



**Pestalozzi Trust (IT6377/98)
Comments on the Draft Policy on
Home Education**

Date: 8 December 2017

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1. Executive Summary

The Pestalozzi Trust has studied the proposed Draft Policy on Home Education in the short period afforded the public by the Department of Basic Education (“DBE” or the “Department”).

Due to the constrained time frame, it is not possible to comment in the detail in which we would have wished.

The Draft Policy is flawed for the following reasons:

- A flawed consultation process means that there has not been the required meaningful consultation, and because home educators have not had insufficient input into the policy provisions, the Draft Policy itself betrays a number of flaws.
- In general terms, the Draft Policy is flawed: while it asserts a very powerful set of constitutional and home education principles, it fails to translate those into a workable policy. In fact, it could be said that the practical provisions of the Draft Policy are diametrically opposed to the principles on which the Draft Policy is based.
- To further compound this problem, the Draft Policy is based on both the South African Schools Act (No. 84 of 1996) and the BELA Bill. It is highly problematic that a draft policy is being based on the provisions of a proposed bill that is still subject to the public comment process and parliamentary review.
- Underlying the above is the fact that the Draft Policy conflates home education and public education.
- These underlying flaws have led to a policy that is unworkable in practice, and will merely contribute to increased non-compliance by parents, and increased conflict between parents and education officials.
- The Draft Policy does not treat parents and children with dignity, as required by the founding provisions of the South African constitution.

The Pestalozzi Trust wishes to indicate that we make this submission with the utmost reservation and under protest. Our participation should in no way be construed as legitimising a process which we deem flawed and which in no way constitutes meaningful consultation.

The Pestalozzi Trust reserves its rights in this regard.

2. Background

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

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

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

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

On the 17th November 2017 the Department of Basic Education released the Draft Policy on Home Education for public comment.

Home Educators and their representative bodies received no advance notice of the call for public comment, this despite the fact that the Pestalozzi Trust was in regular communication with the DBE.

We would like to state that the period for public comment has been wholly inadequate for the following reasons:

1. Lack of meaningful consultation in the drawing up of the Draft Policy.
2. Period for comment being limited to 21 days.
3. Comment being required while the period for comment on the BELA Bill is still open.
4. The Draft Policy drawing on a number of pieces of legislation, regulations and policies, and the period in question being not long enough to enter into a thorough study of these.
5. Lack of time to consult legal counsel.
6. Lack of an opportunity to consult with home educators and other stakeholders, many of whom are located in geographically diverse regions and are not organised into representative bodies.
7. Being both a period of examinations and so close to the festive season, this is a time of the year which does not allow concerned citizens the time to make the necessary representations.

Therefore, the Pestalozzi Trust is unable to comment in the detail that it would like to do. We therefore offer these comments as preliminary comments in the hope that future consultations will allow us to make more incisive and useful comments.

3. General Comments

a. Lack of meaningful consultation

Once again the Trust and the representative bodies for home education (whose details are lodged with the Department) have been excluded from the process of drawing up this policy.

The unfortunate consequence of this lack of consultation is that valuable time and resources of the Department have been expended on a Draft Policy that is impractical, unworkable and of doubtful legality.

The Department has contended that consultation has taken place, and the Pestalozzi Trust seeks to place on record the events which led up to the release of the Draft Policy to show that this did not constitute meaningful consultation.

b. History of the consultative process

Representatives from various homeschool associations, as well as the Pestalozzi Trust, were invited to meetings with the DBE in October 2014 and July 2015. Many of the associations were sceptical about attending these meetings, because it was commonly felt that the DBE does not consult with stakeholders in a meaningful way, and that stakeholders are steamrollered over to achieve the pre-determined outcome desired by the Department.

