

## CHAPTER 16

### PARTIAL CARE

#### 16.1 Introduction

This Chapter deals with the temporary care of children by persons other than their parents or ordinary care-givers. The essential feature of this care is that it is of relatively short duration and that the children are still cared for and live with their parents / primary care-givers. Parents or primary care-givers continue to be involved with the children and exercise primary responsibility for them, but they ask or pay somebody else to look after their children for part of the day or week.<sup>1</sup> Hence, the form of care discussed here must be contrasted with full-time care provided for children in residential care facilities or foster homes.

Much of the temporary care which is the subject of this Chapter can accurately be described as 'day-care', but on occasions parents or guardians place children in the care of others overnight. Hence the general term 'partial care' is used throughout this Chapter.<sup>2</sup>

Although there are differing views about the desirability of facilitating the provision of partial care, it is undeniable that the demand for partial care services in South Africa is substantial. This demand is unlikely to decline in the foreseeable future. One factor in the widespread use of partial care facilities is undoubtedly the number of women in the workforce. Another is the relatively high proportion of single parent households.<sup>3</sup> However, it would be wrong to view partial care as being provided solely to meet the needs of working mothers or single parents as traditional alternative sources of child care, such as friends and relatives, are less readily available than in the past. Appropriate care arrangements for children are therefore a matter of public importance.

Partial care services cater for a wide variety of needs. Examples of the situations of children accommodated by the various service providers and individuals include:

- Children whose parents work full or part time;
- Children who need after-school care;

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<sup>1</sup> Some (wealthier) parents employ au-paires or nannies on a full-time basis to care for their children.

<sup>2</sup> ECD services, like other services, can also be provided at partial care facilities. See further 15.6 above.

<sup>3</sup> See 8.2.1 above for an exposition on the contemporary South African family.

- Children of parents who are seeking work or attend lectures, classes or any form of training;
- Children who need care in an emergency, such as the illness or hospitalisation of a parent;
- Children whose parents need assistance for a short time (for example, to go to the gymnasium, to keep an appointment, to go shopping);
- Children in play groups and play schools. These groups are intended to bring together pre-school children in a stimulating environment and to give the children an opportunity to interact with others of their own age;
- Children attending (sport) training camps and other organised recreational activities such as holiday camps, school tours, and church outings.

Partial care might be regular and continuous, or occasional and of limited duration. Thus a child might be placed in a private home or centre five days a week if both parents are working, or the placement might be short and for a single, specific purpose, for example, to permit the mother to do Christmas shopping. A distinction can be made between occasional care, part-time care and full-day care, where occasional care is defined as short-term care; full-day care as non-residential care for a full day; and part-time care as care for a certain number of mornings (or afternoons) each week. In looking at the way in which these types of care are provided, it is possible to distinguish between centre-based services and home-based services. Most such services are provided by private individuals and organisations for profit,<sup>4</sup> although a large number of non-profit organisations are also involved.

As we have seen in the previous Chapter,<sup>5</sup> the provision of appropriate partial care services tends to free parents, particularly women, to enter the labour market. This has the effect of assisting families and communities to break out of poverty. The provision of partial care services (whether home or centre-based) is also a potential form of employment in a society in

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<sup>4</sup> Most profit-making provision is in the form of day care for pre-school children. However, there are various other forms. Some casino's, for example, provide adjunct child care facilities free of charge to allow patrons (the parents) the opportunity to gamble.

<sup>5</sup> See 15.1 above.

which unemployment rates are high.

## 16.2 Basic problems

The Commission's analysis of the law relating to partial care in South Africa and the way the system operates revealed a number of problems requiring solution:

- *Lack of clarity in the law.* The relevant provisions of the Child Care Act, 1983 dealing with 'places of care' lack clarity and precision. It is not clear which forms of partial care should be registered as 'places of care' and which should not. As a result, those whose task it is to implement the registration provisions make arbitrary distinctions between facilities which require registration and those which do not, despite the language of section 30(2) of the Child Care Act, 1983. In this regard, the distinction between centre-based and home-based partial care services is particularly problematic.
- *An outmoded law.* Not only is the law unclear, but it is also ill-adapted to the varied range of partial care services which have developed in South Africa. Such services meet a variety of needs, from occasional to full-day care, from the care of infants to the care of older children after school and during school holidays. Sometimes a number of different services are combined at one multi-purpose centre. This is not provided for under the existing legislation.
- *Need for tighter control.* In submissions to the Commission and elsewhere a number of persons have expressed their anxiety about the quality of care provided in some partial care facilities.<sup>6</sup>
- *Excessive and unrealistic bureaucratic demands.*

## 16.3 Current law and practice

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<sup>6</sup> See also the submissions on ECD at 15.4 above.

Section 1 of the Child Care Act 74 of 1983 defines a ‘place of care’ as follows:

**‘Place of care’** means any building or premises maintained or used, whether for profit or otherwise, for the reception, protection and *temporary or partial care*<sup>7</sup> of more than six children apart from their parents, but does not include any boarding school, school hostel or any establishment which is maintained or used mainly for the tuition or training of children and which is controlled by or which has been registered or approved by the State, including a provincial administration.

‘Temporary or partial care’ commonly occurs in environments such as day care or after-school centres where ECD services might also be provided. ‘Temporary or partial care’ itself is not defined in the Child Care Act, 1983.

It should be noted that the definition separates out registered private or state **educational** institutions for treatment elsewhere (in education legislation). It is submitted that, insofar as this definition excludes school activities, a correct approach has been taken. These should indeed be reserved for education legislation. In terms of the Commission’s present approach, the latter should fall outside the new children’s statute.<sup>8</sup> However, the above-quoted definition of places of care in the Child Care Act is unclear about pre-school care centres. The new children’s statute must not create confusing duplication by trying to regulate ‘Reception Year’ programmes **as partial care, but rather as ECD services** as the Commission has recommended.<sup>9</sup> However, the definition of partial care will need to be broad enough to include other forms of care such as day nurseries and kindergartens.

Another important aspect of the above-quoted definition of ‘places of care’ in section 1 of the Child Care Act is that it is premises-oriented. It is the use of a ‘building or premises’ which is essential to trigger the relevant protective provisions. It is appropriate to regulate aspects of the premises in which many forms of partial care operate, including most day care facilities. However, partial care services are potentially infinite in variety, and premises may be in short supply in impoverished communities.

#### 16.4 **Partial care provided at ‘places of care’**

Once partial care services are offered at a building or premises to more than six children apart

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<sup>7</sup> Our emphasis.

<sup>8</sup> See 2.6 above.

<sup>9</sup> See 15.5 above.

from their parents, such services come under the ambit of the definition of a 'place of care' and the provisions of sections 30 and 31 of the Child Care Act, 1983 apply. These sections provide for the registration, classification and inspection of places of care.

