

**SECTION27 and BLIND SA's submission to the Committee on the Rights of
Persons with Disabilities**

**For consideration at the 18th Pre-Sessional Working Group in relation to the
development of the list of issues prior to South Africa's second periodic report**

7 July 2023

Executive Summary

SECTION27 and BLIND SA note the severe lack of reading material available to persons who are blind and visually impaired living in South Africa, which violates their constitutional rights to basic education, equality, dignity, freedom of expression and the right to participate in the cultural life of their choice. South Africa's ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled ("Marrakesh VIP Treaty") will significantly improve access to accessible formatted materials by allowing its member states to engage in cross-border exchange, as well as access online libraries and consortiums, guaranteeing immediate access to hundreds of thousands of titles in accessible formats. The state has refused to ratify the Marrakesh VIP Treaty on the basis that South Africa's copyright laws do not include an exception to copyright for persons who are blind and visually impaired, which the Marrakesh VIP Treaty requires. However, in September 2022, in a case initiated by Blind SA, represented by SECTION27, the South African Constitutional Court rectified this defect by crafting an exception to copyright for persons who are blind and visually impaired that must be read into the Copyright Act immediately. As such, there are no further legal barriers preventing the state from immediately ratifying the Marrakesh VIP Treaty. SECTION27 and BLIND SA therefore propose that the state respond to the following questions:

- When does South Africa intend to ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled?
- Please indicate what measures have been taken towards the ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, and the reasons for delaying ratification.
- Please indicate whether the Copyright Amendment Bill has come into force, and if not, what processes must still be initiated to ensure this.

SECTION27 and BLIND SA also note the state's failure to provide learners who are blind with all their prescribed braille textbooks. This not only violates their rights to equality and a basic education but is inconsistent with a settlement agreement entered into by the state in 2017, in which it undertook to provide these. SECTION27 and BLIND SA therefore propose that the state responds to the following questions:

- What steps has the state taken to ensure that every learner who is blind receives their prescribed braille textbooks for all subjects for their relevant grades at the start of an academic year?
- What steps has the state taken to monitor compliance with the settlement agreement consented to in the matter *South African National Council for the Blind and Others v Minister of Basic Education and Others* case no. 72622/17?

SECTION27 and BLIND SA note further that in many schools for the blind across the country, there is a shortage of braille machines which results in two or more learners needing to share. This causes delays in learning to write in braille, and SECTION27 and BLIND SA therefore propose that the state respond to the following question:

- What steps has the state taken to ensure that all learners who are blind have their own braille machine to write with?

SECTION27 and BLIND SA also note that learners who are blind are not receiving adequate Orientation and Mobility training or training regarding Skills for Daily Living. Consequently, learners are left to continuously depend on others for assistance and are denied an opportunity to engage in daily tasks independently. As such, SECTION27 and BLIND SA propose that the state respond to the following question:

- What steps has the state taken to ensure that Orientation and Mobility training as well as Skills for Daily Living training are being provided to learners who are blind?

Lastly, SECTION27 and BLIND SA note the state's failure to provide qualifying learners with disabilities with state-subsidised scholar transport in terms of the National Learner Transport Policy, despite the critical role such provisioning plays in affording these learners access to basic education. SECTION27 and BLIND SA are also concerned by the lack of accurate, up-to-date data provided by certain provincial departments of education indicating how many learners with disabilities are in need of scholar transport and how many learners are in fact being transported. SECTION27 and BLIND SA therefore propose that the state respond to the following questions:

- What steps are being taken to ensure that all learners with disabilities are provided with appropriate scholar transport to school and back?
- What steps are being taken to ensure that learners with disabilities are provided with scholar transport that takes into account the nature of their disability?
- What efforts are being made to address certain provinces' failures to report adequately on the number of learners with disabilities in need of scholar transport and the extent to which they are receiving this?
- What efforts are being made to ensure that the Department of Education's data on learners with disabilities in need of scholar transport is regularly updated?

Introduction

2. SECTION27 is a public interest law clinic based in Johannesburg, Gauteng, South Africa, that seeks to advance the rights to basic education and health care services throughout the country through research, advocacy and litigation.
3. BLIND SA is an organisation based in Alberton, Gauteng, South Africa, that aims to equip people with visual disabilities with the skills they need to fully and independently participate in society through education, braille and developmental services. BLIND SA advocates for equality and the promotion of the rights of people with visual disabilities across the country.
4. SECTION27 and BLIND SA welcome the opportunity to present this joint submission to the Committee on the Rights of Persons with Disabilities (“the Committee”) for consideration at its 18th Pre-Sessional Working Group, in its determination of the List of Issues Prior to Reporting (“LOIPR”) concerning South Africa’s second periodic report.
5. In this submission, SECTION27 and BLIND SA discuss firstly, the state’s failure to ratify the Marrakesh VIP Treaty, which is preventing persons who are blind and visually impaired in South Africa from accessing significant amounts of reading materials in accessible formats. Secondly, this submission highlights reports of the state’s failure to provide prescribed braille textbooks to all learners who are blind. Thirdly, this submission discusses the need for all learners who are blind to be provided with their own braille machines to ensure they are given proper opportunity to learn to write in braille. Fourthly, this submission discusses the state’s failure to provide learners who are blind with Orientation and Mobility training as well as Skills for Daily Living training at school, which has affected their ability to walk independently and engage in daily tasks on their own. Lastly, this submission highlights the state’s failure to ensure that all qualifying learners with disabilities attending public special schools in South Africa are provided with sufficient, appropriate, state-subsidised transport to school.

