with one another; …

2.14 It must be borne in mind that these principles of cooperative governance are also in the public's interest so that actions and legislation are properly aligned, and discrepancies and conflict avoided to ensure clarity and certainty. This is especially important considering the concurrent jurisdiction that the national Department of Basic Education and the provincial education departments have in terms of the Constitution.

2.15 It also becomes important when one considers that the governing bodies of ordinary public schools are also organs of state that are duty-bound and have the power to formulate certain policies – such as language or admission policies – in terms of the SASA. They must also be treated within the spirit of the principles of cooperative governance and be assisted and supported as far as policies and legislation are concerned. They should not be left with uncertainty in terms of what should be followed as a result of conflicting policies and regulations.

2.16 There should not be separate regulations – as in the case of the Gauteng province on the admission of learners in public schools – that are in conflict with the national policy. Instead, provinces should formulate policies on the admission of learners that are consistent with the national policy and adapted as far as necessary for purposes of specific provincial requirements. Any aspects that do not require specific adaptation within a particular province must comply with the national policy. This will ensure unequivocal certainty for governing bodies that the national policy applies uniformly (as it seems to be intended), thereby creating a uniform national standard for provincial governments and governing bodies across the country.

2.17 It is unfortunate that the current formulation of the scope and purpose of the draft national policy is not unequivocal. More clarity and certainty are therefore required. Provincial regulations that govern admission must not contradict the draft national policy. This is also required by section 2(2) of the SASA.

2.18 In *Affordable Medicines Trust v The Minister of Health*[3] the Constitutional Court dealt with the requirement of certainty in [108]:[4]

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[3] *Affordable Medicines Trust v The Minister of Health* 2006 (3) SA 247 (CC).

[4] Own emphasis.

> … The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is the foundational value of our constitutional democracy. **It requires that laws must be written in a clear and accessible manner.** What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness must thus not require absolute certainty of laws. The law must indicate with reasonable certainty those who are bound by what is required of them so that they may regulate the conduct accordingly.

2.19 Furthermore, and considering the principles of cooperative governance in terms of the Constitution referred to above, the Minister of Basic Education in coordination with the provinces – and particular the Gauteng province – should repeal the regulations for the admission of learners to ordinary public schools and substitute these with a provincial policy that is aligned with the draft national policy. If not, this will create an untenable conflict in several instances and cause uncertainty for governing bodies.

2.20 If the intention is that the draft national policy must be uniformly applied countrywide by provincial education departments as well as governing bodies, the judgement by the Constitutional Court (per Deputy Chief Justice Moseneke) in *Federation of Governing Bodies v MEC For Education, Gauteng and Another*[5] should be borne in mind and applied:[6]

> Under the scheme,[7] provincial legislation prevails over national legislation **except if the national legislation applies uniformly countrywide**, or the matter cannot be regulated effectively by respective provinces, **or the matter is one listed in the Constitution as requiring uniformity across the nation**.

2.21 In order to complete the reference to section 146 of the Constitution, the wording of section 146(2)(b) should be considered:

> National legislation that applies uniformly with regard to the country as a whole and prevails over provincial legislation if any of the following conditions is met:
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> …
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> (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing –
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> (i) norms and standards;
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> (ii) frameworks; or
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> (iii) national policies.

2.22 It undermines the constitutional scheme if provincial subordinate legislation contradicts national legislation (which exists to create uniformity nationwide). National legislation, such as the NEPA, was indeed enacted for the purpose of creating a national policy framework for governing bodies.

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5 *Federation of Governing Bodies v MEC For Education, Gauteng and Another* 2016 (4) SA 546 (CC).

6 Own emphasis.

7 The conflict-resolution scheme of sections 146,149 and 150 of the Constitution.

2.23 Considering this, we propose that it must be stated unequivocally in the scope and purpose of the draft national policy that – in terms of section 146(2) of the Constitution – the national policy will prevail over provincial legislation and provincial subordinate legislation in terms of any conflict over the admission of learners to ordinary public schools. It must also be stated that the national policy creates a framework for governing bodies and provincial governments for purposes of the formulation of admission policies for learners in public schools.