Section 30(2) of the Child Care Act, 1983 provides that no child may be received in a place of care (other than a place of care maintained and controlled by the State) unless that place of care has been registered. Application for the registration of a place of care must be made to the Director-General: Social Development in the prescribed manner.<sup>10</sup> At the time of registration, the Director-General may classify or amend the classification of a facility, and any such classification may differ according to the sex or age, or the physical, mental or spiritual needs of the children in that facility.<sup>11</sup> A certificate of registration may at any time be cancelled by the Minister of Social Development.<sup>12</sup> Any person who contravenes or fails to comply with the registration requirements is guilty of a criminal offence.<sup>13</sup>

Section 31 of the Child Care Act, 1983 provides for the inspection of places of care. In terms of subsection (1), a social worker, a nurse, a commissioner of child welfare, or any authorised person may enter any children's home, place of care, shelter or place of safety in order to inspect that place and observe and interview any child therein, or cause such child to be medically examined. After conducting such an inspection, a report must be submitted to the Director-General: Social Development.<sup>14</sup>

**The Commission recommends that where more than six children are cared for on a partial basis<sup>15</sup> apart from their parents, whether for profit or otherwise, in any building or premises maintained or used for such purpose, that such facility must be licensed as a *partial care facility*. We believe the terminology 'partial care facility' more accurately**

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<sup>10</sup> Section 30(3) of the Child Care Act, 1983, read with Regulation 30. Regulation 30(2) provides that an application for registration must be accompanied by (a) the constitution of the association of persons who is to manage the place of care; (b) a certificate issued by the local authority to the effect that the building(s) complies with all the structural and health requirements of the local authority; and (c) a certificate issued by the Director-General: Social Development confirming that a needs assessment supports the need for the resource in the community. Registration is to be reviewed every 24 months on the basis of a quality assurance assessment undertaken by departmental officials.

<sup>11</sup> Section 30(4) of the Child Care Act, 1983.

<sup>12</sup> Section 32(1)(a) of the Child Care Act, 1983.

<sup>13</sup> Section 30(6) of the Child Care Act, 1983.

<sup>14</sup> Section 31(4) of the Child Care Act, 1983.

<sup>15</sup> All forms of statutory care are supposed to be temporary, but they are either full-time or partial.

**reflects the type of facility involved and accordingly recommend a change in terminology from 'place of care' to 'partial care facility'. The existing registration and inspection requirements contained in sections 30(2) and 31 of the Child Care Act, 1983, with the necessary changes, can, for the moment, therefore be retained.**

Regulation 30A of the Child Care Act further provides for some additional requirements with which a place of care shall comply. The Regulations, in part, read as follows:

- (1) Subject to the provisions of the Act and these regulations no place of care shall be registered or shall remain registered after 24 months unless the Director-General is satisfied that the following behaviour management practices are expressly forbidden:
  - (a) Group punishment for individual behaviour;
  - (b) threats of removal, or removal from the programme;
  - (c) humiliation or ridicule;
  - (d) physical punishment;
  - (e) deprivation of basic rights and needs such as food and clothing;
  - (f) deprivation of access to parents and family;
  - (g) denial, outside of the child's specific development plan, of visits, telephone calls or correspondence with family and significant others;
  - (h) - (o) ....
- (2) All children in a place of care shall, where appropriate, have the right -
  - (a) to know their rights and responsibilities;
  - (b) to a plan and programme of care and development, which includes a plan for reunification, security and life-long relationships;
  - (c) to participate in formulating their plan of care and development, to be informed about their plan, and to make changes to it;
  - (d) to expect that their plan and programme is based on an appropriate and competent assessment of their developmental needs and strengths and, where possible, is in the context of their family and community environments;
  - (e) to a regular review of their placement and care or development programme;
  - (f) - (u) ....

Most respondents at the ECD focus group discussion held in Pretoria on 30 March 2000 agreed with the assertion that the above provisions seem to have been designed with children's homes,

rather than ECD or other forms of day care, in mind.<sup>16</sup>

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Groups 3 and 4; SA Federal Council on Disability; the Centre for Early Childhood Development; the Early Learning Resource Unit; the Department of Welfare, Pretoria; DICAG, Free State.

It is indeed questionable whether some of the behavioural management practices expressly forbidden in terms of Regulation 30A(1) or the rights of children listed in Regulation 30A(2) do have any relevance for children making use of partial care services in a place of care. It hardly makes sense, for instance, to accord a child in a partial care facility the 'right to a plan ... for reunification ... and life-long relationships' with a (temporary) care-giver or service provider.<sup>17</sup> Such a right is even less relevant for a toddler in a play group which meets once a week. **The Commission accordingly recommends that the present regulations pertaining to the requirements with which a partial care facility (the old 'place of care') shall comply be revised to ensure that they are worded in a manner appropriate for children making use of such services.** In this regard, the Commission would recommend that the revised Regulations at least accord children in partial care the following minimum rights:

- Partial care must promote the physical, emotional and intellectual development of children while in partial care;
- Children in partial care should have access to a safe area in which to play, taking into account the number of children catered for;
- Children in partial care should have the right to shelter and to protection from the elements where necessary; with adequate ventilation in any part of a facility used by children;
- Children in partial care should have the right to safe drinking water and age-appropriate nutrition at intervals which are appropriate to their age and development;
- Children in partial care should have access to hygienic and safe toilet facilities;
- Children in partial care may not be subjected to corporal punishment.<sup>18</sup>

Some, if not most, of the additional requirements listed in Regulation 30A with which a place of care must comply are more appropriate to 24-hour or week-long care situations.<sup>19</sup> It is to cater for these situations that provisions such as Regulation 30A are needed. **The Commission accordingly recommends that in the redrafting of the present regulations care be taken to ensure that the different types of partial care situations are covered adequately,**

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<sup>17</sup> Regulation 30A(2)(b).

<sup>18</sup> See the provision on the issue and term of license below.

<sup>19</sup> Such situations are akin to residential care arrangements and the question arises as to whether such forms of care should not be subject to registration as 'child and youth care centres'. It is nevertheless a reality that e.g. migrant workers are using weekly boarding arrangements due to the practicalities of their employment situations and some degree of leeway should therefore be allowed for such circumstances.