The legal framework protecting the rights of learners who are blind or visually impaired to reading materials, braille machines, Orientation and Mobility training and Skills for Daily Living training, and the right of learners with disabilities to scholar transport

The Convention on the Right of Persons with Disabilities

The right to education

6. South Africa ratified the UN Convention on the Rights of Persons with Disabilities (the “Convention”) as well as the Optional Protocol to the Convention, in November 2007. As the Convention entered into force on 3 May 2008, South Africa is obliged to fulfil the rights and obligations enshrined therein.
7. In particular, article 24 of the Convention protects the right of persons with disabilities to education and imposes obligations on States Parties to realise this right without discrimination, and on the basis of equal opportunity, by ensuring an inclusive education system at all levels. This includes, amongst others, the obligation on States Parties to ensure that persons with disabilities can access inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.¹ In addition, this includes the obligation to reasonably accommodate individuals’ requirements and needs when providing such education.²
8. Article 24(3)(a) of the Convention also states that:

“States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

- (a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

¹ Article 24(2)(b) of the Convention.

² Article 24(c) of the Convention.

...

(b) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximise academic and social development”.

9. The Committee’s General Comment 4, which further explains article 24 of the Convention and the right to inclusive education, reiterates that all parts of States’ Parties education systems must be accessible to people with disabilities, but adds that this includes, amongst others, the provision of textbooks, learning materials and scholar transport.³

10. In addition, General Comment 4 states that education settings have an immediate duty to provide reasonable accommodations to persons with disabilities and defines these accommodations as changes that should be made, where possible, to meet students’ individual needs, such as requiring information in a certain format, or access to special equipment or technology.⁴ General Comment 4 also highlights that States Parties should attend to learners’ reasonable accommodations immediately.⁵

The right to participation in cultural life, recreation, leisure, and sports

11. Article 30 of the Convention protects the right of persons with disabilities to take part, on an equal basis with others, in cultural life and obliges States Parties to take all appropriate measures to ensure, amongst others, that persons with disabilities enjoy access to cultural materials in accessible formats.⁶

12. In addition, the Convention requires that States Parties’ laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.⁷

³ Committee on the Rights of Persons with Disabilities *A guide to Article 24: The Right to Inclusive Education* p 5.

⁴ *Ibid* p6.

⁵ *Ibid* p7.

⁶ Article 30(1)(a) of the Convention.

⁷ Article 30(3) of the Convention.

The South African Constitution

The right to basic education

13. The right to basic education is enshrined in section 29(1)(a) of the South African Constitution, which states that everyone has the right to a basic education, including adult basic education. Unlike other socio-economic rights protected in the Constitution,⁸ the right to basic education is unqualified, and is not subject to internal qualifications such as “progressive realisation”, within “available resources” subject to “reasonable legislative measures”. As such, the South African Constitutional Court has interpreted this right as being immediately realisable,⁹ and therefore imposing a direct duty on the State to ensure its realisation.
14. South African Courts have also given substantive content to the right to basic education, and have interpreted this as including, amongst others, the provision of state-subsidised scholar transport to learners who are unable to afford transport to school¹⁰ and the provision of textbooks to each learner.¹¹

The right to equality, dignity, freedom of expression and the right to participate in the cultural life of one’s choice

15. Apart from the right to basic education, other constitutionally protected rights are also affected by the lack of accessible formatted materials in South Africa, the shortage of braille machines used by learners who are blind, the failure to provide learners who are blind with

⁸ Such as the right to housing enshrined in section 26 of the Constitution. In particular, section 26(1) and (2) state that everyone has the right to have access to adequate housing, and that the state must take *reasonable legislative and other measures, within its available resources, to achieve the progressive realisation* of this right.

⁹ *Governing Body of the Juma Masjid Primary School & Another v Ahmed Asruff Essay NO and Others* 2011 (8) BCLR 761 (CC) para 37.

¹⁰ See *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG). In this case, Plasket J stated that “... [I]n instances where scholars’ access to schools is hindered by distance and an inability to afford the costs of transport, the State is obliged to provide transport to them in order to meet its obligations, in terms of s 7(2) of the Constitution, to promote and fulfil the right to basic education.”

¹¹ See *SECTION27 and Others v Minister of Basic Education and Another* (case no. 24565/12) 4 October 2012 (unreported) and *SECTION27 and Others v Minister of Basic Education and Another* 2013 (2) SA 40 (GNP), and *Basic Education For All & Others v Minister of Basic Education & Others* 2014 (4) SA 274 (GNP). Also, in the case of *South African National Council for the Blind and Others v Minister of Basic Education and Others* (case no 72622/17) (GP), a settlement agreement was reached between the parties on the basis that all visually impaired learners are entitled to their own textbooks for every learning area at the start of the academic year.

training in Orientation and Mobility as well as Skills of Daily Living and the failure to provide scholar transport to learners with disabilities. These include the right to equality¹² and dignity.¹³

16. In addition, the severe lack of accessible formatted materials in South Africa also affects the rights of persons who are blind or visually impaired to freedom of expression, which includes the freedom to receive or impart information or ideas,¹⁴ and the rights to participate in the cultural life of their choice.¹⁵

South African Schools Act

17. Section 12(4) of the South African Schools Act 84 of 1996 (“SASA”) states that the Member of the Executive Council must, where reasonably practicable, provide education for learners with special education needs at ordinary public schools and provide relevant educational support services for such learners.