2.24 Paragraphs 2, 3 and 4 of the draft national policy should therefore be amended as proposed above in order to remove the uncertainty that we pointed out.

3. Comments on "Administration of admissions" (paragraphs 5–13)

3.1 Our comments relate to paragraphs in this section (or portions thereof) that are problematic. When no comment is made about a particular paragraph, that paragraph is well understood, reasonable and acceptable.

3.2 The final sentence of paragraph 7 states that the governing body of an ordinary public school must make a copy of the school's admission policy available to the Head of the provincial Department (HOPD) for approval.[8] The term *approval* is problematic and it should rather be substituted with the word *verification*. The reason for this is that – as much as it is understood that the HOPD must be provided with the admission policy, who must read and scrutinise it to ensure that it complies with the Constitution, the SASA, national policy and provincial legislation – there is a general experience and concern that governing bodies who submit their admission policies to the provincial departments receive no reply regarding the approval of their policies. For example, the Gauteng regulations stipulate that admission policies drafted by governing bodies are **only effective** when approved by the HOPD.

3.3 The result it is that the admission policy remains ineffective even when the provincial Department of Education does not necessarily have an objection to the admission policy but – as in many cases – omits or fails to inform the ordinary public school of the approval. This is not intended by section 5(5) of the SASA. If the word *approval* is substituted with the word *verification*, it means that the HOPD is still authorised to ensure that the admission policy of the school does not contradict the Constitution, the SASA, national policy or provincial legislation.

3.4 Once the policy has been studied by the HOPD and any provision in the policy does not withstand scrutiny, the HOPD should actively communicate with the governing body and require an amendment in the spirit of the principles of cooperative governance. If the HOPD does not reply within a specified period of time, the governing body can accept that the admission policy is in order. The school can therefore act accordingly without being left

[8] This deviates from the current national policy.

uncertain about the validity of its admission policy. While the HOPD is considering the policy, it should be valid until verified by or amended at the request of the HOD.

3.5 Although paragraph 10 is acceptable in that the purpose is not to prejudice learners for purposes of admission or to deprive them of access to classes or other extramural activities where their parents do not subscribe to the school's code of conduct, it may be interpreted that the acceptance of a code of conduct for learners is a matter of choice for learners or parents. We therefore suggest an additional paragraph that refers to section 8(4) of the SASA, which obliges learners to comply with the code of conduct of the school that they attend. It must be stated that a governing body's admission policy may refer to this provision of SASA and that no learner is exempted from the obligation to comply with their school's code of conduct. This would make the position unequivocally clear so that applicant learners and their parents are aware of the existence of a code of conduct that they must adhere to upon admission to the school.

3.6 **Paragraph 9 – second part on language and language policy**

3.6.1 The reference to section 6 of the Constitution is not appropriate in this context. Section 6(2) of the Constitution places an obligation on the state. Similarly, sections (3)(a) and 6(4) of the Constitution place obligations on the national as well as provincial governments.

3.6.2 It is the duty of the state to provide sufficient schools in provinces and districts to accommodate and cater for the different language preferences of learners. The state must also advance all official languages in education by creating and establishing more public schools, especially considering the growth in numbers of learners – particularly in certain areas within provinces – that places significant pressure on the capacity of existing schools.

3.6.3 Furthermore, the language policy in ordinary public schools is dealt with in terms of section 6 of the SASA, which already provides in section 6(2) that the governing body of an ordinary public school may determine the language policy of the school, subject to the Constitution, the SASA and any applicable provincial law (for example section 18A of the Gauteng School Education Act 6 of 1995, which contains provisions about the language policy of public schools).

3.6.4 Because language policy matters are dealt with in terms of separate provisions in the SASA and provincial legislation, it should not be included in this fashion in a national admissions policy. This once again creates uncertainty and confusion.

