



**Pestalozzi Trust** (IT6577/98)  
**the legal defence fund for home education**

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Dear Madam MEC,:

**Draft criteria to register a learner for home education**

Gauteng Provincial Notice No 3097 of 2008, published in Provincial Gazette Extraordinary No 223 of 20<sup>th</sup> August 2008 refers:

Thank you for the opportunity to comment on the proposed measures.

Attached, please find the submission of the Pestalozzi Trust on the Draft Guidelines and Criteria for the Registration of Learners for Home Education in Gauteng as requested.

Yours sincerely

Leendert van Oostrum  
**(Executive Officer)**  
30<sup>th</sup> September 2008

## Comments on draft criteria to register a learner for home education

*Submission on 30<sup>th</sup> September 2008  
by the Pestalozzi Trust legal defence fund for home education  
In response to a call for comments issued by the MEC for Education in  
Provincial Gazette Extraordinary No 223 of 20<sup>th</sup> August 2008*

The Pestalozzi Trust is grateful for the opportunity to comment on the guidelines and criteria for the registration of home learners as being contemplated by the MEC for Education. This is particularly so, since such written criteria have been outstanding for more than ten years, and the Pestalozzi Trust, its associates and members have, over a period of thirteen years, regularly asked for such measures to be stated in writing.

We reserve the right to add to our comments at any future date, and to inform the MEC of any additional insights we may gain.

### **Summary of comments and recommendations:**

- a) From a perspective of legal strategy, we are most pleased with the proposals as they are. The reason for this is that the document is so flawed that not only are the measures themselves legally unenforceable, but they also make the requirement for registration of home learners unenforceable. What this means is that adoption of these measures will make it almost impossible for prosecutors to obtain a conviction against parents who homeschool their children without registering them with the Gauteng Education Department (GED) as provided for in Sec 51 of the SA Schools Act (84 of 1996 – “SASA”) That makes our task as a legal defence fund for bona fide homeschooling families an easy one.
- b) However, this also means that parents who use home education as a smokescreen to hide educational neglect of their children cannot be effectively prosecuted either.
- c) There is no reason to believe that this is the result intended by the MEC. Indeed, much of the document contradicts the stated position of the MEC on the issues involved. It follows, therefore, that the MEC has been very badly advised in the drafting of this document.
- d) The document contains seriously incorrect information which may expose the MEC and the GED to charges of improper conduct. We therefore recommend that the present document be withdrawn as soon as possible to prevent that.
- e) We recommend that the MEC instructs officials from her department who possess the necessary knowledge of the law and of home education to redraft the guidelines and criteria, preferably in consultation with the stakeholders.
- f) We remain prepared to assist in such drafting.

- g) Any final document that fails to respect the rights and interests of those home learners and their parents who are our members may compel the Pestalozzi Trust to seek judicial review. That will afford the MEC the opportunity to submit the evidence on which her guidelines and criteria are based to the scrutiny of experts before an impartial public tribunal.

## Introduction

The Pestalozzi Trust and its associates have, over the past thirteen years, provided the GED with about 1000 pages of research based information on home education and home education policies, and engaged in correspondence to the tune of more than 70 A4 pages on the topic with various GED officials. Over the years, we have regularly and repeatedly asked for an opportunity to discuss with the responsible GED officials the policies on the registration of home learners in the province.

We are still awaiting that pleasure.

<sup>1</sup>Boothe et al (1997) found, however, that up to ten years ago it was the general norm for education officials responsible for the administration of the law on home education in the USA to be ignorant of two things: the law that they are expected to apply to home education and the home education to which they are expected to apply the law.

Sadly, while the knowledge of government officials in the USA seems to have improved, the present draft criteria suggests that this lack of knowledge may now characterise government policy in Gauteng.

Indeed, we possess tape recordings and the evidence of eye witnesses dating back to 2004 to the effect that the official who was at the time and still is involved in the formulation and execution of policy and procedures for the registration of home learners in Gauteng confirmed this. When her attention was directed to certain legal implications of her actions during a meeting with homeschoolers, she stated clearly that she was “*not interested in the law*”.

