



t +27 021 556 5502
a P.O. Box 50110
West Beach
Cape Town 7441
e info@forsa.org.za
www.forsa.org.za

To: Department of Basic Education
p/a Advocate TD Rudman
Per e-mail: rudman.d@dbe.gov.za

Re: Comments on the Draft Basic Education Laws Amendment Bill, 2015

From: Advocate N L Badenhorst
Legal Counsel, *Freedom of Religion South Africa*
Per e-mail: nadene.badenhorst@forsa.org.za

Date: 10 November 2017

Summary of submissions:

1. As an organisation working to protect and preserve religious freedom in South Africa, *Freedom of Religion South Africa (FOR SA)* commends the Department of Basic Education (“DBE”) on the intent of the draft Basic Education Laws Amendment Bill, 2015 (“the Bill”).
2. We are however concerned that the Bill will amend the South African Schools Act¹ (“Schools Act”) in ways that depart from the South African Constitution’s framework, values and intentions in a democratic state, by infringing directly upon the right to religious freedom as well as upon the State’s obligations to protect the family unit and the parents’ rights as the ones having primary responsibility regarding their children’s upbringing.
3. The State has an obligation to respect, protect and promote these rights in terms of not only the Constitution, but also international covenants the Republic is signatory to.²

¹ Act 84 of 1996.

² Article 9 of the African Charter on the Rights and Welfare of the Child (“Banjul Charter”), 1990 provides for the right of children to Freedom of Thought, Conscience and Religion and explicitly mandates that “**State Parties shall respect the duty of parents and where applicable, legal guardians, to provide guidance and direction in the enjoyment of these rights subject to the national laws and**

4. *FOR SA* recommends that the presumably unintended, but nonetheless unconstitutional, consequences of the current Bill be avoided by altering and/or altogether forgoing certain provisions in the Bill relating to the contracting of parents' decision-making powers pertaining to their children's education and the parallel provisions expanding the State's powers in this regard.
5. *FOR SA* would appreciate the opportunity to make verbal submissions with regard to the Bill, if and when such opportunity presents itself.

About FOR SA:

6. *Freedom of Religion SA NPC (2014/099286/08) (FOR SA)* is a non-profit, non-denominational Christian organisation, that serves to protect and preserve religious freedom in South Africa.
7. *FOR SA* represents the views of religious leaders representing over 5 million people from a cross-spectrum of churches, denominations and faith groupings who have authorised *FOR SA* to speak on their behalf (to government and Parliament) to address issues relevant to them.
8. As such, *FOR SA* is a voice for the religious community in South Africa on issues affecting our freedom of religion, freedom of religious expression, freedom of association and the rights of religious communities in South Africa. All of these are fundamental rights entrenched in our Constitution. As such, the State as well as the citizens of South Africa, have an obligation to respect, protect and promote these rights.

FOR SA's interest in the current matter:

9. As already explained, *FOR SA* concerns itself with matters (incl. draft policy and legislation) that may impact upon South Africans' freedom of religion and related rights.
10. We commend the intent of the Bill to strengthen the public schooling system by attempting to align legislation with developments in the education landscape in a manner that promotes the right to basic education.³

policies." [Own emphasis added]. Article 18 of the Banjul Charter, 1990 provides for the Protection of the Family and explicitly states that "The family shall be the natural unit and basis of society. **It shall enjoy the protection and support of the State** for its establishment and development." [Own emphasis added]. Article 20 of the Banjul Charter, 1990 provides for Parental Responsibilities, stating that "**Parents** or other persons responsible for the child **shall have the primary responsibility for the upbringing and development the child.**" [Own emphasis added]. Article 5 of the UN Convention on the Rights of the Child ("CRC") which states that "**States Parties shall respect the responsibilities, rights and duties of parents ..., to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention**" [Own emphasis added].

³ Clause 1.2. of the Memorandum on the Objects of the Basic Education Laws Amendment Bill, 2015.