**individually as well as collectively.**

#### 16.4.1 **Minimum building standards for partial care facilities (places of care)**

There was a general measure of agreement at the ECD focus group discussion that there should be a clear set of simple and achievable standards that should apply across the board. However, the Commission is well aware of the fact that many local authorities apply first-world building regulations with which impoverished communities cannot comply - e.g. requirements for child-sized toilets (even if the children concerned have no toilets of any kind in their own homes), ideal amounts of floor space per child, etc. The Commission has also taken cognisance of the fact that many local authorities presently have too much on their plates to be of great help in getting partial care facilities up and running. In this regard, the Commission has recommended that the draft Guidelines for Day Care be incorporated in the regulations to the new children's statute. As such the Guidelines should serve as the basic issues for compliance. In this context, it has been suggested that what is required in the new children's statute is an empowering provision to allow for nationally-applicable minimum building standards for partial care facilities. It was further said that such minimum standards should be flexible to cater for local requirements.

**The Commission does not recommend that the new children's statute should provide for the formulation, in the regulations, of minimum building requirements for partial care facilities.** In this regard, the Commission holds the view that the present requirement in the Regulations<sup>20</sup> for a certificate issued by the local authority to the effect that the premises comply with all structural and health requirements of the local authority is flexible enough to cater for local and regional differences. While one local authority might therefore require two flushing toilets per six children, another might prescribe access to safe drinking water as a requirement.

**However, the Commission recommends that the health and safety appropriateness of any building or premises, whether this is a private dwelling, a church building, or a community centre, being used or to be used as a partial care facility, should be assessed by the local authority in terms of appropriate bye-laws.<sup>21</sup> The adequacy and**

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<sup>20</sup> Regulation 30A(2)(b).

<sup>21</sup> Many local authorities use antiquated standards (formerly applicable to 'White areas') which are unachievable for community-based organisations. Where such standards are not appropriate, the local authority must revise its standards.

**appropriateness of the proposed partial care *service or programme* should be assessed by the Department of Social Development and the latter Department should, after receiving a health and safety clearance certificate from the relevant local authority, finalise the licensing of the partial care facility.** Such an evaluation would ensure that children in partial care are accommodated in satisfactory, locally appropriate, facilities, that those in charge of such facilities are suitable, and that the programmes provided to the children are appropriate to their needs.

#### 16.4.2 **Registration of partial care facilities (places of care)**

In practice, the requirements for successfully registering a place of care (for example, in the form of a day care or after-school facility) are administratively onerous and vary considerably in different parts of the country according to the different local authority bye-laws. Mr K Naidoo, an Environmental Health Officer (North/South Central Local Council, Durban Metropolitan Region), summarized and criticized the registration requirements as follows:

The various departments in the Local Authority, including Health, Fire, Town Planning and Building Inspectorate, carry out inspections of the facility/premises to see if the requirements are met. The Environmental Health Officer co-ordinates the reports of all the departments and provides the Department of Welfare with the clearance certificate and the necessary recommendations. This process leads to the duplication and fragmentation of the services.

Mr Naidoo considered that the application process is a burdensome one because applicants have to satisfy several different authorities. He therefore recommended that local authorities should take over sole responsibility for the registration and monitoring of all child care facilities.

With regard to registration requirements, there was intense debate at the March 2000 ECD focus group discussion.<sup>22</sup> The debate was about whether extensive registration requirements should be set by law in order to protect children properly, or whether less extensive requirements should be set in order to encourage the setting up of much greater numbers of partial care facilities or ECD programs. The Law Review Project (not linked to the Commission) was of the view that the current registration requirements (in the Child Care Act for more than six children) have the unintended and undesirable consequence that numerous places of care conduct their activities illegally and entirely unmonitored. They were thus not in favour of a

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<sup>22</sup> See Chapter 15 above.

registration requirement as it criminalises child-minding in deprived communities, and prevents health officials, community nurses, social workers and welfare officials from helping and advising those child-minders who are most in need of assistance. The solution put forward by the Law Review Project was:

that there should be legislation to empower the authorities to prevent a place of care that is a danger to the health or safety of the children from being used as a place of care. The legislation should provide that, if there is reason to believe that a danger exists in a place of care that threatens the health or safety of children, the authorities can give notice prohibiting the continued use of that place as a place of care. Failure to comply with the prohibiting notice should be an offence.<sup>23</sup>

However, the Law Review Project's proposal that registration requirements be completely scrapped did not receive much support at the March 2000 ECD focus group discussion. The majority view at the focus group discussion was that there should continue to be legally-designated minimum safety and health registration requirements.

**The Commission has recommended that the existing *registration* system be replaced with a *licensing* system<sup>24</sup> and that regular inspection and monitoring of partial care facilities be carried out.<sup>25</sup>**

#### 16.4.3      **The number of children criterion**

An important limitation in the current wording of the definition of a 'place of care' in the Child Care Act, 1983 is one based on the number of children receiving services. This definition uses the guideline of services for more than six children before certain facilities will need to be registered as 'places of care'.<sup>26</sup> Some delegates at the March 2000 ECD focus group discussion were of the view that this is an unnecessary limitation and that the Act should apply even where only a single child is involved in the activity concerned.<sup>27</sup> But as far as services for children are concerned, it has been suggested that it is not feasible or appropriate to try to

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<sup>23</sup> Law Review Project 'Proposal for a New Approach to the Regulation of Child Minding' (July 1994) p. 6.

<sup>24</sup> See 16.5 immediately below.

<sup>25</sup> See 15.8 above.

<sup>26</sup> See, for example, the definition of 'place of care' in section 1 of the Child Care Act, 1983.

<sup>27</sup> Group 2; S A Federal Council on Disability; the Early Learning Resource Unit; Department of Welfare, Pretoria; SAVF; DICAG, Eastern Cape; DICAG, Free State; Law Review Project. Contra Inner City Pre-school Forum, Johannesburg; Centre for Early Childhood Development.

control all such activities by means of legal provisions.<sup>28</sup> Limited resources in South Africa for legislative policing of such services and the danger of stifling good initiatives through disproportionate bureaucratic barriers need to be kept in mind.

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The SA Federal Council on Disability maintains that in most instances the number of children in a facility is not the issue, but rather the needed support, the space to accommodate children and the developmental quality assurance services required especially by disabled children.

**It is therefore recommended by the Commission that partial care facility *licensing* provisions should apply only where groups of more than six children are involved.** This is in line with the current definition of 'place of care' in the Child Care Act, 1983 and the proposed definition of 'ECD services'.<sup>29</sup> The consequence of this limitation to six or more children is that most 'au-pair' and nanny situations, as well as occasional baby-sitting, will not fall within the licensing provisions. Other protective provisions, such as provisions covering closure of facilities, should apply even where there are six or fewer children.

The Commission did consider including a provision to the effect that in calculating the number of children for whom partial care may be provided without a licence, regard should be had to the number of children (below a certain age) of the person providing the partial care. This would disadvantage care givers with big families who may provide care to other children precisely because they themselves are home-bound or unemployed. For this reason, and to secure access to partial care services, the Commission decided not to include such a limitation in the new children's statute.

