



## Children's Institute's submission on the 2022 BELA Bill

*Endorsed by the Legal Resources Centre*

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### INTRODUCTION

Thank-you for the opportunity to make a written submission on the 2022 BELA Bill.

We would also like to request an opportunity to make an oral submission to the Portfolio Committee.

Our submission is focussed on providing evidence to assist the committee when deliberating on the definition of 'required documents' in **section 1**, and the wording and intent of **section 4** with regards to the **admission of undocumented learners** and the establishment and composition of **inter-governmental committees to assist schools with undocumented learners**. We have endorsed the legal arguments and recommendations for amendments to these two sections that are outlined in the submission by the Legal Resources Centre.

Our submission provides evidence on the significant number and the vulnerable profile of the children that stand to be excluded from or deterred from attending school due to the current wording and intent of section 1 and 4. We submitted this evidence to the High Court in the *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG) (12 December 2019) ("*Phakamisa case*") and this evidence contributed to the

High Court's unequivocal judgment that no child may be refused admission to education based on being undocumented. We are bringing this same evidence to Parliament's attention in the hope that it will convince Parliament to amend section 1 and 4 as requested in the Legal Resources Centre's submission. The goal of the legislative framework should be to include these children in the education system rather than exclude, intimidate, or deter them from attending school.

The Children's Institute is a multi-disciplinary research and advocacy unit based in the Health Sciences Faculty of the University of Cape Town. We conduct research, advocacy, and education on children's rights. The work of the Children's Institute is aimed at promoting equality and realising the rights of all children in South Africa. One of our projects provides legal services to caregivers of children without birth certificates with the aim of supporting them to obtain birth certificates and social grants and to access education. In our experience, parents and caregivers face many difficulties with Home Affairs services, including high transport costs due to having to make multiple trips, and long delays before obtaining documents from the Department of Home Affairs. Their inability to provide birth certificates to schools is largely as a result of inadequate and inefficient service delivery by the DHA, compounded by the failure of relevant supporting departments (such as social development) to collaborate effectively, and by the endemic poverty of the affected parents and caregivers.

## **THE NUMBER OF CHILDREN WITHOUT BIRTH CERTIFICATES**

We estimate that in 2018 there were approximately 500 000 children (aged 0 – 17 years) in South Africa who do not have birth certificates. Of these, around 80% are South African citizens.<sup>1</sup> Responding to our evidence in court, the Department of Basic Education (DBE) revealed that there were nearly 1 million learners (aged 6 – 21 years) attending public schools who either did not have birth certificates or whose ID numbers could not be verified, and confirmed that 83% of these were SA citizens.<sup>2</sup> More recently the DBE has reported, in answer to a question posed in parliament, that there are approximately 660 000 learners

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<sup>1</sup> Hall K (2019) Expert affidavit in the matter between Centre for Child Law and others v Minister for Basic Education and others. Case no: 2480/17 in the High Court of South Africa, Eastern Cape Division ("Phakamisa case"). For a summary, see Hall K, Sambu W et al (2019) Early Childhood Review 2019. P.32 Available:

[http://childrencount.uct.ac.za/uploads/publications/SA%20ECR\\_2019.pdf](http://childrencount.uct.ac.za/uploads/publications/SA%20ECR_2019.pdf)

<sup>2</sup> Acting Director General of the Department of Basic Education (2019) First to Third Respondents' Supplementary Affidavit. Case no: 2480/17 in the High Court of South Africa, Eastern Cape Division ("Phakamisa case"), at Para 22.

(aged 6 to 21 years) in eight provinces (the Eastern Cape data was not available) who either did not have birth certificates or whose ID numbers could not be verified.<sup>3</sup> If the Eastern Cape's numbers for the previous year are included, the total is approximately 700 000 undocumented learners in public schools.

The paragraphs that follow provide more detail on this data:

It is difficult to determine with certainty the exact number of children living in South Africa whose births are not registered, but there are some credible data sources that provide an insight into the extent of the problem. The first is the **National Income Dynamics Study (NIDS)**, the second is **administrative data collected by the Department of Education**, and the third is **late registrations of birth recorded by DHA**.

### **National Income Dynamics Study**

The paragraphs below draw from the expert affidavit written by Dr K Hall in the *Phakamisa* case. This case concerned access to education for children without identity documents.

