



Pestalozzi Trust (IT6377/98)

Comments on draft Basic Education Laws Amendment (BELA) Bill

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1. Executive Summary

The Pestalozzi Trust welcomes the opportunity to make comments on the draft Basic Education Laws Amendment Bill 2015 (BELA).

As with all our work, our submission is informed by one main imperative, viz the best interests of the child, including but not limited to the educational interests of the child.

We believe that homeschoolers' experiences at finding learner-oriented solutions that are responsive to ever-changing circumstances qualify homeschoolers to offer an independent and informed perspective on the impact of the proposed Bill. There are significant learning opportunities for the Department to benefit from and to make both the formal schooling environment and the environment for home education better for all concerned.

The Pestalozzi Trust wishes to avail itself of the opportunity to engage with the task teams who must consider the comments and propose solutions to make the Bill a lawful and workable piece of legislation that is of benefit to the country as a whole and that creates a legally certain educational environment.

2. Background to the Pestalozzi Trust

The Pestalozzi Trust ("The Trust") is a legal defence fund for home and civil education.

It was established in 1998 to protect the rights and freedoms of all its member families to educate their children at home according to their own religious and/or philosophical persuasions, pedagogical convictions and cultural traditions.

Since the time of its founding the Trust has broadened its area of operation to include certain private schools, primarily cottage schools.

We are the only legal defence fund for home education in South Africa and work closely with associations for home education locally and internationally

Section 51 of the SA Schools Act of 1996 was so flawed that it resulted in more than 95% of homelearners not registering for education at home. The changes proposed in the BELA Bill will most probably exacerbate this situation.

3. Procedural Considerations

This, our initial submission, is limited to those sections of the Bill which we, in the limited time available, were able to study, consult and seek legal opinion on. We have in this time not been able to provide the detail of comment and insight that we would have been capable of, should our request for an extension of the comment period had been granted.

This submission is necessarily limited because:

1. Home-schoolers and home-schooling associations were not consulted, nor given any forewarning, about the BELA Bill;

2. A very short period (of less than 30 days) was given to stakeholders in the homeschooling community to make comments;
3. The proposed legislative changes are complex and require intense analysis;
4. The submission deadline (10th November 2017) falls in the middle of exam time for home-schooling learners and parents;
5. The decentralised and diverse nature of the home educating community requires additional time for broad and inclusive consultation;
6. Despite the fact that the offices of the DBE were flooded with requests for an extension these requests were denied by the Deputy Minister.

Considering the flawed nature of the consultation with stakeholders, stakeholders have no alternative but to protect their rights. All rights are expressly reserved, including the right to make further submissions, as well as the right to challenge the decision to refuse to grant an extension of the comment period.

We, at this eleventh hour, still urge the Minister to grant an extension. Should she entertain our prayer we would withdraw this submission and submit a more comprehensive and useful set of comments.

4. Annexure Containing Detailed Clause-by-Clause Analysis of the BELA Bill

We enclose a preliminary analysis on a clause-by-clause basis of the BELA Bill, limited however to the provisions pertaining to home education, mainly in Clause 25. This is marked Annexure A.

Annexure A

Clause 25: Section 51(1) & 51(2)

51(1) A parent of a learner who is of compulsory school going age may apply to the Head of Department for the registration of the learner to receive home education.
51(2) The Head of Department must approve the application and register the learner as contemplated in subsection (1) if he or she is satisfied that—

Objection

This provision is unreasonable and negatively affects the interests of children. It is untenable that parents, who are primarily responsible for the education of their children, require permission from the state to choose a form of education including, but not limited to, the choice of home education.

Grounds for objection

A. If a parent must apply to be registered for home education, the implication is that the Head of Department (HOD) **grants permission** for parents to choose home education. According to Section 39(1)(b) of the South African Constitution, a court must consider international law. Various provisions in international law state that the parents have primary responsibility for the upbringing and development of the child. In particular, the Convention on the Rights of the Child (ratified by the Republic of South Africa on 16th June 1995) states: “*Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child.*” It is therefore neither reasonable nor congruent with the provisions of international law that parents should require permission from the state to discharge this primary responsibility.