3.6.6 Furthermore, section 6(1) of the SASA provides for the determination of norms and standards for language policies in public schools by the Minister of Basic Education. Again, the purpose of these norms and standards is to create uniformity for all ordinary public schools across the country.

3.6.7 Such norms and standards was determined by the Minister in terms of section 6(1) of the SASA. Sections VB(2) and VB(3) cater specifically for the admission of learners, which should rather be cross-referenced in the national policy. These sub-sections provide the following:

VB (2) The learner must choose the language of teaching upon application for admission to a particular school.[9]

VB (3) Where the school uses the language of learning and teaching chosen by the learner, and where there is a place available in the relevant grade, the school must admit the learner.

3.6.8 In *Governing Body, Hoërskool Overvaal and Another v Head of Department of Gauteng Province and Others,*[10] the High Court interpreted the aforementioned provisions of the norms and standards and ruled the following of the reported judgment (page 173), with reference to section VB (3) of the norms and standards for language policy:

> (My note: The adverse in my view must also be true that where a school uses the language of learning and teaching not chosen by the learner the school is not compelled to admit the learner).

The court also ruled the following (at p. 174):

> In the result, I cannot, with respect, accept the argument offered on behalf of the respondents that language is irrelevant for purposes of deciding whether or not the school can be forced to accept learners seeking tuition in a language different from the one offered at the school.

3.6.9 It must be mentioned that the Gauteng provincial Department of Education applied for leave to appeal directly to the Constitutional Court following the judgement of the High Court in this case. Its application was dismissed by the Constitutional Court, however, as it had no reasonable prospect of success. The judgement of the High Court is therefore the binding authority in terms of the rule of law in this matter.

3.6.10 In view of the provisions of the norms and standards for language policy mentioned in paragraphs 3.6.6 and 3.6.7, coupled with the judgement in the Overvaal case, the draft national policy on admission for learners in public schools must agree with the norms and standards for language policy as well as the judgement in the Overvaal case – and not contradict it.

3.6.11 Therefore, the national policy should provide that, upon application for admission to the school, the learner must exercise a choice of language of tuition and the application form should make provision for the exercising of this choice. It should also be made clear – so that no unreasonable expectations are created – that the school can only admit learners whose choice of language corresponds with the language of tuition offered by the particular school, and that the school will not be obliged to admit a learner if the learner chooses a language of tuition that is not offered by the school.

3.7 **Paragraph 11 – tests**

3.7.1 We welcome the provisions for placement tests for specific courses or programmes. However, this is another example where the regulations in the Gauteng province – regulation 2C(1) – seem to contradict this paragraph of the draft national policy, because the Gauteng regulations prohibit any tests, with no exception. It provides another reason

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9 This clearly requires that the admission application must make provision for the exercising of such choice. The national policy cannot contradict this provision.

10 *Governing Body, Hoërskool Overvaal and Another v Head of Department of Gauteng Province and Others* [2018] 2 ALL SA 157 (GP).

why subordinate provincial legislation or policies should be aligned with a national policy, and why the national policy should state that it prevails over provincial legislation and regulations in case of any dispute.

3.7.2 It must be pointed out that the provisions in the draft national policy remains silent on the admission of learners in respect of schools with boarding houses. Learners who were admitted to school boarding houses must be treated equally in terms of the preferential placement criteria that favour parents who live in the feeder zone of the school. For all intents and purposes, these learners reside for school purposes within the feeder zone of the school.

4. Comments on "Documents required for admission of a learner" (paragraphs 14–19)

4.1 With reference to paragraph 14, it is suggested that an admission application form should also be designed electronically to be used nationally by all schools. Printed application forms must also be made available by schools in cases where parents have no internet access.

4.2 The application form should provide for a language of choice for tuition and for the date and time on which the application was submitted, according to which the preferential placement on the "first come, first served" principle can apply. This will give effect to the preferential criteria which is dealt with in paragraph 38 of the draft national policy.

