

INPUTS FOR THE CHILDREN'S THIRD AMENDMENT BILL

SUBMISSION No.1 FROM SMARTSTART

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Introduction

This is one of two submissions from SmartStart. **This submission a) responds to the government's proposed amendments, and b) proposes how within the framework of two chapters, a regulatory system for ECD programmes can be made to work more coherently and effectively.**

Submission No.2 sets out a different approach that enables all ECD programmes to be regulated under one chapter of the Act. **It should be noted that of the two approaches, the second (one chapter) is simpler and requires fewer amendments to be made.**

Duplication created by dual registration

The current interpretation of the Children's Act (the Act) is that early childhood development (ECD) programmes with more than six children must be registered as partial care. They must deliver ECD programmes as defined in the Act, which must be registered as well. So an ECD programme provided out of a partial care facility is subject to two sets of legal processes, each with its own requirements and norms and standards, creating unnecessary duplication and bureaucratic burdens.

The 'one size fits all' approach and lack of differentiation between different types of ECD programmes

The Act does not explicitly provide for differentiation between ECD programme modalities, resulting in a 'one size fits all' approach to regulatory oversight. However, ECD programmes in South Africa are characterised by their diverse settings. The current approach therefore causes particular difficulties for ECD programmes which are 'non-centre based', such as child minders and playgroups, and which serve high poverty rural, peri-urban and informal housing areas. As a result, provincial DSDs have tended to focus on partial registration, to the exclusion of non-centre based ECD programmes.

Onerous and inappropriate registration requirements

The nature of the types of premises and structures in which many ECD programmes operate, makes the current health, safety and infrastructure requirements of the Norms and Standards for Partial Care both inappropriate and unrealistic. Furthermore, an additional layer of health and safety standards is introduced by the requirement for partial care facilities to comply with municipal health and building standards for the purposes of registration. It is neither logical nor desirable for ECD programmes to have

to comply with parallel sets of health, safety and infrastructure standards in the Act's norms and standards and local by-laws *for the purposes of registration*. This approach works against the streamlining and clarity that are needed to facilitate wider registration. There is also considerable variation between municipalities in terms of their enforcement of by-laws.

Impact and problem statement

In short, the current Act does not speak to the realities of large numbers of ECD programmes, results in significant duplication, is unduly onerous, and is interpreted and applied inconsistently. The types of programmes most affected are often relied upon by vulnerable families for both child minding and access to early learning and development opportunities.

Various reviews by the government have found that because of the barriers created by the current registration system, many ECD centres are either not trying to register or failing to meet registration requirements. Unregistered ECD programmes are often allowed to keep running, but without proper oversight to ensure safety and quality. At the same time, these programmes are denied the opportunity to access the very subsidies that would help them to improve their facilities and provision.

The impact is significant:

- **the system acts as a substantial impediment to the realisation of the government's key objective of securing universal access to quality ECD; and**
- **there are missed opportunities to secure better social, emotional, physical and cognitive outcomes for children living in poor communities.**

Proposal

If ECD programmes are to continue to be regulated under two chapters of the Act, then there should be a one-step registration system for partial care under Chapter 5 and a one-step registration system for other ECD programmes under Chapter 6. In addition, regulations should define different types of ECD programmes ('modalities') in order to enable appropriate differentiation in the regulations and norms and standards.

While the current consultation process is only concerned with the Act itself, it should be noted that a central plank of our recommendations is that the regulations and norms and standards should focus on *basic minimum standards* for ECD programmes, creating an accessible threshold that pulls as many ECD programmes as possible into the regulatory net, while safeguarding children's wellbeing. The review of the regulations and norms and standards will therefore be as important as the current review of the Act.

Furthermore, the norms and standards in the Act's regulations are the appropriate vehicle to stipulate the basic minimum health, safety and infrastructure standards for ECD programmes *for the purposes of registration*. Local by-laws should be enforced separately through their proper processes.

In order to ensure that this amendment process results in a more coherent, appropriate and effective regulatory system, we are calling on the government to publish the draft revised regulations for ECD (including the norms and standards) in parallel to the Children’s Amendment Bill. This is necessary to show how the new system will actually work in practice and how the different levels of law will speak to each other. It will also enable parliament and the ECD sector to work with government through the Bill’s passage to identify and resolve implementation gaps.

