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REPORT

OF THE

PARLIAMENTARY LEGAL COMMITTEE

ON THE

EDUCATION AMENDMENT BILL

2005 [H.B.6, 2005]

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INTRODUCTION

Mr. Speaker Sir, the Parliamentary Legal Committee considered the Education Amendment Bill 2005, [H.B.6, 2005] within the framework of its mandate and regrets to report that it found the provisions of clauses 2, 5, 7, 13 and 14 to be in contravention of section 16 and 20 of the Constitution.

CLAUSE 2 OF THE BILL

Mr Speaker Sir, it is your committee's view that the proposed definition of "responsible authority" in clause 2 of the Bill is unconstitutional for being inconsistent with section 20 (3) of the Constitution.

Section 20 (3) of the Constitution confers on any religions denomination, person or group of persons the right to establish and maintain a school. In the Education Act, the term "responsible authority" is defined as meaning the person responsible for establishing and managing the school concerned. Clause 2 of the Bill substitutes a new definition of "responsible authority". In terms of the proposed definition, the responsible authority will mean the person, body, organisation (sic- no "or") responsible for the establishment or management of the school will include any person delegated by such person, body or authority to be the responsible authority. That definition is nonsensical. It is not clear what is meant by a person delegated to be "the responsible authority". It appoints heads to manage the school that does not mean that the head has been delegated to be the responsible authority because the body or person responsible for maintaining the school retains that responsibility.

The proposed new section 36 set out in clause 7 of the Bill provides that a school development committee shall be vested without the control and management of the financial affairs of the school. That does not mean that it has been “delegated to be the responsible authority”.

Last year when schools increased their fees without the necessary approval, the Minister of Education sent the police to arrest a number of school heads. The police arbitrarily arrested the heads and put them in the cells, even though the heads had not committed any offence.

It was not the heads who had increased the fees but the responsible authority. So much for the rule of law in this country. It seems to me that what the Minister is trying to do is to provide that if the board of governors/trustees of a school raises the fees unlawfully, then the heads can again be arrested, but this time with a semblance of legality. However, the drafting of the definition is very inept.

In my view the new definition has nothing to do with the new section 36. In fact, it might even be counter-productive if the Minister’s reason for introducing the definition is as I have set above. The proposed new section 36 provides that the school development committee is vested with the control and management of the financial affairs of the school. Does that mean that it has been delegated to be responsible authority?

THE CONSTITUTIONAL PROVISION

Section 20 of the Constitution deals with the protection of freedom of expression. Subsection (3) of that section provides that no religious denomination and no person or group of persons shall be prevented from establishing and maintaining schools. It is obvious from that provision that the Declaration of Rights confers on the people in this country a right to establish and maintain schools of their choice. Subsection (4) of section 20

of the Constitution does limit to a certain extent the very wide ranging right conferred by subsection (3). It provides that nothing contained in any law shall be held to be in contravention of subsection (3) to the extent that it makes provision which is:

- a) in the interests of defence, public safety, public order, public morality, public health or town and country planning, or
- b) for regulating private schools in the interests of persons receiving instruction therein.

except so far as the provision is shown not to be reasonably justifiable in a democratic society.

None of the provisions of the Bill could be said to be in the interests of any of the matters specified in paragraph (a) above. Therefore, the provisions in the Bill can only be justified if they are in the interests of persons receiving instruction at the school concerned and are also reasonably justifiable in a democratic society.

Section 16 of the Constitution deals with the protection from deprivation of property. Subsection (1) of that section, insofar as it relates to property which is not land or any interest or right therein, provides that such property shall not be compulsorily acquired except under the authority of a law, amongst other things,

- a) requires that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that or any other property for a purpose beneficial to the public generally or any section of the public, and
- b) requires the acquiring authority to give reasonable notice of the intention to acquire the property to the owner thereof, and

- c) requires the acquiring authority to pay fair compensation for the acquisition before, or within a reasonable time after acquiring the property.

Subsection (7) of that section specifies a number of cases where a law may provide for the acquisition of property without contravening subsection (1). The only relevant case is that specified in paragraph (a) which provides that the law may lawfully provide for the acquisition of property by way of penalty for breach of any law, whether under civil process or after conviction of any offence, or forfeiture in consequence of a breach of any law.

