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The Deputy Director-General: Curriculum Policy, Support and Monitoring

The Department of Basic Education

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For Attention: Ms P. Ngcobo

**COMMENTS ON: DRAFT POLICY ON HOME EDUCATION IN TERMS OF THE NATIONAL EDUCATION POLICY ACT 27 OF 1996**

**Introduction**

1. The Eastern Cape Home Schooling Association (hereinafter referred to as "ECHSA") herewith presents its response to the invitation for public comments on the Draft Policy on Home Education (hereinafter referred to as the "Draft Policy") which was published on 17 November 2017.

2. ECHSA was established in 1998, and represents home educators in the Eastern Cape Province. ECHSA represents approximately 500 families.
3. The Draft Policy attempts to address matters pertaining to home education nationally and provincially and as such ECHSA, as an association of home educators, has a direct interest. ECHSA's members are directly affected by the proposed provisions.

### **Objection to time-frame for filing of proper comments**

4. ECHSA, in the strongest possible terms, objects to the short time period provided for the public comments and deems that the period 17 November 2017 to 8 December 2017 (21 days) provides insufficient time to prepare detailed, in-depth and meaningful comments.
5. The Draft Policy is a substantial and detailed document which requires in-depth analysis, discussion and input from members of ECHSA.
6. The provisions in the Draft Policy significantly impact on the lives of many children and families, not only in the Eastern Cape Province, but also nationally. The proposed provisions have far-reaching consequences for children. The limited time-frame for submission on comments is therefore completely inadequate and is not in the best interests of the children whom it will affect.
7. ECHSA has been informed that several requests for an extension of the closing date for comments have been made. To date we have not been informed whether such a request has been granted or not.
8. ECHSA therefore reserves the right to amend and/or provide additional comments after the closing date of 8 December 2017. In no way should the observations be viewed as complete. ECHSA has not had sufficient time to engage with its members to compile complete observations and submissions.

### **Objection to the timing of the invitation for public comments**

9. ECHSA objects to the timing of the publishing of the Draft Policy for comments. The Basic Education Laws Amendment Bill of 2017 was published on 13 October 2017 and the closing date for comments was 17 November 2017. (ECHSA also objected to the inadequate time-frame provided for public comments to the Basic Education Laws Amendment Bill of 2017.)

10. Within a week of the closing date for public comments on the Basic Education Laws Amendment Bill of 2017, the Draft Policy was published for public comments.
11. The Draft Policy refers to provisions in the South African Schools Act 84 of 1996 (hereinafter referred to as the "SA Schools Act") in its current un-amended form (see paragraphs 6.2. (2) and 7 of the Draft Policy), **and** in its proposed amended form (see paragraph 8.2 of the Draft Policy).
12. The Department of Basic Education has therefore issued a draft policy (which at most may be categorised as subordinate legislation) relying on provisions in draft primary legislation (in other words, the Basic Education Laws Amendment Bill of 2017) which are still to be analysed, discussed, debated and consulted
13. The fact that a Draft Policy was issued by the Department of Basic Education, which incorporates provisions of draft primary legislation which consultation processes are not complete, indicates a flagrant disregard for the democratic rights of the citizens in South Africa.
14. This furthermore begs the question whether the Department of Basic Education intends to take seriously the submissions made on the draft primary legislation or whether the call for public comments was merely lip service being paid to consultation processes.
15. It would appear that the Executive is usurping the role of the Legislature; and infringing on its power by pre-empting the outcome of the consultation process/es on the Basic Education Laws Amendment Bill of 2017; whereas such process only began on 13 October 2017.
16. These actions are providing grounds for constitutional challenge of the proposed amendments, which will result in the provisions being declared invalid.

### **Request to engage in meaningful consultation**

17. ECHSA requests that the Department of Basic Education invites representatives of ECHSA to engage in a meaningful consultation process on matters affecting its members, including all aspects relating to the regulation of home education in the SA Schools Act, or any other matters which may affect home education in the Eastern Cape Province.

