



## **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 comment on the draft Basic Education Laws Amendment Bill, 2015 (BELA Bill).

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 home education environment better for all concerned.

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

Therefore, 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, both locally and internationally

## 3. Procedural Considerations

This, our second, more comprehensive submission, replaces our previous submission, which we withdraw. We comment on 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 detailed comment and insight that we would have been capable of if we had been consulted previously and been given forewarning of the BELA Bill.

This submission is limited for the following reasons:

1. Since January 2016 home-schoolers and home-schooling associations have neither been consulted, nor given any forewarning, concerning the BELA Bill;
2. A very short period (of less than 30 days) was given to stakeholders in the homeschooling community to make comments, and although an extension was belatedly granted it fell within the December holidays;
3. The proposed legislative changes are complex and require intense analysis;
4. The original submission deadline (10<sup>th</sup> November 2017) fell in the middle of exam time for home-schooling learners and parents. The decentralised and diverse nature of the home educating community requires additional time for broad and inclusive consultation.
5. Despite the fact that the offices of the DBE were flooded with requests for an extension these requests were formally denied by the Deputy Minister. We are grateful that an extension was eventually granted on the 28<sup>th</sup> of November, 2017, although the comment period spanned the December holidays.
6. The various changes to the submission deadlines have further impaired the opportunity for meaningful consultation on the proposed Bill. Homeschoolers began by preparing comments in order to meet the initial deadline. They then began to revise those comments to make more detailed submissions when they were informally informed that they could make comments until the process of reviewing comments was complete. The granting of an extension on the 28<sup>th</sup> November 2017 to the general public that extended the comment period until the 10<sup>th</sup> January 2018 has created further confusion.
7. In addition, the need to comment on the draft Policy on Home Education at the same time as the BELA Bill has further impaired the process of meaningful consultation with respect to both instruments. Many interested parties are confused as to which instrument is which and particularly why they are being asked to comment on a Policy that takes for granted the passage of the Bill they are being asked to comment on. These actions have raised the gravest questions concerning the bona fides of the DBE in the minds of many home schoolers. This may have deterred some from commenting at all.

For the reasons stated above we urge the DBE to engage extensively with us both in the task team process and during the public hearings which the DBE will be convening.

Furthermore, we urge the DBE to have an 'open agenda' approach during both of these processes and to allow additional comments and further issues broad of those detailed in this submission to be raised and addressed.

Considering the flawed nature of the consultation with stakeholders, we have no alternative but to protect our rights. All rights are expressly reserved, including the right to make further submissions.

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

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

# Annexure A

## 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

This definition is problematic for the following reasons:

- A. Homeschooling parents can follow a **multitude of educational approaches**. By inserting the term "*purposeful programme*" in the definition of home education, it outlaws education approaches that are difficult to describe as a "*purposeful programme*", but still have the higher purpose of developing the personality of the child.
- B. To describe home education as an alternative to school attendance is an expression of **prejudice against home education**. It portrays school education as the norm that should be preferred above the exception of home education, and the definition is therefore discriminatory in nature.
- C. This definition depicts home education as the only alternative to school education and **makes no allowance for a multitude of education types** where learners receive part of their education at home and part at a centre or school. This binary definition has caused the cottage school industry (which has grown exponentially) to operate mostly underground.
- D. According to the Children's Act and International law, **all education is the primary responsibility of parents, not only home education**. Even when learners are attending a school, parents are still responsible. When learners attend a school, the teachers are acting "n loco parentis" (n the place of parents), with delegated authority from the parent.
- E. It **cannot be assumed that children are not receiving an education**, merely because they are not registered.

### Proposal

The definition should be changed as follows: "*home education' means a ~~purposeful programme~~ type of education provided to 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);"~~

## 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

The proposed penalty for failing to register for home education is of such a nature that it will destroy families. There is no reason to believe that it is in the best interests of children to destroy their families merely because parents failed to perform certain administrative actions.

