Pestalozzi Trust *(IT6377/98)*

the legal defence fund for home and community-based education
die regsfonds vir tuis- en gemeenskapsonderwys

PO Box/Posbus 12332 Queenswood Pretoria 0121 RSA Tel: +27 12 330 1337
E-mail/E-pos: defensor@pestalozzi.org Web: https://www.pestalozzi.org

The President
Mr Matamela Cyril Ramaphosa
Private Bag X1000, PRETORIA, 0001
Private Bag X1000, CAPE TOWN, 8000
Union Buildings, Government Avenue, PRETORIA
Tuynhuys Building, Parliament Street, CAPE TOWN
E-mail: president@presidency.gov.za; malebo@presidency.gov.za

Dear Hon. President Ramaphosa

A. INTRODUCTION

1. The National Council of Provinces ("**NCOP**") and National Assembly ("**National Assembly**") adopted the Basic Education Laws Amendment Bill [B2D-2022] ("**BELA Act**") on 16 May 2024.

2. The BELA Bill has been, or will be, placed before you for Presidential assent and signature.

3. This correspondence is directed to and intended for your consideration in advance of any decision to assent to, and sign, the BELA Bill.

4. This correspondence is addressed on behalf of the Pestalozzi Trust ("**Trust**").

5. The Trust has as its objective the protection of the interests of South African homeschoolers, an extensive community that incorporates parents and children, tutors, curriculum providers, sporting, cultural and religious groups ("**Homeschooling Community**").

6. The Trust addresses this letter to you on its own behalf, and on behalf of its members. It does so too in the public interest, and on behalf of the tens of thousands of children and their families who have chosen homeschooling for a variety of reasons. Many of these reasons are profoundly personal and private, while some are practical and circumstantial. In either event, these are elections relating to family matters, impacting deeply and personally not only children but families as a whole.

7. This letter is intended to highlight the concerns about the BELA Bill in respect of the regulation of homeschooling in South Africa. The relevant clause is Clause 35 of the BELA Bill, which would amend section 51 of the South African Schools Act and impose excessive regulatory burdens on parents who opt for homeschooling. The BELA Bill seeks effectively to coerce homeschoolers to subject themselves to monitoring and assessment regimes that are used in schools, under threat of harsh penalties for failing to seek and obtain registration as a "homeschooler".[1]

[1] The current South African Schools Act states: "A parent may apply to the Head of Department for the registration of a learner to receive education at the learner's home."

8. The concerns the Trust wishes to draw your attention that relate, in summary, to the following issues:

   8.1. The **first** relates to adherence to the Socio-Economic Impact Assessment System ("**SEIAS**") and the treatment of homeschooling interests in the Socio-Economic Impact Assessment (SEIA).

   8.2. The **second** are procedural concerns, failures and challenges which have beset the legislative process in the parliamentary processes in respect of the BELA Act, both in the NCOP and NA and which have resulted in an under-representation of the interests of the Homeschooling Community in the legislative process.

   8.3. The **third** relates to the constitutionality of the BELA Act.

B. FLAWS IN THE SEIAS PROCESS INSOFAR AS HOMESCHOOLING IS CONCERNED

9. The need for a full and proper understanding of the socio-economic impact of legislation has long been recognised. For that reason, for nearly a decade, cabinet memoranda seeking approval for draft bills must include an impact assessment that has been signed off by the Presidency's SEIAS Unit.

10. This did not happen while the Department of Basic Education ("**DBE**") invited public comment on the BELA Bill in 2017. When the BELA Bill was published in 2017 for public comment a SEIA did not accompany the Bill. This is in violation of the SEIAS guidelines, and undermines the important purpose serviced by it. Public comment could not have been informed and meaningful input could not have been provided by the public without them having access to the SEIA before making their comments to the DBE on the 2017 BELA Bill.[2] It was a very serious lapse, given the very important purpose served by a SEIA and because the SEIAS function sits within the Presidency.

11. Only in the following year (in 2018) was a SEIA published. However, this version did not consider homeschooling.
12. The Pestalozzi Trust entered into correspondence with the DBE, provided initial research documents, and indicated the research required, on which to base a comprehensive SEIA. This was ignored by the DBE and in no way included or even acknowledged in subsequent SEIA studies. Homeschooling continued to be sidelined.

13. The DBE remained entirely silent on the SEIA and the only opportunity the public had to comment on the SEIA was in 2022, when the Bill was tabled in parliament and a SEIA was then published.

FLAWS IN THE SEIA ITSELF

The BELA Bill proposes to change this to: "If the parent of a learner who is subject to compulsory attendance as contemplated in section 3(1) chooses to educate the learner at home, such parent must apply to the Head of Department for the registration of the learner to receive home education."