11. It seems that wide powers, like those under the previous Apartheid dispensation, are granted to the State in a *bona fide* attempt to address the education problems that are being experienced in our country, and thereby to safeguard the rights of children under the South African Constitution.⁴
12. We are however concerned that, in its endeavour to strengthen the public schooling system, the Bill:
 - 12.1. May override the rights and responsibilities of parents to bring their children up in conformity with their religious, moral or philosophical convictions and beliefs, and take away from the authority of the family as the cornerstone of society;⁵
 - 12.2. Will prove to be illegal, given the scope and limitation of fundamental rights protected under the Constitution and international covenants ratified by South Africa; and
 - 12.3. Will result in a situation that is unworkable and impractical given the already scarce financial, structural and human resources at the DBE's disposal.

COMMENTS RELATING TO PROCEDURAL GROUNDS:

Consultation and time frames:

13. *FOR SA* is concerned that the process for in public consultation is seriously flawed, due to:
 - 13.1. The time allowed for comments being very limited in duration (being 30 days only for the public);
 - 13.2. This limited timeframe resulted in numerous parents, educators and organisations such as *FOR SA* not having enough time to study the Bill and assess its legality and/or likely impact;
 - 13.3. The timeframe for comments fell during the exam period, limiting *FOR SA*'s ability to consult adequately with its constituency;
 - 13.4. A requested extension of the 30 day comment period (by *FOR SA* and many others) was denied.
(For these reasons alone, we believe that the process is open to judicial review).
 - 13.5. The result is limited public engagement which severely impacted the quality of the comments we were able to make. We have therefore limited our submissions to a few key issues and reserve our right to make additional submissions.

⁴ s28 of the Constitution of the Republic of South Africa.

⁵ Article 9 of the Banjul Charter, 1990 provides for the right of children to Freedom of Thought, Conscience and Religion and explicitly mandates that "**State Parties shall respect the duty of parents and where applicable, legal guardians, to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.**"

COMMENTS RELATING TO SUBSTANTIVE GROUNDS:

Legal Framework:

14. Post-1994, the totalitarian State that had encompassed all of society, was replaced with the new Constitutional dispensation. The people conferred upon the State certain powers, in order for it to perform certain functions. The State therefore has no power in and of itself, and is not the source of any power, but all power it has, is conferred upon it by the people to be exercised in a manner that respects, protects, promotes and fulfils the rights of the people (i.e. the Bill of Rights) - and it stewards such power on behalf of the people.
15. Section 15 of the Constitution guarantees the right to religious freedom.
16. Section 29 of the Constitution bestows upon every person a right to basic education - a right people hold *vis-a-vis* the State.
17. The State is bound to respect, protect, promote and fulfil these rights in terms of section 7(2) of the Constitution.
18. In a clean break from the previous dispensation, this was further recognised in the Education White Paper 1 which set forth the goals for education in the new democratic society:

“Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by State authorities with respect to the form that education should take and to take part in its governance. Parents have the inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling, whether provided by the State or not, subject to reasonable safeguards which may be required by law. The parents’ right to choose included choice of the language, cultural or religious foundation of the child’s education, with due respect to the rights of others and the rights of choice of the growing child.”⁶

19. School Governing Bodies (“SGBs”) were therefore established in recognition of these rights that attach to parents by virtue of them being parents. White Paper 2 emphasised this point yet again by expressly stating that governance of public schools forms part of the new democratic dispensation.⁷

⁶ Page 21 of Education White Paper 1, Department of Education *Education and Training in a Democratic South Africa: First Steps to Develop a New System* (1995). [Own emphasis].

⁷ Department of Education *Report of the Committee to Review School Organisation, Governance and Funding* 31 August 1995 paragraph 2.4.

20. The Constitutional Court has said the following about the partnership model that governs education:

“An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school.”⁸

“The importance of cooperative governance cannot be underestimated. It is a fundamentally important norm of our democratic dispensation, one that underlies the constitutional framework generally and that has been concretised in the Schools Act as an organising principle for the provision of access to education. Neither can we ignore the vital role played by school governing bodies, which function as a ‘beacon of grassroots democracy’ in ensuring a democratically run school and allowing for input from all interested parties.”⁹

21. South Africa is also a state party to, *inter alia*, the following two international legal instruments which protect the family as the central unit of society and the right of parents to raise their children as they believe best:¹⁰

21.1. The African Charter on the Rights and Welfare of the Child (“Banjul Charter”), 1990; and

21.2. The UN Convention on the Rights of the Child (“CRC”), 1990.

22. We also pause to mention that with a previous policy proposed by the Western Cape Department of Education (namely the WCED Policy on the Registration of a Learner for Education at Home

⁸ *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and others* 40/09 [2009] ZACC 32 at para 56.