4.3 The application administration and processes of provinces should be aligned with the draft national policy and not contradict it.

4.4 With reference to paragraph 15.1, no provision is made – as in the current policy – for parents to obtain at least abridged birth certificates from the regional office of the Department of Home Affairs. This requirement must be added, and only when a duplicate certificate is unattainable can parents submit sworn affidavits.

4.5 It is unacceptable that learners are unconditionally admitted when parents cannot provide birth certificates. Instead, these learners should only be admitted provisionally, as provided for in regulation 6 of the admission regulations for Gauteng. The regulation also provides that the application lapses when parents were allowed reasonable time to submit the necessary documentation but failed to do so, subject to an extension on good cause shown. The regulation should also provide for principals to report undocumented learners and learners whose applications lapsed to the District Director for ultimate submission to the Provincial Director who is responsible for admissions, so that these learners can be facilitated on a district or provincial level.

4.6 It is for example impossible for schools to give preference to learners of compulsory school-going age (in terms of paragraph 8 of the draft national policy) if their age cannot be determined by way of birth certificates. This provision may also prejudice learners who submitted their documentation and whose documentation was verified. The practical implication of the current regulation is that preference is given to learners whose admission documentation is not in order over learners whose documentation is in order.

4.7 Our comments in this regard also apply to paragraphs 23 and 24 of the draft national policy. It is an untenable situation that schools must admit learners irrespective of their compliance in terms of required documentation. Therefore, provision must be made for provisional admission so that there is an extended period for compliance. However, in case of ultimate non-compliance, it is very unreasonable towards other learners, parents and schools if undocumented learners are admitted to schools. These learners must be facilitated on a district or provincial level for suitable placement once support has been provided to allow parents to obtain the necessary documentation, or once other methods have been applied to verify essential information such as age, residential or work address. It cannot be expected of school principals or governing bodies to provide such support.

4.8 To be unprejudiced towards learners whose documentation is in order, the draft national policy should unequivocally give preference to the admission of learners whose documentation is in order after verification by the school before admitting and placing learners whose documentation is not in order. The latter should be placed on a waiting list until their documentation is in order.

4.9 Documents such as certified copies of the parents' IDs or other acceptable proof of identity should be required; also documents that provide proof of the parents' residential or work address. This is important to be able to apply the preferential placement requirements set out in paragraph 38 (d) of the draft national policy with reference to the feeder zone of the school.

4.10 Regulation 6(1)(f) of the admission regulations for Gauteng also requires that, where an applicant is enrolled at another school, the most recent school report of that learner must be furnished to the school where the learner is applying for admission. This should also be provided for in the draft national policy.

4.11 Although paragraph 19 is in order, it is incomplete. The paragraph should provide for forms that must be completed, as well as for the process that must be followed by learners or parents to exercise their right to object or appeal to the relevant provincial authority. This is an example where provincial authorities must formulate policy or publish guidelines that augments the national policy in terms of objections and appeals.

5. Comments on "Admission of learners who are not South African citizens" (paragraphs 20–22)

5.1 Paragraphs 21 and 22 are unacceptable and unreasonable, as these allow the admission of learners whose information could not be verified because their documentation is not in order. It also places unfair obligations on schools to verify the information further. This may also prejudice South African citizens whose documentation is in order but cannot gain access to schools because learners are placed and admitted whose documentation are not in order. This is unreasonable and irrational.

5.2 It must be mentioned that regulation 12 of the admission regulations for Gauteng provides for only provisional acceptance and admission, pending further support and verification. The draft national policy should also adopt this approach as it is more preferable than the

current formulation in the draft national policy. This is also a matter in which the requirements must be applied nationally to create uniformity.

