

The Pestalozzi Trust acts on SACAI

The Pestalozzi Trust has instructed its legal representatives to take all necessary steps, to redress the situation created when SACAI issued an “Assessment Instruction” on the law and practice of home education.

If any members of the Trust’s legal defence fund for home education have relinquished or compromised any of their children’s rights or their own in direct or indirect consequence of SACAI’s instruction, or have suffered any other loss or damage as a result thereof, the Trust will also assist those members in suing for damages.

OPSOMMING IN AFRIKAANS

Om onbekende redes het SACAI ’n “instruksie” uitgereik oor die aard en praktyk van tuisonderwys. Hy lewer egter geen bewys dat hy wetlik gemagtig is om instruksies oor tuisonderwys uit te reik nie. ’n Instelling wat voorgee om instruksies uit te reik oor sake waarvoor dit nie wetlik gemagtig is om uitsprake te maak nie handel *ultra vires* – dit is ’n magsvergryp.

SACAI se “Assesseringsinstruksie” gee sy lesers *instruksies* dat die *beleid vir die registrasie van tuisleerders* verpligtinge daarstel wat wetlik afdwingbaar is op leerders en/of ouers in tuisonderwys. Die betrokke beleid is uitgereik ingevolge artikel 3(4) van die Nasionale Onderwysbeleidswet.

Die Pestalozzi Trust het SACAI reeds op 26 Augustus daarop attent gemaak dat die Grondwetlike Hof reeds twaalf jaar gelede bevind het dat enige beleid ingevolge daardie artikel geen afdwingbare verpligting op ouers lê nie. SACAI se instruksie is dus direk in stryd met ’n uitspraak van die Grondwetlike Hof. (<http://tinyurl.com/ConCourt>)

Onder voorwendsel dat die beleid wel afdwingbaar is, voorsien SACAI dat tuisonderwys deur SACAI gekontroleer sal word deur assesserings in Grade 3, 6 en 9.

SACAI gee sy lesers instruksies dat die afdwingbare wet die *aanbieding* van tuisonderwys reël. In werklikheid handel die wet oor die *ontvang* van tuisonderwys. Die instruksie beklemtoon dus die *onderrig* funksie in tuisonderwys, terwyl die wet die *leer* funksie beklemtoon (en geen voorskrifte oor onderrig gee nie).

SACAI lewer ook geen bewys sy uitsprake op enige gesaghebbende inligting oor tuisonderwys berus nie. Gevolglik is die instruksie se voorskrifte vir die praktyk van tuisonderwys en die instansies wat hulpmiddels vir tuisonderwys verskaf ver van die werklikheid verwyder. Dit wek die indruk van hoe SACAI meen dat tuisonderwys moet wees, eerder as van hoe dit is.

Die instruksie gee ook al daardie bepalings van die SA Skolewet weer wat *verpligtinge* op ouers en leerders plaas. Dit verwyg, daarenteen, daardie bepalings wat ouers en leerders beskerm teen magsvergrype deur amptenare. SACAI negeer dus leerders en ouers se reg op administratiewe geregtigheid en stel daarmee ook ander grondwetlike regte in gevaar.

Die Pestalozzi Trust het sy regsvertegenwoordigers opdrag gegee om die nodige stappe te neem om regstelling namens sy lede te verkry, insluitende vergoeding vir enige verlies of skade wat enige van hulle reeds gely het of mag ly as direkte of indirekte gevolg van SACAI se uitreiking van die instruksie.

1. BACKGROUND

The Pestalozzi Trust received enquiries from concerned homeschooling families and other interested parties. The enquiries arose because families felt seriously intimidated after the South African Comprehensive Assessment Institute (“SACAI”) circulated an “Assessment Instructions” relating to home education and published it on their web site.

SACAI is a Section 21 (tax exempt) company that is provisionally accredited by Umalusi to exercise such powers as Umalusi is authorised to delegate to an “assessment body”.