18. ECHSA requests that its members be given an opportunity to participate in consultations, be invited to present opinions and expert evidence, and to be heard in public hearings nationally and in the Eastern Cape Province.
19. The content of the provisions which are proposed creates a tension between the private and public spheres of society, and applies to and affects different human rights (the right to human dignity, the right to privacy, the freedom of conscience, religion, thought, belief and opinion, the freedom of expression, children's rights, the right to basic education, and the right to just administrative action). Due to the fact that children are the focus of the proposed provisions, the application of the best interests of children, has to be of paramount importance. The very nature of the provisions which are proposed, therefore demand that extensive consultation and public participation processes be followed throughout the proposed promulgation of the legislation.

#### **Objection to the enabling provision**

20. The Policy for the Registration of Learners for Home Education (GG No.20659 published on 23 November 1999) (hereinafter referred to as the "Current Policy"), was issued in terms of section 3(4)(g) of the National Education Policy Act 27 of 1996 (hereinafter referred to as the "National Education Policy Act"). Section 3(4)(g) of the National Education Policy Act provides that the Minister may determine national policy for the organisation, management, governance, funding, establishment and registration of education institutions.
21. Home education is not an "education institution" as is referred to in section 3(4)(g) of the National Education Policy Act. "Education institution" is defined in the National Education Policy Act as "any school contemplated in the South African Schools Act, 1996". "School" is defined in the National Education Policy Act as "a pre-primary, primary or secondary school". The SA Schools Act, in turn, defines "school" as "a public school or an independent school which enrolls learners in one or more grades between grade zero and grade twelve". The definition for public schools in the SA Schools Act refers to a school contemplated in Chapter 3 (which does not include home education). The definition for independent schools in the SA Schools Act refers to a school registered or deemed to be registered in terms of section 46 (which again does not include home education). Home education therefore does not fit within the definition of education institution, as per the definitions of the National Education Policy Act or the SA Schools Act, and it is

argued that the empowering provision of the Current Policy, is incorrect and invalid.

22. There does not appear to be any reference to the empowering provision of the Draft Policy.
23. In light of the fact that there is no reference to the empowering provision within the Draft Policy, ECHSA questions whether the Department of Basic Education concedes that the reference to section 3(4)(g) of the National Education Policy Act is/was incorrect and invalid.
24. ECHSA furthermore submits that there are insufficient grounds to argue that the empowering provision is the general introductory portion of section 3(4) of the National Education Policy Act without any reference to the specific subsections listed under section 3(4), due to this general section referring to the education system. The general portion of section 3(4) reads as follows:  
“Subject to the provisions of subsections (1) to (3), the Minister shall determine national policy for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system (our underlining) and, without derogating from the generality of this section, may determine national policy for - “
25. The term “education system” is not defined in either the National Education Policy Act or the SA Schools Act.
26. The term “education” is however defined in the National Education Policy Act as “any education and training provided by an education institution, other than training as defined in section 1 of the Manpower Training Act, 1981”. The term “education” is not defined in the SA Schools Act. Therefore, again, the term “education institution” is incorporated into the definition of “education”, and it is clear that there exists no empowering provision for the promulgation of a national policy on home education in terms of section 3(4) of the National Policy Education Policy Act.

### **Comments on Provisions**

27. Although ECHSA submits that the empowering provisions are not in existence, and that the Current Policy, and the Draft Policy are invalid, ECHSA does wish to provide detailed comments on proposed provisions, in order to participate in the development and understanding of home education in South Africa.

