

Good, BELA, Best?: The Current State of Educational Law Reform in South Africa

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On 6 December 2021, the Minister of Basic Education tabled a Basic Education Laws Amendment (“BELA”) Bill in the National Assembly of the South African Parliament.¹ This Bill seeks to amend the South African Schools Act (1996) and is the most significant legal reform of the South African education system since the complete reform of the Apartheid-era education system that took place in the 1990s.

This paper addresses the background to the tabling of the BELA Bill, the challenges that the Bill faces due to a lack of policy formulation, developments within South Africa, and emerging global trends in education, and suggests ways that these challenges can be addressed.

The need for innovative approaches to developing sound education policies and passing these into law quickly, along with the suitability of South Africa as a locus for developing these approaches, is highlighted.

1. Background

It has been argued that the transformation of the South African schooling system in the 1990s was the most far reaching reform of an educational system seen anywhere in the world in the second half of the twentieth century.²

This transformation saw the wholesale geographical restructuring of education departments, the reform of the administration system, educational funding, employment practices, and the development of a new examinations system. Following these reforms a new national curriculum was also introduced.

At national level, these changes were encapsulated in the following Acts:

- South African Schools Act, 1996 (Act No 84 of 1996),
- National Education Policy Act, 1996 (Act No 27 of 1996),
- General and Further Education and Training Quality Assurance Act, 2001 (Act No 58 of 2001),

¹ Basic Education Laws Amendment Bill (B2-2022)

https://www.gov.za/sites/default/files/gcis_document/202203/b2-2022basiceducationlaws.pdf

² Crouch, L and Hoadley, U. “The Transformation of South Africa’s System of Basic Education” in “The Politics and Governance of Basic Education: A Tale of Two South African Provinces” Levy, B. Cameron. R. Hoadley, U and Naidoo, V. (eds), Oxford University Press, 2018. p27

- Employment of Educators Act, 1998 (Act No. 76 of 1998), and the
- South African Qualifications Authority Act, 1995 (Act No. 58 of 1995)

These new Acts were bolstered by a raft of new regulations and policies that sought to give effect to the new educational dispensation.

Each of South Africa's nine provinces also passed provincial education acts, although in the main, these closely follow the national legislation. These provincial acts are supported by provincial regulations and policy, and while these in the main follow the national guidelines, there can be important variations.

After roughly the mid-2000s, the legislative landscape entered a period of relative stability or dormancy, and reform of the education law has, since this time, primarily taken the form of a number of adjustments more technical in nature than a wholesale reform of the educational system.

This period ended abruptly in 2017 with the publication of the BELA Bill for public comment. Public participation in the process set a record, at the time, for public submissions. Over 5000 submissions were received and the Bill caused unprecedented public reaction. This unprecedented level of public participation appeared to have delayed the processing of the Bill by the Department of Basic Education for two critical years. By 2019 the Department was moving the Bill forward, but the COVID pandemic further delayed progress.

The BELA Bill

The tabling of the BELA Bill in the South African parliament in December 2021 therefore took place just over four years after it was released for public comment.

The intervening period had done little to dampen opposition to the Bill and when discussions around the Bill began in parliament's Portfolio Committee on Basic Education, the controversy resurfaced. Civil society and school governing body organisations claimed that the Bill marked a breach of the constitutional settlement of 1994.³

Core Controversies

The two core issues that these organisations are concerned about are the provisions in the Bill that seek "to enhance the authority of the Head of Department in relation to the admission of a learner to a public school, after consultation with the governing body of the school" and "to provide that the governing body of a public school must submit the admission and language policies of the public school to the Head of Department for approval"⁴.

³ See the statement by Afriforum as an example: <https://afriforum.co.za/en/government-breaches-1994-settlement-with-planned-amendments-to-the-schools-act-targeting-afrikaans-schools/>

⁴ See the 'objectives' at p2 Basic Education Laws Amendment Bill (B2-2022) https://www.gov.za/sites/default/files/gcis_document/202203/b2-2022basiceducationlaws.pdf

The negotiations around the existence of state-funded single-language medium schools secured by powers of school governing bodies was one of the most contentious issues in the Constitutional negotiations, but did not result in an express constitutional protection.

In later years, the practice of school governing bodies setting their own admission criteria and especially being able to maintain a specific pupil/educator ratio became of key importance to fee-paying public schools. School fees allow this class of public schools to appoint additional educators (above the number of posts allocated according to state funding models for a school of that size) and therefore maintain a lower pupil/educator ratio.

The Education Ministry states that the proposed changes in the BELA Bill relating to language and admissions policy are in response to Constitutional Court judgement in the “Ermelo” case “which provided guidance with regard to the approval of a school’s language policy. The Constitutional Court made it clear that even though the function of determining a school’s language policy is a devolved function (or responsibility), in terms of section 6(2) of the SASA, it is not the exclusive preserve of an SGB.”⁵

In the “Constitutional Court judgment of Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another [CCT 103/12 [2013] ZACC 25]” the education department finds grounds to “incorporate further checks and balances above and beyond those that are currently in the SASA in respect of the language and admission policies of schools.”⁶

Specific Interest Groups

Along with these fundamental reforms, the Bill also seeks to introduce changes in other areas. These have proved to be equally controversial with the affected stakeholders.