## 16.5            **Reconsidering the merits of a registration process and introducing a system of licencing**

### 16.5.1        **Introduction**

Before further consideration is given to possible changes in the law governing partial care in South Africa, a decision must be made on the fundamental question of whether registration procedures should be retained as a method of regulation in this field.<sup>30</sup> Registration and inspection procedures are no more than one of the law's methods of attempting to regulate conduct, some of the other methods being certification, accreditation and licensing. As an alternative to these, however, reliance could be placed on the criminal law or on the use of civil

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<sup>29</sup> See 15.5 above.

<sup>30</sup> The worksheet used at the focus group discussion on ECD on 30 March 2000 posed the question (4.3) as to whether registration of places of care in terms of the present Child Care Act, 1983, serves any useful purpose. Respondents were divided on this issue.

law remedies or injunctions. Further, it could be argued that the law should not concern itself with partial care at all and that high standards are best pursued through public education and awareness campaigns. Alternatives to reliance on a registration system must therefore be examined.

#### 16.5.2 Alternatives to registration

\* *Civil and administrative law remedies.* Reliance on the civil process would clearly be unsatisfactory. If it were left to a dissatisfied parent to initiate proceedings in delict or contract it would only be gross and obvious deficiencies (such as negligence producing actual harm to the child) which would result in action being taken. The initiation of such proceedings would be a slow, costly and cumbersome means of attempting to bring pressure to bear on those who provide child care. Proceedings of this kind would occur only 'after the event'. The dissatisfied parent would have to wait until those responsible were in breach of their duty or had broken the terms of the contract before taking action. Finally, the initiative would have to come from the parent. If the child had been placed in unsatisfactory conditions and the parent decided to take no action, the child would not be likely to receive the protection he or she needed. The conditions in which child care is provided are not always open to public scrutiny, and those who are likely to suffer most if it is inadequate are not able to take action to protect themselves. In short, reliance on the civil process would not be likely to assure children of the protection they require. Similar comments could be made about resort to an interdict to control the standard of care. Before seeking an interdict, a dissatisfied parent would have to wait until there had been a failure on the part of those responsible for the child's care, the procedure would be costly, and the onus would be entirely on the parent.

\* *Reliance on the criminal law.* An alternative to employing registration procedures would be to establish certain standards for all who care for other people's children, and to prosecute those who fail to meet these standards. **The Commission is not in favour of this approach.** The control of child care services is not an area in which resort to the criminal law should be encouraged. The criminal law is a blunt instrument, the use of which should be reserved for seriously harmful conduct. Its procedures are stigmatising and require a high standard of proof before intervention is permitted. Further, the use of criminal sanctions is not an appropriate way in which to seek to regulate child care. When unsatisfactory care is provided it is not generally because of wrong-doing of a criminal kind, but because of a failure to reach acceptable standards. Such a failure is more susceptible to control by a system of registration or licensing

than by the criminal law. A major consideration is that much of the child care with which this Chapter is concerned is provided on a commercial basis. Those operating on such a basis are more likely to be effectively controlled by the fear of losing a registration certificate or licence than by the threat of a prosecution which is unlikely to succeed. Most importantly, the criminal law, like the civil law, is invoked 'after the event.' Procedures which require fault or failure before they can be invoked are not the most effective means of protecting children or of ensuring high standards of care.

\* *Reliance on public education.* Although education programs have an important role in making parents aware of the need to ensure that their children receive high quality care in partial care facilities, it would be unsatisfactory to place total reliance on educational campaigns. The law has a role to play in protecting children whose parents do not respond to such campaigns.

The view that some form of administrative control of partial care services should be retained does not lead inevitably to the conclusion that registration procedures provide the most appropriate method of regulation. As has been noted, registration is simply one of a number of administrative mechanisms. Others are licensing, certification and accreditation.

It is important to attempt to distinguish between the various forms of administrative control<sup>31</sup> and for present purposes the following distinctions are made:<sup>32</sup>

'*Accreditation*' is a weak form of control. It usually indicates that a group or organisation has conferred recognition on a member. It may indicate no more than membership of a particular

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<sup>31</sup> The meaning of the various terms discussed below is not clearly established and the distinctions made in this Chapter are far from being universally accepted. The terminology in this area is used in a confusing manner.

<sup>32</sup> See also Australian Law Reform Commission **Report No. 18: Child Welfare**, par. 419.

group or organisation. Accreditation denotes that the person has been approved to undertake a particular activity. It does not, however, operate to exclude from the field those who have not been accredited.

'*Certification*' denotes a procedure by which a person or organisation is accorded a form of official recognition. It is usually an independent agency which certifies that a person is approved to perform a certain task. Like accreditation, it does not exclude unregulated persons from the occupation. Thus a person may be certified as a member of a particular trade or profession, and advertising may encourage members of the public to employ only persons who are so certified. However, such a system does not prevent other persons from offering exactly the same service, provided they do not hold themselves out as being certified. Thus certification merely gives members of the public a means of distinguishing between, on the one hand, those who have official approval and may be subject to standards and discipline and, on the other, those who have no such approval and are not so subject. Members of the public are not assured of protection, but they are provided with a means of distinguishing between those who have and those who lack the official seal of approval.

'*Registration*' is seen as an arrangement under which individuals are required to list their names in some official register if they engage in certain kinds of activities. There is no provision for denying the right to engage in the activity to anyone who is willing to list his or her name. Before a person is permitted to register it may be necessary for him to meet certain formal requirements. For example, a particular academic qualification may be made a pre-requisite of registration. Registration is an exclusionary system. It operates to inhibit entry upon the regulated occupation by those who are not registered.

'*Licensing*' also formally inhibits entry upon the regulated occupation. It is a system which requires official approval if a person is to undertake a particular occupation. A licensing authority sets standards and is required to evaluate an applicant's suitability before granting a licence. It is made an offence for a person to carry out a particular occupation without first obtaining a licence. Also, the licence may be withdrawn if the required standards are not maintained. The essential feature of a system of licensing is that it involves, at the point of entry, satisfying the licensing authority that certain standards have been met. Those who do not meet these standards are denied a licence and the result is to exclude them from the field.

**In the Commission's view it is desirable to introduce a system of *licensing* as a method**

**of regulating partial care in South Africa.** Licensing offers a mechanism by which:

- standards may be set before a person or agency is authorized to provide child care;
- adherence to required standards can be regularly monitored; and
- those who fail to meet these standards can be compelled to do so or be excluded from the provision of partial care.