### Grounds for Objection

- A. Since the legalization of home education in 1996, this kind of education has **increasingly been accepted in society** as a reputable type of education with a track record of success. In the same period the reputation of public school education has fallen into decline. It is therefore ironic that the punishment for choosing a reputable type of education (without unreasonable registration conditions) as an alternative to the failed public school system is proposed to increase twelve-fold.
- B. There is **no reason to believe that jailing homeschooling parents will be in the children's best interests**. Jailing parents will mean that the children must be placed in foster care, since the parents cannot care for their children while in jail. After the 6 year jail term they might also not be able to care for their children anymore, since it will be difficult to find a job with a criminal record. This punishment will only serve to destroy homeschooling families and will not contribute to the best interests of any learner. This manner of dealing with homeschooling parents is reminiscent of the way in which the apartheid government dealt with home education. On 14 December 1992, Andre and Bokkie Meintjies were sentenced to prison because their children did not attend a school. After a court case that lasted for almost five years, Andre was sentenced to two years and Bokkie to one year in separate jails in Johannesburg, while their three children were placed in an orphanage in the Eastern Cape to prevent contact between the parents and the children. Several other parents were given suspended sentences on condition they put their children in schools. All of those parents still have criminal records.
- C. There is **no limit set to the fine that a court can give** to homeschooling parents who fail to register. This will give courts the power to fine homeschoolers into poverty if they are not willing to submit to registration conditions that are in conflict with their philosophical or religious convictions. Giving these powers to the courts will enable the courts to ban home education in a similar way that the German and Swedish governments have done.
- D. The proposed changes to section 3(6) **fail to consider the difference between criminal and civil law**. Parental responsibilities and rights are civil matters that should be dealt with as such and probably preferably through the Children's Court to keep costs as low as possible.
- E. The **test for reasonableness and the appropriate relief** with a flexible approach should be applied as in constitutional remedies, where the courts are left to decide what would be

appropriate relief in the particular case. The least invasive remedy and hopefully appropriate remedy would be the proposal below where, if the court finds that the parent/s failed to act in the child's best interests, it merely sends the child to a local school that provides better education for the child/ren concerned. Appropriate relief is relief that is required to protect and enforce the Constitution, and a six-year prison sentence whereby the child is deprived of his/her guardian and caregiver cannot be in the child's best interests. The parents are not criminals but in the main very concerned parents and good citizens, who make positive contributions to family and community. To deprive a community of a contributing member and possible income generator, is illogical and irrational and cannot be justified. The remedy should also not impose costs that are disproportionate to the benefits that it aims to achieve.

## Proposal

The section should be changed to read as follows:

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~~ and can be ordered to place their children in a school of the parent's choice for as long as the justification why a school is in the best interests of the child remains valid;  
or*

## 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 best 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 when interpreting our law. Various provisions in international law state that the parents have the primary responsibility for the upbringing and development of the child. In particular, the United Nations Convention on the Rights of the Child (ratified by the Republic of South Africa on 16<sup>th</sup> 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 held accountable for his choices. 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 proposed 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 should 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 while the registration process runs its lengthy course. There are 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, 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 of the child’s right to parental care for families to wait for permission before commencing with home education.

## Proposal

The wording of the section should be changed to the following:

51. (1) A parent a learner who is of compulsory school going age may notify ~~apply to~~ the Head of Department that a learner is ~~for the registration of the learner~~ to receive home education.

51(2) The Head of Department must register a learner as contemplated in subsection (1) if he or she is ~~satisfied~~ notified that-

## Clause 25: Section 51(2)(a)

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

### Objection

To require the HOD to judge whether home education is in the best interests of an individual learner requires the HOD to have access to detailed private information which is not at the disposal of the HOD. It is therefore not reasonable to require the HOD to make such judgements.

