

Draft Policy Fact Sheet: What are the Facts?

- On the 17th November 2017 the Department of Basic Education released the [Draft Policy on Home Education](#) for public comment.
- The public currently has until the 8th December 2017 to comment on the policy.
- The brief time allocated to make comments does not afford us the opportunity to address each and every issue in a Fact Sheet for general use. Be assured the Pestalozzi Trust's legal team is reviewing the draft policy in detail and we will be making a detailed submission.
- The Trust uses a pre-cautionary approach when drawing up these guides and aids to comment. That means in the case of any ambiguity or doubt we take the most negative construction. This may prove not to be correct but we would rather be wrong and protect your rights.

The most important issues are the following:

1. Treating home education like a type of government school

For the last 20 or so years home educators have based their legal position on the fact that *“one of the principle distinctions between law and policy is that law binds all persons whereas policy, unless it is enacted into law, binds only those members of the administration who are subject to the executive authority of the policy maker.”*¹

The Constitutional Court has ruled that policy made in terms of the National Policy Act (such as the current draft Policy on Home Education) does not create obligations of law that bind parents or independent schools.

As home education does not fall into the public education sphere we can avail ourselves of these protections but one of the most disturbing aspects of the new draft Policy is that it treats home education as if it is an alternative type of public schooling. If we allow this to go unchallenged we could be seen as agreeing to this subtle re-classification and then end up losing our legal protection.

To understand this we need to look at the rights of private schools under the Bill of Rights and how the existing Policy on Home Education deals with this.

Section 29(3) of the Bill of Rights sets out the rights in respect of independent schools as follows:

¹ Minister of Education v Harris (CCT13/01) [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) (5 October 2001)

Section 29(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

1. do not discriminate on the basis of race;
2. are registered with the state; and
3. maintain standards that are not inferior to standards at comparable public educational institutions

As home educators we are not “*independent educational institutions*” and our rights to home educate are based on more fundamental provisions in the Bill of Rights (for example s28(1)(b) – the child’s right to family or parental care – and S28(2) – the child’s best interests are paramount) but we can say that what applies to “independent educational institutions” must at the very least apply to home education as well.

This was implicit in the way in which the current [Policy of Home education \(1999\)](#) was drawn up. Sections 5 to 8 of the existing policy address the three qualifications of the right to establish independent schools i.e. non-discrimination, registration and not inferior standards at comparable public schools in general terms. We may say with fairness that these sections seek to give effect to s29(3) in the context of home education.

As home educators we would argue that this is not wholly appropriate as home education precedes school education, as the DBE acknowledges: “*Home education is the oldest form of child education, which precedes formal school education in all cultures.*”². So the character of home education is not identical to that of an independent school, but our rights can in no way be inferior to those enjoyed by an independent school.

A problem with the new policy is that the DBE nowhere states that this is not the case. As a matter of fact, when you read through the whole draft Policy it is evident that ***the DBE is treating home education not like a type of independent schooling (which it does in the current Policy) but like an alternative channel to deliver the same education that is provided at public schools.***

Examples of this are:

- The broad conditions relating to home education not having “inferior standards” in the existing policy are replaced with strict adherence to the NCS and CAPS.
- Post-grade 9 is not mentioned in the 1999 Policy but is mentioned in the draft policy, s12(4) “*The provision of education beyond the scope of this policy is provided in the Regulations Pertaining to the Conduct Administration and Management of the NCS examination.*”
- And even special needs education is not exempt: the broad provisions of s6 (1999 Policy) are replaced in the draft Policy with s(19) “Barriers to learning”.

² s8(3)1 p.9 (Draft) Policy on Home Education

Please read Sections 5-8 of the [existing policy](#) and compare them to the new provisions.

It is therefore very important that every person writing to comment on the new policy ***rejects this attempt to move home education into the public education sphere***. Even if we are proven wrong in our assumptions this must be firmly resisted.