28. The fact that ECHSA wishes to provide comments, must in no way whatsoever be seen or interpreted to be that it concedes that the Current Policy and the Draft Policy are valid.
29. As mentioned above, ECHSA has not had sufficient time to prepare comments on the proposed provisions, even though it wishes to do so. In no way, whatsoever, should these comments be seen to be complete, and where comments are not made on provisions which appear in the Draft Policy, these omissions should not be interpreted to infer that ECHSA agrees with the provisions.
30. Please find below a limited number of comments on the specific paragraphs in the Draft Policy, in the format as was requested on the Department of Basic Education web site. (ECHSA strongly opposes many of the provisions in the Draft Policy, as it does in the current SA Schools Act, and the proposed amendments in the Basic Education Laws Amendment Bill of 2017) and therefore ECHSA rejects the mere revision of some of the wording in the paragraphs under discussion.
31. As mentioned, ECHSA requests that extensive consultation occurs, whereby these provisions and the premise on which they are based can be analysed, discussed and solutions reached.
32. You are also referred to the submission made by ECHSA on the Basic Education Laws Amendment Bill of 2017 (**Annexure A**), as there are provisions which were commented on which directly pertain to the provisions in the Draft Policy.

## DRAFT POLICY ON HOME EDUCATION

Policy Page	Chapter/Section	Comment	Proposal for Revision
5-6	1. Definitions	Please refer to the ECHSA submission (Annexure A) made on 10 November 2017 on the Basic Education Laws Amendment Bill of 2017.	Please refer to the ECHSA submission (Annexure A) made on 10 November 2017.
7	5	1. The legal framework for home education does not make mention of the International Legal Instruments which directly provide a legal framework within which home education functions.	The following International Legal Instruments need to be included: <ol style="list-style-type: none"> <li>1. The Universal Declaration of Human Rights;</li> <li>2. The United Nations Convention on the Rights of the Child;</li> <li>3. The African Charter on the Rights and Welfare of the Child;</li> <li>4. The International Covenant on Economic, Social and Cultural Rights; and</li> <li>5. The International Covenant on Civil and Political Rights.</li> </ol>

Policy Page	Chapter/Section	Comment	Proposal for Revision
11	Chapter 2 Paragraph 12. (1)	<p>The wording of this provision is ambiguous and the meaning is unclear.</p> <p>One of the interpretations of this paragraph is that a parent may not home educate their child until such time as the HOD has approved the home education of such child. This is a most concerning process. The practical implications and processes which this interpretation will require, will not be in the best interests of children. It would require that children, in whose best interests it is to be home educated, will need to wait (which by implication then means that it will not be in that child's best interests) for administrative processes to be dealt with.</p>	
11	Chapter 2 Paragraph 12.(2)(b)	By providing a month of the year, by which applications to register must be submitted,	



Policy Page	Chapter/Section	Comment	Proposal for Revision
		<p>requires that home education and the best interests of a child, have to be subordinate to the time-line which is imposed by the Draft Policy.</p> <p>The paragraph does permit a deviation from this time-line, but it places a burden on the parent to then provide “sound reasons” for the delay.</p> <p>Should there be administrative processes and requirements imposed on parents and children by the State, it is submitted that these processes and requirements be as minimal, flexible, and parent and child centred as possible.</p>	
12	Chapter 2 Paragraph 13.(1)(a)	<p>It is not clear why the wording “in the interests of the learner” is utilised. International law, our South African legislation and case law refer to the “best interests of a child” as the criteria to be applied. According to section 28 (2) of the</p>	

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		<p>Constitution of the Republic of South Africa, 1996, a child's <b>best interests</b> are of paramount importance in every matter concerning the child.</p>	
12	<p>Chapter 2 Paragraph 13.(2)(c)(i) and (ii)</p>	<p>The wording "cover the acquisition of content" which is required to be at least comparable to the relevant national curriculum outcomes is concerning.</p> <p>Article 11.4 of The African Charter on the Rights of the Child and Article 13.3 of The International Covenant on Economic, Social and Cultural Rights both refer to parental choice of schools which "conform to the minimum educational standards".</p> <p>It is submitted that the wording "at least comparable to the relevant national curriculum" is a higher standard than "conform to the minimum</p>	