The only conclusion to be drawn from this is that, in the execution of her duties, she considers herself to be above the law.

The same official is on record as stating to homeschoolers that “*Education is a political game*”. In addition, her (now former) superior, Mrs Tidimalo Nkotoe, when asked on the TV programme Carte Blanche to explain why home education needs to be monitored, stated that it was to ensure uniformity among the citizens of the Republic: “*We are gunning for the same South African citizen*”.

And yet, the MEC is on record as stating that the GED conforms to the “ten fundamental values of the Constitution” which also form the foundation of the national

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<sup>1</sup> Boothe JW, Bradley LH, Flick TM & Kirk SP 1997. No place like home: our nationwide survey shows what school administrators know - and don't know - about home-schooling. *The American School Board Journal*. February 1997.

curriculum. These include the value of “the rule of law”. That is the principle that everyone, including government officials, are subject to the same law. Elsewhere, the Constitutional Court has cited with approval a definition that the “rule of law” means that citizens must be free from unjustified interference from the state. Both versions require at least a minimal understanding of the content of the law.

From the above, it seems that our impression that the draft criteria are not informed by adequate knowledge of the law and of home education, but rather by political objectives, is supported by the record of official statements on the matter.

(At a recent international conference of homeschooling representatives from many countries ranging from North and South America to Europe, Africa and the Far East and including other African countries our delegation, as patriotic South Africans, was often left red-faced at the uninformed and unsophisticated approach of our own government to home education.)

From other statements by the MEC, however, the proposed policies seem to be in contradiction to the position taken by the MEC.

For that reason, we shall analyse the proposals in greater depth. However, we shall only attend to the legal framework – the rest of the document is not worth much effort, given the fatal flaws in the legal foundation on which they rest.

## Comments on the draft document

### *Paragraph 3. Purpose*

Subparagraph (iv) is incomplete. It states that one of the purposes of the document is to “provide the Department with guidelines to determine whether the learning environment at home is conducive”. It fails to specify what the learning environment must be conducive to, and it is therefore not possible to judge whether the document meets this objective.

### *Paragraph 5. Legislative Framework*

The purported “legislative framework” on which the proposed guidelines rest is:

- a) *In parts, non existent.* Subparagraph (ii) refers to “sections 41 and 42” of the National Education Policy Act (27 of 1996, “NEPA”). The cited act has only 15 sections, and nowhere in its text does the cited act refer to the registration of home learners at all.
- b) *Grossly misrepresented.* Subparagraphs (iii), (iv) and (vi) falsely claim that Government notices no 1411 and 1473 published in Government Gazettes no 20659 and 20692 respectively constitute “amendments” to NEPA, and that Government Gazette no 29626 contains an “amendment” to SASA. None of this is true. All three government gazettes contain nothing but policies issued or purportedly issued in terms of the powers of the national Minister of Education under NEPA.

Nothing in these documents can be construed by any reasonable person to amend any Acts of Parliament. Even if there were elements that could be

misunderstood by lay people in this way, all the documents are issued by the Minister of Education who does not have the power to amend Acts of Parliament.

- c) *Highly selective and extremely limited*, and seems to include mostly those aspects of statutory law that purport to empower officials to intrude into home education. It ignores almost entirely all aspects of law that limits the powers of officials.

#### *Effects of the poor legal framework*

The effect of the misrepresentation and the reference to non-existent statutes in a) and b) above is that the MEC finds herself mistaken in law. The proposals present as law, matters that either do not exist at all in the form claimed, or are mere ministerial policies which do not have the force of law.

This constitutes incorrect information presented in an official document and her advisers thereby expose the MEC to serious censure or worse.

The failure of the drafters to conduct a thorough analysis of the constitutional implications of the proposed guidelines referred to in c) above has the result that many applicable aspects of law have been overlooked. The effect of that is that the MEC is proposing to adopt guidelines that are inconsistent with the Constitution or otherwise vulnerable and are therefore invalid in accordance with Sec 2. Of the Constitution.