The amendments set out below achieve the following:

- a one-step registration and funding system for ECD centres under Chapter 5 (which would no longer need to register under Chapter 6 as well);
- a one-step registration and funding system for non-centre based ECD programmes under Chapter 6 (covering health and safety as well as programmatic content);
- only ECD centres and other ECD programmes with more than six children *must* register, while smaller centres and programmes *may* register voluntarily – in addition, the regulations would set out other types of ECD programmes that are exempt from compulsory registration but may register voluntarily;
- the same headings/norms are used for the Norms and Standards for Partial Care and for the Norms and Standards for ECD Programmes;
- the norms and standards properly cross-reference the National Early Learning and Development Standards and the National Curriculum Framework for Birth to Four - these statutory guidelines did not exist when the Children’s Act was drafted but they now provide the statutory framework for the content of all ECD programmes;
- the use of conditional registration is prescribed nationally;
- a new quality assurance system enables supporting good practice standards and continuous improvement to be dealt with separately to enforcing basic minimum standards.

CLAUSE COMMENTED ON	PROPOSAL	MOTIVATION
Section 1 – subsection (j)	(j) 'early childhood development centre' means a partial care facility that provides an early childhood programme for children from birth until they enter Grade R/formal school to school going age , <u>which is operated in rooms or spaces that are not used for domestic purposes at other times and that is attended by children for more than 16 hours total per week;</u>	<p>In order to create greater clarity and clearer distinctions between different ECD modalities, we propose that an ECD centre should be defined by the fact that:</p> <ul style="list-style-type: none"> - it is operated in rooms or spaces that are not used for domestic purposes at other times; - children attend for at least 16 hours per week. <p>Rooms or spaces that are not used for domestic purposes at other times could include structures on private property <i>that are only used for the purpose of the ECD programme</i> – e.g. a converted garage.</p> <p>Other ECD programmes run in private homes where there is no dedicated space for the programme, would be regulated under Chapter 6, and could be subject to an overall cap (e.g. 10 children, to be defined in regulations).</p> <p>'School going age' is not a legal concept and is likely to create some confusion. It is proposed that the reference is instead to entering 'Grade R/formal school'.</p>
Section 1 – subsection (oA)	(oA) 'non-centre based early childhood development programme' means any early childhood development programme, as described in Section 91, that is not provided from a partial care facility.	<p>Non-centre based ECD programmes must be defined because they are referred to in a government amendment to Chapter 6.</p> <p>It is essential that the definition makes clear the distinction between these types of ECD programmes and partial care, in order to provide coherence across Chapters 5 and 6.</p>
Section 5		<p>We are unclear why the various amendments proposed to Section 5 in the last version of the draft Bill have been removed. It would be helpful for DSD to communicate with the ECD sector on this and provide assurances that those amendments will now be placed in regulations.</p>
Clause 8 – Application	(4) This Act applies to all children who are citizens of <u>lawfully in</u> the Republic, including unaccompanied and separated migrant children."	<p>The proposed restriction of the application of the Act to children who are citizens is unacceptable and we question whether it would be in line with international human rights instruments (e.g. the UN Convention on the Rights of the Child) to which South Africa is signatory. The Act should apply to all children lawfully in South Africa.</p>
Clause 12 – Discipline of children		<p>It is disappointing that the government has decided to remove its amendment to abolish the common law defence of reasonable chastisement. This should be re-instated as per the previous draft of the Bill.</p>