18. In addition, section 12(5) of SASA states that the Member of the Executive Council must take all reasonable measures to ensure that the physical facilities at public schools are accessible to disabled persons.

Additional documents underscoring the state’s responsibility to provide scholar transport to learners with disabilities as well as reading materials, including braille textbooks, braille machines, and training on Orientation and Mobility and Skills of Daily Living to learners who are blind or visually impaired

19. The Department of Transport has published the *National Learner Transport Policy* (the “NLTP”), which highlights that when identifying learners who qualify for state-subsidised scholar transport, learners with disabilities must be prioritised.

¹² Section 9 of the Constitution.

¹³ Section 10 of the Constitution.

¹⁴ Section 16(1)(b) of the Constitution.

¹⁵ Section 30 of the Constitution.

20. In addition, the national *Guidelines for Full Service/ Inclusive Schools*¹⁶ emphasises the importance of accessibility to Full Service and Inclusive Schools, and the steps schools must take to provide transport to learners with disabilities.
21. Lastly, the *Guidelines to Ensure Quality Education and Support in Special Schools and Resource Centres*¹⁷ obliges special schools to provide transport to all learners in need, as well as ensure the availability of adequate and appropriate learning and teaching support material which should be provided to all learners in an appropriate and relevant format, depending on the learners' needs. Special schools are also obliged to ensure that the principle of one textbook per subject per learner is adhered to.
22. In addition, these guidelines indicate that school principals must ensure effective curriculum management, which includes providing adequate and appropriate assistive devices and technology and ensuring that these are effectively integrated in the teaching and learning process.¹⁸ The guidelines also indicate that special schools must be equipped with appropriate, up-to-date, and well maintained material resources, which include personal devices for learners such as Perkins Braille.¹⁹
23. Lastly, these guidelines require that principals of special schools ensure that periods are introduced in the school timetable for mastering specific skills such as orientation and mobility.²⁰
24. Despite this international and domestic framework, access to reading materials in accessible formats for persons who are blind or visually impaired, including learners, is still largely limited, and not all learners who are blind are provided with all their prescribed braille textbooks, adequate access to braille machines, or provided with training on Orientation and Mobility and Skills of Daily Living. In addition, thousands of learners with disabilities are still being denied access to basic education through the state's failure to provide sufficient and appropriate scholar transport. These challenges will be discussed in further detail below.

¹⁶ Department of Basic Education *Guidelines for Full Service/ Inclusive schools* (2010).

¹⁷ Department of Education *Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres* (2014).

¹⁸ Ibid p8.

¹⁹ Ibid p17.

²⁰ Ibid p8

South Africa's failure to ratify the Marrakesh VIP Treaty

The Book famine and its impact on South Africa

25. Globally, the world is experiencing a so-called “book famine”, which refers to the severe lack of reading materials for persons who are blind or visually impaired. According to the World Blind Union, less than 10% of all published works are available in formats such as Braille, large print, DAISY or audio editions.
26. Tragically, in South Africa, the percentage of reading material available to persons who are blind or visually impaired is far lower, as less than 0,5% of published books are available in accessible formats,²¹ despite around 11% of the population living with visual disabilities.²²
27. The lack of accessible formatted materials has a devastating impact on the lives of persons who are blind or visually impaired in South Africa. In particular, their right to basic education is increasingly violated as schools catering specifically for learners who are blind or visually impaired struggle with insufficient quantities of textbooks in accessible formats for their students, many times for specific subjects such as maths and science. This is often as a result of the high cost of converting a book into an accessible format such as Braille,²³ and even well - resourced schools experience such shortages.
28. In schools catering for learners who are blind or visually impaired, the lack of accessible formatted materials also affects teachers' abilities to prepare for lessons, as they have access to only a limited number of books to teach from.

²¹ The Marrakesh VIP Treaty defines an accessible format copy as “a copy of work in an alternative manner of form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons”. This definition was recently adopted by the South African Constitutional Court and read into the Copyright Act in the case *BLIND SA v Minister of Trade Industry and Competition and others* 2023 (2) BCLR 117 (CC) (21 September 2022).

²² Statistics South Africa Profile of persons with disabilities in South Africa (Census 2011)

²³ For example, it costs around R600 to convert only one Grade 4 book into Braille.

29. In addition to these challenges, there are only a limited number of service providers who can convert books into braille or large print, impacting the availability of these formats.
30. At a tertiary level, most books and study materials are not readily available in accessible formats in libraries or stores, and students who are blind or visually impaired must often incur the cost of converting reading materials necessary for research or studying purposes into accessible formats themselves. This is not only an extremely costly process, but as the conversion process is time consuming, students often receive accessible formatted copies at a much later stage, compared to other students.
31. In addition, an extremely limited variety of books are available in accessible formats for private use, and those that are available are very expensive. Consequently, poorer individuals are unable to afford these reading materials. Access to reading materials is fundamentally linked to a feeling of inclusion within society, and the denial thereof prevents individuals who are blind or visually impaired from engaging in social and cultural life.
32. In light of the above, it is evident that persons who are blind or visually impaired in South Africa are continually denied access to reading materials which effects not only their right to basic education and their ability to learn, but infringes upon their rights to equality, dignity, freedom of expression and ability to participate in cultural life.
33. This status quo was recently affirmed in a case initiated by Blind SA, represented by SECTION27. In the case of *Blind SA v Minister of Trade, Industry and Competition and Others*²⁴ (the “*Blind SA judgment*”) the Constitutional Court declared the Copyright Act unconstitutional and invalid to the extent that it limited access to books in accessible formats such as Braille and large print for persons who are blind and visually impaired. As interim relief, the Court read-in a set of provisions that immediately permit blind or visually impaired persons to convert books into accessible formats without requiring the authorisation of the copyright holder. This provision draws almost entirely from the Marrakesh VIP Treaty. The Court further ordered Parliament to remedy the constitutional invalidity of the current Act within two years of the date of the judgment.