[2] Para. 4(1) "*5. Publication of the draft policy initiatives, regulation or legislation for public comment and consultation with stakeholders, with the final assessment attached.*"
Socio-Economic Impact Assessment System (SEIAS) Guidelines

14. Even when the SEIA was provided with the BELA Bill in 2022, the SEIA provisions which related to home education did not give citizens and parliament the necessary information to meaningfully consider the social and economic impacts of BELA Bill from a homeschooling perspective.

15. This was so for the following reasons:

The SEIA is not supported by research insofar as the Homeschooling Community is concerned.

15.1. According to the DBE's own documents, no research was done on home education when the SEIAS was prepared.

15.2. Ironically, it is the uncertainty about the Homeschooling Community, and the monitoring of this section of the education sector, that was identified as a serious concern to the DBE and which motivated the inclusion of Clause 35 of the BELA Act. But by legislating a specific interest group without first doing its homework, the DBE and SEIAS Unit fell into the very trap which they had sought to remedy in the BELA Bill.

15.3. The problem of uncertainty means that legislation (the BELA Act) has been enacted to target specifically the regulation of a particular community (the Homeschooling Community) without understanding key features of the community, such as its size, how it operates, and the challenges it experiences. In such a case, it is simply not possible to appreciate or understand the impact of regulation, i.e. the BELA Act, on this interest group.

15.4. Legislators cannot legislate in the dark. They cannot legislate without the facts and/or without insight into the problem they are legislating on and how that legislation will impact on the subjects of the regulation. That is the very purpose of preparing a SEIA.

Annexures to the SEIA: omitted and not considered

15.5. The BELA Bill SEIA consists of the main document and various annexures. Annexure C to the 2022 SEIA was intended to contain information on the costs of Home Education Assessment. It was a crucial piece of the SEIA which was required to appreciate the financial implications related to home education, in line with published policy.

15.6. However, that information never saw the light of day. Annexure C was not initially distributed to the Parliamentary Committee on Basic Education ("**PCBE**").[3] This meant that some PCBE processes took place without this evidence and without it being considered.

15.7. The public was one stage worse off: the public had <u>no</u> access to <u>any</u> of the annexures. As far as the public were concerned, they had no insight into home education assessment costs and could accordingly provide no comment or input on and could not consider it. While the public, in general, did not have insight into the proposed costing, they were aware of the flaws of the SEIA and numerous oral and written submissions to both the NA and NCOP highlighted the inadequacy of the SEIA.

[3] It was excluded from the emails which were sent to the PCBE and therefore not before the PCBE.

Annexure C: Home education assessment costs considered irrelevant grades 10-12

15.8. Annexure C was, in any event, patently lacking in its own terms: it covered grades 10-12, although registration for home education is only for grades R-9 (grades 10-12 were not relevant at all).

15.9. The costing that was contained in annexure C was thus entirely incorrect and irrelevant to the assessment. No correct annexure C was provided.

15.10. The legislative process proceeded on the flawed assumption that Annexure C addressed costs relevant to home education as defined in the Act (i.e. Grade R to 9) when in fact they did not.

True financial impacts not considered

15.11. Home education should, in fact, generate significant savings for the state.

15.12. However, if home education is regulated in the manner proposed by the BELA Act (i.e. to impose registration processes, assessment requirements and submission of assessment reports), it would put these savings at risk and create significant costs to the state.

15.13. There is therefore a serious financial incentive to ensure that home education be appropriately regulated to increase savings, reduce costs to the state and at the same time ensure that the right to education of children is ensured.

Unable to achieve objectives: no causal relationship between “problem” and “solution”

15.14. The effect of not undertaking any research into, and therefore not understanding, the Homeschooling Community, is that the Homeschooling Community has been entirely misunderstood in the legislative process, and as a result the end sought to be achieved (better transparency in respect of homeschooling) bears no relationship with the solution sought to be enacted through the BELA Act.

15.15. One example is the registration requirement. The BELA Bill clause 35 (which amends section 51 of the South African Schools Act) is intended to provide certainty about the requirement to obtain registration in order to homeschool (although it is questionable whether the re-phrasing of the section provides this clarity at all).

15.16. But more fundamentally, the SEIA fails to seriously consider and address the views of the Homeschooling Community – namely, that it is offensive to ask for permission to educate children at home, having regard to the parent-child relationship and the duties of a parent to act in a child’s best interests, which cannot be subservient to, or conditional upon, permission being granted by the state.

15.17. This arises from the section 28 constitutional standard that every child has a right to family or parental care, which includes securing “the child’s education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child…”.