Opposition to clauses allowing for the sale and consumption of alcohol on school premises created substantial public concern, and reflected public concern over alcohol abuse by learners.⁷

Home education was legalised by s51 of the South African Schools Act (1996) and a Policy on the Registration of Learners for Home Education was published in 1999.⁸ Home education at the time was not widely practiced, with perhaps as few as 1000 or 2000 learners studying at home. In the intervening years home education has grown considerably. While there are no

⁵ See 2.5.4 Basic Education Laws Amendment Bill (B2-2022)

https://www.gov.za/sites/default/files/gcis_document/202203/b2-2022basiceducationlaws.pdf

⁶ See 2.5.5 Basic Education Laws Amendment Bill (B2-2022)

https://www.gov.za/sites/default/files/gcis_document/202203/b2-2022basiceducationlaws.pdf

⁷ Should alcohol be in schools? <https://mg.co.za/special-reports/2022-06-10-should-alcohol-be-in-schools/>

⁸ Policy on the Registration of Learners for Home Education, Government Notice No 1411, 23 November 1999.

reliable figures on the number of home schoolers in South Africa, research by LearnFree indicates that between 35 000 and 50 000 learners of compulsory school-going age are being home schooled.

This increase in the number of home schoolers, as well as the creation of a dedicated home education unit within the Department of Basic Education in 2013 to attend to home education, has led to the development of a new policy on home education⁹ that has culminated in new provisions being included in the BELA Bill to regulate home education.

Home schoolers are bitterly opposed to these new provisions in the Bill. While home schoolers represent much less than 1% of the school-age population required to receive compulsory education, comments by home schoolers represented over 20% of the submissions during the Bill's initial public comment period. Ongoing research by LearnFree has found that less than 2% of home schoolers believe that the Bill should pass through the parliamentary process unchanged. 65% of home schoolers want the home schooling provisions removed from the Bill and would rather see home education being regulated in terms of the broad provisions of South Africa's Children's Act. One in five home schooling families want to see the home education provisions split from the Bill, and new provisions being developed in close consultation with home schoolers. Only 12% of home schoolers support the home education provisions remaining part of the Bill and changes being made on a clause-by-clause basis. When presented with a menu of changes most respondents indicated their preference for substantial changes being made to the Bill.¹⁰

2. Key reforms required

Without detracting from the importance of the powers of school governing bodies, the regulation of home education, and the alcohol-use policy, there are key areas for reform that are required in the Bill, that are being overlooked. These areas are:

- Reform of the education law to make it child centric,
- Regulation of the early education sector,
- Addressing the rural education crisis,
- Taking account of trends that are impacting, and will impact the education sector in South Africa, and
- Future-proofing South African education law so that it enables South Africa to meet the requirements of SDG 4.

Child-centric education law - The Children's Act and the Child Justice Act

The fundamental reform of the South African education system in the mid-90s paid significant legislative attention to systems and educators. The SA Schools Act, however, preceded the adoption of the Children's Act, Child Justice Act, and the School's Act, and has not adequately

⁹ DBE, Policy on Home Education, 2018.

https://www.gov.za/sites/default/files/gcis_document/202005/Home%20Education%20Policy%20.pdf

¹⁰ BELA Bill Survey, LearnFree, unpublished, 2022.

incorporated the principles contained in these Acts. Reyneke argues that “In contrast to th[e] explicit child-centred requirement of the Constitution, the Schools Act does not have an explicit child focus. The hypothesis that the Schools Act does not focus sufficiently on the best interests of the child is based inter alia on the lack of reference to children in the legislation, the lack of focus on the needs of children of different age groups, the lack of focus on the different needs of different children, and the lack of child-friendly processes.”¹¹

Early Childhood Development – changes and unforeseen consequences.

The BELA Bill has had a very long gestation period, as work on aspects of the Bill began in 2013, and it has taken over four years to move from the public comment phase to tabling the Bill in parliament. This will now also involve extensive public comment. One danger of such a long period of development is that a bill becomes an omnibus bill, with new additions being made as the Bill moves along.

The most significant of these has been the proposed lowering of the compulsory schooling age by one year, to accommodate, in part, the government’s commitment to provide two years of universal free early education. On 1 March 2022, the responsibility for the Early Childhood Development programme and Early Childhood Development facilities was shifted from the Department of Social Development, to the Department of Basic Education.

Unfortunately, no appropriate policy or regulatory framework was put in place, and no provision is made for this change in the proposed BELA Bill, other than the proposed lowering of the age for compulsory education. Among a myriad of practical problems, such as reports that those who wish to register an Early Childhood Centre are being sent between the two departments, with neither claiming to be able to process registrations, the legal implications of the change do not appear to have been carefully considered.