²⁴ 2023 (2) BCLR 117 (CC).

The Marrakesh VIP Treaty and its implications for South Africa

34. The *Blind SA* judgment did not deal with the Marrakesh VIP Treaty. The Marrakesh VIP Treaty was adopted 10 years ago by the member states of the World Intellectual Property Organisation (“WIPO”) to address the global book famine and improve access to published works for persons who are blind or visually impaired.
35. States wanting to accede to the Marrakesh VIP Treaty must adhere to two main requirements. Firstly, states must ensure that their copyright laws do not hinder the availability of reading materials to persons who are blind or visually impaired. In particular, their domestic copyright laws must include exceptions that allow for the reproduction, distribution and making available of materials in formats accessible to persons who are blind or visually impaired without the consent of the copyright holder. In terms of the *Blind SA* judgment, discussed in more detail below, this has now occurred.
36. Secondly, the Marrakesh VIP Treaty requires the cross-border exchange of accessibly formatted materials between member states. This would allow, for example, a book converted into Braille in one member state to be shared with an individual or organisation in another member state.
37. In light of the limited availability of reading materials for persons who are blind or visually impaired in South Africa, the ratification of the Marrakesh VIP Treaty has significant benefits.

Improved access to reading materials through cross-border sharing

38. As a member state, South Africa will be able to engage in cross-border sharing with the 118 countries who are already party to the Marrakesh VIP Treaty. South Africa will also have immediate access to online consortiums and libraries, such as Bookshare and the Accessible Books Consortium, which hold hundreds of thousands of titles in accessible formats. As seen in India, where ratification of the Marrakesh VIP Treaty provided access

to almost 5 million books compared to the 200-300 before ratification,²⁵ South Africa's ratification can significantly increase the availability of reading materials for people who are blind or visually impaired.

Reduction in costs

39. Through the cross-border exchange of reading materials, individuals will no longer need to incur costs converting materials into accessible formats if they are already available in, for example, another member state or online library, thereby saving time and money that can be used to convert South African material into accessible formats.

The realisation of individual's constitutional rights

40. Increased access to reading material has the potential to improve an individual's knowledge and skills, as well as increase access to educational and professional opportunities, employment, social inclusion and participation in cultural life. The ratification of the Marrakesh VIP Treaty will therefore advance the realisation of the rights of persons who are blind and visually impaired to basic education, equality, dignity, freedom of expression and the right to participate in cultural life.

Strengthened alignment with the Convention

41. In its Preamble, the Marrakesh VIP Treaty recalls:

“the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities”.

²⁵ Dao Thu Huong, UNDP Viet Nam, Mao Meas, UNDP Cambodia, and Kazuyuki Uji, UNDP Bangkok Regional Hub ‘Major steps being taken to end the ‘book famine.’ (2022) available at www.undp.org/asia-pacific/blog/major-steps-being-taken-end-book-famine.

42. As such, the Marrakesh VIP Treaty aims to align itself with the purposes of the Convention, and South Africa's ratification will therefore assist in ensuring that its domestic legal framework also gives effect to the Convention's human-rights based principles.

South Africa's refusal to ratify the Marrakesh VIP Treaty

43. South Africa has often indicated its intention to ratify the Marrakesh VIP Treaty. However, since the Treaty's adoption, the state has justified its refusal to ratify on the basis that the Copyright Act 98 of 1978 was deficient and needed to be amended to include the requisite exceptions for persons who are blind or visually impaired. This justification is evidenced in the responses South Africa provided to this Committee in relation to its Initial Country Report.

44. In particular, in the Committee's previous List of Issues, dated 14 March 2018, compiled in relation to South Africa's Initial Country report, South Africa was required to respond to the following questions in relation to the right to participation in cultural life, recreation, leisure and sport, protected in article 30 of the Convention:

“32. Please provide information on measures taken towards the ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.”²⁶

45. In its response, dated 20 June 2018, South Africa stated the following:

“181. South Africa is currently amending its Intellectual Property (IP) Policy, as well as amending the Copyright Act of 1978. Cognisance was given to incorporate aspects of the Marrakesh Treaty into the above amendment processes.

182. Once the above processes have been completed, the Inter-Ministerial Committee on Intellectual Property will analyse all

²⁶ Committee on the Rights of Persons with Disabilities *List of Issues in Relation to the Initial Report of South Africa* (25 April 2018) CRPD/C/ZAF/Q/1 para 32.