15.18. The concern is fundamentally with the role of the state in requiring a permission for a parent to fulfil a parent's constitutional role, based on a child having reached an arbitrary school-going age.

15.19. That is not to say that registration should not be considered, but that it should take a different form which caters for these concerns – such as a requirement to "register" through a notification (such as when a birth is registered) which provides as much, if not more, certainty and transparency to the Department about student numbers and whereabouts, and the like.

15.20. The above position, one held by the majority of homeschoolers, was peremptorily dismissed, if even considered. No alternatives to the DBE position were generated or considered, as required by the SEIAS process.

The impact of the penalty clause is not considered.

15.21. The impact on the penalty clause on the Homeschooling Community is a matter of grave concern.[4] The legislative intention is to deter through punishment. What the section permits is harsh penal provisions for parents who elect to home educate for a multitude of reasons, not all of which have been appreciated or can be avoided. It is unduly harsh and entirely unaccommodating of learners' differences and their best interests.

15.22. The penalty (or any penalty) is overharsh if the parent has merely committed an administrative oversight and places undue focus on administrative compliance rather than whether the child in question is adequately educated; the latter, it is submitted, is the foremost concern.

15.23. It also overlooks the costs associated with a severe increase of the penalty. This penalty will have significant financial implications on homeschooling families and the state. It could also discourage parents to choose homeschooling, and negatively affect the right of children to receive parental care, the right to a basic education and the right to privacy.

The impact analysis in the SEIAS is incomplete

15.24. The SEIAS also fails to consider the interaction between the BELA Act and existing regulation and statutes, in particular provincial legislation, creating a confusing, regulatory jigsaw-puzzle.

15.25. The BELA Act also overlooks the Children's Act and the Constitution (section 28) on parental care and parental responsibilities, and the best interests of the child and parental care (if parents fulfil their parental responsibilities as described in the Children's Act in a way that does not comply to the parental responsibilities described in the BELA Act (through obtaining registration approvals), this would expose parents to significant penal risk).

16. In the light of these concerns, the Trust contends that the SEIAS process was not followed and that the SEIA was inadequate.

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[4] In the BELA Act, Section 3(6) the penalty clause is increased from six months to 12 months or a sentence at the court's discretion.

17. There is simply no way that you can be satisfied that the BELA Act will achieve its aims, or that the Bill is rational, or meets strategic and policy objectives insofar as home education is concerned, in the light of the failings regarding the SEIAS.

C. THE PROCEDURAL FAILURES/CHALLENGE

18. The BELA Act process has been a lengthy one. There have been numerous, serious lapses. The Trust intends to highlight just three.

19. The **first** complaint is that the public participation processes were in some instances abused.

20. In some instances, those who attended public meetings were not given sufficient time to speak as officials did not relinquish the microphone to enable the public to participate, at least until the last few minutes of the proceedings.

    20.1. In Gauteng, children who were in attendance and wished to share their views were advised that they would not be heard on the BELA Bill (despite the legislation impacting such students / learners directly). To allow the gravity of these breaches to be demonstrated a few representative examples are mentioned:

    20.2. In the NCOP, children were prohibited from making submissions – At a public hearing in Thembisa (on 28 February 2024), mentioned above, it was indicated that submissions by children would not be allowed. In this regard, the Chair (Hon. T.B. Munyai) stated at the end of the meeting that he had spoken to the State Law advisor and received advice that **children under 18 cannot make submissions**. The obvious issue is that the BELA Act impacts children. Their voices should have been of foremost consideration.

    20.3. In the PCBE – there was a lack of pre-education regarding the Bill.

    20.4. In the NCOP – In Gauteng, in both Randfontein and Thembisa, respectively, on the 26th and 28th February 2024, the Chairperson stated he expects members of the public to print their own copies of the BELA Bill (which is plainly a precondition for participation, but which is not a realistic requirement to impose on most people, who do not have printing facilities available to them).

    20.5. In the PCBE, Speakers at Embalenhle in Mpumalanga indicated that they could not comment because they either did not understand the bill or they did not have enough time to prepare for the hearing because they had not been invited.

    20.6. In the PCBE, at certain venues, such as, for example, Phuthaditjaba in the Free State, blind and visually impaired attendees did not receive copies of the handouts and copies of the BELA Bill in braille or in large font and thus could not participate.

21. Evidence of the above (through recordings that are available) are included in the attached Annexure "A" hereto. In addition, further examples are included to demonstrate that these are not isolated examples but rather indicative of a trend in how the public engagement process took place.