### Grounds for Objection

- A. Since each learner has a **unique personality**, it requires personal knowledge of the individual learner to determine whether something is in the best interests of a specific learner. Since the parents have the most personal knowledge of their children, they are best **qualified to determine** whether home education is in the best interests of a learner. Since the HOD who receives the applications for registration has not even met the learner, the HOD is not qualified to evaluate whether home education is in the best interests of a specific learner.
- B. The decision of parents to choose home education is based on a multitude of **conscious and unconscious considerations** which have built up over a long time. Many of the considerations are difficult to accurately articulate. It is therefore not reasonable to expect that parents must be able to articulate their reasons for home education in a few lines in a registration form in such a way that will persuade the HOD who has **no knowledge of the context** in which the parents have made their decision.
- C. The **parents are in the best position to decide whether home education is “in the best interests of the learner” and not the HOD**. To motivate contrary to the decision of the parents, the HOD would need to base his/her motivation on some special privileged information that would detail why those particular parents are not competent to make that decision.
- D. Some parents may be **better at articulating their reasons for choosing home education** than others, and less articulate parents may thus be disadvantaged.
- E. The parents may have **factors in the decision for choosing home education that they do not wish to formally state to the HOD**, such as perceptions about the possible special needs of the child; opinions about schools in their area; their financial situation and the costs of alternatives; and the career choices of the spouse who would home educate the children.
- F. If in an exceptional instance the HOD was to prohibit a child from being home educated, **he/she would need to have some special information** about that particular child or family situation, not provided by the parents in the application.
- G. The requirement is **discriminatory against home education**, because a parent does not need to motivate to the HOD that their decision to place their child at another alternative form of education is “in the best interests of the learner”. For example, one parent may decide their child is better suited to structured, formal schooling, while another chooses a less structured type of schooling such as a Montessori school. The HOD does not decide which is in the best interests of such learners.
- H. In deciding whether to home educate their child, **parents must consider the educational alternatives in their area**. The better schools may not have the capacity to accept all applicants.
- I. The expression **“interests of the learner” is vague and devoid of legal meaning**. The standard legal term is “best interests” and not “interests”. The term “best interests” is used for instance in Sec 28 (2) of the Constitution of the Republic of South Africa (1996), in the Children’s Act, in Article 3(1) of the United Nations Convention on the Rights of the Child (1989) and in Article 4(1) of the African Charter on the Rights and Welfare of the Child.

## Proposal

This section should be removed, because it is impossible for a third party who does not have personal knowledge of a child to make a judgement on what is in the best interests of a child. Therefore this section serves no purpose.

## Clause 25: Section 51(2)(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 Objection

- 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 interests 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 in 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. To require parents to submit a "proposed home education programme" before starting with home education **makes it impossible to explore and change educational approaches.**

## Proposal

Remove this section, because it infringes on the constitutional rights of parents to choose what is in the best interests of their children and on the freedom of conscience, religion, thought, belief and opinion of parents and children.

## 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 and Grounds for Objection

The section is based on the Bill of Rights "Section 29(3) *Everyone has the right to establish and maintain, at their own expense, independent educational institutions that... (c) maintain standards that are not inferior to standards at comparable public educational institutions.*"

### Proposal

The section should be retained, since this is in line with Section 29(3) of the Constitution.

## Clause 25: Section 51(2)(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 Objection

- 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 and Charlotte Mason. 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 interests to write such assessments.
- I. This provision prescribes that home schooling parents 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 they 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 the 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.

## Proposal

This section should be removed, because it restricts the rights of parents to serve the best interests of their children and places a financial and administrative burden on homeschooling families and government without any justification.

## 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 and Grounds for Objection

- A. This section will give the HOD the **power to attach unreasonable conditions to registration**, without consulting stakeholders, and will require costly litigation in order to have the unreasonable conditions set aside.
- B. If the HOD is allowed to set particular non-standardised conditions, then the HOD can **practically ban home education in a province**, by adding stringent conditions that almost no parent can meet, without following the consultative process required for passing laws and regulations.
- C. If the HOD is allowed to set conditions for registration, then this is a **covert method to formulate a homeschooling policy**. This means that if sections in this bill are removed by the National Assembly, they can just be added again in the form of regulations, after this bill becomes an act.
- D. If the HOD is allowed to set conditions for registration, some provinces might have more stringent registration conditions than other provinces. This will make **some provinces more homeschool friendly** than other provinces, and might cause families to relocate to those provinces for reasons of educational freedom. This will create education refugees, as is the case with Swedish families who relocated to Finland to obtain freedom to home educate their children, and a German family who received asylum in the USA on the grounds of home education.
- E. In a **constitutional democracy legislation should be crystal clear** on what is allowed and what is not allowed. It is unacceptable in a constitutional democracy that permission to choose home education is dependent on vague concepts such as "*circumstances of the learner or parent*" or "*the character of home education*".
- F. Since the **HOD does not have insight into the unique circumstances of each individual learner**, or the diverse nature of home education, conditions based on such matters can be challenged in court and lead to much unnecessary litigation. A learner has recently been turned down for registration as a learner at home by a PED, and the reason provided by the official was that the light in the home education site was insufficient. No standards are provided for home education sites in the registration documents. The provision of an unnamed quantity of light in the place of study can be regarded as an unreasonable condition set by the authorities.