Despite this scepticism, the home education associations decided to attend these meetings as an act of good faith. These groups attended the meetings as separate organisations, but also worked together as part of the South African Coalition for Homeschooling. The participants were surprised when significant progress was made and when it appeared that the DBE was beginning to understand the following: that a 'paradigm shift' was needed to be made with regards to home education, and that home education was not simply an alternative to public and independent schooling but has a different character. This progress was visible in the second draft version of the discussion document by Dr. Trevor Coombe.

Before the last day of the second meeting, the members of the South African Coalition for Homeschooling met and reached a consensus position on a regulatory framework. This document was entitled "Notes on the Second Consultation Meeting 2015.07.03" and was handed to Dr. Simelane during the morning of 3 July 2015 by Mr. Leendert van Oostrum.

After these two meetings, the actual drafting process began in the Working Groups. Three people from homeschooling organisations received invitations to these meetings, this being in their personal capacities. These were Mr. Bouwe van der Eems, Ms. Joy Leavesley and Mr. Leendert van Oostrum. According to the Terms of Reference distributed before the first working group meeting, the purpose of the working group was to draft a new policy. Ms. Leavesley and Mr. van Oostrum accepted the invitation to the first working group meeting and attended in person. Since the Terms of Reference document stated that meetings would also be held by means of teleconference, Mr. van der Eems requested to attend this meeting telephonically from Cape Town. This request was however not granted.

Before the 1st Working Group meeting on 14 October 2015, an agenda and a Progress Report were distributed. The Progress report seemed to have replaced the Discussion Document by Dr. Trevor Coombe, and this action nullified the progress that was made in terms of basing the policy process on a new paradigm.

In the description of the background to the process of drafting a policy, the report included the following statement: "*Government remains the ultimate guardian of each and every child in the country and this includes the responsibility of ensuring that every child receives education.*" Statements of this kind caused the invitees to become increasingly concerned that the purpose of the working group meeting was not to consult with stakeholders, but to use stakeholders merely to provide legitimacy to a pre-determined outcome. Mr. van Oostrum replied to the Progress Report of the DBE and raised his concerns about the Progress Report and the Terms of Reference, and proposed changes to these documents. The proposed changes were however not accepted. Furthermore, the working groups consisted of 14 members. 9 members came from the DBE and only one member, attending in their personal capacity, was a homeschooler. This meant that the views of home educators would have had no significant influence when matters were determined by means of a vote.

During the first working group meeting on 14 October 2015, the concerns were confirmed. Firstly, it was stated that members of the working group would perform their duties in the capacity of an employee of the DBE, and not as a representative of their organisation (ie. the associations). This means that the members of the working group would be co-responsible for the outcome. Furthermore, in his opening speech, Dr. Simelane made the statement: “*The child is a child of the state*”. Given the statements made in the Progress Report, and the opening statement by Dr. Simelane, Mr. van Oostrum was not willing to be co-responsible for the outcome of this process based on such statement, and he withdrew from the working group. However, he repeatedly stated that he would remain available in the capacity of consultant. Ms Leavesley had similar concerns to Mr. van Oostrum, and also noted that the submissions made during the meetings did not get any traction with DBE representatives, and that there was almost no common ground between homeschoolers and other stakeholders.

A second working group meeting was planned for the 13 November 2015 and Mr van der Eems was invited to this meeting. Since he could not attend in person and would have had to do so telephonically, Mrs Karin van Oostrum attended in his place. In her report on the second work group meeting, Mrs. Van Oostrum confirmed the concerns of Mr. van Oostrum and Ms. Leavesley; that the purpose of the meetings was not to consult homeschoolers and that the purpose of the DBE was to provide legitimacy to a pre-determined output. When Mrs. van Oostrum received an invitation to the next meeting on 29 January 2016, she resigned from the working group.

The last communication received from the DBE by any homeschooling association or the Pestalozzi Trust was on 29 January 2016.

The Pestalozzi Trust learned about the publication of the BELA Bill when they were informed by a vigilant homeschooler who read about it in the media on 13 October 2017.

While home education representatives and individual homeschoolers have sought to have input to the consultative process, they withdrew from the process in protest for the reasons alluded to above. They did however remain available as a resource to the DBE, and were willing to consult with the DBE.