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NEW CLAUSE 13A	<p>13A Right to Early Childhood Development Programmes</p> <p>(1) Every child has the right to have access to quality early childhood development programmes that ensure to the maximum extent possible the survival and development of the child.</p> <p>(2) Government is responsible for taking all appropriate legislative, administrative and other measures necessary to secure the realisation (and progressive realisation, where appropriate) of the universal early childhood development rights of all children.</p>	<p>The proposed amendment would make explicit children’s right to ECD and is in line with the National Integrated Early Childhood Development Policy, the government’s commitment to universal access to ECD, the Constitution and international law (specifically the UN Convention on the Rights of the Child, to which South Africa is a signatory).</p> <p>Section 29 of the Constitution holds that “everyone has the right to basic education”. This must include a child’s rights to education in the early years. This is further bolstered by section 28 of the Constitution which requires that we must adopt an interpretation that promotes the “best interests” of the child.</p> <p>Further, under international law, the right to education under the UNCRC has been confirmed to include early learning. Other clauses in the UNCRC (such as Articles 5, 6 and 31) are also understood to combine to create a right to early childhood development. (See General Comment No.7 on the UNCRC).</p> <p>The wording in proposed subsection (1) mirrors the wording in Article 6 of the UNCRC, and therefore confirms a legal principle to which South Africa has already subscribed.</p>
Clause 76 - Partial care	<p>76. (1) Subject to subsection (2), partial care is provided when a person or organisation, whether for or without reward, takes care of six <u>one</u> or more children on behalf of their parents, guardians or care-givers during specific hours of the day or night, or for a temporary period, by agreement between the parents, guardians or care-givers and the provider of the service, but excludes the full-time care of a child <u>and the care of a child in</u>;</p> <p>(2) Partial care facilities are-</p> <p>(a) early childhood development centres as defined in Section 1;</p> <p>(b) an after school care service, other than a service provided by a school as defined in the South African School’s Act 1996, (Act No. 84 of 1996), for a child attending a primary school or a secondary school; and</p>	<p>No minimum programme size is included. This is because minimum programme size should only be engaged in relation to the <i>requirement to register</i>, not as part of the definition. See amendment to Section 80 below which states that programmes with six or fewer children are exempt from compulsory registration. All programmes with six or fewer should have the option to register as a matter of good practice.</p> <p>The government should reinstate subsection (2) from the previous version of the draft Bill, which defined the different categories of partial care. This speaks directly to the later new requirement in Section 79 to provide norms and standards specific to the type of partial care.</p> <p>Subsection (3) is no longer required, as a result of changes to subsection (1) and Section 80.</p>

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	<p>(c) temporary respite care services for children including children with disabilities.</p> <p>(3) A partial care facility operated or managed by the Department or provincial department or by a municipality may register in accordance with section 80 despite being unable to meet the requirement of taking care of six or more children as contemplated in subsection (1).</p>	
<p>Clause 77 - Strategy concerning partial care</p>	<p>(2) The MEC for social development must- (a) maintain a record of all the registered partial care facilities <u>early childhood development centres, after school care services, and temporary respite care services</u> in the province;</p>	<p>It should be the responsibility of provincial DSDs to identify <i>all</i> partial care facilities in their province, not only registered facilities. This is important in terms of ensuring that all facilities are pulled into the regulatory net. It also enables PDSs to fulfil their enforcement duties under Section 85.</p> <p>It is also important that the record maintained at provincial level distinguishes between different types of partial care facilities in order that the provision of places at ECD centres can be properly planned and monitored.</p>
<p>Section 78 – Subsection (1)</p>	<p>(1) The MEC for social development may, from money appropriated by the relevant provincial legislature, must set aside money for partial care from the monies appropriated by the relevant provincial legislature and may, from such money appropriated provide and fund partial care facilities for that province, taking into consideration the national and provincial strategies contemplated in section 77.</p>	<p>These amendments would bring Section 78 into line with the amendments proposed by the government to Section 93.</p>
<p>Section 78 – Subsections (2) and (3)</p>	<p>(2) A partial care facility only qualifies for funding contemplated in subsection (1) if it is <u>registered or conditionally registered</u>. (a) must be managed and maintained in accordance with this Act; and (b) must comply with- (i) the prescribed national norms and standards contemplated in section 79 and such other requirements as may be prescribed; and (ii) the structural safety, health and other requirements of the municipality of the area where the partial care facility is situated.</p>	<p>The existing provisions in subsection (2) and (3) are unnecessarily complex. The general requirement to register is in Section 82 and only needs to be repeated here insofar as it relates to eligibility for funding.</p> <p>The registration process is the process that ensures the fulfilment of existing subsections (2)(a) and (b). There is no mechanism for establishing that these subsections are fulfilled other than the registration process, so the purpose of subsections (2) and (3) as currently drafted is unclear. It is also important not to include undue requirements under funding as this impacts on how provinces manage the funding processes and results in duplication between funding and registration processes in practice.</p>