### Proposal

This section should be removed, since it is in conflict with the principles of a constitutional democracy.

## Clause 25: Section 51(3)(c)

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

### Objection

This section could make the right of children to receive home education dependent on the capacity of the education department, and will authorise the HOD to make it impossible to register for home education by merely not building sufficient capacity to handle registrations.

### Grounds for Objection

- A. According to the Constitution, children have the right to parental care, and according to the Children's Act this care includes guiding and directing the child's education. If parents have decided that home education is in the best interests of their child and apply for the learner to receive education at home, this section will allow the HOD to attach the condition that parents should wait until the education department has sufficient capacity to support and monitor home education, before learners will be registered. Given the current state of government finances, it could take years before the department is allocated a budget to establish sufficient capacity. This means that the **child's right to parental care is made dependent on the capacity of the education department.**
- B. This condition can easily be used as a **covert means to effectively ban home education in South Africa.** The HOD merely needs to attach the condition that home learners can only be registered once the education department has sufficient capacity to support and monitor the home education of learners, and then never establish the capacity.
- C. The condition may **prejudice learners in some provinces** and may favour rural vs city learners.

### Proposal

This section should be removed, since it infringes on the rights of children to parental care and the best interests of the child, as determined on a case-by-case basis.

## 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 and Grounds for Objection

- A. This section makes the **completion of grade 9 a precondition to enrol at a public school for grades 10 to 12.** If a home learner has followed an educational approach that is not based on grades, and wants to do matric at a public school, it will not be possible. Such a learner will be forced to do grade 9 at a school or with a curriculum supplier who provides the CAPS curriculum, in order to receive a report that proves that the learner has completed grade 9. This section limits the choice of parents to choose home education until grade 9.

- B. A learner has in any case a right to enrol at a public school at any grade, **subject to admission requirements set by that particular public school**. Why mention only grade 9, unless the special purpose is to prohibit enrolment for those who have not completed the CAPS curriculum grade 9?
- C. The **requirement is discriminatory**. Children regularly transfer to public schools from different educational alternatives, for example from private schools following different curricula or from other countries following other curricula. The particular school must assess and negotiate with the parents whether or not the child is ready for a particular grade. It is not reasonable that a special condition should be set to treat home educators differently.
- D. After grade 9 or age 15, compulsory schooling is not required, and so the **SA Schools Act has no authority to regulate home schooling beyond compulsory school-going age**.

## Proposal

This section limits the freedom of parents to choose an education that is in the best interests of the child, and it is therefore unconstitutional. It achieves no useful purpose and is inconsistent with the provisions for compulsory school-going age in the SA Schools Act. It should be removed.

## 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 a 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 subordinate 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 the same degree with respect 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 Objection

- 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 by 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 learners beyond those who attend state or private schools** until grade 9 or age 15 (the latter schools 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 and Grounds for Objection