WIPO Treaties, including the Marrakesh Treaty, in order to determine whether they present opportunities that could benefit the country.”²⁷

46. Subsequent to this response, the Committee noted in its Concluding Observations that, in relation to the right to participation in cultural life, recreation, leisure and sport:

“48. The Committee is concerned about the delay in revising the Copyright Act (1978) and ratifying the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

49. The Committee recommends that the State party expedite action to complete the process of revising the Copyright Act (1978) and ratifying the Marrakesh Treaty.”²⁸ (emphasis theirs)

The states refusal to ratify is no longer justified

47. SECTION27 and BLIND SA recognise that the State has taken steps to revise the Copyright Act through the Copyright Amendment Bill (“CAB”), which includes an exception to copyright for persons who are blind and visually impaired in a proposed new section 19D. However, this process has been characterised by significant delays, and to date, remains incomplete.²⁹

²⁷ Committee on the Rights of Persons with Disabilities *List of Issues in Relation to the Initial Report of South Africa (Addendum) and Replies of South Africa to the List of Issues* (2 July 2018) CRPD/C/ZAF/Q/1/Add.1 Question 32, paras 118 and 119.

²⁸ Committee on the Rights of Persons with Disabilities *Concluding Observations on the Initial Report of South Africa* CRPD/C/ZAF/CO/1 (23 October 2018) paras 48-49.

²⁹ On 27 July 2015, the Department of Trade Industry and Competition published a draft Copyright Amendment Bill (“CAB”) for public comment, which proposed the inclusion in the Copyright Act of a new section 19D which contained an exception to copyright for persons with disabilities. On 8 June 2016, Cabinet approved the CAB for introduction to Parliament. On 16 May 2017, the CAB was introduced in the National Assembly, as a “section 75 bill” and referred to the Portfolio Committee on Trade and Industry, which issued a call for public comments on 29 May 2017. A second call for public comments was made on 29 June 2018, and on 5 December 2018, the CAB was passed by the National Assembly and sent to the National Council of Provinces. On 28 March 2019, the CAB was passed by the National Council of Provinces and sent to the President for his consideration, by which time more than 3 years had passed since a draft of the CAB was first circulated for public comment. After 14 months, the President expressed his reservations about the constitutionality of the CAB and referred the bill back to the National Assembly to be considered afresh. At no point did the President raise concerns about the proposed new

48. It was because of these unreasonable delays in finalising the CAB, and the continued violation of the rights of persons who are blind and visually impaired, that the *Blind SA* case was launched in the Constitutional Court in 2022.
49. On 21 September 2022, the Constitutional Court handed down the *Blind SA* judgment³⁰ and confirmed that the Copyright Act was unconstitutional, invalid, and inconsistent with the rights of persons with visual and print disabilities to the extent that it limited access to published works in accessible format copies. In addition, the Court gave Parliament 24 months to remedy the defects within the Copyright Act.
50. However, as indicated previously, the Court also crafted an exception to copyright that ensures that persons who are blind or visually impaired no longer need to seek the consent of the copyright holder to convert published works into an accessible format. Importantly, while waiting for Parliament, the Court ordered that this exception be read into the Copyright Act immediately as “section 13A”, thereby rectifying the Copyright Act so that it aligns with the requirements of the Marrakesh VIP Treaty.³¹

section 19D of the CAB. On 15 June 2020, the CAB was returned to the National Assembly, and on 31 May 2021, the National Assembly referred the CAB back to the Portfolio Committee on Trade and Industry for further consideration. On 1 September 2022, the CAB was passed by the National Assembly and referred to the National Council of Provinces, where public hearings have recently been held in all 9 provinces. Currently, the CAB is still before the NCOP.

³⁰ 2023 (2) BCLR 117 (CC) (21 September 2022)

³¹ The Constitutional Court’s crafted “Section 13A” states the following:

“Section 13A - Exceptions applicable to beneficiary persons

(1) For the purposes of section 13A -

(a) ‘accessible format copy’ means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy must be used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;

(b) ‘beneficiary person’ means a person who –

(i) is blind;

(ii) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(iii) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would normally be acceptable for reading regardless of any other disabilities;

(c) ‘literary works’ means literary works as defined in section 1 of this Act, and shall be taken to include artistic works forming part of a literary work;

(d) ‘permitted entity’ means an entity, including a government institution or non-profit organisation, that provides education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, and has the provision of such services as one of its primary activities or institutional obligations.

51. The Court also ordered that two definitions drawn directly from the Marrakesh VIP Treaty be read into our Copyright Act namely, the Marrakesh VIP Treaty’s definition of a “beneficiary person” (the person who will benefit from the new exception to copyright that the court has crafted), and the meaning of an “accessible format copy”. The adoption of these definitions aligns our Copyright laws even further with the Marrakesh VIP Treaty.
52. The immediate reading in of the Constitutional Court’s section 13A exception has now rectified the deficiencies in the Copyright Act, and there are no longer any legal reasons why South Africa should not immediately ratify the Marrakesh VIP Treaty. Unfortunately, more than 9 months have passed since the Constitutional Court judgment, and the State has still not taken any steps to initiate the process of ratification.

The State’s responsibility to initiate and complete the process of ratifying the Marrakesh VIP Treaty

53. In terms of section 231(1) of the Constitution, the negotiating and signing of all international agreements is the responsibility of the National Executive. However, before an agreement or treaty is signed, the President’s approval through a so-called “Presidential Minute”, must be obtained. This process begins with obtaining a legal opinion from the State Law Advisors of the Department of Justice and Constitutional Development which will determine whether the Marrakesh VIP Treaty is consistent with South Africa’s domestic law.

