

COMMENTS ON THE CHILDREN’S AMENDMENT BILL, 2020 [B 18-2020]			
AS RELATES TO INCLUSION AND CHILDREN WITH DISABILITIES			
Contact Person:	Ms Lindiwe Ntsabo	Due date for comments:	27 November 2020
Email:	childrens-amendment-bill@parliament.gov.za		

Introduction:

1. This submission is made by the Equal Education Law Centre (“**EELC**”) in respect of provisions in the Children’s Amendment Bill B18-2020 (“**the Bill**”) relating to children with disabilities and which are aimed at facilitating inclusion. 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.

2. This submission has been endorsed by the following organisations:
 - 2.1 Down Syndrome South Africa (DSSA);
 - 2.2 BlindSA;
 - 2.3 Autism SA;
 - 2.4 Centre for Child Law (CCL);
 - 2.5 National Council of and for Persons with Disabilities;
 - 2.6 The Chaeli Campaign, and
 - 2.7 Western Cape Forum for Intellectual Disability (WCFID).

3. We also note and endorse the submissions made by the WCFID in relation to special care centres.

4. This submission is not exhaustive of all the issues pertaining to the Bill. We highlight some of the key concerns emerging from our experience in working on issues which affect children with disabilities and advocacy to create an inclusive regulatory environment for all children. We do so through high-level general and section-specific comments.

5. In our General Comments, we point out the need for comprehensive legislative reform, far beyond what is contained in the present set of proposed amendments included in the Bill. All our recommendations must be read with this overarching recommendation in mind.

6. It is our intention to address the Portfolio Committee on Social Development on these issues and our recommendations in oral presentations.
7. Our detailed comments are provided in the table below.

For any queries, please contact:

Equal Education Law Centre:

Robyn Beere (robyn@eelawcentre.org.za)

Table of comments

General Comments:

The principle of inclusion refers to a process that assists in addressing and overcoming all barriers to the presence, participation and achievement of all children on an equal basis.¹ Legislation and policies have been enacted to build an inclusive system in South Africa; however, many children continue to experience barriers to accessing learning, care and support. One of the contributing factors to this has been the deficiencies in the regulatory frameworks which regulate the rights of children and the lack of implementation of those laws and policies that do exist.

As the principal legislation in South Africa relating to children, it is especially important that the Children’s Act, 38 of 2005 (“**Children’s Act**”) enables inclusivity and creates an inclusive system in which all children are protected on an equal basis. The Bill presents an opportunity to ensure that the Children’s Act achieves this and that the principle of inclusion is applied in all matters concerning children.

Unfortunately, the Bill misses this opportunity, in that, amongst other things:

1. It does not refer to the concepts of “inclusion” and “inclusive programmes” with any degree of specificity so as to ensure a common understanding of these terms and to improve implementation.
2. The words “*inclusion*” and “*disability*” are used throughout the Bill without being defined. They are sometimes used interchangeably and other times to refer to distinct concepts. We recommend that these terms be defined to promote clarity and certainty and to incorporate all aspects of diversity. We recommend the following definitions be included:

¹ Definitions adapted from the Unesco: Guide for Ensuring Inclusion and Equity in Education (2017). Available at: http://www.unesco.org/new/en/media-services/single-view/news/a_guide_for_ensuring_inclusion_and_equity_in_education/

- **“Inclusion:** A process that assists in overcoming all barriers which limit the presence, participation and achievement of all children, including but not limited to barriers experienced by children with disabilities, through which all children receive the necessary support to enable them to participate on an equal basis”.
- **“Inclusive programmes:** A programme in which all children are supported so that they can optimally participate and benefit”.²
- **“Disability”** must be defined or explained using the accepted definitions in the White Paper on the Rights of Persons with Disabilities and in the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

3. Perhaps, most critically, the Bill fails to facilitate the holistic reform needed to ensure that inclusivity is built into the system and design of the frameworks put in place to protect children. Instead, the current proposed amendments simply pepper words such as “disability” and “inclusion” throughout, but without at the same time enabling comprehensive amendments to Children’s Act. The Bill, like the Children’s Act itself, has not been drafted through the lens of mainstreaming disability and with the explicit intention of creating a truly inclusive piece of legislation.

4. For example, the current amendments fail to cross-refer to section 11 of the Children’s Act, which deals specifically with children with disabilities, and section 11 itself has not been modified or expanded by the Bill. In section 11 of the Children’s Act, which deals with factors to be considered in any matter concerning a child with a disability, the decision-making rights of the child and the right of children to be heard, have not been included, for instance. Without holistic reform, these ad hoc amendments on their own will not achieve effective inclusivity.

Section in Children’s Act, 38 of 2005	Clause in the Bill <i>(The proposed amendment)</i>	DSD’s explanation of proposed amendment	Comment	Recommendation <i>(Suggested deletion/ amendment/ addition)</i>
---------------------------------------	---	---	---------	--

² Definitions adapted from the Unesco: Guide for Ensuring Inclusion and Equity in Education (2017). Available at: http://www.unesco.org/new/en/media-services/single-view/news/a_guide_for_ensuring_inclusion_and_equity_in_education/ and the National Integrated Early Childhood Development Policy, 2015 Available at: <https://www.unicef.org/southafrica/media/531/file/National%20Integrated%20Early%20Childhood%20Development%20Policy.pdf>