The lack of consideration given to the input of home educators has led to a Draft Policy that is potentially open to legal challenge.

c. A strong principled basis for advancing legislation and policy

Despite the flawed process of consultation it is very pleasing to note that some common ground exists between the DBE and home educators.

The recognition by the DBE that the Constitution and the Bill of Rights are directly relevant to home education is warmly welcomed.

Sections 8.3 “The Character of Home Education”, 8.4 “Rationale and Motivation for Home Education”, and 9 “General Principles of Home Education” provide a sound basis for further discussion and should directly inform legislation, regulation, and policy.

We look forward to consulting with the DBE in order to create a practical legal framework that gives effect to these constitutional and home education principles.

However, the 'practical' provisions of the Draft Policy bear no relation to the 'principle' provisions. While the sections of the Draft Policy pertaining to principles are in general sound it must regrettably be stated that almost all of the practical provisions of the draft are irreconcilable with the 'principle' sections.

These two parts do not bear any relation to each other, and in this respect the Draft Policy is fundamentally flawed and should therefore be sent back as a whole to have the 'application' sections redrafted, with input from home education representatives.

d. The Draft Policy is based both on the South African Schools Act (No. 84 of 1996 as amended) and the proposed Basic Education Laws Amendment Bill

Just as the Draft Policy is flawed because the practical provisions do not give expression to the principles articulated in it, the Draft Policy is equally flawed because it draws from two pieces of 'legislation'. While the Draft Policy directly references the SASA it is equally evident that it also references the proposed BELA Bill. For example in the many provisions touching on "competent assessors" [i.e. Definitions, Sections 13(2)(e)(iii), 18.5 (2), 18.6(1)(b) and 8.6(1)(2)]. "Competent assessors" appear nowhere other than in the BELA Bill.

As this Draft Policy refers simultaneously to the SA Schools Act, as well as to the proposed BELA Bill, it will create confusion among education officials and will render the implementation of the Draft Policy inconsistent. This complexity is already leading to confusion in the DBE at the highest level.

Since the Draft Policy pre-empts the BELA Bill, it means that if the Bill is amended by parliament, a new Draft Policy will have to be drafted. This will be extremely wasteful of limited resources.

Furthermore, it should be noted that the pre-empting of the parliamentary process may represent an infringement on the prerogatives of Parliament.

It is also very concerning that policy is being drawn up in consideration of a proposed bill whose period for public comment has not yet been closed.

This practice unfortunately strengthens the contention that the DBE is not engaged in a process of meaningful consultation, and has pre-determined the outcome not only of the public comment on the BELA Bill, but even of the parliamentary process.

We urge the DBE to withdraw this Draft Policy immediately, and only re-introduce it once the new BELA Bill has been promulgated.

e. Home education is treated as public education

An overview of the Draft Policy reveals that in a number of places reference is made to legislation, regulation, policy, and provisions that apply to public schools or at the very most to certain private schools.

These include, but are not limited to, the following sections:

- s12(4) *“The provision of education beyond the scope of this policy is provided in the **Regulations Pertaining to the Conduct Administration and Management of the NCS examination.**”*
- s13(2)(c)(ii) *“the proposed education programme; (ii) covers the acquisition of content at least comparable to the relevant national curriculum”*
- s(19) *“Barriers to Learning”*.

These are now being applied to home education in what appears to be an attempt to treat home education as an alternative channel to deliver the same education that is provided at public schools.

If this is the case, it is firmly and completely rejected by the Pestalozzi Trust, as it is a violation of the constitutional rights of home educators, as well as being in conflict with the very principles the DBE has articulated in the Draft Policy.

Here again we see the Draft Policy being rendered unworkable as a result of an attempt to reconcile two different elements.

f. Unworkable policy

As has been demonstrated above, this Draft Policy is inconsistent for the following reasons:

- The principles conflict with the articulation of those principles when made into practical provisions.
- The Draft Policy is based on two pieces of ‘legislation’, one of which has not even been sent to parliament yet.
- Home education and public education are conflated.