(2) A permitted entity may, without the authorisation of the owner of copyright in a literary work, make an accessible format copy of the literary work; obtain from another permitted entity, an accessible format copy, and supply those copies to beneficiary persons by any means, including non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, provided that all of the following conditions are met –

- (a) the permitted entity wishing to undertake said activity has lawful access to that work or a copy of that work;
- (b) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;
- (c) such accessible format copies are supplied exclusively to be used by beneficiary persons; and
- (d) the activity is undertaken on a non-profit basis.

(3) A beneficiary person, or someone acting on their behalf, including a primary caretaker or caregiver, may make an accessible format copy of a work for the personal use of the beneficiary person or otherwise may assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.”

54. Thereafter, the relevant desk at the Department of International Relations and Cooperative Government (“DIRCO”) will provide inputs on the Treaty in relation to any relevant political considerations, and then request a legal opinion from the Office of the Chief State Law Advisors (“OCSLA”) (International Law) within DIRCO on whether the Treaty is consistent with international law and South Africa’s international obligations.
55. The text of the treaty must then be certified by OCSLA (IL) within DIRCO. Once certified, the responsible Minister (in this case the Minister of Trade Industry and Competition) must counter-sign the President’s so-called “Presidential Minute”, and the documents must be presented to the Presidency for approval to sign the Treaty.
56. The President grants approval by signing the “Presidential Minute”, and once signed, the Treaty must be deposited with the South African Treaty Section, located in the OCSLA (IL) in DIRCO.
57. However, according to section 231(2) of the Constitution, the Marrakesh VIP Treaty will only be binding on the Republic once it has been approved by resolution in both the National Assembly and the National Council of Provinces.
58. To initiate this process, a Cabinet memorandum must be submitted to Cabinet to approve ratification / accession of the a treaty in Parliament. After approval from Cabinet, the treaty must be tabled in Parliament. Once tabled, it will be referred to the relevant Portfolio Committee of the National Assembly and the National Council of Provinces, who must recommend approval.
59. Once approval has been obtained by both Houses of Parliament, the act of ratification must be undertaken by depositing an Instrument of Ratification or Accession with the depositary of the treaty.
60. As evidenced above, the ratification of the Marrakesh VIP Treaty can only be initiated and completed by relevant state departments and parliamentary officers, leaving civil society with very little recourse in the event that these officials fail to initiate and complete the process of ratification. From the enquiries of SECTION27 and Blind SA, this process has not been initiated.

Proposed questions to the State

61. In light of the above, SECTION27 and BLIND SA propose that the state respond to the following questions in terms of article 30 of the Convention:

- When does South Africa intend to ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled?
- Please indicate what measures have been taken towards the ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, and the reasons for delaying ratification.
- Please indicate whether the Copyright Amendment Bill has come into force, and if not, what processes must still be initiated to ensure this?

The state's failure to provide sufficient Braille textbooks to learners who are blind and visually impaired

62. All learners, including learners who are blind or visually impaired, are entitled to his or her own textbook for every learning area at the commencement of each academic year.

63. However, for many learners who are blind, this right is not being adequately realised. As a result of severe shortages in the provision of prescribed Braille textbooks, the South African National Council for the Blind, the South African Braille Authority and three schools for the blind were forced to launch a case in 2017 in the High Court, Gauteng Division, Pretoria, compelling the national Department of Education (“DBE”), and all nine of its provincial departments, to produce and deliver braille textbooks to all learners who are blind that attend schools for the blind as well as full-service schools across South Africa.³²

64. The case was settled out of court, and the terms of the [agreement](#) included the following:

³² *South African National Council for the Blind and Others v Minister of Basic Education and Others* case no. 72622/17.

- An audit of all schools for the blind (22 schools in total) and full service schools was to be undertaken by the DBE to determine the number of learners using braille at each school; the number of prescribed braille textbooks already available to these learners and the language they are available in; those prescribed braille textbooks that are not available; the braille production facilities at each school; and the number of staff qualified to operate braille production units at these schools.
- Where master copies of prescribed textbooks existed, the DBE undertook to provide every learner with his or her own braille textbook for every learning area for the 2018 academic year, and deliver all prescribed braille textbooks for 2019 by 30 November 2018.
- The DBE undertook to provide the master copies of all prescribed braille textbooks in English and Afrikaans within 6 months of the signing of the settlement agreement, and deliver master copies of prescribed braille textbooks in the remaining African languages within 18 months of signing the settlement agreement;
- The DBE undertook to reproduce and deliver the prescribed braille textbooks to each learner within 3 months after the master copy of each textbook is produced;
- As an interim plan, the parties also agreed that all affected schools will have access to a functioning braille production unit and be provided with staff members who were trained and skilled to operate these units.
- Lastly, the DBE undertook to establish a Braille Advisory Committee that would meet on a quarterly basis to ensure parties' continued engagement with each other on, amongst others, the continued provision of teacher support materials to learners who are braille users.

65. Unfortunately, the DBE has only partially complied with this court order. During June 2023, BLIND SA visited 6 schools for the Blind (4 schools in Limpopo and 2 schools in

the Free State), to investigate the provision of prescribed braille textbooks. During its visits, it found that 5 of these schools were experiencing severe shortages.

66. In another school for the blind located in Qwa-Qwa, Free State, BLIND SA has been advised that the school has been able to procure braille textbooks over the last two years but has not been able to procure all the prescribed braille textbooks due to financial constraints. Consequently, in some grades, less than 50% of the prescribed braille textbooks have been procured. Despite engagements with the provincial education department, and its undertaking to procure the outstanding braille textbooks, no progress has been made.

