



**SUBMISSION TO THE PORTFOLIO COMMITTEE ON SOCIAL DEVELOPMENT ON THE CHILDREN'S
AMENDMENT BILL, B18-2020
EARLY CHILDHOOD DEVELOPMENT**

1. INTRODUCTION

- 1.1. This submission is made by the Equal Education Law Centre (“EELC”) in response to the call for comments on the Children’s Amendment Bill [B18-2020] (the “Bill”), as it relates specifically to early childhood development (“ECD”).
- 1.2. The EELC is a public interest law centre using legal advocacy, research, and litigation to advance the struggle for equal and quality education in South Africa. ECD is one of our key thematic areas of work, focusing on the analysis of the ECD regulatory framework and advocating for its comprehensive reform.
- 1.3. This submission has been informed by a broader campaign calling for Real Reform of the ECD sector, which to date, has been supported by over 130 organisations.¹
- 1.4. For years the ECD sector has been languishing; in desperate need of holistic, coordinated regulatory reform which facilitates universal access to quality ECD services. The current regulatory framework, as embodied in the Children’s Act, 38 of 2005 (the “Children’s Act” or the “Act”) fails to create the enabling environment required in order for the rights of children to be fully realised when it comes to accessing ECD services. The Children’s Act also fails to expressly acknowledge ECD as a “*fundamental and universal human right*”,² as it has been firmly recognised in international law and the National Integrated Early Childhood Development Policy, 2015 (the “ECD Policy”).
- 1.5. The introduction of the Bill presented a much needed opportunity for meaningful reform; unfortunately, in its current form, the Bill is an opportunity missed. The Bill fails to address, and in fact *entrenches* current regulatory challenges, including inaccessible registration requirements and compliance standards, a complicated dual registration process, and a failure to accommodate all types of ECD provisioning. The Bill also *compounds* existing challenges by diluting current mechanisms which exist in the Act to empower government to support facilities to comply with prescribed requirements, and denying infrastructure support for partial care facilities on private land.
- 1.6. Rather than simplifying and clarifying the regulatory landscape, the Bill creates further duplication and incoherence in the regulation of ECD, including through the introduction of a new section dealing with “Early Childhood Development Centres” which simply replicates the current Partial Care chapter in the Children’s Act. Importantly, the Bill also fails to account for or respond to the imminent shift

¹ For more information about the campaign, visit www.ecdreform.org.za.

² The ECD Policy at 22.

of responsibilities in respect of ECD services from the Department of Social Development (“DSD”) to the Department of Basic Education (“DBE”).

- 1.7. The fundamental and pervading flaws of the Bill indicate the need for significant revision and a comprehensive redesign of the legislative proposals being made. Therefore, instead of having the Bill be rushed through Parliament, the current legislative reform process should be seized as an opportunity to meaningfully engage ECD sector stakeholders on the best ways to achieve holistic reform.
- 1.8. In light of the need for a comprehensive legislative overhaul, this submission seeks to highlight certain principal concerns regarding the Bill, at a high-level. It does not exhaustively address all issues with the Bill or all its inadequacies, nor does it present line-by-line recommendations. A failure to deal with any specific clause in the Bill should not be read to suggest that we necessarily accept or endorse the proposed amendments.
- 1.9. Accordingly, the submission focuses on the following core issues, which the Bill must address:
 - 1.9.1. overall regulatory incoherence;
 - 1.9.2. a complex multi-registration system;
 - 1.9.3. the failure to recognise different modalities of ECD provisioning;
 - 1.9.4. duplicate, overlapping, incoherent and onerous compliance standards;
 - 1.9.5. the dilution and under-utilisation of pro-poor mechanisms which exist in the Act;
 - 1.9.6. an incoherent conditional registration framework; and
 - 1.9.7. the failure to enable implementation of the ECD Policy, including by expressly recognising the right to ECD and the lack of infrastructure support for ECD provisioning.
- 1.10. In relation to each of these issues, this submission expands on the nature of the current challenge, whether the Bill addresses the challenge, and if not, makes high-level recommendations of how the challenge might be addressed.
- 1.11. It is our intention to address the Portfolio Committee on these issues and our recommendations in oral presentations.