CLAUSE 5 OF THE BILL

Clause 5 of the Bill amends section 21 of the Education Act (the Act) in a number of respects. The new subsection (1) that is inserted empowers the Minister to “prescribe the amount or percentage of the fees and levies to be charged by non government schools in a given year”. No responsible authority may charge or increase any fee or levy by more than the amount or percentage that is prescribed, unless the fee or levy or the increase has been approved by the Permanent Secretary. The new subsection (3) provides that where such an application has been made, the Permanent Secretary must have regard to various factors, such as the costs of operating and maintaining the school, any programme for improving facilities thereat, representations made by parents or pupils and other relevant factors. He may then grant or refuse the application or fix the fee or levy.

It is significant that subsection (1), in empowering the Minister to prescribe the amount or percentage of the fees or levies charged, does not require him to have regard to any factors. He is at liberty to prescribe whatever he wants to fix. Having regard to the vast range of private schools in this country, it will be impossible for the Minister to prescribe a fee, or a

schedule of fees, that would be appropriate and reasonable for each individual school.

The right of the responsible authority to maintain its school, which is conferred by section 20 (3) of the Constitution, will be effectively nullified by the new provisions that are to be inserted in section 21 of the Act. The proposed new subsection (1) is clearly unconstitutional because the responsible authority will not be able to maintain its school if it is not able to get the money it needs for that purpose by charging the necessary fees and levies. The Minister or the Permanent Secretary will be able to close the school by fixing fees or levies which are inadequate.

Clause 5 of the Bill also amends section 21 of the Act by inserting new provisions in subsection (5) thereof. The effect of the new provisions is that if the Permanent Secretary is satisfied that his approval was obtained on the basis of false or incorrect information or that the proceeds have been applied for different purposes, he may place the school under the direct management of the Ministry for a specified period or cause the excess amount to be forfeited to the State or to deregister the school.

These provisions are also clearly unconstitutional because they effectively prevent the responsible authority from maintaining the school. If the school is placed under the direct management of the Ministry (whatever that may involve), clearly the responsible authority would no longer be in a position to continue maintaining the school. When one has regard to the state of most government schools, it is difficult to imagine that it would be in the interests of the children attending the school for the school to be placed under the direct management of the Ministry. Since the parents of children at the school will have paid the fees or levies concerned, how could it be in the interests of the children for the monies to be forfeited to the State. Likewise,

if the school is deregistered, the children would have to be sent to another school. The deregistration can surely not be held to be in their interests.

The provision empowering the Permanent Secretary to cause the excess amount to the State is clearly in contravention of section 21 of the Constitution. By the time the Permanent Secretary acts in terms of this provision, the money would have been spent on maintaining the school. Therefore the excess amount that is to be forfeited could only be taken from the fees and levies collected in the succeeding term or terms. That would have a disastrous effect on the running of the school. Whilst, the forfeiture of the excess amount would amount to a deprivation of property belonging to the responsible authority, it would no doubt be argued that the deprivation is authorised by subsection (7) (b) of section 16 of the Constitution in that it is acquired by way of forfeiture in consequence of a breach of section 21 of the Act.

CLAUSE 7 OF THE BILL

Clause 7 of the Bill substitutes a new section 36 in the Act. The new section requires the responsible authority of a school to ensure that the parents elect a school development committee which shall be vested with “the control and management of the financial affairs” of the school. In the opinion of your committee, that provision is also clearly unconstitutional because it impacts on the right of the responsible authority to maintain the school and therefore contravenes section 20 (3) of the Constitution. If the responsible authority does not have effective control and management of its financial affairs, it will not be able to maintain its school.

The responsible authority of a private school raises money, by way of fees and levies, for maintaining the school. All monies paid to the school become the property of the responsible authority. By vesting “the control and management of the financial affairs” of the school in the School

Development Committee, the new section 36 is authorizing that committee to spend money which belongs to the school. If it has no authority to spend any money, how will it be able to exercise “control and management”? The effect of the provision is that the responsible authority will be deprived of its property or its interest or right therein. Such a deprivation is not authorised by any of the paragraphs in subsection (7) of section 16 of the Act. Therefore, in my opinion, the new section 36 also contravenes section 16 (1) of the Constitution.

CLAUSE 13 OF THE BILL

Clause 13 of the Bill seeks to limit membership of teachers’ organisations to specified persons. It appears to us that this clause does not comply with the provisions of section 21 of the Constitution to the extent that it restricts the freedom of association. It should be stressed that the Constitution does not create room for the State to prescribe who should and who should not belong to an association of this nature. The permissible derogations in section 21 (3) of the Constitution do not save the proposed provision.