Section 29(3) of the South African Bill of Rights states “Everyone has the right to establish and maintain, at their own expense, independent educational institutions” subject to certain conditions, one of these being registration with the state.¹² A recent comprehensive census of early learning programmes found that there were 42 420 programmes, which is nearly double the number of public schools, and of these 42% were not registered. Government funding was the primary source of funding for only 27% of the over 42 000 providers and this corresponds closely with the 28% of centres registered, it is therefore likely that at least 42% and as possible as much as 72% of institutions (nearly 30 000) are unregistered independent institutions.¹³

A key question that has not been answered is: does this function shift constitute a legal transfer of these centres into the education sphere? This is something about which there will be little

¹¹ Reyneke, M, Realising the child's best interests: lessons from the *Child Justice Act* to improve the *South African Schools Act*, http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812016000100030

¹² Constitution of the Republic of South Africa, 1996. Section 29(3)(b).

¹³ Schenk J, ECD Census 2021 presented to Portfolio Committee on Basic Education, 07 June 2022, ikapadata.

doubt once they begin providing “compulsory education” in line with the lowering of the compulsory schooling age, when the BELA Bill comes into force, but what is their current status? If this status is that of an educational facility, are these institutions, by act of executive fiat, now in breach of section 29(3)(b) of the South African Constitution that requires registration of independent “educational institutions”? Under the Department of Social Development it could be argued that their primary character was childcare, broadly speaking, and not education. The move to the education department has been embarked on precisely to make these institutions educational ones. Therefore, this argument seems to have little merit and these institutions should be treated as educational institutions and would be subject to the constitutional provisions.

There has been discussion of some new educational legislation being planned, or to cater for these institutions in a revised “second” Children’s Act Amendment Bill but by when can this be in place? A major reform of the Children’s Act was proposed through a Children’s Act Amendment Bill. This amendment sought, among other matters, to reform the early childhood development system. There was improper consultation on these sections and the bill was therefore split in order not to delay other sections. The transfer of responsibility for early childhood development from the Department of Social Development to the Department of Basic Education has led to suggestions by the state law advisors that the “efficacy of the early childhood development portion of the bill” is questionable “if the portfolio committee on social development vets and approves legislation that will be implemented by another department.”¹⁴ The complexity and confusion that has been part of this process gives substance to the concern that by the time the BELA Bill is passed and Early Childhood Development centres become subject to section 29(3)(b), “the registration clause”, an appropriate regulatory structure will not be in place and tens of thousands of centres will be operating in violation of the constitution, if they are not doing so already.

Rural education

Rural education policy is critical in a country such as South Africa. A draft Rural Education Policy was published for public comment in 2017, but this policy was quietly abandoned in favour of a ‘framework’.

In terms of this framework, several thousand rural schools have been closed since 2017 with over 3000 rural schools meeting the criteria for closure and facing the possibility of closure over the next few years. This framework has been adopted without extensive consultation with stakeholders, no research has been done to determine the impact on these closures on the well-being and outcomes experienced by rural learners, and no socio-economic impact assessment of the policy or framework has been completed.

¹⁴ Wolfson Vorster, R. “Is the Children’s Amendment Bill about child protection, cost cutting or control?” Daily Maverick, 13 June 2021. (<https://www.dailymaverick.co.za/opinionista/2021-06-13-is-the-childrens-amendment-bill-about-child-protection-cost-cutting-or-control/>)

Rural education cannot be treated according to the same criteria as urban education, but no special provisions is made for rural education in the BELA Bill.

This is not surprising as the underlying policy framework lacks the rigour required when developing a policy, as opposed to a framework. A framework is an instrument of ‘soft law’¹⁵; given that the closure of schools affects the right to education directly and it is fundamentally questionable that a ‘soft law’ instrument is the most appropriate. While ‘soft law’ provisions should in theory be easily subject to legal challenge and therefore justiciable, in practice they rarely are, especially where poor communities lack access to justice. Their very nature as ‘soft law’, that can be easily withdrawn, amended, and reissued in a slightly different guise with minimal public involvement, means that they often represent a ‘moving target’ for legal practitioners, trying to use cumbersome hard law processes to tie a soft law cloud down.

Thought needs to be given to the source of authority for soft law, as well as how oversight is put in place. Legislative guidelines that set out how soft law should be used could address some of these concerns while at the same time not making ‘soft’ law into ‘hard’ law through empowering it as a class of subordinate legislation. Although its use in the context for school closure remains questionable.

3. 5 key trends

Policy development is also not taking account of major trends that are impacting, and will impact, the provision of basic education in South Africa, and no doubt the world.

The COVID pandemic highlighted the impact that ‘shocks’ can have on the educational system and that these shocks need to be planned for. Irrespective of whether one’s view is that COVID was the proverbial once in a lifetime event, or the herald of a new era in which global pandemics become common, it is evident that COVID merely acted to highlight and act as a catalyst for a number of underlying trends.

From Public to Private

In sub-Saharan Africa, learners are moving from public to private education. The World Bank has noted that “Between 1991 and 2003, private primary enrolments in Sub-Saharan Africa grew by 113%, compared with a 52% growth for public primary education.”¹⁶ The rate of enrolments in private institutions have continued to grow, between 2000 and 2014 “11% and 19% of primary and secondary students ... [are] enrolled in private schools”¹⁷ in Sub-Saharan Africa. Learner numbers in private primary schools increased by a moderate 3.8% over that

¹⁵ ‘Soft law’ in this context refers to frameworks, circulars, guidelines, instructions and to a certain extent formal policies (e.g. Policy on Home Education) that while not having legally binding force (although where they implement law they may) have practical law-like effects as they are treated on the ground as law.