Thus licensing offers the best hope of controlling the quality of partial care services. A further dimension which needs to be developed is that of capacity-building and guidance; also that of promoting standards as a basis to qualify for state financing and to promote private sector contributions. There is a massive shortage of services and these need to be developed - hence the need to encourage people to seek registration / licensing and also to view those who fall short (unless they are positively abusive) in terms of their potential as caregivers and not just their potential for abuse or exploitation of children for profit. The licensing process should be used for this purpose as well as for standard-setting and monitoring.

As has been explained, licensing provides the strictest form of administrative control. A corollary of the Commission's conclusion is the view that alternative forms of administrative control would be neither appropriate nor effective methods of regulating the majority of partial care services in South Africa.

The basic purpose of the licensing system should be to ensure, to the extent that the law can do so, that children in partial care are accommodated in satisfactory facilities, that persons in charge of these facilities are suitable, and that the programs provided for the children are appropriate to their needs. The essential aim must be to protect children against inadequate care. It should not be overlooked that partial care services are often provided to suit the convenience of parents. If partial care were unregulated, parents could use the services best suited to their needs. Licensing is necessary to safeguard children.

It is, nevertheless, important to recognise the limitations of licensing procedures. The law can do no more than enforce standards on such matters as the physical conditions in which children are housed, qualifications of staff, and ratios of staff to children. It cannot control intangible matters such as the quality of care, affection and attention which children receive. Significant limitations also arise from the nature of a licensing system. As a control mechanism it is relatively complex and cumbersome to administer. A properly administered licensing system

requires careful scrutiny of the qualifications of those seeking a licence and of the condition of the premises in which children are to be accommodated. If this scrutiny is not provided the granting of a licence will degenerate into a rubber-stamping of applications and the system will not provide the protection which it purports to offer. Further, once a licence has been granted, adherence to the prescribed conditions should be regularly policed. It is neither practicable nor desirable to apply such intrusive procedures to the whole range of partial care arrangements. Many of these arrangements are casual and informal, and involve neighbours, relatives and friends in caring for each other's children. Much partial care takes place on a small scale and is provided in private homes. If the creation of an unacceptably intrusive system is to be avoided it is clear that there are many informal, casual arrangements to which licensing provisions cannot and should not apply. A balance must be struck between, on the one hand, the need to safeguard children against poor and unscrupulous care, and, on the other, the necessity of avoiding excessive, heavy-handed, bureaucratic intrusion into citizens' lives.

**The Commission believes that the new licensing provisions should reflect an awareness of the practical problems of enforcement. However desirable it is to assure every child of the highest possible standards of care, it is simply not practicable to design a licensing system which will effectively regulate all forms of partial care.** Choices must be made as to the types of care which it is feasible to regulate and as to the types of care which must remain beyond the control of the law. Recommendations for the basis on which these choices should be made are set out below.

A system of licensing, or its equivalent, is in operation in several jurisdictions. In most Australian jurisdictions the licensing provisions are applicable only if a fee is charged.<sup>33</sup> Tasmania,<sup>34</sup> like Queensland,<sup>35</sup> does not limit its licensing provisions to services in respect of which a monetary payment is made. In Ontario, Canada, licensing provisions also apply.<sup>36</sup>

There are also significant variations on the numbers and ages of children whose care requires a licence. In Queensland, a care provider must not provide care at any one time for more than the

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<sup>33</sup> Australian Law Reform Commission **Report No. 18: Child Welfare**, par. 424.

<sup>34</sup> Part VI of the Child Care Act, 1960 (Tasmania).

<sup>35</sup> Child Care Act, 1991 (Qld); Child Care (Family Day Care) Regulation, 1991 (Qld).

<sup>36</sup> Section 11(1) of the Day Nurseries Act, R.S.O 1990, c. D-2.

number of children determined by the licensee or seven children, whichever is the less.<sup>37</sup> In Tasmania and Western Australia the relevant provisions apply regardless of the number of children accommodated. In New South Wales a licence is required if one or more children (disregarding any children who are related to the person providing the service) are cared for.<sup>38</sup> Greater consistency exists with regard to the age of children in respect of whom licensing requirements apply. In Queensland, however, section 24(3) of the Child Care (Family Day Care) Regulation 1991 specifies that there must not be more than 2 children under 1 year or 4 children who have not started school with a care provider.

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<sup>37</sup> Section 24(1) of the Child Care (Family Day Care) Regulation 1991 (Qld).

<sup>38</sup> Section 31, read with the definition of 'child care service' in section 3, of the Children (Care and Protection) Act 1987 (NSW).

The Ontario Day Nurseries Act<sup>39</sup> limits licensing provisions to a 'day nursery' and 'private-home day care agency'. A day nursery is defined as premises that receive more than 5 children who are not of common parentage, primarily for the purpose of providing temporary care, or guidance, or both temporary care and guidance, for a continuous period not exceeding 24-hours, where the children are (a) under 18 years of age in the case of a day nursery for children with a developmental handicap; and (b) under 10 years of age in all other cases, but does not include (c) part of a public, private or separate school. 'Private-home day care agency' is defined as a person who provides private-home day care<sup>40</sup> at more than one location. The crucial distinction between a day nursery and private-home day care is one of number: the former accommodates **more** than five children, while the latter is limited to the care of five or fewer than five children. The Act does not require the licensing of the person who actually minds the child in a private home. Instead, it requires the private-home day care agency which placed the child to be licensed. This is seemingly made possible because, according to the definition of private-home day care agency, it is the agency which provides the private-home day care.

In the United Kingdom, elaborate provision is now made for child minding and day care in Part XA of the Children Act, 1989,<sup>41</sup> which provides for a system of registration for child minding<sup>42</sup> and day care.<sup>43</sup> In England the registration authority is the Chief Inspector of Schools and in Wales it is the National Assembly for Wales.<sup>44</sup> Section 79B applies slightly different registration requirements to child minding and day care:

- (3) A person is qualified for registration for child minding if-
- (a) he, and every other person looking after children on any premises on which he is

<sup>39</sup> R.S.O. 1990, c. D-2, section 11.

<sup>40</sup> 'Private-home day care' in turn is defined as the temporary care for reward or compensation of 5 children or fewer who are under 10 years of age where such care is provided in a private residence, other than the home of a parent or guardian of any such child, for a continuous period not exceeding 24 hours.

<sup>41</sup> The amendments were affected by section 79 of the Care Standards Act, 2000.

<sup>42</sup> 'Act as a child minder' is defined as looking after one or more children under the age of eight on domestic premises for reward. Excluded from the definition is a person who is the parent or relative of a child, a person who has parental responsibility for a child, or foster parents. Also excluded is a person who acts as a child minder, or provides day care, for less than two hours in any day. In determining whether a person is required to register as a child minder, any day on which he or she does not act as a child minder at any time between 2 am and 6 pm is to be disregarded (section 79A).