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2. REGULATORY INCOHERENCE- OVERLAP BETWEEN PARTIAL CARE, ECD CENTRES AND ECD PROGRAMMES

Current challenge(s) - overall regulatory incoherence

- 2.1. Stakeholders in the ECD sector have been advocating for a comprehensive, but simple, cohesive and comprehensible regulatory framework for ECD. The DBE, in its deliberations regarding how it may regulate ECD after the function shift, is considering the possibility of separate ECD legislation in order to achieve this.
- 2.2. Currently, the Children’s Act regulates ECD provisioning in Chapter 5 - “Partial Care” (partial care is provided when a person takes care of more than six children on behalf of their parents or care-givers for specific periods and all partial care facilities must provide an ECD programme) *and* Chapter 6 - “Early Childhood Development Programmes” (an ECD programme is part of an ECD service and provides learning and support appropriate to the child’s developmental age and stage).
- 2.3. This creates opportunity for duplication, overlap and regulation in piecemeal.

What the Bill does - perpetuates regulatory incoherence

- 2.4. The Bill introduces a new Part II to Chapter 6 of the Act, headed “Early Childhood Development Centres”. Whilst initially encouraged by what appears to be an attempt to regulate ECD provisioning entirely under Chapter 6, the manner in which this is accomplished in the Bill is problematic. The Bill fails to use the opportunity for a single ECD chapter to (i) enable a single, streamlined registration system, (ii) accommodate differentiation between different types of ECD programmes, and (iii) facilitate the development of new, simplified minimum norms and standards for ECD.
- 2.5. Instead, the incorporation of the ECD centre provisions within Chapter 6, as currently proposed in the Bill, creates significant duplication *within* Chapter 6. For example, there are two provisions for the assignment of functions to municipalities;³ two registration processes;⁴ two different funding mechanisms;⁵ two different enforcement provisions and two different appeal and review provisions,⁶ all within a single chapter.
- 2.6. In addition, the mere copy and paste of the partial care provisions in the proposed Part II of Chapter 6 creates confusion and a lack of clarity regarding the relationship between partial care (Chapter 5) and ECD centres (Part II of Chapter 6). The definition of “early childhood development centre” overlaps with the definition of “partial care”.⁷ As a result, there is no clarity around the intended

³ Clause 103K of the Bill and section 102 of the Act.

⁴ Clause 103C of the Bill and section 95 of the Act.

⁵ Clause 103A of the Bill and section 93 of the Act.

⁶ Clause 103I of the Bill and section 101 of the Act.

⁷ Clause 1(j) read with Clause 34 of the Bill.

scope, purpose and interaction between the new Part II of Chapter 6 of the Bill and the Partial Care chapter, creating further duplication.

- 2.7. Any opportunity for regulatory coherence through a single ECD chapter has been wasted in light of the duplication of multiple processes and the overlap of powers, roles and responsibilities between ECD programmes and ECD centres.

Recommendations for holistic reform

Relevant provision in Children’s Amendment Bill	Recommendation(s)
<p>Part II - Chapter 6 of the Bill (Clause 55 of the Bill introducing sections 103A-103L).</p> <p>Read together with: Clause 1(j) of the Bill; Part I of Chapter 6 of the Bill and Chapter 5 of the Bill.</p>	<p>Holistic legislative reform is required. If ECD is to be regulated in a single chapter, this must be done comprehensively, and not just by wholesale duplication of other provisions in the Act. In order to achieve this, drafters of the Bill must engage stakeholders on the holistic model for such reform. This model must include:</p> <p>(i) a reconsideration of all terminology, definitions and the overall framework adopted in the single ECD chapter;</p> <p>(ii) comprehensive amendments to ensure a streamlined registration process (See Section 3 below) which is inclusive of all modalities of ECD provisioning (See Section 4 below); and</p> <p>(iii) the careful review of current regulations and norms and standards prescribed under the Act relating to ECD provisioning (See Section 5 below).</p>