¹⁶ Evans, D. How well does regulation of private schools work in Sub-Saharan Africa? World Bank, <https://blogs.worldbank.org/developmenttalk/how-well-does-regulation-private-schools-work-sub-saharan-africa>

¹⁷ Baum, D. Cooper, R. Lusk-Stover, O. Regulating market entry of low-cost private schools in Sub-Saharan Africa: Towards a theory of private education regulation. *International Journal of Educational Development* 60 (2018) 100–112.

decade and a half period. In Kenya, the “number of private primary schools grew by 773 % between 2003 and 2017, compared to a growth of only 33 % for public primary schools.”¹⁸

These figures do not paint the complete picture. Research in South Africa has shown that over a quarter of low-fee private schools are not registered and therefore will not appear in these figures.¹⁹

In addition to traditional private education institutions, there has been significant growth in micro-schools. Micro-schools are small institutions usually with less than 30 learners and run by a small group of educators. In South Africa there is no research into the number of these institutions, but extremely conservative estimates indicate that the lower bound for these institutions would be around 500 institutions; this would be equal to a quarter of registered private schools. Although it is within the realms of possibility that as many as 2000 of these unregistered micro-schools may exist.

There has been no policy development to address this sector, and the only provision in the BELA Bill that addresses this trend is an increase in the penalty for running an unregistered school from 3 months jail time to one year.²⁰ While the regulation of independent (private) schools has historically been a provincial competency, and should in all likelihood stay that way, policy and law regarding independent educational institutions remains underdeveloped.

COVID and the consequent economic disruption do appear to have placed some pressure on private institutions, with learners moving to public schools. But it is questionable whether this will be anything more than an adjustment, especially in light of other developments, such as the increase in the availability of information to all at a low cost that makes the establishment of small schools feasible.

Democratisation of the access to information

The founding of Khan Academy in 2008 marked the creation of a new kind of educational institution, one that provided free education. But that was outside the traditional educational structures.²¹ A limitation was that while this was a major step forward in the provision of quality free education on a global basis, the content and programme were firmly rooted in the American K-12 system.

In South Africa, in the late 2010s up until the present, a raft of organisations have provided free or low-cost programmes aligned to the South African national curriculum. The most prominent

¹⁸ Shiundu, A. Dissatisfaction with “free” public education. <https://www.dandc.eu/en/article/kenya-even-poor-parents-send-their-kids-private-schools>

¹⁹ Schirmer, S. Johnston, D and Bernstein A. “Hidden Assets: South Africa’s low-fee private schools”, The Centre for Development and Enterprise, August 2010. p28.

²⁰ Clause 34 amending Section 46(4), Basic Education Laws Amendment Bill (B2-2022). https://www.gov.za/sites/default/files/gcis_document/202203/b2-2022basiceducationlaws.pdf

²¹ Khan Academy website, What is the history of Khan Academy? <https://support.khanacademy.org/hc/en-us/articles/202483180-What-is-the-history-of-Khan-Academy->

of these is the UCT Online High School, a collaboration between a private provider and the University of Cape Town, which provides, alongside a paid offering, a comprehensive free high school programme.²²

This has made it possible for small schools to have access to world-class instruction for free, and allows educators to play a tutoring, rather than a lecturing, role. These changes allow schools to be operated on a much smaller scale, and deliver a higher quality education than was hitherto possible.

These programmes remain tied to curricula, the focus being on a predetermined standardised learning programme, with the accompanying traditional assessment and accreditation. While these programmes offer great flexibility in ‘when’ a learner learns, they are not as flexible in allowing freedom in ‘how’ the learner learns, and still prescribe ‘what’ the learner learns.

The fact that learners do not have substantial control over what they learn, including the materials and content provided to them, has many reasons, but the key one, as it relates to technology, is that before the advent of the internet and specifically “Web 2.0”, the average learner had limited access to an educational field, and a small group of credentialed experts acted as necessary gate-keepers, providing access and guidance. This has completely changed with the rise of the “power of search”. Today, within a few minutes, a person who knows how to search, using simple natural language, has access to almost unlimited information; and that at low or no cost. This search also provides access to material at every level, from entertainment, to the most detailed and up-to-date academic debate. One can watch a YouTube video that lasts 10 minutes, or a YouTube course that stretches over 50 one-hour long lectures, with hundreds of hours of supplementary viewing and in-depth materials.

Accelerating this trend is the ability of Web 2.0 to facilitate access to a community. This community can now (for good or ill) guide the learner in their chosen field. This unfiltered access to information requires that the user has news skills that allows them to evaluate and weigh the trustworthiness of information. It is posited that these are very high order skills that are best developed through educational approaches that have traditionally sought to develop the “prudent”²³ person, and that these skills are generally not developed in the South African national curriculum, or indeed many curricula world-wide.