<sup>43</sup> 'Day care' is defined as care provided at any time for children under the age of eight on premises other than domestic premises (section 79A(6)). See the discussion above.

<sup>44</sup> Section 79B(1) and (2) of the Children Act, 1989.

- or is likely to be child minding, is suitable to look after children under the age of eight;
- (b) every person living or employed on the premises in question is suitable to be in regular contact with children under the age of eight;
  - (c) the premises in question are suitable to be used for looking after children under the age of eight, having regard to their condition and the condition and appropriateness of any equipment on the premises and to any other factor connected with the situation, construction or size of the premises; and
  - (d) he is complying with regulations under section 79C and with any conditions imposed by the registration authority.
- (4) A person is qualified for registration for providing day care on particular premises if-
- (a) every person looking after children on the premises is suitable to look after children under the age of eight;
  - (b) every person living or working on the premises is suitable to be in regular contact with children under the age of eight;
  - (c) the premises are suitable to be used for looking after children under the age of eight, having regard to their condition and the condition and appropriateness of any equipment on the premises and to any other factor connected with the situation, construction or size of the premises; and
  - (d) he is complying with regulations under section 79C and with any conditions imposed by the registration authority.

Where it appears to the registration authority that a person has not registered, the authority may serve an enforcement notice on him or her.<sup>45</sup> Failure to comply with such a notice within one year beginning with the date on which it is served constitutes a criminal offence. Provision is also made for the inspection of child minding and day care.<sup>46</sup>

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<sup>45</sup> Section 79D(2) of the Children Act, 1989.

<sup>46</sup> Sections 79N - 79U of the Children Act, 1989.

The Ghanaian Children's Act, 1998 provides for a permit system in operating day-care centres.<sup>47</sup> Permits are to be obtained on application to the Department of Social Welfare, subject to the payment of fees as prescribed in bye-laws. The Department must inspect the proposed day-care centre and if it meets the required standard it must approve the application and grant a permit upon payment of the fee for the permit. Any day-care centre in operation without a permit shall be closed on 14 days notice to the owner or operator by the Department.<sup>48</sup>

The Act further provides for the inspection of the premises, books, accounts and other records of a day-care centre at least once in every six months.<sup>49</sup> If the inspection reveals that the day-care centre is not being managed efficiently in the best interests of the children, the Department must suspend the permit and the owner or operator ordered to make good any default within a stipulated time. Failure to make good such defaults will result in cancellation of the permit.

### 16.5.3 **A basis for licensing partial care**

The view that partial care services should be subject to licensing procedures requires distinctions to be made between the forms of care which can and should be regulated and those which it is unrealistic and undesirable to seek to control. Before these distinctions are made it is necessary to identify the various bases on which child care services can be classified.

#### (a) **Child care for reward**

A distinction which immediately suggests itself is that between services which are voluntarily provided and those for which a fee is charged. Such an approach reflects the assumption that the law should intervene only when the care is provided on a commercial basis. Further, legislation drafted in this way is clear and easy to administer.

#### (b) **Setting a number**

As has been noted, in several jurisdictions the relevant provisions permit a certain number of children to be cared for without a licence being required. Government regulation of child care occurs only when this number is exceeded. Although the numbers set vary from jurisdiction to

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<sup>47</sup> Section 115 of the Ghanaian Children's Act, 1998.

<sup>48</sup> Section 115(4). Any person who operates a day-care centre without a permit or continues to operate in contravention of the Act, commits an offence (section 120).

<sup>49</sup> Section 116.

jurisdiction, the exemption of small scale child care services appeals to common sense. The argument is that a law which sought to control every child minder, no matter how small the number of children cared for, would be unacceptably intrusive and unaffordable.

(c) **Premises used**

A distinction can be drawn between care provided in a centre and that provided in a private home. Such a distinction would reflect the view that the two types of care are different in kind. This distinction is embodied in the Ontario Day Nurseries Act (R.S.O. 1990).

(d) **Age of children cared for**

A distinction can be made between partial care services catering for pre-school children and those catering for children attending school. The care needs for these two groups of children are different, and further distinctions based on age (say 3 months to a year; 1 year to 2 years; 3 - 5 years, etc) within this broad category might be necessary. The age grouping of the children to be cared for can therefore serve as a very useful basis on which to classify partial care services.

(e) **Types of care**

Finally, distinctions might be made on the basis of the duration of the care provided. It is, for instance, possible to distinguish between, on the one hand, full and part-time care, and, on the other, occasional care. The argument for making such a distinction is that the law should generally not concern itself with brief, temporary placements but should confine itself to regulating more sustained forms of child care.

#### 16.5.4 **Evaluation and recommendations**

In formulating provisions to regulate partial care the aim should be to devise a system which provides children with protection against unsatisfactory care, but which does not result in the enactment of laws which are either unacceptably intrusive or unenforceable. It is clear that, **when partial care is provided for reward, it should be regulated by licensing provisions.**

Reference has already been made to the danger that pursuit of profit can place children at risk. The law has a legitimate role to play in regulating commercial operations in this sensitive area. Further, the regulation of child care facilities operated on a commercial basis is well established internationally. **The crucial question, however, is whether partial care services which are provided for reward should be the only form of care which requires a licence. In the Commission's view they should not.** If the purpose is to protect children there is no logical reason for limiting this protection to those who are cared for in facilities operated on a commercial basis.

Although no accurate figures are available, voluntary, non-profit organisations play a substantial part in the provision of partial care in South Africa. These organisations sometimes arrange for the care of large numbers of children. Further, it has been suggested that the role of private individuals and voluntary community agencies in the provision of partial care is likely to increase in future. The care which private individuals and voluntary organisations offer is often paid for by the parents, but this is not always the case. A group might, for example, operate on a co-operative basis and the parents might 'pay' by putting in an agreed number of hours caring for children. Also, sometimes voluntary groups waive the payment of fees. If these organisations were exempted from licensing requirements the protection which it is the purpose of a licensing system to provide would be denied to a large number of children.

There is also the concern, to which reference has already been made, about those centres which have been categorised as 'adjunct centres'. The available evidence suggests that these should be regulated. Adjunct centres do not always make a charge for the services which they provide. If the licensing provisions contained in the new children's statute were applicable only to services in respect of which a charge is made, some adjunct centres would continue to be unregulated. A distinction between commercial and non-commercial services therefore does not provide a foundation on which to build a satisfactory regulatory system, nor do distinctions based on the type of care or on the premises on which it is provided.

