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Submission
to the
Department of Basic Education
on the
Basic Education Laws Amendment Bill

Attn: Adv TD Rudman, Director-General: Department of Basic Education

Contents

1. Executive Summary

The Department of Basic Education recently unveiled a revised draft of the Basic Education Laws Amendment Bill, 2015, which proposes changes to be made to both the South African Schools Act and the Employment of Educators Act. This submission addresses itself principally to the amendments proposed to the Schools Act.

While most of the Bill entails technical amendments warranting no comment, it is deficient in that it unduly centralises South Africa's public education system. The powers of school governing bodies are limited to near-irrelevance, with greater authority being given to the heads of provincial education departments. The Bill's justification for this centralisation of power is weak and often non-existent. The attempts in the explanatory memorandum to justify the interventions at various junctures amount to little more than deceptive intellectual trickery and fallacies.

This proposed centralisation is problematic because government officials in the education bureaucracy do not possess the most up-to-date and intimate knowledge concerning the subjects of their regulation: the schools and their pupils. They lack any emotional connection with individual schools that would otherwise spur appropriate and speedy action in response to problems. With centralisation, problems will be responded to too late, or inappropriately. Only school governing bodies understand their respective schools' circumstances well enough to bring about appropriate and timely rectifications.

The Bill also falls foul of the section 29(3) guarantee in the Constitution that South Africans have the right to establish their own independent educational institutions as long as independent institutions do not discriminate based on race, and that their standards must be the same as or superior to those of equivalent public institutions. For government to introduce additional criteria that makes it more onerous for independent institutions to be established would make these constitutional provisions redundant and not amount to a 'right', properly-understood, at all. The Bill gives heads of department the authority to decide, according to their own whim, what is and is not in the "best interests" of home-schooled learners. This violates the section 1(c) constitutional requirement that discretionary powers be circumscribed and not absolute (and consequently arbitrary).

Rather than centralisation, there needs to be more decentralisation with more power being vested in individual school governing bodies. Provincial education departments and the national education department should only serve to provide oversight and support structures for individual schools, which must be left to innovate and cater to the particular circumstances in which they find themselves. Home education and independent education more broadly must be regulated only insofar as the Constitution requires. These institutions have been very successful over recent years and should not be interfered with.

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2. The Free Market Foundation

The Free Market Foundation (FMF)[1] is an independent public benefit organisation founded in 1975 to promote and foster an open society, the Rule of Law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations, and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction, and human welfare. As a think tank, the FMF's fundamental approach to policy questions is consumer-based. Individual consumer choice is placed at the centre of any policy recommendations that the FMF espouses. Consumer satisfaction is generally achieved by an absence of barriers to entry into the provision of goods and services, allowing consumers a choice between the offerings of freely competing providers, and the absence of regulations that impose avoidable costly burdens on the providers of goods and services.

3. Introduction[2]

Was the anti-apartheid struggle in vain? It appears increasingly that freedom is being equated with the mere absence of apartheid, rather than the absence of oppressive government *per se.*

For concepts like democracy, freedom, liberation, empowerment, the Rule of Law, due process, African Renaissance, and the NDP to have any meaning, the South African government must walk the talk. They must remain true to these precepts and faithfully implement them. Desire is not enough. Real concrete changes have to be made. Changes that increase personal and economic freedom.

Was the struggle in South Africa a struggle for freedom or a struggle for power? Have black South Africans become the victims of *amandla* (power) or the beneficiaries of *nkululeko* (freedom)? Many people make the false assumption that erosions of liberty do not affect the poor or black South Africans. After all, protests are usually first heard from the affluent who are assumed to be the whites. When some members of society lose some of their liberty, everyone loses, even though they may not realise it.

The kind of centralised planning and stifling controls being introduced by the Department of Education amount to a conscious decision to deny black South Africans true freedom. If this type of governance is implemented pervasively, it will condemn black South Africans to enduring poverty. Personal and economic liberty, always and everywhere, results in prosperity. Its absence, always and everywhere, results in oppression and poverty. The evidence is now so overwhelming, the matter can no longer be a subject for informed debate.