²² <https://www.uctonlinehighschool.com/free-curriculum>

²³ Wikipedia gives the following as “the integral parts of prudence:

- Memoria : accurate memory; that is, memory that is true to reality; an ability to learn from experience;
- Docilitas : an open-mindedness that recognizes variety and is able to seek and make use of the experience and authority of others;
- Intelligencia : the understanding of first principles;
- Sollertia : shrewdness or quick-wittedness, i.e. the ability to evaluate a situation quickly;
- Ratio: Discursive reasoning and the ability to research and compare alternatives;
- Providentia : foresight – i.e. the capacity to estimate whether particular actions can realize goals;
- Circumspection : the ability to take all relevant circumstances into account;
- Caution: the ability to mitigate risk.”

The social aspect is a key defining feature of Web 2.0, and has the potential to redefine the learner/educator relationship. It, therefore, also presents challenges to the conventional conception of curriculum-based education, in favour of self-directed education, with the attendant empowerment of the individual as a director of their own education, tailored to their own educational interests and needs, especially where the older learner is concerned.

Emerging Educational Modalities

This redefinition of the learner/educator relationship is shaping and leading to non-conventional educational modalities. These modalities include home schooling, collaborative or community-based home schooling, micro-schools, online schools, and hybrid education. Hybrid education can include a mix of all of these modalities, either with each other or with brick-and-mortar-based schooling.

There has been significant debate within this sector concerning the use of the term ‘emerging education modalities’. Home schoolers argue that home education is the earliest form of education, and that it predates formal schooling and certainly mass schooling and is therefore not ‘emerging’. Those operating micro-schools object to the term ‘school’. The South African Schools Act defines schools very narrowly with a focus on learners being enrolled for grades.²⁴ As many micro-schools don’t use grade-based systems, they object to the label ‘school’, and in addition do not want to be associated with what they see as repressive practices associated with schooling. Whether these diverse approaches can and should be grouped together as a modality is questionable and research into an appropriate taxonomy is required.

No appropriate regulatory environment exists for online schools. They have been approaching the Department of Basic Education (DBE) for at least ten years, requesting reform of the regulatory environment. This was ignored until well into the COVID pandemic. Finally in May 2021 the DBE issued the “e-Education Guidelines: Virtual Schools”²⁵ framework.

Some independent, and many Quintile 4 and 5 schools (the section of the public schooling sector serving the wealthiest segments of South African society), moved relatively quickly to online learning especially during the hard lockdown. However, not only was the digital divide in South African society exposed²⁶ but so was the incomplete implementation of the education systems regulatory architecture.

<https://en.wikipedia.org/wiki/Prudence>

²⁴ “‘school’ means a public school or an independent school which enrolls learners in one or more grades from grade R (Reception) to grade twelve” South African Schools Act (1996 (Act No 84 of 1996).

²⁵ This document is not publicly available but may be obtained from the author.

²⁶ Mkhize, T. Davids, M. “Towards a Digital Resource Mobilisation Approach for Digital Inclusion During COVID-19 and Beyond: A Case of a Township School in South Africa” Educational Research for Social Change vol.10 n.2 Port Elizabeth Sep. 2021 http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2221-40702021000200003#back_fn1

A “White Paper on e-Learning (South Africa, 2009)”²⁷ proposed a framework for the use of ICTs within the educational sector. However, this has not been developed into policy and a comprehensive regulatory framework.

A further stumbling block to the development of a regulatory framework governing the online education sector is that the original post-Apartheid regulatory framework was not fully implemented. As the framework points out the “The NQF and GENFETQA Acts would need to be amended to allow for accreditation of public virtual schools”²⁸ the initial “GENFETQA Act (2001) provided for Umalusi to accredit provincial education departments. However, in the 2008 amendment, that was removed and accreditation was limited to private education institutions.”²⁹ Independent online educational institutions are therefore likely to be able to operate long before public ones can, creating a regulatory divide that will overlay the existing digital divide between the children of higher-income earners and the children of no- or low-income earners.

The regulation of the online sector (public and private) should be included in the BELA Bill. However, consideration should be given not just to regulating this sector as a brick-and-mortar school but just “in the cloud” would be but in a manner that unleashes its full potential, in line with the democratisation of access to information and the structural changes that that may engender.

In line with the characteristics of the internet-based economy, such institutions also transcend national boundaries, thereby creating new regulatory challenges.

Large is Beautiful/Small is beautiful - Medium is ‘?’

One of the characteristics of the internet-based economy is that a single large institution tends to predominate³⁰ and the more virtual their offering the more likely a single institution is likely to dominate a sector. At the same time these large players empower small entities, and, more often than not, individuals. The rise of the independent tutor, micro-school, and YouTube creator/educator are all examples of this trend.

This creates a challenge to medium-sized institutions – not only conventional schools but provincial and national educational systems. Fundamental questions will need to be asked about the scope and nature of these geographically determined systems, as online educational institutions easily transcend national boundaries.

Learners with Disabilities

Finding the right answers to these questions is vital to meeting the needs of not just learners in general, but particularly of learners with disabilities.

²⁷ <https://www.gov.za/documents/white-paper-e-education-transforming-learning-and-teaching-through-information-and>

²⁸ DBE, e-Education Guidelines: Virtual Schools, 2021. 34

²⁹ *Ibid.*

³⁰ Report on the hearings on “The Digital Economy” by the Competition Commission of the OECD, 2012. p.7.