B. If the HOD gives permission for parents to choose home education, then the **HOD takes responsibility for the consequences** of granting or not granting permission. It is not reasonable that the HOD takes responsibility for choices that should be parental choices, but cannot be accountable for this. For example, if the HOD does not grant permission for home education, and due to this decision a child is placed in a school, and the child is bullied or raped at the school, then the HOD must take responsibility for this and pay the civil claims arising from the incidents at the school. It is not reasonable that this bill allows the HOD to make decisions on behalf of parents, but the bill does not specify a mechanism through which the HOD can be held accountable for his or her decisions.

C. If parents must **wait for permission** of the HOD **before they can start** with home education and their child is in a school, the child must remain in school until permission is granted by the HOD. Due to the limited resources and administrative capacity of the Department of Basic Education and the provincial departments of education, it could conceivably take months, and in a case where a dispute arises, even years, until permission is granted. If it is in the best interests of their child to receive education at home, parents have the right to start with home education immediately. Section 28 (2) of the South African Constitution states that the best interests of the children are of paramount importance and therefore supercede considerations of administrative capacity. We aver that it is unconstitutional to postpone the exercise of this right until lengthy administrative processes have run their course.

D. The bill does not contemplate a situation where a **child cannot be placed in a school** inter alia where the local schools are full. If parents then choose to home educate their child they cannot be expected to endure a legal limbo that may last for months or years to while the registration process runs its lengthy course. The Pestalozzi Trust has on record cases where parents are still waiting for a response to their applications for registration years after they have been submitted. Given the fact that the Gauteng and Western Cape Education Departments were unable to place tens of thousands of children in 2017, and foresee a similar situation arising in 2018 and beyond, this situation is a common occurrence.

E. Section 28(1) of the South African Constitution, states “every child has the **right to parental care**”, and according to the Children’s Act, 2005, the definition of care includes “guiding, directing and securing the child’s education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child’s age, maturity and stage of development”. It is therefore an infringement on the child’s right to parental care for families to wait for permission before commencing with home education.

Clause 25: Section 51(1)(a)

education at home and registration as such is in the interests of the learner;

Objection

To be provided in a later submission.

Grounds for objections

To be provided in a later submission.

Clause 25: Section 51(1)(c)

the proposed home education programme is suitable for the learner's age, grade level, ability and covers the acquisition of content and skills at least comparable to the relevant national curriculum determined by the Minister; and

Objection

The requirement that the proposed home education programme must cover contents and skills comparable to the national curriculum prohibits parents from choosing a curriculum or educational approach that would be in the best interests of the child, and which would not necessarily cover comparable skills and contents.

Grounds for objections

A. The national curriculum is just one example of what is known as a structured curriculum, based on the principle that knowledge is divided into subjects and grades. There are however a multitude of other educational approaches that are not based on this principle such as Phenomenon Based Learning (PhenoBL), Montessori, Classical Education and Charlotte Mason. These educational approaches have a track record of success and it is worthwhile noting that the Finnish education system, which is regarded as the best in the world, is moving away from subjects and moving towards PhenoBL. Prescribing a structured curriculum will **limit the choices of parents** to choose a type of education that is in the best interest of their children, and is therefore unconstitutional.

B. The content prescribed in the curriculum currently determined by the Minister contains content that is **in conflict with the religious, philosophical and educational convictions of many parents**. Prescribing to parents to provide an educational programme that is in conflict with their religious convictions is an infringement of the child's and parent's rights to freedom of conscience, religion, thought, belief and opinion.

C. The structured curriculum was developed in the 19th century for a public school system to serve the needs of the colonial/industrial society and was introduced to South Africa by the colonial government. Such a type of education is not ideologically suitable for a post-apartheid South Africa and also **does not serve the needs of a 21st century society**.