3. COMPLEX REGISTRATION PROCESSES

Current challenge(s) - dual registration

- 3.1. The regulation of ECD in both Chapters 5 and 6 of the Children’s Act, means, in practice, that an ECD programme provided out of a partial care facility needs to **register twice**: first, as a partial care facility and second, as the provider of an ECD programme. Each registration process has its own regulations, norms and standards and requirements. This creates unnecessary duplication and an additional administrative and financial burden.⁸

⁸ By way of illustration, the following regulations are duplicated across the two registration processes in the General Regulations Regarding Children, 2010 GN 261 in GG 33076:

1. Particulars of the applicant: Reg 14(3)(a) and (b) are identical to Reg 24(3)(a) and (b)
2. Programme description: Reg 14(3)(f) is very similar to Reg 24(3)(d)
3. Clearance certificate: Reg 14(4)(e) is identical to Reg 24(3)(h)

What the Bill does - fails to simplify registration and introduces possible ‘triple registration’

- 3.2. The Bill not only fails to address the challenges of a dual-registration system, but also introduces the possibility of a third registration requirement.
- 3.3. Under the Bill, a facility which provides ECD programmes for more than six children from birth to school-going age will be considered as *both* a partial care facility and an ECD centre. This means that such an ECD programme provider may be required to comply with **three separate registration requirements** (i.e. registration as a partial care facility, registration as an ECD centre and registration of its ECD programmes).
- 3.4. We doubt that this is the intended effect of the legislation and therefore amendments have to be made to avoid this outcome.

Recommendations for holistic reform

- 3.5. The sector has long been calling for a **one-step registration process**. All aspects of ECD, such as physical space, health and safety and programmatic elements ought to be dealt with in a single registration process guided by regulations and norms and standards that allow for different types of ECD programme providers (more detail on the need for different types of ECD programme providers follows in Section 4 below).
- 3.6. A one-step registration process can best be achieved **together with more holistic reforms**, which must include:
 - 3.6.1. recognition of different modalities of ECD provisioning (see Section 4 below); and
 - 3.6.2. ensuring that registration requirements are clear and not unduly onerous (See Section 5 below).
- 3.7. The current Bill needs to be **significantly reconsidered** in order to achieve this. We urge the responsible departments (including local government and the Department of Health) to, in the process of finalising this Bill, engage stakeholders on the holistic model for such reform and to consider comprehensive amendments to ensure a streamlined and effective registration process is achieved.
- 3.8. **The following are recommendations of the changes which could be made to the Bill towards holistic reform and a one-stream registration system:**

Relevant provision in Children’s Amendment Bill	Recommendation(s)
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4. Number of children: Asked on both Form 11 and Form 16 (although more details is required on Form 16)
5. Exposition of staff skills: Asked for on both Form 11 and Form 16.

<p>Clause 55 of the Bill inserting a new section 103C.</p> <p>Read together with: Clause 1(j) of the Bill); Sections 76 and 80 of the Children’s Act); and clause 47(e) of the Bill.</p>	<p>In the least, the Bill needs to be amended to avoid the potential for triple registration and to remedy the confusing overlap between the scope and regulation of partial care and ECD centres. While this requires a holistic approach, amendments may include the following:</p> <p>(i) Providing for an overarching definition of an “ECD provider” that is broad enough to include different types of ECD provisioning (and to exclude some types of provisioning where appropriate);</p> <p>and</p> <p>(ii) Removing provisioning of ECD programmes from the scope of partial care entirely by deleting section 93(5)(a) of the Children’s Act;</p> <p>and</p> <p>(iii) Excluding the care of a child by an ECD provider (as contemplated under Chapter 6, Part II) from the scope of partial care under section 76 of the Children’s Act;</p> <p>and</p> <p>(iv) Removing “early childhood development services” as contemplated in section 91(2) of the Act for children up to school going age as a type of partial care from regulation 12(1)(a) of the General Regulations Regarding Children.</p>
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4. FAILURE TO RECOGNISE DIFFERENT MODALITIES OF ECD PROVISIONING