One of the many paradoxes of the new South Africa is that the government has repeatedly announced generalised policies such as GEAR and the NDP to promote personal and economic freedom, but while some departments have implemented far-reaching reforms in the right direction,

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1 www.freemarketfoundation.com

2 This section appears in substantially the same form in the FMF's submission on the Education Laws Amendment Bill, 2002, and the Higher Education Amendment Bill, 2002, by Temba Nolutshungu & Eustace Davie.

others, however, march resolutely in the opposite direction. Imaginative reforms have given South Africa one of the freest agriculture sectors in the world, a flourishing private housing market for low-income communities, and thousands of black South Africans their apartheid land tenure upgraded to full ownership. In sharp contrast, some departments and most local authorities have intensified stifling controls at the direct expense of the poor and in direct contradiction with proclaimed government policy.

On 13 October 2017, the Department of Basic Education published the revised draft Basic Education Laws Amendment Bill, 2015. The Bill amends both the South African Schools Act[3] and the Employment of Educators Act.[4]

The Department of Basic Education appears to be intent on centralising the public education system, thereby eliminating all educational diversity and innovation. Its latest and particularly distressing plan is to make the penalty for violations of archaic compulsory schooling laws even harsher, and to empower officials in the education bureaucracy to make decisions that should be left in the hands of the schools themselves. A free society would move in precisely the opposite direction to where education policy would be devolved to individual schools, and parents and students would have freedom of choice.

4. The Bureaucracy Disease[5]

The main trouble with government schooling is that it suffers from "bureaucracy disease", a disease that to a greater or lesser extent afflicts all entities managed by governments to provide goods and services, whether their task is to provide schooling, electricity, water, railways, healthcare, mining, roads, food or whatever else is designated to be an essential good or service.

Reasons for the inordinate amount of bureaucracy in government service delivery and some of its effects are:

- Government entities are not allowed, by their very nature, to be risk-takers. They are expected to proceed with extreme caution and can only adopt new ways of delivering services once the success of a method has been proved beyond all doubt.
- Senior positions in government are, with few exceptions, dependent on length of service and thorough familiarity with the "way things have always been done". This further entrenches systems and ensures that some urgently needed changes are either delayed or not made at all.
- While enduring, sound principles are of great value, systems that do not adapt to changing circumstances can do great harm. Bureaucratic drag has held up the development of South Africa's ports, railways, telecommunications, electricity delivery, schools and a great deal more.

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3 South African Schools Act (84 of 1996).

4 Employment of Educators Act (76 of 1998).

5 This section appears in substantially the same form in the FMF's submission on chapter 9 of the National Development Plan by Eustace Davie.

- Senior government officials, when it comes to evaluating the honesty or ability of their subordinates, are compelled to institute multiple layers of costly and time-consuming procedures and controls that absorb available funds and slow down processes.

Bureaucracy disease is endemic to government and there is very little that government appointed school teachers can do about it. School teachers tend to complain that they are forced to teach by rote, are instructed as to what to teach and how to teach it, and are prohibited from using their discretion or even fully utilising the teaching skills they were taught when training to become a teacher.

The harm caused by bureaucracy disease became patently obvious when the world could observe people with the same backgrounds, levels of education, languages and cultures, such as in East and West Germany, North and South Korea, China and Hong Kong and Taiwan, or Cuba and the large Cuban community who fled to Florida in the United States of America, being subjected to very high levels of bureaucracy in one territory and relatively low levels of the affliction elsewhere.

Some same-country "experiments" reveal similar effects; poor economic results under heavy doses of the bureaucracy disease and better results when the affliction is reduced. West Germany, which had been badly harmed by the Nazi fascist bureaucracy, prospered when it threw off much of the disease after 1945. Britain, which was heavily bureaucratised during the 1939-45 World War, struggled on under a heavy dose of the affliction until some relief was effected by the Thatcher government. Most countries are not entirely free of the disease but the unintentional real live experiments show that less bureaucratically burdened economies far outstrip the economic performance of those that are more heavily burdened.