This provisionally accredited assessment body issued on 23rd October “Assessment Instruction” 69 of 2013. This instruction pretends to “*eliminate confusion*” on the way “*home education fits into the system for the provision of education...and what opportunities exist for parents, learners and potential role layers...*” (<http://sacai.co.za/english/index.php/assessment-instructions/assessment-instructions2013>)

The Trust investigated the enquiries and found the “Instruction” to be fatally flawed. The “Instruction” errs both in what it states and in what it fails to state, thereby creating a misleading impression of what home education is, what it is not, and what it should be in accordance with law.

Homeschooling families and others who act in accordance with the SACAI’s “instruction” may compromise the rights of learners and/or their parents in ways that may be contrary to the best interests of children, or they may suffer other forms of loss or damage.

2. THE SOURCES FOR SACAI’S CLAIMS AND ITS AUTHORITY TO ISSUE INSTRUCTIONS ON HOME EDUCATION

In its “Instruction”, SACAI explicitly cites the sources on which it relies for authority to issue its instruction. The entire bibliography for the “Instruction” is given as:

- *The South African Schools Act No 84 of 1996*
- *The National Education Policy Act No 27 of 1996*
- *Policy for the Registration of Learners for Home Education, Government Gazette No 20659 of 23 November 1999, Staatskoerant No 20659 van 23 November 1999*

SACAI also provides copies of these public sources on its web site.

The instruction fails, in three respects, to provide evidence that SACAI has the authority to issue its instruction on home education: It provides no evidence that SACAI is legally authorised to issue an instruction on the matters that it deals with; it provides no authority for its claims about the nature or practice of home education; and, in fact, judgments in different divisions of the High Court have set aside the authority of one of the sources that SACAI *does* provide.

2.1. *No evidence that SACAI has legal authority to issue instructions on what home education is and matters relating thereto*

The bibliography of sources that purport to establish the authority for SACAI’s instruction is more notable for what it does *not* list than for what it does. SACAI makes several declarations about what home education is, about “*Ways in which home education is provided*” and about “*Institutions involved in the provision of home education*”.

However, none of the empowering documents that are cited by SACAI directly or indirectly empowers Umalusi, SACAI, or any other assessment body to proclaim instructions on these matters.

Also, at least three of several other relevant laws are conspicuous by their absence from the sources cited by SACAI:

- *The South African Parliament's act on the UN Convention on the Rights of the Child ("UNCRC"), which (inter alia) determines the definition of "education" as well as some legitimate restrictions that may be imposed on the right to education.*
- *The Constitution of the Republic of South Africa which determines (inter alia) the limitations (or boundaries) of the meaning that may be ascribed to the "laws" that SACAI does cite.*
- *The Promotion of Administrative Justice Act ("PAJA"), which (inter alia) protects individuals from the abuse of power by restricting the manner in which any official or organ of government, including bodies such as Umalusi and SACAI may exercise statutory or quasi-statutory powers.*

It seems, therefore, that SACAI selectively cites sources that purportedly confer legal authority to its instruction, while remaining silent about sources that protect learners and their parents against abuse of power by those exercising state or quasi-state powers.

Nevertheless, SACAI fails to provide any evidence at all that Umalusi, any assessment body accredited by Umalusi or SACAI itself is legally empowered to issue the instruction on home education that it did. It seems as if SACAI, by issuing such an instruction, may be acting rather beyond its mandate.

2.2. No evidence provided that SACAI relies on any expert or research based authority to determine or declare what home education is and matters relating thereto

SACAI provides no evidence that it has the legal power to originate determinations of what home education is or about the manner in which it should be done.

There is, therefore, a justified expectation that SACAI would refer to other recognised authorities or to verifiable reports to substantiate the claims made in its instruction. Such independent support for SACAI's claims would include:

- at least a few of the thousand or so independent research reports about home education published over the past thirty years; and/or
- at least some of the dozen or two Masters' and Doctoral thesis that have been produced on the topic in South Africa alone over the past fifteen years; and/or
- a few of the hundreds of newspaper and magazine articles, radio or TV programmes in the South African media; and/or
- at least small but representative sample of the hundreds of authoritative books about home education that have been published (including some in South Africa), that are available in the libraries of the Pestalozzi Trust, the universities and others, and that can be freely purchased on the internet or in bookshops within a few city blocks of SACAI's office.