Current challenge(s) – inappropriate “one-size-fits-all” approach

- 4.1. The Children’s Act does not explicitly provide for different types of ECD programme provisioning and does not accommodate non-centre based programmes. Under the current legislation, it can be argued that certain modalities of ECD provisioning (e.g. sessional programmes such a playgroups) do not fall within the scope of the definition of “partial care” and should therefore not be subject to those onerous registration requirements (and need only register as an ECD programme). However, even with this approach, the current Act does not adequately address the need for a fully differentiated approach to different types of ECD providers.
- 4.2. Non-centre based programmes can reach hundreds of thousands of children in areas where ECD infrastructure is limited, and they offer caregivers alternate early care and learning programmes which may better suit their needs. They must be recognised as distinct from partial care (or ECD centres) and ought to be registered, regulated and funded accordingly.

What the Bill does - fails to implement a differentiated approach to various ECD providers

- 4.3. The introduction of a new part headed “ECD centre” by the Bill seems to focus on centre-based provisioning. The Bill therefore still fails to adequately recognise and regulate different types of ECD modalities.
- 4.4. Further, and as discussed in Section 2 and 3 above, the provisions relating to ECD centres are simply a cut and paste from the Partial Care chapter, including the norms and standards framework. This leads to even more duplication and confusion in the regulation of the ECD sector.

Recommendations for holistic reform

- 4.5. Different types of ECD programme modalities must be expressly recognised and must have differentiated norms and standards applicable to each modality.
- 4.6. **The following are recommendations of the changes which could be made to the Bill towards holistic reform and a differentiated system for different ECD provisioning:**

Relevant provision in Children’s Amendment Bill	Recommendation(s)
Clause 1(j) of the Bill introducing a definition of “early childhood development centre”.	i) The legislature must reconsider the terminology and definitions utilised in the Bill, in particular the definition “ECD centre”, which must be broad enough to include different types of ECD provisioning. An amendment to the definition of ECD centre must be made in the context of a broader overhaul of terminology and definitions referred to in Section 2 above. ii) The Bill must expressly provide for the recognition of different types of ECD providers. This can be achieved by requiring the Minister to make regulations concerning different types of ECD programme delivery and differentiated norms and standards in respect of these different modalities of provisioning.

5. DUPLICATE, OVERLAPPING, INCOHERENT AND ONEROUS COMPLIANCE STANDARDS

Current challenge(s) - duplication, overlap and fragmentation of compliance standards and unclear roles and responsibilities result in non-compliance for most ECD providers

- 5.1. Despite acknowledgement in the ECD Policy and the Children’s Act of the importance of effective intergovernmental and interdepartmental coordination for the holistic provisioning of ECD, the Act fails to set out clear roles and responsibilities in respect of (i) developing health and safety standards; and (ii) ensuring compliance with health and safety standards for ECD providers.
- 5.2. As it currently stands, compliance standards for ECD providers are set out in:

- 5.2.1. the Children’s Act;
 - 5.2.2. the National Health Act; and
 - 5.2.3. and various local government by-laws.
- 5.3. This requires ECD providers to comply with multiple sets of requirements which often overlap, are spread across various pieces of legislation or bylaws and in some cases, are duplicated.
- 5.4. Norms and standards contained in the Children’s Act are also onerous and often unattainable for the overwhelming majority of ECD providers who serve poor communities, and standards introduced in the National Environmental Health Norms and Standards (“NEHNS”), are informed by the highest “international best practice,”⁹ a standard which is inappropriate in the South African context.

What the Bill does - fails to clarify roles and responsibilities and to impose appropriate compliance standards

- 5.5. The Bill makes no attempt to clarify the roles and responsibilities of different government departments or the different levels of government in respect of ensuring a healthy and safe environment for children.
- 5.6. Requirements to comply with multiple different standards remain and the inclusion of Part II to Chapter 6 for ECD centres causes further overlap and duplication.