D. The words 'the proposed home education programme' in Section 51(2)(c) substitutes the previous wording 'education likely to be received' in section 5(2)(b) of the SA Schools Act, 1996. The difficulty here is that it assumes that the parent must submit a 'proposed home education programme' to the department for them to evaluate. This is yet **another hurdle for them to clear in order to home-educate their children**. In the case of less structured approaches, it would be more difficult to submit a 'proposed home education programme'.

E. It is often advised that families do not follow any specific program for an extended period of time when they start with home education, but take their time to get to know themselves and explore options in order to find what will work best for them. To require parents to submit a 'proposed home education programme' before starting with home education **makes it impossible to explore and change educational approaches**.

Omission of 51(2)(b)(ii) of SASA (84 of 1996)

will be of a standard not inferior to the standard of education provided at public schools;

Objection

To be provided in a later submission.

Grounds for objections

To be provided in a later submission.

Clause 25: Section 51(1)(d)(iii)&(iv)

51(2)(d)(iii) arrange for the learner's educational attainment to be assessed annually by a competent assessor, approved by the Head of Department, at the parent's own expense who will apply a standard that is not inferior to the standard expected in a public school according to the learner's age, grade level and ability; and

51(2)(d)(iv) provide the Head of Department with the learner's assessment report signed by the competent assessor.

Objection

The requirement for annual assessments by external assessors serves no educational purpose, covertly enforces the National Curriculum and will be costly to homeschooling parents and the taxpayer.

Grounds for objections

A. According to the Universal Declaration of Human Rights, "education shall be directed to the full development of the human personality". This means that the primary criterion for education is the development of the personality of the child. The child's attainment measured against an arbitrary standard external to the child is **not a valid indication of whether a learner receives an education**.

B. Standardised assessment, where children with a large diversity of personalities are evaluated with the same assessment instruments, is **inherently unfair**.

C. Homeschooling parents can make use of a multitude of educational approaches such as Phenomenon Based Learning (PhenoBL), Montessori, Classical Education, Charlotte Mason, among others. These educational approaches do not necessarily make use of subjects and grades. If home learners whose curriculum is not based upon grade level assessments are subjected to assessments based on the National Curriculum, it will be inherently unfair to the children concerned and interfere with **a parent's duty to choose the educational approach that is in the best interests of the child**.

D. Many parents choose home education, because it is an affordable means to provide a quality education. This is especially the case in large families. Many families have to sacrifice a second income in order to homeschool their children. The market-related price of an assessment is about R600 per assessment per subject per child. Using an average of 7 subjects per child, the assessment costs of a family with 7 children could be $R600 \times 7 \times 7 = R30\,000$ per annum. This could **make home education unaffordable** to many families.

E. The additional cost may **unfairly benefit those curriculum providers who follow the national curriculum** as opposed to those who do not. Possibly those who follow the national curriculum may be approved by the HOD as 'competent assessors'. It has come to our attention that a popular home schooling curriculum provider has recently been refused accreditation by Umalusi, and it might very well happen that a provincial HOD may similarly refuse to accredit some curriculum provider as a '*competent assessor*'.

F. It is not clear whether all qualified **school teachers would be considered 'competent assessors'** or whether there would be special requirements for home schooling 'competent assessors'.

G. In schools, assessments are used to determine whether learners can be promoted to the next grade. However, the National Policy on the Promotion Requirements states that a learner may only be retained once in a phase. This means that a learner can be promoted to Grade 12 without ever passing a single assessment, which means that assessments are in any event **not decisive in determining promotion to the next grade level**.

H. One of the greatest benefits of home education is that learners can progress at their own pace. Gifted children can progress faster than the pace prescribed by the national curriculum and children with special needs can progress more slowly. When learners progress at their own pace, there is absolutely **no value in doing assessments on the learner's grade level**. Since it will frustrate both learners who progress faster and those who are progressing more slowly, it is therefore not in the learner's best interest to write such assessments.

I. This provision prescribes that home learners must subject their children to assessments and provide these to the HOD, but does **not provide any justification as to how these assessments will be used to promote the interests of home learners**. If parents are expected to pay for assessments without justification, this provision appears merely to be an attempt to extract money from homeschooling parents and create jobs for competent assessors and can be viewed as an additional tax burden. It is estimated that there are about 100 000 home learners in South Africa. At a cost of R600 per assessment, assuming 7 subjects per learner, the implementation of this section could cost the homeschooling community as much as R420 million per annum, which is unreasonable and irrational in the light of the fact that there is little or no discernable benefit to the children concerned.