22. The Trust addressed a letter to the NCOP in which it set out extensively the process failures in the NCOP processes. The letter set out the inadequacies of the process followed, and the failure

of the NCOP (through the work of the provinces) to comply with the requirements of section 72(1) of the Constitution, which requires the NCOP to (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and to (b) conduct its business in an open manner ("**NCOP Letter**").

23. The Trust, in the NCOP Letter, highlighted that the duty to facilitate public involvement requires legislatures to provide citizens with a meaningful opportunity to be heard in the making of the law that will govern them. This could not happen because of *inter alia* the failure to facilitate pre-meeting "education" on the BELA Bill, inadequate notice of the hearings, venue changes without notice; impeding access to public meetings, and lack of procedure (particularly involving virtual platforms).

24. A copy of the letter is attached as Annexure "B" hereto. Its contents are not repeated herein, but should be considered because:

    24.1. The Trust had demonstrably sought to engage in the spirit of cooperation and openness and the NCOP Letter illustrates that serious lapses took place in the NCOP processes.

    24.2. Unfortunately, the processes had suffered certain irredeemable defects. These impacted upon the reasonableness of the process as well as the perception of the public that the legislature is engaging and acting reasonably.

25. The **second** complaint is that the submissions of the Trust were ignored or misrepresented during the legislative process.

    25.1. The NCOP Letter provides a ready example of this. The letter was circulated widely to the relevant officials in the NCOP. The only response it has elicited to date is an undertaking from the Chairperson of the NCOP to look into the matter, but it has for all practical purposes been ignored.

    25.2. The position and submissions of the Trust was also misrepresented before the Select Committee. Advocate Ngema, Parliamentary Legal Services, stated that the Trust's proposal submitted to the Select Committee on 31 January 2024 was "substantially the same" as the Bela Bill. This was fundamentally to misstate the position of the Trust and render nugatory the Trust's submission. Members thus appear to have proceeded under the misapprehension that the Trust's proposal and the BELA Bill were in essence the same (and therefore under the assumption that many homeschoolers supported the BELA Bill). This was so even though the vast majority, if not all, in the public hearings rejected it. The Select Committee proceeded to discuss and vote on Clause 35 under this misapprehension about the position of homeschoolers. The NCOP thought that it was adopting a Bill with provisions *supported* by homeschoolers in South Africa; but in fact, the opposite was true.

26. The **third** is a lack of engagement with homeschoolers and a failure to properly consider homeschoolers' submissions.

    26.1. Adv. Rudman, Special Advisor to the then Deputy Minister, Enver Surty, assured the Trust "that the task team will provide you with an opportunity to address it in

regard to your concerns and suggestions.” (e-mail of the 19th October 2018). This promise was never honoured.

26.2. Despite claims to the contrary made by the Minister and her officials that there was wide and extensive engagement with homeschoolers concerning the BELA Act, this was limited to the following:

26.2.1. One meeting with the Trust to arrange mechanisms to alleviate the IT systems' failures plaguing the DBE computer system due to the volume of submissions.

26.2.2. One meeting between the Minister and the Trust, for which the Trust was grateful, but which provided limited scope for a full discussion.

26.2.3. One meeting with officials at which the Trust presented research. As a result of this meeting, the Trust submitted suggestions to improve the SEIA, but the Trust received no response and these did not feature in any SEIA to date.

26.3. Other than the abovementioned meetings, all face-to-face engagements between the Ministry, DBE and homeschoolers were either discussions on the implementation of the Policy on Home Education or the writing of the regulations on home education that will follow the BELA Act coming into force.

26.4. None of these involved discussing input into the BELA Bill and in many cases homeschoolers were directly told the Bill was not the subject of discussions in these meetings.

26.5. Despite the above the DBE has stated (both before the PCBE and the Select Committee) that extensive consultation with homeschoolers took place – but nothing could be further from the truth. This statement was effectively rebutted in an oral submission to the NCOP by Ms. Marietjie Ueckermann of the Cape Home Educators. Yet the Chair of the Select Committee entertained the same misrepresentation by the DBE and appeared to have no recollection of the presentation by Ms. Ueckermann.

26.6. Annexure “F” (here as part of the annexure marked Annexure “BB”) to the NCOP Letter sets out this incident in detail.

26.7. Overall, there has been a regrettable pattern of homeschoolers' comments and inputs being ignored. Public outcry over the inclusion of a clause allowing the sale of alcohol led to the clause being removed from the BELA Bill in its entirety. However, the universal rejection of clauses regulating home education were not similarly considered, even where reasonable alternatives were presented. The apprehension of bias on the part of parliamentarians and officials is hard to discount, a conclusion supported by statements made by roleplayers at the highest levels in the educational establishment.