Schooling in most countries suffers from the bureaucracy disease. It is impervious to changes that take place in the rest of society because of the vested interests that benefit from an absence of change. The idea that all children should be compelled by law to attend school, to avoid the possibility that in the absence of the threat of force some parents might fail to educate their children, has been translated into a bureaucratic monstrosity that is detrimental to most children who pass through its processes. A stark demonstration of the accuracy of this observation is that schools today are fundamentally the same as they were more than a century ago.

Laws imposing compulsory schooling have brought with them bureaucratic rules and structures that prevent schools from educating children in a manner that will be more appropriate to the changing conditions under which they will live their lives. And more importantly, to provide the kind of education and training that individual students and their parents consider will best suit the students' personal interests, talents, characteristics and ambitions.

Government should be seeking the most effective, low-cost and efficient policy to transform the education of South Africa's young people to ensure that the vast majority become numerate, literate, confident, capable young adults. The evidence is clear: remove bureaucracy and schooling will flourish in the same way as entire other sectors of economies flourish in its absence.

5. Socio-Economic Impact Assessments

The Rule of Law is a principle of South African constitutional law found in section 1(c) of the Constitution.[6] It provides that South Africa is a democratic state founded on the supremacy of the Constitution and the Rule of Law. The most important tenet of the Rule of Law is its prohibition on arbitrariness. Arbitrariness is not only a symptom of unfair and bad governance, but is also very harmful to the economy, as it leads to uncertainty and means people and businesses cannot plan their affairs ahead of time.

The opposite of arbitrariness is reasonableness. Reasonableness consists of two elements, namely, rationality and proportionality. Proportionality means that there must not be an imbalance between the adverse consequences of a policy and the beneficial consequences.[7] Rationality means that evidence must support the policy. Stated differently, there must be a rational connection between the purpose of the policy and the solutions proposed.[8] It has also been said that a third element, effectiveness, is a part of reasonableness.

It stands to reason that the requirement of rationality, read together with section 195(1)(g) of the Constitution, which states the principles according to which the public administration must function, provides that transparency "must be fostered by providing the public with timely, accessible and accurate information", requires that policy or legislative interventions must be supported by demonstrable evidence.

To determine whether a policy will have the consequence intended by the enacting authority, a study must be done as a matter of course, and must be publicly available to satisfy the principle of transparency. If a study is not conducted, it means the intervention is not supported by evidence, and is therefore irrational and unconstitutional, and if a study is not released to the public, government is failing to comply with section 195(1)(g), and thus, the process is unconstitutional. These studies are known as socio-economic impact assessments (SEIAs).

Without published SEIAs, government is called upon to *judge for itself* whether its *own* policies are reasonable. Such a state of affairs would make the Rule of Law a redundant concept.

For the people to have a say in the decisions that affect their lives, they must know how the decision was arrived at and on what basis, and their participation must be meaningful (in other words, government must engage in good faith) and not merely a façade. Without a SEIA, the public cannot participate in the policy-making and law-making processes as mandated by the Constitution.

In *Principles of Good Law*, the Good Law Project writes:[9]

> "Although widely divergent, all the international assessment models amount ultimately to institutionalised procedures for determining the need for a law and its expected benefits. They are also concerned with the cost to government of implementation, as well as the capacity of government to police and enforce the law and the cost to the public of compliance. Other aspects considered are the economic and other likely impacts, the prospect of

6 Constitution of the Republic of South Africa, 1996.
7 Hoexter, C. *Administrative Law in South Africa*. (2012). 344.
8 Hoexter 340.
9 Good Law Project 34.

unexpected or unintended consequences; and the behaviour modifications likely to be promoted by the law and distortions that might flow from them."