Certainly, there is a justified expectation that SACAI would cite at least the independent research report on the state of home education in South Africa that had been commissioned by the national Department of Education some years ago.

One cannot accuse SACAI of citing the literature on home education selectively. SACAI simply provides no evidence of having consulted any authority other than itself.

Due to this lack of evidence, SACAI's descriptions of home education seem to be little more than an imaginary excursion into what SACAI would, for reasons unknown, *want* home education to be. And that is the impression that the "Instruction" is likely to create in the minds of a large majority of the more than fifty thousand *bona fide* homeschoolers in the country.

2.3. Case law from two judgments in the High Court contradicts SACAI's claim that the policy on the registration of home learners is "law"

The most glaring omission from the list of sources consulted by SACAI, however, is a reference to any of the numerous court judgments that determine how the two laws and one policy cited by SACAI must be understood.

Among these, perhaps the most important one is the Constitutional Court judgment in the 2001 case of Minister of Education vs Harris (CCT 13/01). (See <http://tinyurl.com/ConCourt>)

The absence of a reference to this case is a mystery, because the Pestalozzi Trust, in an email dated 26th August 2013, drew SACAI's attention to both the existence and the import of that judgment (which had been widely reported in the media and is freely available on the internet) The Trust also recommended that SACAI obtain advice on the significance of this judgment for claims that SACAI had made in public about home education.

Anyone who refers to the authorization for the policy, will observe that the policy was issued on 23rd November 2001 as a government notice under the following authority:

The Minister of Education, after consultation with each Member of the Council of Education Ministers, hereby gives notice in terms of section 3(4)(g) of the National Education Policy Act, 1996 (No. 27 of 1996) of the policy for the registration of learners for home education as set out in the schedule.

However, the Constitutional Court declared on 5th October 2001 that *no* policy issued in terms of Sec 3(4) of the National Education Policy Act does creates obligations that are binding on provinces, parents, independent schools or learners. Since the policy on the registration of home learners was issued under that provision, SACAI's pretense that the policy creates obligations that bind home educating learners or parents is seriously mistaken.

This particular policy was not set aside by the court. The court simply declared that *no* policy issued under authority of Sec 3(4) of NEPA may be enforced on learners or parents because, in the word that the court used, the provision does not authorise the minister to issue binding "edicts". The policy may still function as a (by now completely outdated) administrative planning instrument. But that is all.

Contrary to what SACAI states in its instruction, therefore, the policy does not impose any duty on provincial education officials to enforce it. Neither does it give officials the power to enforce it. Finally, it creates no duty on parents or learners to comply with it.

In explicit application of this non-enforceable policy, SACAI proceeds to position itself in the role of assessing home learners in Grades 3, 6 and 9.

3. SACAI's DEFINITION OF HOME EDUCATION

After stating its aim, the "Instruction" purports to define home education¹ by "explaining" to its readers what home education is. SACAI does not, however, provide any source for this definition. It is, therefore, SACAI's definition and SACAI's alone.

3.1. "Home education" as defined in the SA Schools Act

There is no formal definition of "home education" provided in Sec 1 of SASA. Indeed, SASA does not even define "education". (The UN Convention on the rights of the Child, which does define "education", is both a law of Parliament and an international treaty which South African courts are required to take into account when applying South African law.)

Section 51 of the SA Schools Act, however, is the only source in which Parliament has indicated what the lawmakers contemplated when legislating on "home education". Any definition of "home education" that is legally binding can, therefore, be found only in the generally unambiguous wording of that section², from which it is clear what "home education" is:

The relevant part of Sec 51 reads that a learner may be registered "...to receive education at the learner's home".

That is the core of the definition. Nothing more, nothing less.

As the SACAI instruction correctly states, the lawmaker also imposes certain restrictions on home education as defined above.

- *The registration [must be] in the interest of the learner.*
- *The parents [must] comply with such other reasonable conditions as set by the Head of Department.*
- *The education received by the learner must meet the minimum requirement of the curriculum at public schools*
- *The education received by the learner must be of a standard not inferior to the standard of education provided at public schools.*

Officials enforcing these restrictions are themselves, however, constrained by law – *inter alia* by the provisions of the Constitution, the UNCRC and PAJA and may only be enforced within

¹ SACAI claims:

"Home education is:

- "Education provided by a parent to his/her own child at their own home and for which the parent may enlist the services of a tutor for specific areas of the curriculum;
- "A legal form of independent education if the relevant legal requirements are complied with".