This will render the Draft Policy unworkable for the following reasons:

- The Draft Policy is so complex that when it is applied in practice by provincial officials, this will lead to its application being inconsistent and will lead to regular conflict between officials and parents. Some of these conflicts will lead to unnecessary court cases.
- Many homeschoolers deem standardised testing to be severely detrimental to the child, a view supported by scientific study. Some Scandinavian countries have severely restricted standardised testing and have improved their educational outcomes as a result. Continuous evaluation and quarterly examination have proven to be detrimental to children and to constitute a barrier to learning. It is for the parent to decide when the child is ready for assessment and standardised tests (examinations). As a general rule, this starts with the examinations provided by international curriculum providers such as Cambridge and GDE/SAT.
- The costs of assessments might make it unaffordable for parents to provide home education, and will contribute towards establishing a culture of non-compliance.

- The registration process places such a significant administrative burden on parents and the department that it will be unworkable in practice.
- This administrative burden does not promote the best interests of the child, and for this reason parents will resist it. This will result in increased non-compliance and conflict between homeschooling parents and officials.
- The costs of implementing the registration and monitoring processes described in the Draft Policy could run into the hundreds of millions of rands. Given that there is no evidence of large scale educational neglect of home learners, it is very difficult to justify this expenditure, especially as it will draw resources away from other critical programmes.

4. A Note on Cottage Schools

We wish to make a brief reference to the issue of cottage schools, which is beginning to come to the fore, and ask the DBE to take constructive action to address the issue.

While the Draft Policy takes a very strong position against cottage schools, it is quite possible that a lot of the confusion over cottage schools has been created by the DBE itself.

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

*“Home education as contemplated in section 51 of the Act is –
 (a) a programme of education that a parent of a learner(s) may provide to his/her own child at their own home. In addition the parent may, if necessary, enlist the specific services of a tutor for specific areas of the curriculum; **or**
 (b) a legal, independent form of education, alternative to attendance at a public or an independent school.”*

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

Is it possible that some people, in starting a cottage school or sending their children to such a school, had this clause in mind, or were told that the law did indeed cater for cottage schools because of this clause?

While this clause has a variety of different interpretations and it is possible that it was not the intention of the DBE to open the door to entities like cottage schools, the key question is: why was this not made clear long before the new Draft Policy? After all, the current policy has been in effect since 1999. It may be that this confusion led to the creation of many cottage schools, that now cater for as many as 40 000 to 50 000 students.

This is a practical reality that the DBE has to deal with, and it may have played a role in creating the legal uncertainty that surrounds cottage schools. The DBE cannot now simply wish the phenomenon away by merely stating repeatedly that cottage schools are illegal.

The legally conflicted situation that cottage schools find themselves in can only be addressed by the DBE working with cottage schools to find an appropriate path to legal certainty and compliance.

Furthermore, the current approach of merely stating that these cottage schools are illegal is by no means constructive, and is in fact destructive, as it will only drive cottage schools underground. The only solution to this situation is broad-ranging dialogue and meaningful consultation.

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

5. Clause-by-Clause Commentary

These are attached in an Annexure marked "A".

6. Conclusion

There has been a lack of meaningful consultation, and this is evidenced by the fact that the provisions of the Draft Policy are one-sided and impractical, infringe on the rights of home educated learners and their parents, and will in the main be rejected by home educators.

However, the Draft Policy sets out a number of principles that are shared by home educators and the DBE. It is hoped that these can form the basis of constructive consultations in the future.

The principles on which the Draft Policy is based are sound, but application of those principles is flawed.

Furthermore, the Draft Policy pre-empts the discussion of the BELA Bill in parliament. A new Draft Policy should only be issued after parliament has finished considering the BELA Bill.

In addition, home education is not a form of public education, and provisions suitable for public education cannot work in a home education environment.