- A. This section is **prejudiced against home education**, because it requires that the HOD *must* cancel a learner's registration for home education when the HOD is satisfied the home education is not in the educational interest of a learner, whilst the HOD is not required to move learners from school education to home education when school education is not in the best interests of a learner. Such a one-sided approach pretends to promote the best interests of learners, but could in practice covertly be used to promote school education at the expense of home education.
- B. The **Children's Act already provides for "mandatory reporters"**. These include all teachers, police officers, health care practitioners, including traditional healers, ministers of religion and all other religious leaders. Mandatory reporters are required by law to report possible neglect (including neglect of the education of the child) if they have reason to believe that a child's education is being neglected. It is submitted that the Children's Act provides adequate oversight to punish the neglect, including educational neglect of children, and there is therefore no need for the HOD to perform the function of determining whether home education is in the best interests of a child and cancel the learner's registration.
- C. There is **no provision for the HOD to provide reasons in writing** for his actions to the parents.
- D. The **term "educational interest" is vague** and would have to be defined precisely before it can be used as a yardstick.

### Proposal

To bring the section in line with the Children's Act, it is proposed that this section is changed to the following: *"51(7) The Head of Department must cancel a learner's registration for home education if a mandatory reporter has reported that a home learner is educationally neglected and a court of law has found that it is in the best interests of a learner to attend a school."*

## 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 and Grounds for Objection

- A. This section makes **provision for a learner to appeal to the MEC**, meaning that a 7 year old child can appeal to the MEC. The authority to make decisions on the type of education a learner

should receive vests in the caregiver as defined in the Children's Act. This definition of caregiver does not include learners, and making provision for learners to appeal to the MEC therefore contradicts the Children's Act.

- B. This section also **contradicts section 51(8)(a)** which states that the HOD needs to inform the parent only.
- C. Making provision for learners to appeal to the MEC can create opportunities for education officials and social workers to encourage learners to appeal to the MEC without the knowledge and against the wishes of the parents. Such situations can create **conflict within families and undermine parental authority**.
- D. A homeschooling parent who wants to make a decision on whether to appeal or not will have to acquire counsel from various parties, including amongst others lawyers and education psychologists. It is **not reasonable to expect homeschooling parents to lodge an appeal within 14 days**. Parents should be given at least 30 days in order to notify and should be allowed to apply for additional time if they can supply adequate reasons as to why the additional time is required.
- E. A parent who needs to compile an appeal to the MEC could require counsel from various professionals and would have to send learners for various evaluations. Parents might not have the financial resources to pay for all these services immediately and will have to delay certain actions until financial resources are available. It is therefore **not reasonable to attach any specific timescales** to when an appeal must be submitted to the MEC.
- F. **Clause 29: Section 59A** The following **dispute resolution mechanism** between the HOD and an SGB is proposed in the newly inserted s59A:

#### *Dispute Resolution*

*59A. (1) In the event of any dispute between the Head of Department and a governing body, the parties must meaningfully engage each other to resolve the dispute.*

*(2) In attempting to resolve a dispute, the following steps must be taken:*

*a) The aggrieved party must give the other party written notice of the dispute; and  
b) such notice must include a description of the issues involved in the dispute and a proposed resolution thereof.*

*(3) If the dispute has not been resolved within 14 days after the issuing of the written notice contemplated in subsection (2), each party must nominate a representative and those representatives must meet within 14 days after their nomination in order to resolve the dispute.*

*(4) If the parties cannot reach agreement, the dispute may be referred for mediation to a person agreed upon by the parties."*

No provision is made for home educating parents and/or their representative bodies or their legal defense funds to use this mechanism. This is clearly discriminatory.

## **Proposal**

The DBE should consult with stakeholders in the home education sector and determine how home educators can access a dispute resolution process. This provision should be amended accordingly.

## Clause 25: Section 51(10)

*The Minister may make regulations relating to the registration and administration of home education.*

### **Objection and Grounds for Objection**

This provision **amounts to a complete delegation of powers from the legislature to the Minister**. It must be questioned why this section is included here and not in Section 61 of the SA Schools Act (1996), with the rest of the provisions empowering the Minister to make regulations. It is not possible for meaningful consultation to take place on this provision until those aspects of home education the Minister needs to regulate are made clear and furthermore why the Minister needs to issue regulations on those matters is clarified.

### **Proposal**

The provision should be redrafted to state explicitly what is to be regulated and an explanation of why these areas need regulation should be given (perhaps in an amended "Memorandum on the Objects of the Bill").