CLAUSE 14 OF THE BILL

Clause 14 of the Bill inserts two new paragraphs in section 69 (2) of the Act. The effect of one of the paragraphs is to empower the Minister to make regulations providing for school uniforms. It is difficult to see how any regulations providing for school uniforms can be said to be in the interests of the children attending the school. If the regulating authority wants to provide for uniforms then it must be free to be able to do so.

If the power conferred on the Minister was to be used to impose a national uniform for all schools, as he tried to do some months ago, it could be argued that such a regulation could not be reasonably justifiable in a democratic society. A democratic society requires that every responsible authority should be free to adopt a uniform of its choice.

SOME GENERAL REMARKS

It is our view that the person who drafted the Bill did not apply his/her mind carefully to the matter. These are our reasons:

1. The existing subsection (1) of section 21 of the Act provides that a responsible authority cannot change or increase a fee or levy without obtaining the approval of the Permanent Secretary. Subsection (2) of that section then provides for the manner in which an application should be made for approval “in terms of subsection (1)”. Clause 5 of the Bill repeals subsection (1) and substitutes a subsection which authorises the Minister to prescribe the fees and levies. However, it does not amend subsection (2) of the Act. Therefore, if the Bill remains as presently drafted, subsection (2) of section 21 of the Act is meaningless because neither the Permanent Secretary nor the Minister can grant approval in terms of subsection (1).
2. There is no provision in the proposed new subsection (1) of section 21 of the Act to “save” fees and levies that were approved before the Bill becomes law. If, therefore, a school is charging fees and levies which have been approved and the Minister, in terms of the new provision, prescribes a lower fee or levy, the school will have to drop its fees and levies to the new level. If some of the fees and levies have been collected, the responsible authority would be able to keep the full amount but, in the case of fees and levies which have not been paid, the “lucky” parents will only have to pay the new lower rates.
3. The proposed new subsection (3) of section 21 of the Act specifies various factors which the Permanent Secretary must have regard to

when he considers an application made in terms of subsection (2) of that section. However, that subsection (2) refers to applications for approval in terms of subsection (1). When the Bill becomes law, the Permanent Secretary will no longer have the authority to grant approval in terms of subsection (1) of section 21.

4. It is anomalous that the Permanent Secretary is required by the proposed new subsection (3) of section 21 of the Act to have regard to a number of specified factors before he grants or refuses an application and yet the Minister, in exercising his powers under the proposed new subsection (1) of that section, is bound by no restrictions. He can be as arbitrary as he wants. If regard is given to the very wide range of private schools in Zimbabwe, it will be impossible for the Minister to prescribe fees and levies that will be appropriate for every individual school. He will have to prescribe different levels of fees for different classes of schools. If the fee is appropriate for the top-of-the-range schools in a specific category, it would mean that the lesser schools could easily increase their fees to match the level prescribed for their category.
5. Paragraph (c) of Clause 5 of the Bill inserts a new paragraph (c) in subsection (5) of section 21 of the Act. The new paragraph refers to a “non-Government school” contravening subsection (1) of that section. However, the proposed new subsection (1) prohibits the responsible authority from charging higher fees, so it is the responsible authority, not the school which contravenes subsection (1).
6. Paragraph (c) of clause 5 of the Bill also confers certain powers on the Permanent Secretary:
 - a) He may “dissolve” the School Development Committee. What does that mean? Is it only the members of the committee who

are kicked out of office? If that is so, what is intended should be said. If the committee is dissolved, can the parents elect a new committee? Are they required to do so?

- b) He may place the school under the direct management of the Ministry. Does that mean that the Ministry can issue cheques, etc? Are the employees answerable to the Permanent Secretary or to any official in the Ministry? What happens if the Head refuses to do what he or she is told to do?
- c) He may cause the excess amount collected to be forfeited to the State. In the case of forfeiture, it is the actual object concerned in relation to the breach which is forfeited. Once money is banked or spent it cannot be forfeited. The Permanent Secretary would not be able to cause money in a bank account to be forfeited because that is merely a figure, not actual money.

- 7. Clause 12 of the Bill deals with subjects to be taught in schools. The proposed new section 61 (1) provides that the three main languages and “such other local language” shall be taught on an equal-time basis. The reference to “such other local language” is completely meaningless.

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