The main purpose of a licensing system is to protect children in child care facilities. It should also seek to encourage persons to seek licensing and assist those who fall short in terms of their potential as caregivers. The Commission believes this can be achieved by creative use of what we term 'an enforcement notice'. It is proposed that such notice be served on a person who has failed to obtain a licence or failed to operate within the terms and conditions of the

licence.

It is illogical to extend the licencing protection to children in certain types of premises and not in others, or to endeavour to protect those in full-day care but not those in occasional care. With regard to occasional care, it must not be overlooked that a child in this form of care can be more difficult to manage than one who has settled into a routine of full-day care. Occasional care should not be dismissed as an unimportant aspect of the child care system. Also, if a licensing system were based on the type of care provided, difficulties would be encountered in multi-purpose centres which combine different forms of care. It would clearly be impracticable to license one type of care in a multi-purpose centre but not another. The arguments advanced against a licensing system which concerns itself only with commercial services are equally applicable to one which seeks to regulate the provision of care in centres, but not in private homes. Child-minding in private homes in South Africa is widespread. If child care services in private homes were excluded from the licensing provisions, the result would be a system which did not apply to a substantial number of children in care.

**The Commission accordingly recommends the inclusion of the following provisions in the new children's statute:**

**Licensing of partial care facilities**

(1) No person shall operate or continue to operate a partial care facility unless he or she has obtained a licence in the prescribed format from the relevant (provincial) Department of Social Development.

(2) A licence shall stipulate the terms and conditions in terms of which a partial care facility may operate or continue to operate.

(3) Where it appears to the Department that a person has contravened subsection (1), the Department may serve a notice ('an enforcement notice') on him or her.

(4) An enforcement notice shall have effect for a period of 1 year beginning with the date on which it is served.

(5) If a person in respect of whom an enforcement notice has effect contravenes subsections (1) or (2) without reasonable excuse, he or she shall be guilty of an offence.

### **Licences**

- (1) A licence may be issued in relation to a prescribed type of partial care.
- (2) Different types of partial care may be prescribed by regulation.
- (3) A person must not provide partial care of a prescribed type in or on any facility
  - (a) otherwise than under the authority of a licence; or
  - (b) otherwise than in accordance with the terms and conditions of the licence.
- (4) A person who is not authorised under a licence must not hold himself or herself out as providing partial care of a prescribed type.

### **Application for licences or renewals**

An application for a licence, or the renewal of a licence -

- (a) must be made to the (provincial) Department of Social Development in the prescribed manner;
- (b) must be accompanied by the prescribed fee, if any;
- (c) must be accompanied by such relevant information and documents as the Department reasonably requires; and
- (d) in the case of an application for renewal, must be made at least 90 days before the current licence is due to expire.

### **Inspection before issue of licence**

Any authorised person may inspect a facility at which partial care is proposed to be provided under a licence for which an application or an application for renewal has been made.

### **Issue and term of licence**

- (1) The (provincial) Department of Social Development may issue or renew a licence to an applicant who is not disqualified from holding a licence unless the Department is of the opinion that, in the best interests or safety of the children, the application should not be granted.
- (2) In deciding whether to issue or renew the licence, the Department must consider-
  - (a) whether-
    - (i) the facilities provided or proposed to be provided are adequate for the provision of partial care, due regard being had to the relevant local authority's building clearance certificate and the factors listed in subsection (3);
    - (ii) the applicant is a fit and proper person or body to provide partial care services;
    - (iii) each person proposed to be engaged to provide partial care is a fit and proper person to be providing the services;
    - (iv) the applicant can provide the services in respect of which the licence is being sought; and
  - (b) any relevant information given by or in relation to the applicant under this Act.
- (3) In considering the adequacy of any partial care facility, the Department and the local authority involved must take into consideration the following factors:
  - (a) The availability of a safe area in which children may play, taking into account the number of children catered for;
  - (b) The availability of safe drinking water for the children;
  - (c) The availability of hygienic and safe toilet facilities at the facility;
  - (d) Adequate means for disposing of the refuse originating at the facility;
  - (e) The availability of a hygienic area for the preparation of food to be consumed by the children at the facility;
  - (f) Adequate ventilation in any part of the facility used by the children.
- (4) A licence continues in force for such term specified in the licence, but may be

cancelled, through just administrative action, at any time by the (provincial) Department concerned.

### **Disqualification from holding licence**

A person is not qualified to hold a licence if he or she has, at any time,

- (1) been convicted of a sexual offence relating to a child;
- (2) been found to be unfit to work with children as is provided for in the Act.

### **Applicant's duty to disclose charges, convictions, etc.**

An applicant for a licence must disclose by written notice with the application and, in the case of a later event, immediately after the event to the (provincial) Department particulars of -

- (1) any offence of which the applicant has been convicted;
- (2) any charge laid (whether before or after the making of the application) against the applicant where, if convicted, the applicant would be disqualified from holding a licence;
- (3) any refusal of an application by the applicant for a licence; and
- (4) any suspension or revocation of such a licence.

It would also be necessary to include extensive provisions on review and appeal procedures in the new children's statute. These aspects are covered in Chapter 23 below.

**In line with the Commission's recommendation regarding assistance to providers of ECD services, it is further recommended that the (provincial) Department of Social Development may support, financially and otherwise, any licenced partial care facility.<sup>50</sup>**

This support does not necessarily have to extend to the same level as that which should be provided by the State for ECD services. The recommended legal formulation reads as follows:

### **Assistance to providers of partial care services**

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<sup>50</sup> See 15.8 above.

1. The (provincial) Departments of Social Development, or any local authority may support, financially or otherwise, any licenced partial care facility. Such support, or the continuation of such support, may be made subject to conditions.

## 16.6 Defining 'partial care'

In section 79A(6) of the UK Children Act, 1989 'day care' is defined as 'care provided at any time for children under the age of eight on premises other than domestic premises'.<sup>51</sup> Ghana's Children's Act, 1998, defines 'day-care centre' as any early childhood development establishment where children below compulsory school-going age are received and looked after for the day or a substantial part of the day with or without a fee.<sup>52</sup> The Victoria Children's Services Act, 1996, defines 'children's service' as a service providing care or education for 5 or more children under the age of 6 years in the absence of their parents or guardians for a fee or reward, or while the parents or guardians of the children use services or facilities provided by the proprietor of the service.<sup>53</sup> In Tasmania, section 3 of the Children, Young Persons and Their Families Act 1997 defines 'child care' as the provision of care or accommodation to a child by a person other than the child's parent or a member of the child's extended family.<sup>54</sup> The Queensland Child Care Act, 1991, defines 'child care' as the provision of care of the prescribed type, on a regular basis, of a child, but does not include the provision of care of a child in the child's home or preschool education within the meaning of their Education (General Provisions) Act, 1989.<sup>55</sup> The 2001 Child Care (British Columbia) Act<sup>56</sup> defines 'child care' as the care and supervision of a child in a child care setting or other facility, other than by the child's parent or while the child is attending an educational programme provided under school's legislation.