² Section 51 of the South African Schools' Act, Act 84 of 1996, which came into effect on 1st January 1997.

the constraints of those and other law. On constraints on the power of officials, the SACAI instruction is silent.

3.2. Comparison between SACAI's instruction on "what is home education" and the statutory provisions for "education at the learner's home".

The SA Schools' Act defines "home education" in terms of who *receives* the education (*the learner*), and where (*at the learner's home*).

SACAI, in contrast, defines "home education" in terms of who *provides* the education (the parent and tutors) and where (at the home of the parent *and* the child).

Contrary to what SACAI pretends, the South African Schools' Act is utterly silent on who must provide the education. It leaves this option free so that anyone can provide the education, including a parent or sibling, friends or family, "tutors", "governesses", "au-pairs" and even the child itself.

By specifying home education in terms of the education that the child "receives", the lawmaker contemplates the criterion for home education to be *what the child learns*.

(It is a trite matter to show (from the results of any class test, for example) that education "provided" (that which is "taught" does not always (or even most of the time) result in education being "received" (that which is "learnt"). In giving effect to the constitutionally and internationally recognised right to education, lawmaker here implements the definition of "education" as prescribed in South African and international law.)

SACAI's definition, in contrast, establishes the criterion as *teaching* (or "*providing education to*" the child). Either SACAI is not aware that there is a difference between "teaching" and "learning", or it distorts the legal definition of home education for reasons unknown.

The South African Schools' Act therefore recognises also autodidactic modes of learning, such as those known (mostly in UK) as "autonomous learning", or "unschooling" (Canada and USA), "natural learning" (mostly Australia) "selfleer" (South Africa) or "Mode 2 learning" (sometimes encountered in the literature).

Autodidactic learning has been extensively researched. It is the very powerful and effective mode of learning by which almost all children learn (by the age of six) natural language which can be shown to be both the most complicated and the most important ability that they will master in their lives. And they do so without the benefit of any "education provided" to them.

SACAI's definition, in contrast, excludes the option of "*learning without being taught*", especially when read in the context of the remainder of the "Instruction" where SACAI applies its definition to the practice of home education.

3.3. The restrictions imposed by the Act

SACAI quotes (apparently verbatim) parts of Sec 51 of SASA articulating the restrictions imposed by the law on home education. Just like the Act's definition of home education, these restrictions are also worded in terms of the *results* of home education and not in terms of the *inputs* into the home education.

SACAI, while quoting the restrictions, fails in its "explanation" to account for the significance of the restrictions imposed by Sec 51 on *both* the parents and the responsible *officials*. For example:

3.3.1. *The restriction of the “minimum requirements”*

The “Instruction” fails to account for the wording in Sec 51 that prescribes “...*the minimum requirements of the curriculum at public schools...*” as the threshold for home education to be acceptable in law. Inspection of the requirements of the curriculum at public schools will show that, if a child who has been admitted to Grade 1 in a public school, masters not a single objective of the curriculum, that child *must* have been promoted to Grade 12 after sixteen years.

In the application of its ideas on what it purports to present as “home education”, it is clear that SACAI (just as all homeschoolers do) has rather more in mind than what is the reality in public schools.

However, *SACAI’s notions of excellence are not law and create no obligations that are binding on home learners or their parents.* The lawmaker prescribes *what happens in public schools* as the criterion by which home education must be measured, not the pronouncements of SACAI.

3.3.2. *Restriction on the “standard of education”*

SACAI fails, in its “explanation”, and its application, to account for the fact that *standard* of the education “likely to be received by the child” in home education may not be required to exceed the standard of education provided at *all* public schools.

Consequently, SACAI takes it upon itself to declare “However, in the Grade 10 - 12 phase *subject knowledge at university level is an absolute requirement...*” There is no such requirement in law or in practice. On the contrary, the law unambiguously excludes the imposition of any “standard” that is not met at all public schools. There can, therefore, be no such requirement while there are teachers without “*subject knowledge at university level*” teaching Grade 10 to 12 in any public school.