This has led to the provisions of the Draft Policy being impractical. Imposing impractical provisions is not only going to be pointless, but is going to cost both the department and home educators potentially hundreds of millions of rands which could be better applied to improving education for learners.

The requirement that parents must be monitored constantly assumes that parents cannot be trusted to realise the educational needs of their children. They are assumed guilty of educational neglect and are required to constantly prove their innocence. This is a fundamental affront to the foundational principle of human dignity enshrined in the Constitution.

We urge the DBE to withdraw the Draft Policy and to enter into meaningful consultation with home educators, in order to create practical provisions which coincide with the constitutional and homeschooling provisions the DBE admits form the basis of the right to home educate.

Annexure A: Pestalozzi Trust

CALL FOR COMMENTS ON THE POLICY ON HOME EDUCATION

COMMENTATORS:

NAME	ORGANISATION
	PESTALOZZI TRUST

NOTE 1:

Due to the:

- 1) Lack of meaningful consultation in the drawing up of the draft Policy;
- 2) Period for comment being limited to 21 days;
- 3) Comment being required while the period for comment on the BELA Bill is still open;
- 4) Time needed to read the numerous pieces of legislation, regulation and policy that the draft Policy aims to make relevant to home education.;
- 5) Need to consult legal counsel;
- 6) Lack of an opportunity to consult with home educators and other stakeholders, many of whom are located in geographically diverse regions and are not organised into representative bodies;
- 7) Time of the year, being both a period of examinations and close to the festive season AND
- 8) The fact that as of the writing of this submission, our request for an extension to the comment period has not received a response,

the Pestalozzi Trust is unable to comment in the detail that it would like to do. We therefore offer these comments as preliminary comments in the hope that future consultations will allow us to make more incisive and useful comments.

Given the fact that we have not been consulted in a meaningful way, we are not in general able to make proposals for revisions. Should such consultation take place we will be pleased to assist in this regard.

Our comments should in no way be construed as an endorsement of this process, or that we agree that such a draft Policy can be legally binding on home educated learners or their parents.

We reserve all of our rights in this regard.

COMMENTS ON THE DRAFT POLICY ON HOME EDUCATION

Policy Page	Chapter/Section	Comment	Proposal for Revision
5	1. Definitions "competent assessor"	There is no provision in the SASA for such a role. The term "competent" is redundant. Does the DBE envisage deploying "incompetent assessors" that these "competent assessor" must be distinguished from by the use of the adjective "competent"? See Note 1	This pre-empts the BELA Bill and should be removed. Remove "competent"
5	"education programme"	See Note 1	
5	"home education"	See Note 1	
5	"home education site"	See Note 1	

Policy Page	Chapter/Section	Comment	Proposal for Revision
5	"illegal independent educational institution"	It is not for the DBE to determine 'legality'; this is a function of the courts. This is a intrusion of the executive into the functions of the judiciary. It is also a violation of the right to due legal process. See Note 1	Any reference to 'legality' needs to be removed.
	'monitoring' means checking for compliance with the Act and the policy established pursuant to section 51 of the Act;	1) Neither this draft Policy nor the Policy for the Registration of Learners for Home Education 1999 were established pursuant to the SASA. They were/are to be established pursuant to the Section 3(4) of the National Education Policy Act 1996. 2) s51 (SASA 1996) nowhere contemplates the creation of a compliance framework that needs to be monitored beyond the application process. As the registration request is processed within the PED, the only monitoring that needs to be done is of how the registration is being processed. Therefore there is no need for monitoring unless the DBE/PEDs wish to monitor their own administrative processes See Note 1	Remove from definitions
6	'Parent"	See Note 1	
6	"tutor" means a qualified educator	What a "qualified educator" is, is not defined either in this Draft Policy or in the SASA 1996. This will	Remove "qualified" and "on parts of the curriculum"