⁹ *The Head of the Department: Department of Education, Free State Province v Welkom High School & Harmony High School* CCT 103/12 [2013] ZACC 25 (10 July 2013) at para 23.

¹⁰ Article 18 of the Banjul Charter, 1990 provides for the Protection of the Family and explicitly states that “*The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.*” [Own emphasis added] and Article 20 of the Banjul Charter, 1990 provides for Parental Responsibilities, stating that “*Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development the child.*” [Own emphasis added], and Article 5 of the CRC which states that “*States Parties shall respect the responsibilities, rights and duties of parents ..., to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention*” [Own emphasis added].

(2014/02/11)), there was a huge outcry by the public against the broad (monitoring and investigative) powers given to the assessors provided for in that Policy, and which posed a major threat to parental authority and the inner sanctum of the home. As a result, the Policy was withdrawn.

Aspects of the Bill that relate to the derogation of religious freedom:

23. As mentioned above, *FOR SA* is concerned that some of the proposed amendments run contrary to the above values and goals established by the Departments' previous White Papers, as well as to the values and principles of a constitutional democracy subject to the rule of law and the international legal framework the Republic is to operate within.

24. We turn now to aspects of the Bill that are of particular concern from a religious freedom perspective, and address the relevant sections in each aspect:

25. Expanding of powers and functions of the State:

25.1. The proposed amendments to sections 5, 6, 20(1)(l) and of 43, and the proposed insertion of section 21(3A) into the Schools Act, unilaterally takes away powers from the parents and award said powers to the State. This is in direct contradiction with the values of the Republic as a democracy where the State has no powers or functions unless same are given to it by the people it serves.

25.2. This unconstitutionally takes away power from the people (by undermining the SGBs, who are a "*fundamentally important norm of our democratic dispensation*"¹¹), and gives such power instead to the State - without such power being conferred upon it by the people. The amendments therefore directly infringe on the rights of parents to raise their children as they choose,¹² instead centralising such decision-making power in the Provincial Departments as discussed below.

¹¹ *The Head of the Department: Department of Education, Free State Province v Welkom High School & Harmony High School* CCT 103/12 [2013] ZACC 25 (10 July 2013) at para 23.

¹² Article 20 of the Banjul Charter, 1990 provides for Parental Responsibilities, stating that "**Parents** or other persons responsible for the child **shall have the primary responsibility for the upbringing and development the child.**" [Own emphasis added]

26. Limitation of SGBs powers:

26.1. **Staff Appointments** (sections 10(a), 32, 33 and 35 of the Bill):

26.1.1. The proposed provisions take away the SGBs' powers of recommendation, which up till now had been with regard to the appointment of all educators, allowing them a say only in the appointment of post level 1 educators. The proposed provision therefore vests the HOD with the power to appoint and promote all other educators, taking away from the powers of the SGBs.

26.1.2. This is an unreasonable and unjustifiable limitation on the powers of SGBs (and therefore the parents whose children are enrolled in that school) and is in direct conflict with the legal framework set out above.

26.1.3. As many schools pay teachers out of their parents' fund, this provision does not cater for such teachers hired "privately" by the schools.

26.2. **Leasing of Facilities / Producing Additional Income** (section 19 of the Bill):

26.2.1. The word "lease" is not defined.

26.2.2. The current wording of the proposed section is also practically unworkable as it would require SGBs to obtain permission from the Member of the Executive Council (MEC) for leasing the school hall, for example, even for a single meeting.

26.2.3. FOR SA also pauses to point out that there are numerous churches that meets on school premises for, *inter alia*, their Sunday meetings. This is a mutually beneficial arrangement and brings in much needed funds into school coffers.

26.2.4. The proposed amendment poses a serious infringement on the right to religious freedom as numerous churches lease school halls and premises for their church services. The removal of power and authority from SGBs to enter into lease agreements with such churches, and the transfer of such power and authority to the MEC (who's limited administrative capacity will result in decisions not being taken timeously, or at all), will directly impact on churches ability to gather and therefore directly infringe on the right to religious freedom.