There is a greater global emphasis on the need to meet the educational needs of learners with disabilities. Added to this is the increasing number of learners being diagnosed on the autism spectrum³¹, with other forms of neuro-diversity, as well as general mental health challenges.

Analysis of student intake at a leading online school in South Africa has shown that one in ten learners experience significant barriers to learning due to a learning disability.³²

In 2001, the Department of Basic Education published a White Paper 6 on Special Needs Education³³. This remains a white paper, despite the dramatic increase in autism and neurodiversity over that period and the need to address the needs of learners with disabilities.

The history of education, for example, in the development of the Montessori Method, has shown that by paying attention to learners outside the mainstream, it is possible to make breakthroughs in conventional education.

Added policy and legal attention to inclusive education can also mean that changes can be made in the conventional educational systems that will prove more effective in catering to the special and unique learning needs we all have.

SDG 4

While meeting the sustainable development goals, now just over seven years away, underlines many key government initiatives, such as lowering the age for compulsory education, there is little overt indication in the BELA Bill and underlying policy development that SDG 4 is being prioritised in an integrated fashion. The Department of Basic Education's Annual Report 2021/22 mentions SDG 4 twice, and then only in the context of reporting to international organisations.³⁴

The proposed lowering of the age for compulsory education by one year seeks to meet SDG Target 4.2 i.e. "By 2030, ensure that all girls and boys have access to quality early childhood development, care and pre-primary education so that they are ready for primary education"³⁵, and the two indicators:

- "4.2.1 Proportion of children aged 24–59 months who are developmentally on track in health, learning and psychosocial well-being, by sex"

³¹ Autism speaks, New study shows increase in global prevalence of autism, April 29, 2022

³² Interview with UCT Online High School.

<https://www.gov.za/documents/special-needs-education-education-white-paper-6>

³⁴ Department of Basic Education, Annual Report 2021/22.

<https://www.education.gov.za/Portals/0/Documents/Reports/Annual%20Report%202022.pdf?ver=2022-10-26-144312-530>

³⁵ <https://sdgs.un.org/goals/goal4>

- “4.2.2 Participation rate in organized learning (one year before the official primary entry age), by sex.”³⁶

Some of the problems arising from how this has been done, and the implications for the regulatory framework, are dealt with above.

4. The BELA Conundrum

BELA Bill now poses a serious conundrum: on the one hand there is a desire to have the Bill pass into law as soon as possible, while on the other hand the Bill is incomplete and the needed reforms that are required most urgently don't even appear in the Bill. The need for these reforms is at the same time an impetus for new education law to be passed into law quickly, and a reason to delay the Bill to allow changes to be added. But the urgent need for the Bill, and the fact that the longer the Bill is delayed the more out of date it becomes argues for quick adoption.

This problem has been caused, in part, by the stagnation of policy formation. Critical policies remain in draft, have taken many years to develop, or are converted into 'frameworks'.

A further contributing factor has been the need for the Department of Basic Education, like education departments worldwide, to focus its energies on dealing with the day-to-day impacts and realities of the COVID pandemic in 2020 and 2021. In these circumstances it is not surprising that education departments lacked capacity to attend to needed policy formation.

An additional impact of COVID is that it has dramatically accelerated the pace of change, which has meant that policy developments need to happen more quickly but against the backdrop of limited resources being available to the education department.

This lack of an appropriate ecosystem of policies has led to the proposed BELA Bill being inadequate; this poses a significant danger to South Africa's ability to meet the ongoing challenge of providing quality and equal education, as well as to be able to achieve its SDG 4 goals.

In addition to the problems related to the policy foundations of the Bill, the engagement process leading up to the tabling of the Bill may prove to be subject to challenge. An area of particular concern is the question of whether lowering the age for compulsory education by one year has complied with the required processes. This change did not appear in the version of the Bill published for public comment in 2017. The public have, therefore, not had the opportunity to comment on this aspect of the Bill. It may be argued that consultation took place on the ECD sections of the Children's Act Amendment Bill. However, that is only one aspect of extending compulsory education. Has consultation taken place with parents who will be providing compulsory education to their pre-school children at home?

³⁶ Ibid.

As the ‘lowering of compulsory age’ clause wasn’t included in the version of the Bill published for public comment the socio-economic impact assessment required by Cabinet to be published with a bill, when that bill is published by a Department for public comment,³⁷ did not include any details that related to the extension of compulsory education. It is not evident to what extent public comment on ECD, or the socio-economic impact assessment (developed when the Children’s Amendment Bill was going through the departmental engagement phase), can substitute for a process conducted under the auspices of the Department of Basic Education.

The question of whether public engagement can be said to be meaningful - unless the public has access to the ‘facts and the figures’ in the socio-economic impact assessments - has not been addressed in the courts. It is perhaps possible to remedy these potential flaws in the parliamentary process but if this is not done the Bill could face a serious legal challenge.

It is unlikely that challenges by stakeholders as to the ‘meaningfulness’ of the public engagement will be limited to the ‘lowering of the age of compulsory education’ issues. Many stakeholders have been vocal in their criticism of the engagement process followed by the Department of Basic Education. Parliament determining the validity of these claims and seeking to remedy these defects would, however, no doubt delay the passage of the Bill. It is an open question whether this is an appropriate role for the parliamentary committee to play. On the other hand, the passing of a flawed Bill that is struck down either in whole or in part would further delay needed reforms to the system.