67. In addition, the 22 schools for the blind mentioned in the court order last received workbooks in 2019, which were 2016 editions. However, mainstream schools are already using updated versions of these workbooks.

68. Lastly, there has only been partial provisioning of prescribed braille textbooks in the remaining African Languages.

69. The state's failure to provide all learners who are blind with the prescribed braille textbooks for each subject area at the start of every academic year jeopardises teaching and learning. These challenges have serious consequences for learners' academic performance and educational development, which violate their right to basic education, as well as their rights to equality and dignity.

70. In light of the above, SECTION27 and BLIND SA propose that the state respond to the following questions in respect of article 24 of the Convention:

- What steps has the state taken to ensure that every learner who is blind receives their prescribed braille textbooks for all subjects for their relevant grades at the start of an academic year?

- What steps has the state taken to monitor compliance with the settlement agreement consented to in the matter *South African National Council for the Blind and Others v Minister of Basic Education and Others* case no. 72622/17?

The need for all learners who are blind to be provided with their own braille machines

71. The availability of braille machines is fundamental to teaching learners who are blind how to write, and realising article 24 of the Convention, which requires States Parties to facilitate the learning of braille.
72. However, in many schools for the blind across the country, two to three learners must share one braille machine. This is analogous to learners needing to share a pen when learning how to write, and inevitably causes delays which effect the rate at which learners learn to write in braille.
73. While SECTION27 and BLIND SA acknowledge that steps are being taken to provide braille machines to schools for the blind, this progress has been unreasonably slow. The Department of Basic Education has been made aware of the shortages of braille machines in schools for the blind, and has been alerted to this in, for example, meetings held by the Portfolio Committee on Basic Education.³³
74. In addition, in February 2020, BLIND SA submitted a memorandum to the Minister of Basic Education noting the urgent need for learners who are blind to each be provided with a braille machine. Despite this, the shortage of braille machines has continued.
75. In light of the above, SECTION27 and BLIND SA propose that the state respond to the following questions related to article 24 of the Convention:

³³ Challenges concerning the shortage of Braille machines in schools in the Northern Cape, that resulted in three learners sharing one machine, were raised in a meeting held by the Portfolio Committee on Basic Education on 9 July 2019. This discussion is available at: <https://pmg.org.za/committee-meeting/28524/>. On 30 October 2019, the Chairperson of the Portfolio Committee on Basic Education highlighted that children should not share a braille machine as each child should have their own for effective learning. In response, the Director-General of Basic Education indicated that he would like to obtain the details of these instances, in order to verify them, so that the DBE could address this issue. This discussion is available at: <https://pmg.org.za/committee-meeting/29205/>.

- What steps has the state taken to ensure that all learners who are blind have their own braille machine to write with?

The state's failure to provide learners with adequate training on Orientation and Mobility and Skills for Daily Living

76. Orientation and Mobility training is critical to ensuring that learners who are blind are able to move confidently, freely and independently in their environments and other surroundings. In addition, Skills for Daily Living (“SDL”) training teaches learners who are blind how to engage independently in daily tasks such as dressing, eating, self-care, personal hygiene, etc.

77. Despite their importance, schools for the blind are failing to teach learners these skills, and it is being left to a limited number of NGOs to do so, leaving many learners ill equipped to manage even basic skills required for daily life and independent mobility. The implications of this became even more evident during the COVID-19 pandemic when social distancing was enforced. As many learners who are blind were not taught the skill to move independently or unassisted on school premises, they still needed to rely on other learners and school staff, despite the need for social distancing.

BLIND SA has engaged the DBE on this issue and delivered a memorandum to the Minister of Basic Education in February 2020 highlighting, amongst others, the need for Orientation and Mobility training as well as SDL training. However, no progress has been made to ensure that schools for the blind are providing this.

In light of the above, SECTION27 and BLIND SA propose that the state respond to the following question in relation to article 24 of the Convention:

- What steps has the state taken to ensure that Orientation and Mobility training as well as Skills for Daily Living training are being provided to learners who are blind?

The state's failure to provide state-subsidised scholar transport to learners with disabilities

78. It is estimated that in the 2022/2023 financial year, 43 182 learners with disabilities across South Africa qualified for, and were in need of, state-subsidised scholar transport.³⁴ However, according to recent statistics provided by the national Department of Education in May this year, only 28 920 of these learners are being assisted by the State.³⁵

79. As highlighted above, the South African High Court has identified scholar transport as a component of the right to basic education.³⁶ In addition to this, the NLTP, the *Guidelines for Full Service/ Inclusive Schools* as well as the *Guidelines to Ensure Quality Education and Support in Special Schools and Resource Centres* detail the obligations on the state to ensure that learners with disabilities are able to access basic education through the provision of state-subsidised learner transport.

80. In South Africa, the provision of learner transport is the joint responsibility of the Department of Transport and the DBE. However, provincial departments of education are responsible for selecting learners who will benefit from subsidised learner transport services. In the selection of learners, provincial criteria may not discriminate on the basis of gender and race and must not deny access for learners from disadvantaged communities. In addition, principals, after discussions with their school governing bodies, must identify beneficiaries in line with the following criteria:

- Beneficiaries must be needy learners from grade R to 12 as prescribed;
 - Learner transport will be subsidised to the nearest appropriate school only and not to a school of parental choice (parental choice means parents prefer to enrol their children at schools other than the nearest suitable school);
 - Priority must be given to learners with disabilities, taking into considering the nature of the disability;
 - Priority must be given to primary schools learners who walk long distances to schools;
- and

³⁴ Presentation made by the DBE titled "Provision of Learner Transport: Briefing to the Portfolio Committee on Basic Education (16 May 2023) slide 9.