Recommendations for holistic reform

- 5.7. **The following are recommendations of the changes which could be made to the Bill towards holistic reform and more streamlined, simpler compliance standards:**

Relevant provision in Children’s Amendment Bill	Recommendation(s)
<p>Clause 55 of the Bill inserting a new section 103B - norms and standards for early childhood development centres</p>	<p>National legislation must clearly define roles and responsibilities of the different levels of government in relation to ensuring a safe and healthy environment for children. In particular, legislation must:</p> <p>(i) provide guidance to local governments to minimise excessive and unrealistic health and safety standards;</p>

⁹ Section 1 of the NEHNS.

<p>Read with existing sections of the Act and the regulations dealing with partial care norms and standards.</p>	<p>(ii) require that national and provincial government exercise monitoring of local government duties (rather than simply duplicating their roles and responsibilities).¹⁰</p> <p>The legislation should also include the power of the Minister to provide model by-laws that must be used as a guide for local government as follows:</p> <p><u><i>“the Minister, in consultation with the Minister of Health, may provide model by-laws aligned with all relevant norms and standards to be used as a guide for local government”.</i></u></p> <p>The model by-laws should include guidance on minimising excessive and unrealistic health and safety standards.</p> <p>The above amendments must be accompanied by a complete overhaul of all existing regulations and norms and standards (including the NEHNS). Regulations concerning health, safety and programme standards must be streamlined and appropriately determined taking into account the differing contexts in South Africa as well as different modalities of ECD provisioning.</p>
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6. ASSISTANCE TO ECD PROVIDERS SERVICING POOR COMMUNITIES

Current challenge(s) - Failure to utilise the “power to assist” clauses to enable registration and compliance with minimum norms and standards

- 6.1. Express powers exist in the current legislative framework to empower the DSD to support facilities to comply with any number of the requirements contained in various national norms and standards frameworks,¹¹ as well as municipal by-laws.¹² The DSD has the power to assist if there has been cancellation of registration and in the process of considering an application for registration.¹³ Funding or other forms of support can be provided to help with compliance when a facility or programme is in the process of registering. This power is not contingent on conditional registration. However, there is little evidence of this power being utilised over the last decade. Part of the problem is that

¹⁰ The Water Services Act 108 of 1997 offers one example of how the appropriate allocation of roles and responsibilities between different levels of government in respect of a Schedule 4B functional competency may be achieved.

¹¹ As laid out in the General Regulations, the National Norms and Standards for ECD Programmes as laid out in the General Regulations, and the NEHNS.

¹² Section 82(5) of the Children’s Act, under the title “consideration of application” and section 84(3) of the Children’s Act, under the section entitled “cancellation of registration”. Similar powers exist in respect of ECD programme registration in section 97(5) and 99(3) of the Children’s Act.

“The provincial head of social development may assist a registration holder to comply with the prescribed national norms and standards contemplated in section 79, any requirements as may be prescribed or any provision of this Act where the cancellation was due to non-compliance with those national norms and standards, conditions, requirements or provision.”

¹³ Sections 82(5); 84(3); 97(5) and 99(3)) of the Children’s Act.

provinces have never had to report on the use of this power and there is no provision mandating the allocation of budget to this.

What the Bill does - deprioritises poor communities and dilutes “power to assist clauses”

De-prioritisation of poor communities:

6.2. The Children’s Act currently requires that the funding of ECD programmes to poor communities *must* be prioritised. The Bill turns this obligation into a discretionary power by **providing** that funding of partial care facilities and ECD programmes to poor communities *may* be prioritised. This undermines the realisation of the right to ECD for all children and is a regressive proposal.

Narrowing of the “power to assist” clauses

- 6.3. The Bill makes the use of the “power to assist” clauses contingent on the granting of registration with conditions. This is a narrowing of the existing powers.
- 6.4. Even though proposed amendments introducing new clauses 78(3A) and 93(3A) appear to recognise that funding may be provided where there has been “only partial compliance with national norms and standards”, those provisions apply to *conditionally registered* facilities and programmes. Together with the ongoing confusion around the meaning of conditional registration (addressed in Section 7 below), these provisions do not alleviate the difficulty of ensuring that facilities and programmes that have not been able to meet registration requirements may qualify for funding assistance.