The lengthy development process has also meant that the Bill has been impacted by the new phenomena of “comment inflation”. The advent of the internet has made public engagement much easier. Before the widespread use of the internet a Bill would receive responses from the public that would number in the low hundreds, mostly by organisations. The advent of the internet has acted as a democratic enabler and in 2017 when the Department of Basic Education published the BELA Bill for public comment 5000 responses were received; as has been noted above, a record for the time.³⁸ The advent of Web 2.0, with its ability to foster social interaction - and indeed social mobilisation - has meant that when parliament made its call for public comment, 18 000 interested and affected parties responded.³⁹ This volume of response has strained parliament’s resources, a fraction of the resources afforded to the Department of Basic Education.

³⁷ See items 5 & 6 “Publication of the draft policy initiatives, regulation or legislation for public comment and consultation with stakeholders, with the final assessment attached.” and “revision of the draft and the final assessment based on comment from the public and stakeholders, if required, and submission of the draft policy initiatives, regulation or legislation for approval with the final assessment attached.” Socio-Economic Impact Assessment System (SEIAS) Guidelines, Department of Planning, Monitoring and Evaluation (DPME), May 2015

³⁸ Meeting of the Portfolio Committee on Basic Education on “ECD Migration & BELA Bill: update by Ministry”, 20 October 2020. <https://pmg.org.za/committee-meeting/31225/>

³⁹ DBE “Portfolio Committee on Basic Education Reflection: A threefold of education priorities in the spotlight”. 2022. <https://www.education.gov.za/ArchivedDocuments/ArchivedArticles/Threefold-of-Education-Priorities-1022.aspx>

This development has not gone unanticipated. The innovative use of a Google form by the Portfolio Committee has provided a useful channel for comment. Non-governmental actors have also undertaken initiatives to manage the response. The Freedom Front Plus, a political party, developed its own Google form and offered to make a “bulk” summary submission on behalf of its supporters. LearnFree⁴⁰, an educational consultancy, approached the Pestalozzi Trust, a civil rights organisation defending home schoolers, with the proposal of developing a survey that would allow home schoolers not inclined to write their own submission, to indicate their views on various aspects of the Bill, including the wording of existing clauses and alternative formulations. This survey received over 1500 responses that were provided as a bulk response in a single submission, hopefully reducing the burden of work on the staff of the committee, but at the same time encouraging informed public engagement.

Despite these efforts the work needed to process the volume of response is still significant and could possibly delay the Bill, give that parliament has limited resources to handle the number of responses received.

There is also opposition to the substance of the Bill. Of the 392 submissions received through a Google form created by the Portfolio Committee, 72% of those commenting did not support the Bill.⁴¹ While the sample size is small, it is likely broadly indicative of the levels of opposition to the Bill.

The BELA Bill faces a number of headwinds. Wide-spread opposition is indicative of a developing crisis for the BELA Bill. High levels of opposition are a leading indicator of potential legal challenges, even if the Bill passed. As educational law reform is urgently needed, the key questions is: how can this crisis be addressed?

Making BELA Better

The responsibility to defuse the looming BELA crisis now rests primarily with the parliamentary Portfolio Committee on Basic Education.⁴² It is in this process that the Bill can be improved to provide the legal architecture that will enable the delivery of quality education for all.

Amongst many other attributes, successful legislation should:

1. Achieve broad societal acceptance
2. Be clear and stable

⁴⁰ For transparency the author of this paper is the founder of LearnFree.

⁴¹ Basic Education Laws Amendment (BELA) Bill: public comment extension, Portfolio Committee on Basic Education, 28 June 2022. <https://pmg.org.za/committee-meeting/35250/>

⁴² As the Bill has been tabled in the National Assembly the Bill is dealt with first by the Portfolio Committee on Basic Education. This need not detract from the level of attention the Bill will receive from the Select Committee on Education and Technology, Sports, Arts and Culture in the National Council of Provinces, although traditionally the bulk of the work in considering the Bill at least initially will be for the Portfolio Committee on Basic Education.

3. Adhere to international law, be constitutional, coherent with other laws at the national and provincial level and avoid conflict, as far as possible, with laws at provincial level and subordinate legislation
4. Follow best-practices from other jurisdictions
5. Be future-orientated and provide regulatory frameworks that allow for flexibility in adapting to change⁴³
6. Educate the public about the law especially fundamental rights law
7. As far as possible to raise the bar to protect against a successful legal challenge to the legislation.

The challenge faced by the Committee will be how to achieve this. This complex task can only be successfully achieved by following strong anchoring principles, especially as there is substantial pressure to move quickly; haste often leads to poorly conceived law, with negative consequences.

Sound education law is based on key first principles such as these:

1. That the best interests of the child are paramount.
2. Law that impacts children should be child-centric, and based on the fundamental rights of the child.
3. The principles of subsidiarity⁴⁴ and solidarity⁴⁵ fundamental to the South African Constitution are followed.
4. Equality and quality of education provision should be achieved.
5. Promotion of freedom in and of education

Following key principles such as these provides a foundational reference point which can ensure sound law.