Invalid measures are, naturally, unenforceable. Furthermore, these guidelines are presented as conditions for the registration of learners for education at home. Since the invalid guidelines are imposed as preconditions for registration, that also makes the registration of home learners unenforceable.

#### *Effect of the selective nature of the legal framework*

From the Bill of Rights in the Constitution, for example, is cited only Sec 29(3)(c), which protects the right to establish and maintain private education institutions.

Since education affects almost all aspects of a child's life, the majority of the rights in the Bill of rights are to a greater or lesser extent involved in the process of education. In this statement of the legislative framework for the guidelines, however, no reference at all is made to the many sections of the Constitution and especially the Bill of Rights, which have direct bearing on home education. These include:

Sec 36(1) which reads:

*The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*

1. *the nature of the right;*
2. *the importance of the purpose of the limitation;*
3. *the nature and extent of the limitation;*

4. *the relation between the limitation and its purpose; and*
5. *less restrictive means to achieve the purpose.*

The relevant point to these sections is that, should the proposed guidelines and criteria be challenged in court, the burden of evidence will be on the MEC to prove that they are “*reasonable and justifiable...*”, and that such proof will have to be based on evidence, and not just opinion.

It will not, for example, be sufficient for the MEC to claim as she does in the proposals that adherence to the requirements set by SACE for the qualification and certification of teachers ensure that learners receive an education of a standard not inferior to that provided in public schools. She will have to submit evidence to prove that this is indeed the case.

What is more, she will have to provide evidence that parents who are not qualified and certified teachers do not provide education of the required standard.

International experience shows that this kind of condition is often inserted in home education policies at the behest of or to pacify teacher unions. However, more than one hundred authoritative studies over more than sixty years have failed to provide conclusive evidence of such claims in school education or in home education.

There is not evidence that children educated by qualified teachers learn more than children educated by persons not so qualified. This applies to children in home education as well as to children in schools.

Courts will most likely, therefore, judge this “*criterion*” requiring teacher qualifications and certification to be entirely arbitrary if not capricious.

#### *How the criteria will be tested in a court of law*

The courts are required to use Sec 36 of the Constitution (quoted above) and related rules to determine whether the MEC’s guidelines and criteria are reasonable and justifiable.

To do this, they will, in the first place, compare the quality of education that is actually provided (not claimed to be provided) in public schools with that provided at home.

It is by now well established by extensive research, including the government’s own Learner Achievement Monitoring Programme (LAMP) that the education provided in public schools (by qualified, SACE-registered teachers) is of the most inferior kind. Indeed, intellectuals such as Dr Mampela Ramphele (former Principal of the University of Cape Town and former executive officer of the World Bank) have stated that the education currently provided in public schools is inferior to Bantu Education.

And, test results show that public education in South Africa amounts to almost no education at all.

Not surprisingly, authoritative research shows that home learners perform at the top of the range, when measured by exactly the same tests as those used to assess the performance of learners institutionalised in public schools.

That in itself should, in South Africa as it has been in other countries, be sufficient to convince courts that almost none of the criteria set by the MEC are justifiable.

However, even if the MEC were able to show that the education provided in public schools is better than that provided at home, the court must compare the burden placed on the child's fundamental rights and freedoms, and judge whether the value of the education provided in public schools justifies the limitations that school attendance places on all and any of the child's fundamental rights.