27. Given that SGBs are compromised out of what have (post-1994) always been seen as the major stakeholders, i.e. parents who have children in that school, the above proposed limitation of the powers of SGBs directly limits parental rights to decide how their children should be educated,

thereby undermining the State's legal obligations in terms of both the Constitution and international law¹³.

28. Additional burdens on home-schooling:

28.1. Many families home-school due to religious reasons. The provisions relating to home-schooling make home-schooling both procedurally and financially burdensome as discussed below. This makes home-schooling much more difficult for parents and directly infringes on the families' (parents' and children's) religious freedom.

28.2. When considering amending home-schooling, it is imperative that one looks at the grand narrative:

- Home-schooling was illegal under the Apartheid regime and parents who wished to home-school their children, as they believed it was in their children's best interest, were imprisoned and their children sent to orphanages.¹⁴
- Only with the advent of democracy was home-schooling legalised.
- Home-schools and/or "cottage schools" perform a massive social service and benefit to the State and the community by removing approximately 57 000 children from the public schooling system, who would otherwise have to be paid for with the already insufficient education budget by requiring more schools to be built and educators to be appointed.¹⁵

28.3. **Narrow definition of "home education"** (section 1(e) of the Bill):

28.3.1. The definition that is proposed is too narrow, as it only considers "home education" to be something that complies with the very detailed list of requirements.

28.3.2. This directly limits the freedom of parents to educate their children at home, or in an environment of their choosing - something which is clearly within their parental right to raise their children as they see fit.¹⁶

28.3.3. It also makes it very clear that "cottage schools", "tutor centres" and "learning centres" are no longer considered to be places of "home education". Apart from being impractical and unworkable, this severely limits and infringes upon parental rights.¹⁷

¹³ Article 20 of the Banjul Charter, 1990 provides for Parental Responsibilities, stating that "**Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development the child.**" [Own emphasis added]

¹⁴ https://en.wikipedia.org/wiki/Homeschooling_in_South_Africa

¹⁵ It is estimated that all Provincial Education Departments are to end the current fiscal year in deficit.

¹⁶ Article 20 of the Banjul Charter, 1990 provides for Parental Responsibilities, stating that "**Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development the child.**" [Own emphasis added]

¹⁷ Article 9 of the Banjul Charter, 1990 provides for the right of children to Freedom of Thought, Conscience and Religion and explicitly mandates that "**State Parties shall respect the duty of parents and where applicable, legal guardians, to provide guidance and**

28.4. **Home-schoolers to comply with the CAPS Curriculum:** (section 51(2)(c) of the Bill):

- 28.4.1. The inclusion of the phrase “*covers the acquisition of content*” results in parents having to have a curriculum that at least covers the content of State-chosen curriculum: CAPS.
- 28.4.2. This, again, limits the freedom of parents who are entitled to choose (from the wide variety of curriculum available) how they wish to educate their children,¹⁸ and who, on religious grounds,¹⁹ have the freedom to decline certain content contained in CAPS.
- 28.4.3. As this same burden of complying with CAPS is not imposed on private schools, the provision is also open to a challenge of unfair discrimination.²⁰

28.5. **State assessment of home-schooled children’s progress** (sections 1(e)(c) and 51(2)(d)(iii) of the Bill):

- 28.5.1. The proposed requirement that a “*competent assessor, approved by the HOD*” directly limits and infringes (arguably unjustly, unreasonably and unfairly so) upon the parents’ and child’s rights to privacy,²¹ and the right of parents to choose how to raise and educate their child.²²
- 28.5.2. It also imposes a financial burden and additional obligation and/or requirement on home-schooling parents that it does not impose on parents who send their children to public and/or private schools. It is therefore open to a challenge of unfair discrimination.²³
- 28.5.3. Practically, it is also not feasible as it will result in parents who choose to home-school, sending their children to public schools as home-schooling becomes financially impossible. This will use the State’s limited resources by and place an additional burden on the already strained public school system.

direction in the enjoyment of these rights subject to the national laws and policies.” [Own emphasis added], Article 18 of the Banjul Charter, 1990 provides for the Protection of the Family and explicitly states that “*The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.*” [Own emphasis added] and Article 20 of the Banjul Charter, 1990 provides for Parental Responsibilities, stating that “**Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development the child.**” [Own emphasis added].