**For the purpose of the new children's statute in South Africa, a definition is required which is not confined only to day-time care. The definition needs to target a range of**

<sup>51</sup> See also the definition of 'act as a child minder' as provided for in section 79A(2) of the Children Act, 1989, as amended by the Care Standards Act, 2000. 'Domestic premises' are defined to mean any premises which are wholly or mainly used as a private dwelling (section 71(12)). See further the definition of 'day care' in relation to local government in section 18(4) of the UK Children Act, 1989. According to this definition day care, for the purposes of that section, means 'any form of care or supervised activity provided for children during the day (whether or not it is provided on a regular basis)'.

<sup>52</sup> Section 124 of the Ghana Children's Act, 1998.

<sup>53</sup> Section 3. 'Care' is not defined in the Act.

<sup>54</sup> 'Extended family' is also defined in the Act.

<sup>55</sup> See also the Queensland Child Care (Family Day Care) Regulation 1991.

<sup>56</sup> [SBC 2001] Chapter 4.

**situations where children are temporarily placed by parents or primary caregivers with persons designated by them, for limited periods of time.** At one end of the partial care spectrum are such situations as baby-sitting or weekly meetings of toddler playgroups which may last for only a few hours at a time. However, at the other end of the spectrum are overnight centres and holiday camps where the child is away from his or her parent or caregiver for longer periods. It should also be noted that children of any age may require partial care. There is thus, in this sense, a distinction between ECD services and partial care – although younger children in partial care should be receiving appropriate ECD services.

School attendance should not be included as receiving ‘partial care’ in the proposed new children’s statute because education legislation applies. The school exclusion provision currently included in the definition of ‘places of care’ in section 1 of the Child Care Act, 1983, therefore needs to be reworded before it can be used. As stated before, the concept of ‘partial care’ as provided for in the new children’s statute should not include ECD services.<sup>57</sup>

Exercise of contact (access) responsibilities by a non-custodian parent, although in a broad sense a kind of partial or temporary care, should also not be covered by the new legal definition of ‘partial care’. Contact (access) of this kind is maintained because parental rights and responsibilities are exercised.<sup>58</sup> Also where contact (access) has been arranged in accordance with a court order, this is not a ‘private arrangement’ and should therefore be covered instead under the relevant parental responsibilities provisions of the new children’s statute.

Obviously, children in the ‘formal’ child care system (i.e. those children placed in substitute family care by means of a court order) should not fall under the definition of ‘partial care’.<sup>59</sup>

**In defining ‘partial care’, the Commission recommends the inclusion of the following elements:<sup>60</sup>**

- **the care is provided on a business or community service basis;<sup>61</sup>**

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<sup>57</sup> See 15.6 above. However, where ECD services are not rendered at a partial care facility (place of care), even a self-styled ECD centre, then the provisions relating to partial care facilities should still apply.

<sup>58</sup> See 8.4.5.1 above.

<sup>59</sup> See Chapters 17, 18, and 19 immediately below.

<sup>60</sup> Ibid.

<sup>61</sup> In other words, whether for profit or otherwise.

- the care is provided for more than six children apart from their parents / primary care-givers;
- forms of statutory care (foster care, adoption, residential care), and care provided in schools and in hospitals,<sup>62</sup> in the course of treatment, should not be included;
- ECD services should not be included.

**The Commission believes the definition of ‘partial care’ should be linked to that of ‘partial care facility’, which is a rework of the definition of ‘place of care’ in the Child Care Act, 1983, and accordingly recommends the following definitions:**

**‘Partial care facility’** means any place, building or premises, including a private residence, maintained or used partly or exclusively, whether for profit or otherwise, for the reception, protection and temporary or partial care of more than six children apart from their parents or primary care-givers, but does not include

- (a) any boarding school, school hostel or any establishment which is maintained or used mainly for the tuition or training of children and which is controlled by or which has been registered or approved by the State, including a provincial administration;
- (b) any hospital or medical facility which is maintained or used mainly for the medical treatment of children;

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Hospitals may run day care centres for use of their members of staff, for instance, and these services should be included under the definition of ‘partial care’.

- (c) the statutory placement of a child in substitute family care;<sup>63</sup>
- (d) ECD services as defined in this Act.

**‘Partial care’** means the services offered at a partial care facility.

#### 16.7 **Partial care not provided at partial care facilities (places of care)**

The Commission recognises that not all partial care services are rendered in buildings or premises (in other words, not in a ‘place of care’ as defined in the Child Care Act, 1983)<sup>64</sup> and that not all ECD or partial care situations involve the care of more than six children apart from their parents. While not registered as places of care, some facilities do care for children apart from their parents and sometimes offer ECD services. The question is whether these facilities should be subject to some form of licensing process.

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<sup>63</sup> This includes foster care, adoption and residential care.

<sup>64</sup> A partial care service provider may, for instance, take the children in his or her care to the zoo for a day outing. While still caring for such children it certainly cannot be said that the service is rendered, on that particular day, in a place of care.

The Commission is reluctant to classify all places where ECD and partial care services are rendered, regardless of where such services are rendered and the number of children involved, as places of care. Such an approach would be unmanageable as, for example, the typical baby-sitting situation where a neighbour looks after the baby while the parents go to the movies, would also require registration, inspection, and monitoring. However, it is realised that some partial care arrangements involving less than six children can be very harmful to children. For such situations, **the Commission regards the solution proposed by the Law Review Project as feasible and accordingly recommends that the Department of Social Development should be empowered to prevent an ECD service or partial care facility from continuing to operate, even though such service is not registered or such facility not licenced.** In this regard, the Commission regards the UK example<sup>65</sup> where provision is made for an enforcement notice as commendable. **It is accordingly recommended that where an unregistered ECD service or an unlicensed partial care facility is de facto in effect or operational, the Director-General: Social Welfare be empowered to issue an enforcement notice to such unregistered or unlicensed operator. Such notice would then either instruct the operator to register or obtain a license or to cease operation forthwith.**

## 16.8 Monitoring<sup>66</sup> and inspection

Monitoring provisions should be included in the new children's statute and must allow for a power to monitor both the environment and quality of care provided at partial care facilities and the implementation of ECD programs - by means of inspections or other methods - regardless of the number of children involved. The Commission has therefore recommended that ECD services and partial care facilities be subjected to regular monitoring and inspection.<sup>67</sup>

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<sup>65</sup> See 16.5.2 above.

<sup>66</sup> See also Chapter 24 (monitoring) below.

<sup>67</sup> See 15.8 above.