<i>(Sections being amended)</i>			<i>(State why the proposed amendment is not supported or what the problem is with the provision)</i>	
<p>Section 91(1): “Early childhood development, for the purposes of this Act, means the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school-going age.”</p>	<p>Clause 45(1): “(1) Early childhood development, for the purposes of this Act, means the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school going age or, in the case of a child with developmental difficulties and disabilities, until the year before</p>	<p>Clause 45 seeks to amend section 91 by amending the definition of early childhood development to include reference to children with developmental difficulties and disabilities.</p>	<p>We are concerned about the inclusion of the following words which appear at the end of clause 45(1): <i>“...in the case of a child with developmental difficulties and disabilities, until the year before the child enters school.”</i></p> <p>The above words are an unnecessary addition as they create a situation where a number of children with disabilities are kept in Early Childhood Development centres for a long time despite being of school going age (Section 5(4)(a)(ii) of the South African Schools Act). This will undoubtedly delay these children from entering the schooling system, and when they eventually do, they will do so when they are much older.</p> <p>The proposed words will also give public schools an excuse not to admit children with disabilities and reasonably</p>	<p>We recommend a deletion of the following words which appear in clause 45(1) of the Bill: “...in the case of a child with developmental difficulties and disabilities, until the year before the child enters school.”</p>

	the child enters school.”		accommodate them as required by various legislation and policies, including the Policy on Screening, Identification, Assessment and Support (SIAS Policy).	
Section 92: “(1) The Minister...must include in the departmental strategy a comprehensive national strategy aimed at securing a properly resourced, coordinated and managed early childhood development system, giving due consideration as provided in section 11, to children with	Clause 46(a)-(b): “(a) maintain a record of all the early childhood development programmes registered in the province with specific mention of inclusive programmes; ” (b) within the national strategy referred to in subsection (1), provide for a provincial strategy aimed at	Clause 46 seeks to amend section 92: (a) inserting a new subsection that the Minister must develop a comprehensive national strategy aimed at securing a properly resourced, coordinated, managed and inclusive early childhood development system. Furthermore, that MECs must ensure their provincial strategies are inclusive and provide for children with disabilities and special needs by: (b) amending subsection (2) (a) to require the MEC for	We welcome the addition of the following words in clause 46(a) of the Bill: “...with specific mention of inclusive programmes”. However, it is not clear what is meant by “inclusive programmes”.	As suggested above in the General Comments, we recommend that a broad definition for “inclusive programmes” be included in the Bill.

<p>disabilities or chronic illnesses.</p> <p>(2) The MEC for social development must—</p> <p>(a) maintain a record of all the early childhood development programmes registered in the province; and</p> <p>(b) within the national strategy referred to in subsection (1), provide for a provincial strategy aimed at a properly resourced, coordinated and managed early childhood</p>	<p>a properly resourced, coordinated and managed inclusive early childhood development system.”</p>	<p>social development to maintain a record of registered early childhood development programmes in the province with specific mention of inclusive programmes.</p>		
--	--	--	--	--

development system.				
<p>Section 106: “(2) The national norms and standards contemplated in subsection (1) must relate to the following...</p>	<p>Clause 57(c): “rehabilitation services for children with disabilities;”</p>	<p>Clause 57 seeks to amend section 106 by adding the phrase “rehabilitation services for children with disabilities” to the requirements for the national norms and standards for child protection.</p>	<p>We welcome the inclusion of a reference to the specific needs of children with disabilities, but the use of the term “rehabilitation services” is not clear.</p> <p>Our understanding is that rehabilitation, and habilitation services more particularly, refer to the right of persons with disabilities to access a full range of services in the community to allow for maximum independence and participation. It is however unclear what the drafters of the Bill mean by “rehabilitation services.”</p>	<p>The definition of “rehabilitation services” must be amended to refer to “<i>rehabilitation and habilitation services</i>” and included in the definitions section of the Bill.</p> <p>Rehabilitation and habilitation must be defined to include a broad range of therapeutic interventions, including, but not limited to, physiotherapy, occupational therapy and speech therapy.</p>

<p>Section 188:</p> <p>“A foster parent may not take any decisions contemplated in section 31 (1) (b) involving a child without giving due consideration to—</p> <p>(a) any views and wishes expressed by the child, bearing in mind the child’s age, maturity and stage of development; “</p>	<p>Clause 95:</p> <p>“(a) any views and wishes expressed by the child, bearing in mind the child’s age, maturity and stage of development and disability, if any;”</p>	<p>Clause 95 seeks to amend section 188 by including reference to disability.</p>	<p>We are concerned about the inclusion of “disability” as one of the factors to be taken into account by parents when considering the views and wishes expressed by the child. The mere fact that a child has a disability should not impact the extent to which their views and wishes are taken into account.</p> <p>More particularly, disability is a broad term and does not in and of itself affect a child’s ability to express their views and wishes. Accordingly, disability ought not to be a factor which is taken into account when considering a child’s views and wishes.</p> <p>Insofar as a disability may have an effect on cognitive ability, the reference to “stage of development” is sufficient to give due consideration to this. It is not necessary to single out disability as a factor which influences the extent to which the wishes and views of a child are given due consideration.</p>	<p>We recommend that the reference to disability be deleted.</p> <p>We also recommend that the General Regulations Regarding Children (GNR.261 of 1 April 2010) be revised to reflect this amendment.</p>
--	---	---	---	---

<p>Section 194: “(2) The national norms and standards contemplated in subsection (1) must relate to the following...</p>	<p>Clause 98: “(IA) access to rehabilitation services for children with disabilities;”</p>	<p>Clause 98 seeks to amend section 194 to insert an additional requirement for the national norms and standards for child and youth care centres which relate to access to rehabilitation services for children with disabilities.</p>	<p>We welcome the proposed amendment to include access to rehabilitation services for children with disabilities. However, as stated above, it is unclear what is meant by rehabilitation services.</p>	<p>We recommend that a definition for “rehabilitation services” be provided in the definition section of the Bill as outlined above.</p>
---	---	---	---	--