It goes on to describe what a SEIA would encompass:[10]

"2. Socio Economic Impact Assessment (SEIA). Multi-faceted analysis *and quantification* of:

2.1 The purposes of laws – precisely what "mischief" they are addressing;

2.2 Desired consequences;

2.3 Estimated secondary and unintended effects, including impacts on the economy or society in general;

2.4 Feasibility and efficacy – prospects in practice of the law being observed, and if not, enforced by officialdom, police and the courts;

2.5 Costs and benefits – accurate and comprehensive estimates of costs of administration and implementation, enforcement and policing, compliance and avoidance/evasion/resistance;

2.6 Inter-departmental considerations – the extent to which other departments are implicated;

2.7 Administration and budget – advance provision for all budgetary, staffing, training and related needs; diversion or dilution of resources and capacity."

The Department of Planning, Monitoring and Evaluations' (DPME) SEIA System (SEIAS) guidelines describe the purpose of SEIA as follows:[11]

"3. The role of SEIAS

SEIAS aims:

- To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.
- To anticipate implementation risks and encourage measures to mitigate them."

The DPME regards a SEIA as more than a mere cost-benefit analysis. SEIAs, instead, must contribute to improving policy, rather than measuring their net value. It must, furthermore, "help decision makers to understand and balance" the impact of policy on different groups within society.[12]

That regulations or legislation can lead to unintended consequences is acknowledged by government. They could occur because of inefficiency, excessive compliance costs, overestimation

10 Good Law Project 35.

11 Department of Planning, Monitoring and Evaluation. "Socio-Economic Impact Assessment System (SEIAS): Guidelines." (2015). 4.

12 DPME 7.

of the benefits associated with the regulation, or an underestimation of the risks involved with following through with the regulation.[13]

The SEIA System applies to legislation and regulations, as well as policy proposals.[14]

6. Basic Education Laws Amendment Bill, 2015

This submission concerns principally those amendments proposed to the South African Schools Act.

The biggest concern with the Bill is that it appears to be, exclusively, an exercise in centralisation for centralisation's own sake, taking power away from parents, teachers, and pupils, and vesting it with a far-away bureaucracy which is not always informed of the needs and circumstances on the ground. This bureaucracy also lacks the necessary emotional connection with the individual schools in question that spurs action, and which school governing bodies possess.

6.1 Compulsory schooling

Clause 2 (amending section 3(6)) increases the penalty period from six months to six years which a parent must spend in jail if they refuse to subject their children to compulsory schooling. While the clause also seeks to punish the wilful interruption or disruption of school activity, which is commendable, compulsory schooling is a morally abhorrent and practically disastrous institution.

Compulsory schooling laws prevent the educational environment from evolving to keep pace with developments in the wider community, yet countries around the world persist with compulsion despite the appalling and well-documented failures of their schooling systems – failures that are a direct, predictable and inevitable consequence of coercive centralised control. This Bill, therefore, if adopted in its present form, is bound to reduce, rather than improve, the already poor quality of South Africa's schooling. As is proposed in this submission, what is needed to improve schooling is greater autonomy of schools, not greater centralisation of power.

Compulsory schooling has no place in a free society whose hallmark is supposed to be voluntarism. "The pursuit of knowledge and understanding requires above all, an environment that is free of such ancient and discredited instruments", writes Eustace Davie.[15] He continues that compulsory schooling is not about ensuring "children receive an adequate education, but to ensure that they receive the kind of education prescribed by the educational bureaucracy". This is clear because these laws apply to all children – even those who get an adequate education anyway.[16]

It is recommended that punishment for truancy be retained at six months, or, ideally, eliminated entirely. Sending parents to prison is not the way to solve a problem that, arguably, in most cases, is not of their making. From all accounts, the fault lies mainly with poor schooling and unaccountable teachers. If a parent is failing to educate a child, it is not a police matter, but one to be dealt with by social services.

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13 DPME 4.
14 DPME 8.
15 Davie, E. *Unchain the Child: Abolish Compulsory Schooling Laws*. (2005). xviii.
16 Davie 5.

6.2 Admission of learners

Clause 3 (amending section 5) proposes to give the Head of Department (HoD) the final say in the admission of learners to a public school. Currently school governing bodies are required to submit proposals to the HoD for approval. This, according to the explanatory memorandum, has created confusion as to where the "locus of authority" lies and, thus, to avoid further confusion, justifies the proposed leap for the authority to be vested with the HoD.