¹⁸ Article 18 of the Banjul Charter, 1990 provides for the Protection of the Family and explicitly states that “*The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.*” [Own emphasis added]

¹⁹ Article 20 of the Banjul Charter, 1990 provides for Parental Responsibilities, stating that “**Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development the child.**” [Own emphasis added]

¹⁹ Section 15 of the Constitution of the Republic of South Africa, 1996.

²⁰ Section 9 of the Constitution of the Republic of South Africa, 1996 and the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (“Equality Act”).

²¹ Section 14 of the Constitution of the Republic of South Africa, 1996., Article 10 of the Banjul Charter, 1990 provides for the Protection of Privacy of children and states that “**No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence.**” [Own emphasis added]

²² Article 20 of the Banjul Charter, 1990 provides for Parental Responsibilities, stating that “**Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development the child.**” [Own emphasis added]

²³ Section 9 of the Constitution of the Republic of South Africa, 1996 and the Equality Act.

28.6. **Threat of six (6) year prison sentence** (section 2(b) of the Bill):

28.6.1. The definition is too wide and presently could include those parents who choose to home-school their children.

28.6.2. The current wide definition is illegal.²⁴

29. Again, the above directly limits the parents' and children's right to religious freedom, parental rights and imposes additional burdens on an education system that relieves the burden on State resources.

30. Independent schools:

Many independent schools exist for predominantly religious reasons. To the extent that the Bill therefore affects independent schools, it directly affects the right to religious freedom.

30.1. **Difficulties in leasing premises from public schools** (section 19 of the Bill):

30.1.1. As discussed in paragraph 26.226.2, the revocation of authority to enter into lease agreements from the SGBs and the resulting requirement that all such lease agreements be approved by the MEC, will have an adverse effect on the leasing of public school facilities by private schools and thereby negatively impact on the learners' right to education.²⁵

30.1.2. Again, given the limited (and already lagging) administrative capacity of the DBE, there is also the very real possibility that decisions will take unreasonable amounts of time to take, if ever, and will open the State and Department up to litigation in terms of the right to just administrative action.²⁶

30.2. **Conditions to subsidies** (section 24 of the Bill):

30.2.1. The provision is broadly drafted and does not limit conditions to, for example, "financial management conditions". The MEC may attach even very wide and unrelated conditions to subsidies received from the State by independent schools, this opens the doorway for loss of "independence".

²⁴ Article 9 of the CRC which states that "*States Parties shall ensure that a child shall not be separated from his or her parents against their will.*"

²⁵ Section 29 of the Constitution of the Republic of South Africa, 1996.

²⁶ Section 33 of the Constitution of the Republic of South Africa, 1996 and the Promotion of Administrative Justice Act 3 of 2000 which gives effect to section 33 of the Constitution.

31. It is submitted that on the religious freedom concerns alone, the proposed provisions will not pass constitutional muster as the proposed provisions fail to meet the requirements of section 36 of the Constitution.

Recommendations:

32. Staff Appointments (sections 10(a), 32, 33 and 35 of the Bill):

This is an unreasonable and unjustifiable limitation on the powers of SGBs and we recommend the removal of the provision.

33. Leasing of Facilities / Producing Additional Income (section 19 of the Bill):

We oppose the proposed amendment and recommend its removal.

34. Provisions dealing with home-schooling:

We oppose the proposed amendments relating to home-education and recommend their removal, particularly:

- 34.1. The narrow definition of “home education” (as proposed in section 1(e) of the Bill);
- 34.2. The requirement that home-schoolers to comply with the CAPS Curriculum (as proposed in section 51(2)(c) of the Bill);
- 34.3. The proposed state assessment of home-schooled children’s progress (as proposed in sections 1(e)(c) and 51(2)(d)(iii) of the Bill);
- 34.4. The provisions relating to the obtaining of a Matric (as proposed in section 51(6) of the Bill); and
- 34.5. The threat of six (6) year prison sentence due the wide drafting of the provision (as proposed in section 2(b) of the Bill), we therefore propose the insertion explicitly excluding home-schoolers and the like, e.g. “cottage schools”.

35. Provisions dealing with Independent schools:

- 35.1. Difficulties in leasing premises from public schools (section 19 of the Bill) are opposed as per paragraph 33 above.

35.2. Conditions to subsidies (section 24 of the Bill):

We recommend that the provision be narrowly drafted and limit conditions to “financial management conditions”.

THE END.