5.3 In such a case, only provisional admission should be granted. However, learners whose documentation, after verification, is in order must receive preferential placement on a waiting list. Foreign learners whose documentation is not in order must be placed on another provisional admission waiting list to await further confirmation for admission once their documentation has been verified. Where the documentation is not available or in order upon assessment by the school, the District Director or the HOPD should facilitate the matter to aid and grant admission to a public school where places are available.

5.4 Schools that cannot verify whether foreign learners are legally in the Republic or whose status is such that they are foreigners who are authorised to receive training from a learning institution in the Republic are at risk of contravening section 39 of the Immigration Act 13 of 2002.

6. Comments on "School zoning" (paragraphs 34–39)

6.1 There are material differences between the admission regulations for Gauteng and the draft national policy, especially in terms of the criteria for preferential order of admission as referred to in paragraph 38. This is important and material, and provides another reason why the draft national policy should unequivocally state that it prevails over provincial regulations and policies.

6.2 For example, regulation 7(2)(a) of the provincial regulations for Gauteng provides that the learner's place of residence is closest to the school within the feeder zone. This contradicts paragraph 38(d)(i) of the draft national policy, which provides for learners whose parents reside in the feeder zone of the school. The latter is the correct and rational formulation as it aligns the residence of the learner within the feeder zone of the school and not necessarily closest to the school.

6.3 In the past, the criteria formulated in the provincial regulations for Gauteng created several problems and anomalies, and are inconsistent with the determination of feeder zones of schools. In fact, the requirement of the school closest to the learner's place of residence created small feeder zones within feeder zones, which is undesirable and irrational, and creates unnecessary practical and administrative difficulties in determining who resides closest to the school.

6.4 A further omission in the draft national policy is to provide for preferential placement of learners in grade R in primary schools for admission to grade 1 in the same school. We propose that, in respect of primary schools, learners who have already been admitted to grade R in a specific school should qualify for re-enrolment at the same school for purposes of grade 1, if the parents of these learners want to enrol them at the same school. Should the parents choose another school for purposes of admission to grade 1, the preferential principles in paragraph 38 should apply.

6.5 With regard to paragraph 38(c), the last sentence should be deleted. It is sufficient that the HOPD finds an alternative school within reasonable distance if school B is also

oversubscribed. It will be unreasonable and irrational to revert back to school A and place an obligation on that school, which may not be able to accommodate the learner because it is already full.

6.6 With reference to paragraph 36, more clarity should be provided if feeder zones are to be reviewed from time to time. The paragraph lacks particulars, which renders it vague. We suggest that the review should occur when the governing body of the school requests an amendment and review as a result of changed circumstances.

6.7 **Capacity**

6.7.1 Lastly – but importantly – the draft national policy does not refer in any respect to the capacity of the school for purposes of determining admissions for entry phase learners or the transfer of learners from one school to another in respect of other grade admissions.

6.7.2 Governing bodies should be able to state in their admission policies what the capacity is for different grades the so that parents are familiar with this when they apply for admission. It is only fair and reasonable from the perspective of the school and applicant learners if there is clarity about the school's capacity. The national policy should refer to the power and function of governing bodies in determining the capacity of the school in the school's admission policy.

6.7.3 Furthermore, the creation of norms and standards for determining the capacity of the school is envisaged in terms of section 5A(1)(b) of the SASA. This sub-section should be read with section 5A(2)(b), which lists the factors that must be considered in the formulation of norms and standards for determining capacity.

7. Conclusion

7.1 AfriForum trusts that our comments will be considered and received in the same constructive and positive manner that it is intended with. It should not be seen as criticism.

7.2 For this reason, we also included proposals and suggestions for improvement of the draft national policy. AfriForum appreciates that the draft national policy is an important document. We view it as essential to achieve uniformity nationwide and to create clarity for schools and governing bodies as a framework in which to formulate their admission policies – instead of leaving governing bodies with uncertainty in the myriad of national and provincial legislation and policies that so often create uncertainty when these contradict one another. In this regard, the principles of cooperative governance in the Constitution as well as the partnership model on which the SASA has been formulated should be fostered and promoted.

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