J. If it is assumed that a home learner has to be assessed on 7 subjects per annum, this means that the DBE must process about 700 000 assessments per annum. These assessments must be reviewed by officials at the DBE and then must interact with parents as required. If it is optimistically assumed that an education official can review about 20 assessments per day, it will require about 150 fully qualified officials, excluding managers, to perform this task at the most superficial level. At an average salary of R500 000 per annum, this will mean that the relevant departments of education (national or provincial) will spend R80 million per annum. If office space and management is taken into account, it **could cost the taxpayer over R100 million per annum** to implement a provision for which the educational benefit is questionable. Therefore on cost alone these provisions are not justified.

K. Homeschooling families are paying tax, but the **education of their children costs the state nothing**. They thus free up financial resources to be spent on other children. This proposal would add to the financial burden on homeschooling families, driving some children into the public education system and thus placing a further burden on an already financially overburdened system.

L. It is argued that this provision **does not meet the criteria of the limitations clause** (section 36) in the Bill of Rights. It fails to justify the purpose and need for the provision and fails to consider less restrictive means to achieve the same purpose.

M. The Children's Act requires parents to fulfil the child's constitutional rights (Sec. 2 of Constitution), which includes nutrition, shelter and healthcare. The Children's Act also states that parents are responsible for "*guiding, directing and securing the child's education*". The Children's Act employs **contingency oversight** - anyone who has reason to believe that any aspect of a child's care is being neglected, may report such neglect to the police or a social worker, who must investigate the complaint. This kind of oversight is viewed as sufficient to detect and address neglect in terms of nutrition, shelter and healthcare. In the absence of evidence that there is general gross educational neglect by homeschooling parents, there is no way to justify that contingency oversight is not sufficient for detecting and addressing educational neglect.

Clause 25: Section 51(3)(a)&(b)

51(3) The Head of Department may attach any reasonable conditions to a learner's registration for home education consistent with subsection (2) that takes into account—

51(3)(a) the circumstances of the learner or parent;

51(3)(b) the character of home education as an alternative to compulsory school attendance; and

Objection

To be provided in a later submission.

Grounds for objections

To be provided in a later submission.

Clause 25: Section 51(3)(c)

the capacity of the education department to support and monitor the home education of a learner.

Objection

To be provided in a later submission.

Grounds for objections

To be provided in a later submission.

Clause 25: Section 51(5)

A parent may, after a learner has completed grade 9, enrol the learner at a public school or independent school for the completion of grades 10 to 12.

Objection

To be provided in a later submission.

Grounds for objections

To be provided in a later submission.

Clause 25: Section 51(6)

A parent of a learner who wishes to continue with home education after the learner has completed grade 9, must make use of the services of a private or independent service provider accredited by Umalusi, established in terms of section 4 of the General and Further Education and Training Quality Assurance Act, 2001 (Act No. 58 of 2001), to register for the Senior Certificate Examination through an independent or private assessment body.

Objection

Section 51(6) poses three distinct legal problems:

In the first instance, a prima facie reading of the provision **appears to outlaw alternative matric qualifications such as Cambridge and GED**. Should this be the intention of the drafter, this would give rise to a number of irrational situations. These situations would give rise to the creation of a class of persons so disadvantaged that this would be in violation of the fundamental principle of equality which underlies the provisions of the Constitution.

Secondly, the requirement that any person wishing to gain the National Senior Certificate should have to follow a three-year programme in order to do so significantly **limits the rights of such a person to education**.

Thirdly, **the provision should not be situated in primary legislation but should rather be in subordinate legislation where such matters are normally dealt with**. Should subsequent regulations be made offering alternative means of gaining an NSC or any change be made to the regulations for that matter, a conflict between primary legislation and sub-ordinate legislation would arise. Should the class of persons affected by those changes wish to avail themselves of those provisions this would only be possible if a further Education Laws Amendment bill were passed.