Even the most cursory inspection of the literature on home education shows, and the experience of homeschoolers in practice demonstrates, that even learners on isolated farms have successfully prepared for the NSS examination without the input of “*subject knowledge at university level*” other than that found in text books and on the internet.

It is, therefore, a matter for concern that SACAI fails to provide authority for an instruction proclaiming such an “*absolute requirement*”.

3.3.3. *The requirement that preconditions for registration be “reasonable”*

SACAI fails, also, to account for the requirement for *reasonability*. Sec 51(2)(c) of SASA which empowers the Head of Department to set “reasonable conditions” for home education.

The constitutional requirement for reasonability includes that such conditions must be:

- *Legal* (i.o.w. issued in terms of law – unlike SACAI’s attempts to enforce the policy on the registration of home learners).
- There must be a *reasonable aim or objective* to the condition. (There must be a “good reason” for imposing the condition.)
- There must be a *causal relationship* between the condition imposed and the objective aimed at. That means that compliance with the condition must result in achievement of the objective.
- If there is a *less restrictive way* of obtaining the objective, the less restrictive way must be used.

- The condition *may not impose on the home education greater burdens* than the restrictions placed on the education provided by the state in its own institutions.

3.4. Conclusions on SACAI's instruction on what home education is

Comparison between the provisions of the SA Schools' Act and SACAI's instruction on what home education is, shows that they are clearly in conflict.

While the Act emphasises the education "received by the learner" ("*learning*"), SACAI is preoccupied by "providing" home education ("*teaching*").

This contrast is so strong that it manifests clearly even in the frequency of the different words used in the SA Schools Act on the one hand, and SACAI's instruction on the other hand.

When referring to home education, the Act uses *only* the verb "to receive" and it does so twice. SACAI's instruction, on the other hand, uses the verb "to receive" education once, but the opposite verbs "to provide" education (9) and "to teach" (3) twelve times.

The concern is that SACAI's instruction on what home education is (if complied with), creates fertile ground for the imposition of a *teaching* driven home education dispensation, to the detriment of a dispensation directed by the *learning* needs of children.

SACAI's instruction is, therefore, not only contrary to the letter of the law it claims to enforce, but is also contrary to its spirit.

4. CONCLUSION

For unstated reasons, SACAI issued an "instruction" on the nature and practice of home education without providing any evidence that is legally authorised to do so. For an institution to issue such an instruction on matters that it is not legally empowered to proclaim upon, is to act *ultra vires* and can expose the institution and the responsible officials to damage claims, also in their personal capacity.

The document instructs its readers that the policy on the registration of home learners creates obligations that are binding on learners and parents. In doing so, SACAI purports to overrule the Constitutional Court itself.

SACAI instructs its readers that home education is the act of *providing* education, in contrast to the SA Schools Act, which clearly intends to govern the act of *receiving* education and is silent on its *provision* in home education. While the SA Schools Act places the emphasis on "*learning*", therefore, the SACAI instruction focuses on "*teaching*".

Furthermore, the SA Schools Act places no restrictions on the *source* from which the learner receives the education, while SACAI limits home education to education provided by parents or tutors.

The instruction reveals all provisions of the SA Schools Act that place obligations on parents and learners, while suppressing those provisions that protect parents and learners from the abuse of power by officials of government and quasi-governmental institutions such as SACAI. In doing so, SACAI negates the learner and the parents' right to just administrative action, which exposes many other constitutional rights to being compromised.

The final result is that the instruction comprises an intimidating document that gives the erroneous impression that home education is subject to untrammelled powers that SACAI claims for itself and departmental officials.

Accordingly, the Pestalozzi Trust has instructed its legal representatives to take the necessary steps to obtain redress for its members, including compensation for loss or damage any of them may have suffered or may stand to suffer as a result of SACAI's publication and distribution of its instruction.

A handwritten signature in black ink, appearing to read "L.J. van Oostrum". The signature is written in a cursive style with a period at the end.

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