2. A strong principled basis for advancing home education rights

Very good news is that whole sections of the policy provide us with a very strong basis to argue for the rights of homeschoolers. The recognition by the DBE that the Constitution and the Bill of Rights are directly relevant to home education is a major step forward in our fight. Sections 8.3 “The Character of Home Education”, 8.4 “Rationale and Motivation for Home education” and 9 “General Principles of Home Education” are all excellent sections.

These advances reflect the work of the homeschool representatives and the Pestalozzi Trust in their meetings with the DBE. They lay a stable ground work from which we can work out details that give effect to those constitutional and home education principles.

Some perhaps have seen these positive sections as an attempt to guild the bitter pill or “smeer heuning om die mond”, and that may very well be the case. But these sections are as much part of the draft Policy as “competent assessors” and much more important, because these are the criteria against which a court or in fact any reasonable person will judge the other provisions of the policy. That these provisions have been included is a real triumph.

3. Policy ignores constitutional principles

Although the policy recognises that the Constitution and the Bill of Rights are directly relevant to home education , the rest of the draft Policy proceeds as if these constitutional imperitives and home education principles did not exist. The document is in two parts that do not bear any relation to each other. In this respect the draft Policy is fundamentally flawed and should therefore be sent back as whole to have the ‘application’ sections redrafted with input from home education representatives. But even this is good news because any reasonable judge, parliamentarian or official (and we are starting to move at the level at which even the officials are reasonable even though they understand little about homeschooling) will see that the ‘application’ provisions are inconsistent with the ‘principle’ provisions .

4. Policy assumes that parliament is just rubberstamp for BELA Bill

The draft Policy assumes that the BELA bill will pass unamended. See for example the many provisions touching on “competent assessors” [i.e. Definitions, Sections 13(2)(e)(iii), 18.5 (2), 18.6(1)(b) and 8.6(1)(2)] yet this role is only mentioned in the

BELA Bill. This may represent an infringement on the prerogatives of Parliament, in some senses putting the cart before the horse.

5. A note on cottage schools

The draft Policy targets cottage schools, tutor centres and home school centres. Parents whose children attend these centres and the owners need to urgently take steps to protect their rights.

This targeting is especially unfair as it is quite possible that a lot of the confusion over cottage schools has been created by the DBE themselves.

In s4 “**Home education**” of the current policy ‘Home education’ is defined as follows:

“Home education as contemplated in section 51 of the Act is –

*(a) a programme of education that a parent of a learner(s) may provide to his/her own child at their own home. In addition the parent may, if necessary, enlist the specific services of a tutor for specific areas of the curriculum; **or***

(b) a legal, independent form of education, alternative to attendance at a public or an independent school.”

The key question is what is contemplated by 4(b)? One interpretation is that it is not (a) “a programme of education that a parent provide[s] to his child at their own **home**” because of the use of the “or” to establish an alternative. And that alternative is something that is “legal” and “independent” and is in fact alternative to “attendance at a public or independent school”.

Is it possible that some people in starting a cottage school or sending their children to a cottage school has this clause in mind or were told that the law catered for cottage schools because of this clause?

This clause has a variety of different interpretations and it is also possible (even likely) that this was not the intention of the DBE. However, by not making this clear long before the new draft Policy (after all, this current policy has been in effect since 1999) a confusion may have been created that led to the creation of many cottage schools which now cater for as many as 40 000 to 50 000 students.

This is a practical reality that the DBE has to deal with and they themselves may have been a contributing factor. They cannot simply wish the phenomena away by now merely stating repeatedly that it is illegal.

The legally conflicted situation that cottage schools find themselves in can only be addressed by the DBE working with cottage schools to find an appropriate path to legal certainty and compliance. The current approach of merely stating that these cottage schools are illegal is by no means constructive and is in fact destructive as it

will only drive cottage schools underground. The only solution to this situation is broad-ranging dialogue and meaningful consultation.

The Pestalozzi Trust is at the moment the only channel for cottage schools to raise their issues for the very reasons that these wide-ranging statements of illegality have made many owners and parent's fearful. Meaningful consultation can only take place in an environment in which cottage schools can participate without fear, and in order to create that environment the DBE needs to offer a period of amnesty for all cottage schools.