Recommendations for holistic reform

- 6.5. The current power to assist clauses must be retained, national and provincial departments must be required to consider the need to assist providers in their strategies (including allocation of budget resources) and must report to the Minister on progress achieved.
- 6.6. **The following are recommendations of the changes which could be made to the Bill towards holistic reform and in order to retain protections for poor communities:**

Relevant provision the Children’s Amendment Bill	Recommendation(s)
<p>Clause 35(c) of the Bill which amends section 78(4) of the Act.</p> <p>Clause 47(b) of the Bill which amends section 93(4) of the Act.</p>	<p>The proposed amendment which turns the obligation to prioritise poor communities to a discretionary power must be removed.</p> <p>The following amendments should accordingly be rejected:</p> <ul style="list-style-type: none"> - Amendment 35(c) to section 78(4) - Amendment 47(b) to section 93(4)

<p>Clauses 35 of the Bill which introduces section 78(3A).</p> <p>Clause 38(b) of the Bill which amends section 82(5) of the Act.</p> <p>Clause 47 of the Bill introducing section 93(3A).</p>	<p>i) The “power to assist” clauses must remain as broad as possible.</p> <p>The following amendment should accordingly be rejected: Amendment 38(b) to section 82(5)</p> <p>ii) In addition, the “power to assist” clauses should be strengthened by: a) strengthening reporting on the power to assist; and b) incorporating the power to assist in planning.</p> <p>This can be achieved by:</p> <ul style="list-style-type: none"> - Amending section 82 of the Act in order to ensure that provincial departments report on the exercise of the power to assist by inserting after subsection (5) the following section: <u>“(5A) The provincial head of social development must make an annual report to the Minister on progress achieved in respect of section 82(5).”</u> - Amending section 97 of the Act by inserting after subsection (5) the following section: <u>“(5A) The provincial head of social development must make an annual report to the Minister on progress achieved in respect of section 97(5).”</u> - Amending sections 77(1), 77(2), 92(1) and 92(2) of the Act to ensure that national and provincial strategies duly consider the need to assist facilities to comply with norms and standards and other registration requirements. This can be achieved by cross referencing the relevant “power to assist” clauses in the list of things the Minister or MECs must give due consideration to. For example: <u>“77(1) The Minister, after consultation with interested persons., must include in the departmental strategy a comprehensive national strategy., giving due consideration to section 82(5) and....”</u>
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7. AN INCOHERENT CONDITIONAL REGISTRATION FRAMEWORK

Current challenge(s) - There is no clear distinction between “conditional registration” and registration with conditions

- 7.1. While the Children’s Act includes the possibility of “conditional registration” for partial care and ECD programmes, this term has not been consistently understood or applied as allowing for the registration of providers who have not yet been able to meet all the requirements of registration. It is sometimes understood as only referring to the attaching of conditions to fully registered providers. The concepts of “conditional registration” and “registration with conditions” are not clearly

distinguished, which leads to confusion and limits the effectiveness of conditional registration as a tool for increasing subsidised early learning and for the progressive realisation of norms and standards.

What the Bill does - fails to provide a clear conditional registration framework

- 7.2. The proposed amendments in the Bill do not clearly define or differentiate between “conditional registration”; “conditions relating to registration” and “registration with conditions” and the terms are used differently in relation to partial care, ECD programmes and ECD centres. It is therefore unclear whether DSD is able to grant conditional registration if there is non-compliance with registration requirements as prescribed.
- 7.3. For example, in relation to ECD centres, proposed sections 103D and 103E make reference to “conditional registration”, however the proposed section 103F does not make provision for conditional registration at all, only to “conditions for registration”.