The National Income Dynamics Study (NIDS) is a national panel study that was initiated by the Presidency, with funding from the European Union and gives some insight into the number of children without birth certificates. According to Dr Hall's analysis of the NIDS wave 5 data (2017), 2.6% of all children under the age of 15 years do not have a birth certificate and thus have no access to an identity number. This is equivalent to 431 000 children under 15 years. The total number of children aged 0-17 without birth certificates is around 478 000, by extrapolation.

From her analysis of the NIDS survey, Dr Hall provides other data that can help to illuminate the situation of children without birth certificates:

- The majority (87%) of children without birth certificates are identified as Black/African.
- An analysis of the per capita household income suggests that children without birth certificates are significantly poorer on average than those with birth certificates.

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<sup>3</sup> Parliament of the Republic of South Africa, National Assembly, Internal Question Paper, Question NW875, 04/2021: Hon B S Masango question to the Minister of Basic Education. Available at <https://pmg.org.za/committee-question/15981/>

- Children without birth certificates are more likely than those with birth certificates to have been born at home rather than at a health facility (8% versus 3%).
- Children without birth certificates are substantially less likely than those with birth certificates to be receiving a Child Support Grant (CSG).
- Dr Hall notes that although almost all children in South Africa (over 99%) were born in South Africa, the place of a child's birth does not necessarily denote their citizenship. Instead, she estimates citizenship status by matching children to their biological mothers and determining where the mothers were born, on the assumption that if both the mother and child were born in South Africa then the child is highly likely to be a South African citizen.

She found that 70% of children without birth certificates definitely had mothers who were born in South Africa. Only 7% had mothers born outside the borders of South Africa. The remaining 23% could not be matched to biological mothers in the survey because the mothers were deceased or not living in the same household (e.g. migrant workers). The analysis confirms what the DBE data also suggests: that the majority of children (between 70% and 93%) who do not have birth certificates are entitled to South African citizenship.

### **Administrative data of the Department of Basic Education**

A second source of data on children without birth certificates is the DBE. According to an affidavit by the Acting DG of the National DBE filed in the *Phakamisa* case the DBE had recorded that there were nearly 1.2 million learners (1,190,434) attending public schools in 2018 for whom the Department had no record of a birth certificate or ID number in the LURITS system. The term "learners" includes children aged 6 to 17 years and also young adults aged 18 to 21 years in the higher grades.

By cross checking with the Department of Home Affairs (DHA), the DBE was able to retrieve the ID numbers for 192,000 of these learners, based on their name and date of birth. This still left 998,432 learners who were enrolled in public school but for whom there was no record of their birth registration or ID with DBE and whose identity could not be verified with DHA. 83% of these (830,898) were South African citizens.

More recent data provided by the DBE in response to a parliamentary question revealed that in 2020, there were 660,331 learners attending public schools for whom the DBE did not have valid ID numbers and could not identify through Home Affairs.<sup>4</sup> Three quarters (73%) were South African citizens. The total count excludes the Eastern Cape, as figures for that province were outstanding at the time. In 2018 the DBE recorded 43,534 learners in the Eastern Cape who were without ID numbers. If we use the EC's 2018 figures as an estimate for 2020, the total number of unregistered learners attending public schools in 2020 is therefore likely to be just under 700 000.

### **Late registrations of birth recorded by Department of Home Affairs**

A third data source is DHA's recorded late registrations of birth. These reports are analysed by Dr Hall in her expert affidavit filed in EC HC in 2019.<sup>5</sup> She shows that although there has been improvement in completeness of birth registration over the years, around 200,000 children are not registered within a year of their birth. This estimate is derived from a simple calculation, as follows: around 1.15 million babies are born in South Africa each year.<sup>6</sup> Yet over the last decade only between 900,000 and 950,000 current-year births have been registered each year.<sup>7</sup>

Births that are not registered in the current year will be pushed into the late registration process, which is much more difficult for families to navigate, and would result in an unknown number of children failing to register at all.