To summarize: Key objections

We have largely kept these the same as those in the BELA Bill to make it as simple as possible to at least make some form of submission.

- **You must follow the CAPS Curriculum**

“s(13)(2)(c) the proposed education programme(i) is suitable for the learner's age, grade level and ability; (ii) covers the acquisition of content and skills at least comparable to the relevant national curriculum

The key phrase here is “contents”. You will have to have a curriculum that at least covers the content of CAPS.

- **A “competent assessor” must assess your child every year at your cost**

“13(2)(e)(iii) “arrange for the learner's educational attainment to be assessed annually by a competent assessor, at the parent's own expense, who will apply a standard that is not inferior to that which is determined in the NCS...”

This essentially means a school teacher will have to assess your child annually to see if they have covered the content of the CAPS curriculum. You will have to pay for this. In the higher grades it is likely that you will have to pay for multiple assessors as a single assessor will not be competent to assess a subject they do not teach. This will apply up to and including grade 9.

- **The issue of matric is raised again at S2(11)(4).**

This section reads *“The provision of education beyond the scope of this policy is provided in the Regulations Pertaining to the Conduct Administration and Management of the NCS examination”*. If you are not familiar with the regulations their “Objectives, scope and application” are:

“(1) To regulate and control the administration, management and conduct of the National Senior Certificate examination and assessment process.

(2) These Regulations apply to both public and independent assessment bodies assessing and examining the National Curriculum Statement Grades R- 12.”

Despite representations and assurances that the BELABill does not impact “alternative” school leaving qualifications this has not been clarified in the draft Policy. This may be an oversight but we strongly advise that you ask that this clause be clarified and that an explicit statement that protects your rights to use an “alternative” school leaving qualification be added.

Draft Policy Act Sheet: What to do?

- ~~1. If you have not done so already **urgently write a [request for an extension to the public comment period](#)** in your own words and send it to Ms. P. Ngcobo at [ngcobo.p@dbe.gov.za]. Bcc a copy to [homeschoolfreedom1996@gmail.com]; this will allow the Pestalozzi Trust to keep track of the requests. If you require help to write a request in your own words use the [extension template](#) to write your own letter.~~
2. The **requirements for identifying yourself** are much less explicit than they were when submitting comments to the BELABill. It is merely stated that you must provide “contact details”. The Pestalozzi Trust will therefore not make the same provisions for anonymous submissions as in the case of BELABill. To submit an anonymous submission, merely send the email to homeschoolfreedom1996@gmail.com and put “ANONYMOUS” in the subject line. The Pestalozzi Trust will remove you contact details and forward to DBE.
- ~~3. If you have **very little time please use the [short extension letter template](#)**. Keep sending these in even until the 8th December and beyond. It is vital to show how many people would have liked to comment but couldn't because of the limited time. **If you can only do one thing, please do this.**~~
4. As soon as you have done that **please tweet** about your experience using **#HomeEdPolicy, #BELABill, #homeschoolfreedom**. Please also post to the BELABill Facebook group (<https://www.facebook.com/groups/BELABill/>) and on the Pestalozzi Trust Facebook page.
5. Then **please make a submission on the Draft Policy**. Send it to Ms. P. Ngcobo at ngcobo.p@dbe.gov.za. BCC a copy to homeschoolfreedom1996@gmail.com; this will allow the Pestalozzi Trust to keep track of the requests.

Once again we provide a number of **resources** to make it easier to make a submission.

- a. If you are a **home educator or a supporter of home education** and would like some help please use the [template](#) provided.

- b. If you are a **supporter of cottage schools** please use either the [template for cottage school owners](#) or the [template for cottage school parents](#).
- c. While these resources are being offered for free it does not cost the Pestalozzi Trust nothing to create them and to defend your rights; so please **consider joining the Trust** if you do not already belong. If you do belong, **thank you for your loyal support** over the years; you are making this fight possible.