Recommendations for holistic reform

- 7.4. Legislation must make it clear that “conditional registration” of providers is possible prior to meeting the full requirements of registration and will therefore be granted based on lower threshold requirements. These providers should be supported to meet full registration requirements within a specified period.
- 7.5. **The following are recommendations of the changes which could be made to the Bill towards holistic reform and in order to provide a clear conditional registration framework:**

Relevant provision in Children’s Amendment Bill	Recommendation(s)
<p>Clause 39 which amends section 83.</p> <p>Clause 50 which amends section 98.</p> <p>Clause 55 which introduces section 103F.</p> <p>Clauses 35(b) and 47 which introduce section</p>	<p>(i) The use of conditional registration for the purposes of progressive realisation of norms and standards or relevant requirements should be made clear.</p> <p>This can be achieved by, for example, amending sections 83 and 98 as follows:</p> <p><i>“(1) The registration or renewal of registration of a partial care facility (early childhood development programme) may be granted on such conditions as the provincial head of social development may determine, including conditions—</i></p> <p><i>(a) specifying the type of partial care (early childhood development programme) that may or must be provided in terms of the registration;</i></p> <p><i>(b) stating the period for which the conditional registration will remain valid; and</i></p> <p><i><u>(bB) specifying the period by which the applicant must comply with the prescribed requirements for registration; and</u></i></p> <p><i>(c) providing for any other matters that may be prescribed.”</i></p>

78(3A) and section 93(3A), respectively. ¹⁴	<i>Similar proposed amendments should also be made to section 103F and 103B which have been inserted in Part II of Chapter 6.</i>
Read together with references to “conditional registration” in proposed sections 103D and 103E.	<p>(ii) It should also be made an express provision that regulations may be issued relating to the procedure for obtaining conditional registration and progressively attaining full registration.</p> <p>This can be achieved by, for example, amending sections 90 and 103 of the Act as follows:</p> <p>By the insertion of paragraph aA after paragraph (a):</p> <p><i>“(aA) the procedure to be followed in connection with the granting of conditional registration and the process by which full registration may thereafter be obtained.”</i></p>

8. LEGISLATIVE GAPS PREVENT IMPLEMENTATION OF THE PRINCIPLES IN THE ECD POLICY

Current challenge(s) - Failure to give effect to key principles in the ECD Policy

Lack of clear infrastructure plan

- 8.1. Under the Children’s Act, there is no prohibition on funding of infrastructure improvements for partial care facilities located on private property. Such funding is, in fact, permissible in light of the “power to assist” clauses.
- 8.2. That said, the current legislation fails to give effect to the ECD infrastructure provisions in the ECD Policy. These include: the development of an infrastructure plan; local government obligations regarding the maintenance and public provision of ECD centres in poor areas and requiring the Minister to develop norms and standards for public provision of ECD centres. This hampers the proper implementation or realisation of these policy objectives.

Failure to expressly recognise a right to ECD

- 8.3. As already mentioned, the ECD Policy clearly articulates government’s recognition of early childhood development as a “fundamental and universal human right” to which all young children are equally entitled. It also emphasises government’s responsibility for taking all appropriate legislative, administrative and other measures necessary to secure the right for all children. This is reflective of the international law position.
- 8.4. The Committee on the Rights of the Child for instance, interprets the UN Convention on the Rights of the Child (to which South Africa is a signatory) in favour of a holistic conception of a child’s “right

¹⁴ While proposed amendments seem to entrench the “narrow” interpretation that the granting of full registration is dependent on the fulfilment of all conditions, amendments to funding provisions (with the insertion of 78(3A) and 93(3A)), appear to envisage some form of registration being possible where there is only partial compliance with the prescribed norms and standards.

to development”, which includes the rights to rest and play, and acknowledges a “coordinated, holistic, multi-sectoral” approach to early childhood education.

8.5. Despite this, the Children’s Act fails to include an express right to ECD.

What the Bill does - does not give effect to the key principles contained in the ECD Policy

8.6. The Bill misses the opportunity to include key policy amendments relating to infrastructure. It does not set out the requirements for clear infrastructure plans and governments duties when it comes to implementing and overseeing these plans. Instead, it regressively prevents funds from flowing to ECD providers operating on private property.