The proper way forward is to, instead, vest authority with a school's governing body to avoid confusion. Members of these bodies are the most involved individuals and are more astutely aware of what is happening at the school. The Constitutional Court judgment referenced in the explanatory memorandum[17] does not preclude this. If the amendment legislation provides explicitly that the governing body has the final authority, there is no constitutional issue present, as the court was interpreting the legislation in the form it then took.

6.3 Language policy

Clause 4 (amending section 6) gives the HoD the power to determine language policy at schools, and even force schools to adopt more than one language of instruction.

This presumptuous intervention ignores the fact that more than one language of instruction depends exclusively on the respective school's capacity. A capacitating environment can be created by the education bureaucracy but capacity cannot be 'imposed' on a school from afar.

The memorandum once again references a Constitutional Court judgment[18] to justify its undue centralisation of power. The court, however, merely said intervention is justified to ensure compliance with the law. Clause 4 proposes to *change* the law. These are two fundamentally different things, so the department is attempting to engage in intellectual trickery to hide this reality.

The judgment does not require *this particular* change in the law,[19] and, again, if the Schools Act provides explicitly that only the governing body may decide the language policy of the respective school (as it should), it will be constitutionally valid. Nevertheless, paragraph 80 of the judgment, which states that the interests of the "broader community" must be factored in, rather than only those of the school and learners, is a legally-suspect pronouncement that has no basis in South African constitutional law.[20]

6.4 Search and seizure

Clause 7 (amending section 8A) amends an already-problematic provision.

The existent section provides that searches may be "at random" if they have a "fair and reasonable suspicion" that a prohibited item is somewhere on the premises or that *some* learners may have

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17 *MEC For Education Gauteng Province and Another v Governing Body of Rivonia Primary School and Others* 2013(6) SA 582(CC).

18 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo and Another* 2010(2) SA 415(CC).

19 And it cannot., The Constitutional Court is not empowered to dictate to Parliament what laws it must enact.

20 In any matter concerning children which comes before our courts, the interests of the child are paramount. See section 28(2) of the Constitution.

prohibited items, without reference to the particular suspected learners. Any State behaviour that occurs "at random" lacks rationality and is explicitly arbitrary. This section must be amended to provide that the principal or their delegate must have a reasonable suspicion that *that particular learner* has a prohibited item in their possession.

6.5 Recommendations of appointment

Clauses 10 (amending section 20) and 32 (amending section 6 of the Employment of Educators Act) takes away governing bodies' ability to recommend level 2, 3, and 4 educators for appointment, and vests this power exclusively with the HoD. This is apparently to achieve 'transformation'. Because some under-resourced and under-funded schools mainly in rural areas do not have the capacity to make appropriate recommendations for principals, deputy principals, or school heads of departments, government feels it appropriate to intervene.

Worryingly, the memorandum goes on to say that the rationale behind the amendment is because, in the past, the HoD had to justify their decision for not appointing the governing body's preferred candidate (as this was administrative action) and the decision could be appealed. It is apparently inappropriate to government that parents and teachers should dare to require justification for a decision and then have the right to appeal. Government's proposed solution is to remove them from the equation entirely.

Government leaves too much unanswered in this instance. How does it follow that because some schools have exhibited an inability to make appropriate recommendations to the HoD, that the ability of all schools must be revoked? This again seems to indicate that the Bill is an exercise in centralisation for its own sake. Clauses 10 and 32 should be removed from the Bill.

6.6 Home education

Clause 25 (inserting a new section 51) introduces various Rule of Law concerns.

New section 51(2)(a) provides that an application for home education must be approved by the HoD if they are "satisfied" that it is "in the interests of the learner". This is absolute discretion and thus vests arbitrary power in the HoD, which is antithetical to the Rule of Law. This amendment must be removed from the Bill.