### **DIFFICULTIES IN ACCESSING BIRTH CERTIFICATES AND ID**

In our experience, many parents and caregivers have significant difficulty lodging applications for late registration of birth and experience long delays before they finally obtain their

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<sup>4</sup> Parliament of the Republic of South Africa, National Assembly, Internal Question Paper, Question NW875, 04/2021: Hon B S Masango question to the Minister of Basic Education. Available at <https://pmg.org.za/committee-question/15981/>

<sup>5</sup> Hall K (2019) Expert affidavit in the matter between Centre for Child Law and others v Minister for Basic Education and others. Case no: 2480/17 in the High Court of South Africa, Eastern Cape Division ("Phakamisa case").

<sup>6</sup> Stats SA Mid-year population estimates (2020 series), provided on request. The Tembisa model similarly estimates over 1.1 million children born each year.

<sup>7</sup> StatsSA Recorded Live Births 2019.

children's birth certificates from DHA. We refer below two four categories of parent/caregiver that are more likely to face these difficulties. As can be seen from the description, these families are already very vulnerable and should be pro-actively assisted by Home Affairs to document their children. However, in reality they are generally discouraged and deterred from finalising the registration process by a lack of co-ordinated efficient service delivery by government departments.

- **Relatives caring for orphaned or abandoned children** are not able to access the required 'proof of birth notice' from maternity wards. Without this document they cannot lodge an application with Home Affairs. They need the assistance of a social worker before the maternity ward will release the document. They also need a social worker report and a court order before they can lodge an application. Social workers are often not accessible and often are unable (due to resource constraints) or unwilling to assist relatives, leaving them unable to even start the birth registration process. We have multiple caregivers who have been in limbo with social workers for the past four years.
- **Unmarried fathers caring for children in cases where the mother is undocumented, deceased or has abandoned the children**, generally can only lodge their applications after undergoing a paternity test at their own costs of approximately R2800, or after obtaining a social worker report and a court order. These processes can take up to 2 years or more before the application can be lodged with DHA. Thereafter it will take a further year or more before DHA will issue the birth certificate. We have many unmarried fathers blocked by the high costs of the paternity test requirement and unable to obtain assistance from social workers. The struggles of unmarried fathers are also aptly demonstrated by the judgments in *Naki and Others v Director-General: Department of Home Affairs and Another* [2018] 3 All SA 802 (ECG) and *Centre for Child Law v Director General: Department of Home Affairs and Others* 2022 (2) SA 131 (CC).
- **Children who are born to foreign national parents** also struggle to secure documentation. These children often enter South Africa with parents or caregivers who are undocumented themselves and/or are fleeing situations of violence or persecution in their countries of origin. The children then enter South Africa without any documents or their documents get lost on the way to South Africa. Through no fault of their own, the children are undocumented in South Africa, and they can struggle to obtain the documents to meet the requirements set out in the BELA Bill. The DHA's asylum process is

notoriously difficult to navigate, and children can wait for years before they receive documents or their stay in South Africa is regularised. Children are also at the mercy of a responsible adult to assist them with the application process and in cases where they have been separated from their parent or caregiver and there is no such adult available, children can remain undocumented and become 'stateless'. Furthermore, the refugee reception offices sometimes insist (unlawfully) that in applications for children to be joined to the files and documents of their parents, DNA tests be undertaken to link the child to the parents. As with unmarried fathers, this is financially an unviable option for many foreign parents who simply cannot afford to undergo the DNA tests. These children then remain undocumented as a result of the prohibitive costs of DNA tests.

- **Mothers who do not have their own birth certificates or IDs**, must first apply for their own late registration of birth, then their IDs before they can apply for their children's birth certificates. This process can take up to 5 years. Even if the mother has her own birth certificate with an ID number on it, Home Affairs will not allow her to apply for her child's birth certificate until she obtains her ID. This problem affects in particular young mothers between the ages of 15 and 21 and contributes to an intergenerational cycle of unregistered births.

## CONCLUSION

A significant number of children in South Africa do not have birth certificates. The majority of these children are South African citizens, and a smaller number are foreign nationals. Children without birth certificates are more likely to be Black African, poor, and not accessing social grants. To ensure that these children are not made more vulnerable, it is important that the education system is an accessible safe haven and not a place where children or their parents fear being excluded, intimidated, stigmatised or reported to labour inspectors or immigration officials. The BELA Bill therefore needs to create a legislative framework that includes all children, irrespective of their documentation status and that expressly prohibits any exclusion or intimidation of undocumented children or their parents and that creates a firewall between the education system and immigration control.

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