8.7. The Bill also fails to expressly introduce the right to ECD into the Children’s Act.

Recommendations for holistic reform

8.8. Any proposed amendments must clearly outline government duties, particularly the duties of municipalities to expand access to ECD programme infrastructure; the maintenance of ECD programme infrastructure and of existing facilities on private property; and must ensure access to sufficient and appropriate infrastructure for ECD providers in poor communities.¹⁵ Proposed amendments should require that an infrastructure plan be developed to ensure equitable and universal access to ECD programmes.¹⁶

8.9. The right to ECD must be expressly provided for in legislation.

8.10. **The following are recommendations of the changes which could be made to the Bill towards holistic reform and to give effect to some of the principles contained in the ECD Policy, including the implementation of an inclusive infrastructure plan and a right to ECD:**

Relevant provision in Children’s Amendment Bill	Recommendation(s)
<p>Clause 35(e) amending s78.</p>	<p>Parliament ought to reject the proposed blanket ban on government investment to improve infrastructure for partial care facilities on private property as this will further marginalise mostly poor children. Any concerns government may have in respect of protecting their financial investments for their social impact goals in ECD, can be mitigated against with other checks and procedures.</p> <p>The following amendments are proposed:</p> <p>(i) Existing funding provisions contained in the Children's Act</p>

¹⁵ Clause 9.5(3)(g) of the ECD Policy.

¹⁶ Clause 9.5 of the ECD Policy.

	<p>Amendment 35(e) inserting proposed section 78(5) must therefore be rejected.</p> <p>(ii) The infrastructure needs of the sector must additionally be supported</p> <p>Provisions clearly outlining government duties, particularly the duties of municipalities, in respect of providing for and maintaining sufficient and appropriate ECD programme infrastructure in their jurisdictions.</p> <p>This can be achieved through the inclusion of the following provision to section 78 of the Children’s Act:</p> <p><i><u>“(3A) The Minister, in collaboration with provincial departments and local government including with the Department of Basic Education, the Department of Health and the Department of Cooperative Governance and Traditional Affairs must develop a costed national infrastructure plan to ensure equitable and universal access to early childhood development programmes”.</u></i></p>
<p>New clause to be added to include the right to ECD</p>	<p>The following wording is suggested in order to incorporate a right to ECD into national legislation in order to align it with the ECD Policy and international law obligations.</p> <p><i>“Right to Early Childhood Development</i></p> <p><i><u>(1) Every child has the right to have access to quality early childhood development services to ensure the survival and development of the child.</u></i></p> <p><i><u>(2) Government is responsible for taking all appropriate legislative, administrative and other measures necessary to secure the realisation of the universal early childhood development rights of all children”.</u></i></p>

9. CONCLUSION

- 9.1. Significant legislative reform is needed in order to create an enabling and coordinated regulatory system for the provisioning and regulation of ECD services in South Africa.
- 9.2. Whilst the Bill is no doubt intended to achieve such significant reform, it is a missed opportunity and fails to address long-existing challenges identified in the ECD sector. Accordingly, the Bill’s current proposals need to be significantly reconsidered and redesigned in order to achieve comprehensive and holistic reform.
- 9.3. In order to achieve this, legislators and drafters of the Bill are implored to meaningfully engage the ECD sector and to reach out to key stakeholders for technical and drafting support where required.

In the interim, we encourage the drafters to consider at least the recommendations made in this submission to amend the Bill immediately to address:

- 9.3.1. overall regulatory incoherence;
- 9.3.2. a complex multi-registration system;
- 9.3.3. the failure to recognise different modalities of ECD provisioning;
- 9.3.4. duplicate, overlapping, incoherent and onerous compliance standards;
- 9.3.5. the dilution and under-utilisation of pro-poor mechanisms which exist in the Act;
- 9.3.6. an incoherent conditional registration framework; and
- 9.3.7. the failure to enable implementation of the ECD Policy, including by expressly recognising the right to ECD and the lack of infrastructure support for ECD provisioning.