Policy Page	Chapter/Section	Comment	Proposal for Revision
		<p>educational standards". In fact, it can be argued that these phrases do not correlate at all.</p> <p>Many of the curricula which home educators rely on, do not match the South African national curriculum in a year by year, grade by grade approach with regard to content and skills.</p> <p>Curricula range across a spectrum of approaches to accommodate the individual needs of families and/or the needs of individual children within families.</p> <p>If this provision is enforced, it is envisaged that there will be litigation to defend the rights of parents to choose for their children the kind of</p>	

Policy Page	Chapter/Section	Comment	Proposal for Revision
		<p>education that shall be given to their children.            (See Article 26.3 of The Universal Declaration of Human Rights.) Also, the application of the best interests of the child will be defended in response to the enforcement of this provision.</p> <p>This provision is based on the premise that all children, of a certain age, grade level and ability, must adhere to content and skills acquisition in a set manner which has been developed for basic education <i>en masse</i>. This is an incorrect premise, as the approach to mass education is a significantly different approach to education of the individual. Home education is predominantly an individualistic approach to education.</p>	

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		<p>It is not clear how the Department of Basic Education intends to administrate this provision.</p> <p>Will this provision be administered in a centralised national manner or will the administration be delegated to a variety of officials at a local level?</p>	
12	Chapter 2 Paragraph 13.(2)(d)	<p>The fact that the PED intends to inspect private homes, is a grave infringement on various human rights as enshrined in the Bill of Rights.</p> <p>ECHSA wishes to make a detailed submission on this provision, but is unable to do so within the limited time-frames provided.</p>	
12	Chapter 2 Paragraph 13.(2)(e)	<p>The requirement that parents must undertake to make suitable educational resources available to</p>	

Policy Page	Chapter/Section	Comment	Proposal for Revision
		<p>support the learner's learning is not suitably defined.</p> <p>It would appear that double standards are being applied to home education parents compared to parents who send their children to under-resourced public schools.</p> <p>Many home educating parents have limited financial means, but create significant and healthy learning environments through nature, every-day objects and creative learning experiences.</p>	
12	Chapter 2 Paragraph 13.(2)(e)(iii)	<p>This provision causes grave concern.</p> <p>ECHSA wishes to make a detailed submission on this provision, but is unable to do so within the limited time-frames provided.</p>	

Policy Page	Chapter/Section	Comment	Proposal for Revision
13	Chapter 3 Paragraph 18.1(1)	The fact that the Department of Education wishes to prescribe the type of curricula which home educated learners may use, causes grave concern and is a direct infringement on human rights as enshrined in the Bill of Rights. ECHSA wishes to make a detailed submission on this provision, but is unable to do so within the limited time-frames provided.	
14	Chapter 3 Paragraph 18.6	ECHSA wishes to make a detailed submission on this provision, but is unable to do so within the limited time-frames provided.	
14	Chapter 3 Paragraph 19.	This paragraph causes grave concern. ECHSA wishes to make a detailed submission on this provision, but is unable to do so within the limited time-frames provided.	
15	Chapter 3	This paragraph causes grave concern.	

Policy Page	Chapter/Section	Comment	Proposal for Revision
	Paragraph 23.	ECHSA wishes to make a detailed submission on this provision, but is unable to do so within the limited time-frames provided.	



## **Conclusion**

33. We would like to thank the Department of Basic Education for the opportunity to provide constructive comments in relation to matters which affect home education in South Africa in general and the Eastern Cape in particular.
34. We are however concerned about the validity of the Current Policy and the Draft Policy, and therefore strongly reject the proposed provisions contained within in their entirety.
35. We sincerely hope that there will be further opportunities for constructive and collaborative interactions to address the complex problems with actual solutions.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M Puchert', with a stylized flourish above the first letter.

**Adv. Megan Puchert**

**Chairperson**

**The Eastern Cape Home Schooling Association**