New section 51(3) provides the HoD the ability to "attach" so-called "reasonable conditions" to the registration of a home educated learner. The factors the HoD must take into account do not constrain this absolute discretion. This amendment must be removed from the Bill.

New section 51(6) is particularly problematic in that it will extinguish the right of home-schooling families to pursue international qualifications, such as Cambridge International. The language of the amendment creates the impression that home-schoolers must operate within the framework of the National Senior Certificate. This is, of course, unconstitutional, in light of the section 29(3) right of South Africans to pursue independent education. This amendment must be removed from the Bill.

New section 51(7) allows the HoD to "cancel the registration of a learner" if they believe "home education is no longer in the education interest of the learner". As with new section 51(2)(a), this is absolute discretion without constraining criteria and must be removed from the Bill.

The criteria in new section 51(8) are procedural, which section 51(8)(c) renders toothless.

The provisions in clause 25 also fall foul of the right contained in section 29(3) of the Constitution which empowers South Africans to establish and maintain their own independent educational institutions that do not discriminate based on race and maintain minimum standards. This is a closed list of criteria, meaning government cannot introduce *new* or *extra* criteria to make it more onerous for people to establish their own private institutions, which includes home education. Clause 25 must be reconsidered in light of the Constitution.

7. Lack of a SEIA

Perhaps the most worrying problem with the Bill is the fact that either no socio-economic impact assessment (SEIA) was conducted, or that it was conducted but not published, which renders it redundant.

The Minister of Basic Education, answering a question in the National Assembly in 2015, said that the "amendments must be subjected to a Socio Economic Impact Assessment System (SEIAS)". She continued, noting correctly that it was (and remains) a "requirement that was introduced by the Presidency [in 2015] for all new legislation and policies as well as amendments to legislation and policies".[21] Even if this answer was to a previous iteration of the Bill, there is no SEIA available on *any* version of the Bill.

The public participation with the Bill is inevitably uninformed if no SEIA is published. The department must commission an independent impact study into the potential consequences of the Bill.

8. Conclusion

While most of the Bill entails technical amendments warranting no comment, on the whole, it is deficient in that it unduly centralises South Africa's faltering education system. The powers of school governing bodies are limited to near-irrelevance, with heads of provincial education departments receiving the bulk of new authority. This is problematic, firstly, because the Bill's justification for this centralisation is, at best, weak, and, at worst, non-existent. The explanatory memorandum to the Bill does attempt to justify the interventions at various junctures, but these amount to little more than deceptive intellectual trickery and fallacies.

This centralisation of power is problematic, secondly, because government officials in the education bureaucracy do not possess the most up-to-date and intimate knowledge concerning the subjects of their regulation: the schools and their pupils. They lack an emotional connection with individual schools that would otherwise spur appropriate and speedy action in response to problems. With the centralisation that flows from the Bill, it is likely that problems will be responded to too late or inappropriately. Only school governing bodies understand their respective schools' circumstances well enough to bring about an appropriate intervention to problems.

The Bill also falls foul of the section 29(3) guarantee in the Constitution that South Africans have the right to establish their own independent educational institutions. The only requirements that

[21] Motshekga, A. "Written Reply to Question 3248". (2015). National Assembly.

independent institutions need comply with are that they may not discriminate based on race, and that their standards must be the same as or superior to those of equivalent public institutions. Government may not introduce additional criteria making it more onerous for independent institutions to be established, otherwise these constitutional provisions would be redundant and not amount to a 'right', properly-understood, at all. The Bill gives heads of department the ability to decide purely according to their whim what is and is not in the "best interests" of home-schooled learners, which violates the section 1(c) constitutional requirement that discretionary powers be circumscribed and not absolute (and consequently arbitrary).

As an alternative to the Bill's exercise in centralisation, there needs to be more decentralisation with more power being vested in individual school governing bodies. Provincial education departments and the national education department must merely serve to provide oversight and support structures for individual schools, which must be left to innovate and cater to the particular circumstances they find themselves in. Crucially, home education and independent education more broadly must be regulated only insofar as the Constitution requires. These institutions have been very successful over recent years and should not be interfered with.

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