#### *The real cost of school attendance*

The burden of proof will be on the MEC to prove that the perceived quality of education in public schools justifies demanding that young children:

- a) travel daily at their own cost for nearly 200 days per year on days and at times specified by the state, effectively controlling the daily, weekly and annual programme of the families of the children (Infringing the rights to Human dignity, Freedom of the Person and Privacy – Sec 10, 12 and 14) ;
- b) at rush hour over roads and streets that are among the most dangerous in the world (Infringing the right to Security of the Person – Sec 12);
- c) to report at places not of their own or their parents' choosing but designated by the state, often dictating the family's choice of abode (Infringing the rights to Freedom of the Person and Freedom of Movement and residence – Sec 12 and 21);
- d) to persons not of their own or their parents' choosing but appointed or approved by the state (Infringing the right to Freedom of Association – Sec 18);
- e) who supervise a much larger number of children than is indicated by research as being adequate for good education (Infringing the right to Education – Sec 29);
- f) there to perform for many hours of unpaid work imposed by the state (Infringing the right not to be subjected to servitude or forced labour – Sec 13);
- g) nearly half of which (and probably much more) results in no learning, since research shows that at least three hours per day in schools are spent in educationally unproductive activities (Infringing the rights to Freedom of the Person and Education – Sec 12 and 29);
- h) in the company of persons not chosen by the children or their parents (Infringing the right to Freedom of Association – Sec 18);
- i) who will almost certainly include drug users and dealers, sexual predators and physically, verbally and psychologically abusive individuals (Infringing the rights to Human Dignity, Security of the Person and Freedom of Association – Sec 10, 12 and 18);

- j) to be subjected because of this forced association with undesirable individuals to drug tests and intimate body searches for drugs and weapons (Infringing the rights to Human dignity, Freedom and security of the Person and Privacy – Sec 10. 12 and 14);
- k) which compulsory work includes ingesting information not of their own or their parents' choosing and expressing ideas on topics not of their own or their parents' choosing, (Infringing the rights to Freedom Religion, Belief and Opinion and Freedom Expression – Sec 15 16); and
- l) in the absence of the constitutionally guaranteed care and protection of their parents or family (Infringing the Child's right to parental or family care – Sec 28).

In all other countries (except Germany, where the courts have not yet been afforded the opportunity to adjudicate on the above) the state has been unable to prove that the perceived value of school attendance justifies the severe burdens imposed on children if they have the alternative option of parents who choose to provide their education at home.

The MEC must judge whether she wishes to be the one to persuade the South African courts to decide otherwise, and that the guidelines and criteria she proposes in the remainder of the document are reasonable and justifiable in that light, especially given the evidence that the standard of school education in South Africa is so inferior to most other countries, even in developing areas of Africa.

## **Conclusions**

The Pestalozzi Trust is quite pleased with the proposals as they are. They are so fatally flawed that they will make our task of defending the rights of homeschoolers in Gauteng very easy.

We are advised that almost none of the guidelines and criteria proposed by the MEC are likely to survive the test of reasonability and justifiability in court, especially since the legal framework on which they are founded is ill conceived and amateurish in the extreme.

Indeed, the proposals are founded on such serious misinterpretation of the law that the MEC may possibly be exposed for making false statements in this official document.

## **Recommendations**

- a) The document contains seriously incorrect information which may expose the MEC and the GED to charges of improper conduct. We therefore recommend that the present document be withdrawn as soon as possible to prevent that.
- b) We also recommend that the legal framework for the proposed guidelines and criteria be allocated for analysis to suitably qualified officials who are able to reconcile a thorough understanding of the law with a competent knowledge of the research on the pedagogy of home education.

- c) Although the present proposals will make it very easy to defend bona fide homeschoolers who may be prosecuted for failing to register their children for home education, we are bound to point out that it will also make it almost impossible for prosecutors to obtain a conviction against families who use "home education" as a smokescreen for neglecting the education of their children. Accordingly, we recommend that the proposals be reconsidered in their entirety by more competent advisers, who would themselves be well advised to consult stakeholders from the beginning.
- d) We again invite the MEC and the GED to make use of the extensive knowledge and experience that exists in the homeschooling community.
- e) Any final document that fails to respect the rights and interests of those home learners and their parents who are our members may compel the Pestalozzi Trust to seek judicial review. That will afford the MEC the opportunity to submit the evidence on which her guidelines and criteria are based to the scrutiny of experts before an impartial public tribunal.

For any enquiries, please contact us as indicated below.



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