³⁵ Ibid slide 9.

³⁶ See footnote 10.

- Existing learner transport services must be taken into account when identifying beneficiaries as no learner transport services will be provided in areas where public transport is available in order to avoid duplication of services and resources.³⁷

81. The NLTP admits, in as early as 2015, that the “current learner transport system does not make sufficient provision for the transportation of learners with physical disabilities to ensure the attainment of universal access to transport services”. In recognition of this problem, the NLTP adds that “all processes involved from planning to implementation must take cognisance of the needs of learners with disabilities and meet required support needs.”³⁸

82. Unfortunately, more than 7 years later, the provision of scholar transport to learners with disabilities continues to remain inadequate, not only violating their rights to access a basic education but infringing upon their rights to equality and dignity.

83. In a meeting held by the Portfolio Committee for Basic Education on 16 May 2023, the DBE revealed the following in its presentation to the committee:

³⁷ Department of Transport *National Learner Transport Policy* Government Gazette no. 39314 (23 October 2015) para 3.3.1.

³⁸ *Ibid* para 3.9.2.

LEARNERS TRANSPORTED -SPECIAL NEEDS

Province	2019/20			2020/21			2021/22			2022/23		
	Number of learners in need	Number of learners served	Number of schools served	Number of learners in need	Number of learners served	Number of schools served	Number of learners in need	Number of learners served	Number of schools served	Number of learners in need	Number of learners served	Number of schools served
Eastern Cape	1482	1411	6	1482	1951	9	1482	2601	11	3696	4366	22
Free State	1618	1618	5	1220	1220	4	1220	1220	6	1220	1322	4
Gauteng	13262	8356	33	11784	4604	22	11784	4778	24	11784	5798	30
KwaZulu Natal	14853	6926	74	14995	5783	74	14673	7919	75	15326	7532	75
Limpopo	266	164	2	314	163	2	314	245	2	314	408	3
Mpumalanga	800	840	4	840	840	4	1004	1004	4	1004	1004	5
Northern Cape	139	102	1	139	96	1	0	41	1	508	508	5
North West	13	13	1	0	0	0	139	9	1	86	233	4
Western Cape	8991	8991	48	8991	8991	48	6621	6621	42	9244	7749	52
RSA	41424	28421	174	39765	23648	164	37237	24438	166	43182	28920	200

84. This slide shows that in the 2022/2023 financial year, the following learners with disabilities were not provided with transport in the respective provinces:

- Gauteng: 5986 learners
- KwaZulu-Natal: 7794 learners
- Western Cape: 1495 learners

85. Similar trends are observed in the previous years. For example, in the 2021/2022 financial year, the following learners with disabilities were not provided with scholar transport in the respective provinces:

- Gauteng: 7006 learners
- KwaZulu- Natal: 6754 learners
- Limpopo: 69 learners
- North West: 130 learners

86. In provinces such as KwaZulu-Natal, which has the greatest number of learners with disabilities that are not provided with scholar transport, SECTION27 and BLIND SA are aware that many learners walk over difficult terrain, through extreme weather conditions, such as storms, and often across extremely far distances. It is concerning that learners with disabilities, who may not be able to afford private transport, may need to walk to school under these circumstances.

87. Concerningly, as is evidenced above and admitted by the DBE, provinces such as the North West and the Northern Cape have also failed to properly report on the number of learners with disabilities in need of transport, and those which are receiving transportation during the last three years.³⁹ This impacts the DBE's ability to accurately determine learners in need and identify shortfalls in scholar transport provisioning.

88. In addition, in the extract of the DBE's presentation provided above, numbers of learners with disabilities in need of transport in certain provinces such as the Western Cape, the Northern Cape, Gauteng, the Free State and the Eastern Cape tend to remain the same in some provinces over two or more years, implying that data is not properly updated.

89. In light of the above, SECTION27 and BLIND SA propose that the state respond to the following questions in relation to article 24 of the Convention:

- What steps are being taken to ensure that all learners with disabilities are provided with appropriate scholar transport to school and back?
- What steps are being taken to ensure that learners with disabilities are provided with scholar transport that takes into account the nature of their disability?
- What efforts are being made to address certain provinces' failures to report adequately on the number of learners with disabilities in need of scholar transport and the extent to which they are receiving this?
- What efforts are being made to ensure that the DBE's data on learners with disabilities in need of scholar transport is regularly updated?

³⁹ For example, during 2020/2021, the North West province failed to provide any information on the number of learners with disabilities in need of transport, how many of these learners received transportation, and how many schools were served.

Conclusion

90. SECTION27 and BLIND SA welcome this opportunity to provide information to the Committee on South Africa's failure to ratify the Marrakesh VIP Treaty as well as its failure to provide learners with disabilities with prescribed braille textbooks, adequate access to braille machines, Orientation and Mobility training as well as training on Skills for Daily Living, as well as the state's failure to provide state-subsidised scholar transport to all learners with disabilities attending public schools. We also welcome the opportunity to propose possible questions for the state in this regard, which will ensure the state's prioritisation of these challenges. We trust that this submission will assist the Committee in its preparation of its LOIPR that must be addressed in South Africa's second country report.

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