The safeguards around promulgating subordinate legislation (regulation) are well-established. A Minister, in making subordinate legislation, is required to act fairly and is subject to the Promotion of Administrative Justice Act (PAJA). This protection is not available to national legislation. The inclusion of this provision in the primary legislation therefore raises an important question: is the Minister trying to avoid the application of administrative justice to this particular provision? If so, why?

Grounds for objections

A. This section will **outlaw alternative matric qualifications** (e.g. Cambridge and GED) that home learners use to get admission to tertiary education nationally as well as internationally. Due to stringent conditions prescribed in the Regulations pertaining to the Conduct, Administration and Management of Assessment for the National Certificate (2008), the cost and time involved in acquiring an Umalusi matric through distance education is much higher than that of the alternative matric qualifications. The cost of an Umalusi matric is about R14 000 per annum for 3 years plus a South African Comprehensive Assessment Institute (SACAI) fee (about R45 000), whilst an alternative matric can be less than R10 000 and be completed in less than a year. This section will make it impossible for many homeschooling families to afford doing a matric through home education.

B. This section will **financially benefit organisations that offer the Umalusi matric** through distance education, at the cost of the to-be outlawed service providers who provide alternative

matric qualifications.

C. This section will not only **affect home learners, but all people who dropped out of the school system without obtaining a matric**, but cannot afford to get an Umalusi matric through distance education. Thousands of such people can be helped by the opportunity to obtain an alternative matric that requires much less time and money. In order to assist such learners, a previous education minister, Naledi Pandor, initiated the introduction of an adult matric in 2008.

D. Many learners wish to study at foreign universities. If **internationally acknowledged alternative matric qualifications are outlawed in South Africa**, it will make it much more difficult for such students to be admitted to foreign universities.

E. Umalusi can refuse to accredit a non-CAPS home schooling curriculum provider. This is **monopolistic prevention of competition of alternative educational curricula**.

F. After grade 9 or age 15 compulsory schooling is not required. This section seeks to **extend the authority of the state to make provisions beyond those who attend state or private schools** (the latter being those schools who seek to conform to the requirements of the Umalusi matric). This appears to be an ultra vires action and we need more time to take opinion on this complex aspect of the provision.

G. Furthermore this will have a **negative effect on the economy of South Africa** and the implementation of the government's National Development Plan. The proposal in section 51(6) is deplorable in the light of the discrimination it will result in for many children, not merely home schoolers, without a Grade 12 CAPS qualification.

Clause 25: Section 51(7)

The Head of Department must cancel a learner's registration for home education if, after enquiry, the Head of Department is satisfied that home education is no longer in the educational interest of the learner.

Objection

To be provided in a later submission.

Grounds for objections

To be provided in a later submission.

Clause 25: Section 51(9)

A learner or the parent of a learner may appeal to the Member of the Executive Council, within 14 days of receiving notice, if a Head of Department —
(a) declines the application to register for home education; or
(b) cancels a learner's registration for home education.

Objection

To be provided in a later submission.

Grounds for objections

To be provided in a later submission.

Clause 1: Section 1

"home education' means a purposeful programme of education for a learner, alternative to school attendance, which—,

(f)(a) is provided under the direction of the learner's parent primarily in the environment of the learner's home;

(f)(b) may include tutorial or other educational support services secured by the parent; and

(f)(c) meets the requirements for registration of a learner for home education contemplated in section 51(2);"

Objection

To be provided in a later submission.

Grounds for objections

To be provided in a later submission.

Clause 2: Section 3(6)

Subject to this Act and any other applicable law—

(a) any parent who without just cause and after a written notice from the Head of Department, fails to comply with subsection (1), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six [months] years, or to both such fine and such imprisonment; or

(b) any other person who, without just cause, prevents a learner who is subject to compulsory attendance from attending a school, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six [months] years, or to both such fine and such imprisonment"; and

Objection

To be provided in a later submission.

Grounds for objections

To be provided in a later submission.