Policy Page	Chapter/Section	Comment	Proposal for Revision
	providing supplementary support services on parts of the curriculum.	<p>lead to confusion and inconsistent application, as a person who is deemed “qualified” by one official or province may not be deemed “qualified” by another. Also “curriculum” is not defined. Homeschooling families use a variety of curricula, and for many of these curricula it will not be possible to get a tutor qualification. In practice this means that parents will only be able to use tutors if they follow the CAPS curriculum.</p> <p>There are many people who are highly suitable to provide tutoring services for a specific subject, for example a family member or friend who has a degree in Mathematics. However, since these people do not necessarily have tutoring qualifications, it will not be possible to make use of the services of such people.</p> <p>See Note 1</p>	
6	C1.s2(1) & (2)	No comment at this stage. We reserve our right to further comment.	
6	C1.s2(3)-(5)	See Note 1	
6	C1.s3	See Note 1	
7	C1.s6	No comment at this stage. We reserve our right to further comment.	
8	C1.s6(2)(1)	No comment at this stage. We reserve our right to further comment.	
9	C1.s8.1(1)	See Note 1	

Policy Page	Chapter/Section	Comment	Proposal for Revision
9	C1.s8.1(2)	The DBE is here once again donning its judicial robes and prescribing to the court.	
9	C1.s8.2	See comments above concerning legality. See Note 1	
9	C1.s8.3	No comment at this stage. We reserve our right to further comment.	
10	C1.s8.4	No comment at this stage. We reserve our right to further comment.	
10	C1.s9	See Note 1	
10	C1s10	See Note 1	
11	s10.1(1)(k)(iii) associate herself or himself or cause the child to be associated with any illegal independent educational institution in respect of the home education provision. Such an association in violation of the Act, is not in the best interests of the learner, and shall amount to a reason upon which the HOD may investigate and which may lead to withdrawal of the registration of a learner to receive education at home.	<p>This creates a situation where, for example, a child registered at a school may attend an extra lesson at a cottage school, but her sibling who is registered for homeschooling cannot. Will the school-going child be under threat of being de-registered from school as well?</p> <p>Many independent educational institutions provide excellent services. Otherwise these institutions would not be growing so fast. It is an attack on the dignity of the people who offer these excellent services to make the sweeping statement that receiving these services cannot be in the interest of children.</p> <p>As for additional comment see Note 1.</p>	

Policy Page	Chapter/Section	Comment	Proposal for Revision
11	C1s10.2	See Note 1.	
11	C1s11	See Note 1.	
11	C2s12	These provisions are impractical and unworkable. See Note 1.	
12	C2s12.4 The provision of education beyond the scope of this policy is provided in the <i>Regulations Pertaining to the Conduct, Administration and Management of the NCS examination.</i>	This appears to preclude alternative school leaving examinations such as “Cambridge”, The International Baccalaureate and the GED. See Note 1.	State clearly and for the avoidance of doubt that this in no way will limit learner’s freedom to pursue any alternative school leaving qualification.
12	C2s13	See Note 1.	
12	C2s13(2)(c)(ii)	See Note 1.	
12	C2s13(2)(e)(iii)	See Note 1.	
12	C2s14	See Note 1.	This section needs to be checked for compliance with PAJA.
12	C2s14(3) f the HOD approves the registration of a learner for home education, the HOD shall within 30 days after approval:	The current Policy requires the HOD to process the request within 30 days. See Note 1.	Impose a reasonable period within which the request has to be processed. This period should be in line with PAJA.

Policy Page	Chapter/Section	Comment	Proposal for Revision
13	C2s15	See Note 1.	
13	C2s16	See Note 1.	
13	C317	See Note 1.	
13	C3s18	See Note 1.	
14	C3s19	See Note 1.	
15	C3s20	See Note 1.	
15	C3s21	See Note 1.	
15	C3s22	See Note 1.	
15	C3s23	No comment at this stage. We reserve our right to further comment.	
16	C4s24	See Note 1.	
16	C4s25	See Note 1.	
16	C4s26	See Note 1.	