The growth in complexity of the education sector raises the question of whether a 'Schools' Bill is the most appropriate legal instrument for regulating the sector. It is after all the right to

⁴³ "Soft law" can be used as a flexible means to regulate education in areas that require urgent attention due to societal change. The use of "soft law" especially at a national and even local level is currently the subject of heated academic debate. Its flexibility and the speed with which it can be adopted recommends its use. On the other hand it can suffer from a "democratic deficit", violating the separation of powers doctrine and further weakening the role of the legislature. What democratic oversight mechanisms should be put in place is also a subject for debate.

⁴⁴ See for example "The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so." The 34 Constitutional Principles. Principle XXI (1). <https://ourconstitution.constitutionhill.org.za/the-34-constitutional-principles/>

⁴⁵ For a discussion on "Ubuntu" see "Reflections On Judicial Views Of Ubuntu [2013] PER 67" <https://www.saflii.org/za/journals/PER/2013/67.html> . For a succinct treatment of the nature of solidarity see Catechism of the Catholic Church, 2nd ed.; Libreria Editrice Vaticana; 2012. paras 1939-1942. https://www.vatican.va/archive/ENG0015/_P6Q.HTM .

education, not the right and duty of school attendance, that is entrenched in the Constitution. The South African Schools Act is a 'Schools' act and not an 'Education' act. This incongruity seems to underlie some of the current criticism being levelled against the BELA Bill.

It will be for the committee to determine if this is a core problem that needs to be addressed. There have already been calls for either sending the Bill for complete redrafting, or splitting it.

Consideration should be given to the overall architecture of South Africa's education law and the space that an individual 'house' like the Schools Act, and therefore the BELA Bill, takes up. Has this single house become too large with too many extensions? Is some of the conflict around the Bill not being caused by having too many sub-sectors under one roof?

A further consideration is the type of the law, and whether it is suited to its object. The BELA Bill is concerned with two types of 'hard' law i.e. original legislation, and empowering subordinate legislation. In assessing the Bill, it will have to be asked what is the correct balance between the type of law and the subjects of the law. As has been discussed in the footnotes: is original or subordinate regulation more appropriate in a particular situation? Where a sector is relatively new would 'soft law' instruments be more appropriate? In addition, is the correct balance being struck between national and provincial competencies?

A final consideration, although no less important, is the extent to which the proposed provisions comply with international law, the SA Constitution, other South African legislation, and the South African law, as well as benchmarking the BELA Bill against relevant international, regional, and the national law of other jurisdictions.

These questions are complex and require adequate resources to address them. Lack of economic growth, corruption, and the impact of COVID have severely constrained the resources available to government departments. Where these institutions are unable to fully perform their mandates, South African citizens have recourse to key apex institutions, for example the Constitutional Court, the Office of the Public Protector, and especially Parliament. The number of submissions made, as well as the public interest, makes it evident that South Africans are looking to parliament to address the impending BELA Bill crisis. Parliament itself is seriously financially constrained, and faces resource challenges that could delay the Bill.

A possible partial solution to this is demonstrated in the different approaches adopted during the submission of comments. Parliament innovated new procedures, political parties played their role in making it easier for their supporters to make submissions, and civil society role-players assisted in providing expert skills to sectors of the public. By drawing on all these three approaches, the resource challenge can be met, and the necessary support provided to the parliamentary staff and parliamentarians.

5. Conclusion

The wholesale reform of the South African educational system in the mid-1990s was successful in increasing access to education for all South Africans. The challenges faced in creating one unified educational system, operating through nine provinces, out of 18 racially-based

education departments, were monumental. Ensuring an equitable share of education spend has helped address inequality, and the provision of school meals at over 21 000 schools through the National School Nutrition Programme has been a major achievement.

However, since that time, policy coherence has been undermined by the stagnation of policy formation. Critical policies remain in draft or have taken decades long to develop, and this often in areas that require urgent attention due to societal change.

This lack of an appropriate policy framework has led to the proposed legal framework of the BELA Bill being inadequate; this poses a significant danger to South Africa's ability to meet the current challenge of providing quality and equal education, as well as the to achieve SDG 4.

There is significant pressure for the BELA Bill to be passed as quickly as possible, although doing so without addressing a number of fundamental problems may provoke legal challenges and societal conflict.

The successful development of the post-Apartheid educational dispensation was crafted by a collaboration of local and international legal experts. International experts played a vital advisory role during the constitutional negotiations and the South Africa role-players were open to close international collaboration. Local and international social actors will need to support parliament, to allow it to craft an innovative legal reform that will lay the foundation for the next phase of the provision of equal and quality education in South Africa, and ensure that the foundation laid by the post-1994 educational dispensation can be built on.

While the BELA Bill process presents a number of problems, it also presents a number of opportunities. If these opportunities can be seized, the process by which this is achieved can provide an example in other jurisdictions.

A rights-based and child-centric reconceptualization of the structure of schooling and education is long overdue, not only in South Africa, but globally. South Africa represents a unique locus for this re-conceptualisation, as it has elements of both developed and developing countries, and one of the most forward-looking Constitutional and Child Law dispensations. A successful reform of the education policy and law in South Africa will be a template that other jurisdictions can follow.