26.8. For example, in the 2018 version of the SEIA it was revealed that “The senior management also recommended that in the quest of developing this policy, they should create some significant stringent measures that will make it not easy for parents to opt for home education.”

Additionally, during a Council of Education Ministers meeting on the 9th March 2017, the statement was made by a participant that "The implication of scrapping the home education should be explored; religious fundamentalism could also be a factor in this regard. Discouraging home education should be created by making parents pay for the expenses in this regard." Fortunately, certain officials argued that the scrapping of home education should not be contemplated. It does, however, appear that the plan to make home education more costly has been given effect to by the Act.

D. THE SUBSTANTIVE GROUNDS: UNCONSTITUTIONAL AND UNACCOMMODATING

27. On account of the lack of research into the Homeschooling Community, home education provisions in the BELA Act do not take cognisance of the practice of home education in South Africa. There is a Homeschooling Community which exists, and which must be afforded regulatory recognition in the BELA Act, just as all law-abiding persons (whatever their differences of opinion) have a place in South African society and must be reasonably accommodated. The BELA Act cannot and should not foreclose on the Homeschooling Community's ability to practice and observe their pedagogical beliefs.

28. It is fundamentally not the same as "conventional" school-going. Home education typically needs monitoring and assessment methodologies that are different from those used in the school system. The failure to undertake the necessary research has resulted in homogenisation of learners and children, and a one-size-fits-all approach to children, education, learning systems, and pedagogy. It is harmful and it ignores children's differences and critical features of their individual well-being and personal development.

29. It is the opposite of the pluralistic and diverse society, tolerant of differences and abilities, which is sought to be achieved through section 9(2) of the Constitution (the equality clause).

30. The imposition of requirements like registration approvals, and harsh penal sanction, will lead to unintended consequences and unanticipated outcomes. It will deter members from joining the Homeschooling Community, or deter those persons who are already part of the Homeschooling Community from seeking registration at all for fear of being "detected" and "punished". Even when such criminal provisions are rarely enforced, their symbolic impact has a severe effect on the social lives and dignity of those targeted.[5] Parents who do not register are criminalised for making decisions which they believe are best for their children – a choice between two evils which no parent should have to face.

31. There is the risk of potential differing applications of the provisions between provinces and sectors on account of their vagueness and overlapping regulation (not all of which is consonant with one another). The result will be arbitrariness and unequal treatment of the members of the Homeschooling Community around the country, legal uncertainty and rule-of-law prejudice.

32. All of the above detracts from, rather than strengthens, what should in law be the primary and overriding consideration: the best interests of the child. Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child."

[5] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (National Coalition) at para 23 and 28.

33. It is trite that section 28(2) is both a self-standing right and a guiding principle in all matters affecting children.

E. CONCLUSION

34. In the light of the legal issues we have highlighted above, you are empowered to refer the BELA Bill back to the National Assembly for reconsideration or refer it to the Constitutional Court for a determination of its constitutionality.

35. The Trust recognises that:

    35.1. home educated learners constitute less than 1% of the learner population of the country;

    35.2. the BELA Act has taken many years to reach the point that it has; and

    35.3. some provisions in the Bill are urgently required to address pressing challenges in the rest of the education system.

36. The above concerns militate against the BELA Bill being shelved in its entirety, and instead favour the adoption of a phased approach to the implementation of provisions of the BELA Bill or its implementation alongside the related regulations.

37. The Trust proposes, in the light of these concerns, that you exercise your discretion not to enact those provisions of the BELA Bill which impact on the home educated (Clause 35).

38. There is an artificial urgency in signing the BELA Act into law at this stage. The legislative process has been underway since 2017 - there is no urgency in implementing it midyear.

39. In particular, there is no urgency in respect of the home education provision (Clause 35). This is a discrete provision of the BELA Act which can be easily carved out from the rest of the BELA Act, should the rest of the Act be ready to be enacted at this stage.

40. The reason it is important to adopt a cautious approach is because the well-being, interests and rights of home-educated children are at stake. It is children who are impacted by the BELA Act, and the Homeschooling Community learner body comprises young people. They may be particularly vulnerable young people (hence the election to home school, rather than educate through conventional schooling). Section 28 of the Constitution demands that children's interests are paramount in all matters which impact them, which includes in respect of any legislative matters.

41. The Constitutional Court has recognised that children and adolescents are vulnerable and merit special protection and children's dignity rights are of special importance. A cautious approach to the enactment of the BELA Act would respect this. This is what we ask you to consider.

Yours sincerely

Bouwe van der Eems ***(Chairperson: Pestalozzi Trust)***