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	<p>(3) The owner or manager of a partial care facility or provider of a partial care service only qualifies for funding contemplated in subsection (1) if such owner, manager or provider complies with the prescribed national norms and standards contemplated in section 79 and such other requirements as may be prescribed.</p>	<p>The approach should be that:</p> <ol style="list-style-type: none"> 1. S82 establishes that a partial care facility must be registered and must comply with the norms and standards and such other requirements as may be prescribed; 2. S78 establishes that a partial care facility is only eligible for funding if it is registered or conditionally registered. In this section, it is not necessary to repeat point 1. <p>It therefore creates clearer law and process for this section simply to refer to registration or conditional registration as the prerequisite for funding.</p>
Section 78 – Subsection (3A)	<p>(3A) A <u>conditionally registered</u> partial care facility registered with conditions qualifies for funding notwithstanding only partial compliance with the prescribed national norms and standards.</p>	<p>The intention of this amendment is supported but the term ‘partial care facility registered with conditions’ will cause significant confusion and conflates two different things. See commentary to Section 83 below.</p>
Section 78 – Subsection (4)	<p>(4) The MEC for social development may <u>must</u> prioritise, and fund partial care facilities and services-</p> <p>(a) in poverty declared wards in the province, taking into consideration the national and provincial strategies contemplated in section 77 and in communities where families lack the means of providing proper shelter, food and other basic necessities of life to their children</p>	<p>We are very concerned that the government is proposing removing the duty to prioritise the funding of partial care in poor communities. The proposed amendments to section 78(4) turns the obligation to prioritise the most vulnerable facilities into a discretionary action. This works against the government’s overarching pro-poor goals and will also undermine progress towards universal access to ECD.</p> <p>It is our view that this amendment is impermissible because:</p> <ul style="list-style-type: none"> - It is a regressive amendment enacted without any public policy justification, and therefore will likely be unconstitutional. When the state takes away existing rights they are under an obligation to provide reasons that ought to be scrutinised at a higher threshold. - The rights to education and the rights of the child are some of the most significant rights in the Constitution. Both section 28, entitled “Children”, and section 29, entitled “education” of the Constitution are known as “immediately realisable” rights. This means that a state’s capacity and resources must be adjusted to meet the identified need; the identified need cannot be ignored or excluded from the state’s attention for reasons of resourcing. - It is anti-developmental. Any law, policy or development plan must prioritise the most marginalised and place considerable weight to the

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		<p>best interests of children (Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC 19).</p> <ul style="list-style-type: none"> - The state must legislate in a manner that ensures the safety and protection of children. As children in poor communities are more likely to attend facilities that are unsafe, it is incumbent on PDSs to prioritise funding in these communities. - The state must legislate in a manner that ensures the dignity of the child and promotes equality. The rights to equality and dignity are preeminent values in the Constitution and are of pivotal significance in a developing society like ours. For true dignity and equality to be achieved, a child's early development and learning are vital. - This amendment is unlawful in light of the MEC's obligation to prioritise the needs of the vulnerable. According to case law, the MEC has a legal obligation to prioritise the needs of the vulnerable, which means this duty cannot be amended to be discretionary. <p>The proposed changes to subsection (4)(a) introduce unnecessary confusion. The term 'poverty declared wards' has no meaning in law. Therefore it is more straightforward to leave this subsection unamended.</p>
Section 78 – Subsection (4)	(aA) in rural areas; and	This amendment should be inserted to reflect the identical amendment that the government is proposing to Section 93.
Section 78 – Subsection (5)	(5) The funding for infrastructure for partial care facilities does not apply to private homes of registered non-profit organisations, private homes in general, business properties or properties not owned by a non-profit organisation	<p>This amendment should be deleted.</p> <p>We are of the opinion that this proposed amendment will put the Department in violation of section 28(2) of the Constitution of South Africa that holds that— “A child's best interests are of paramount importance in every matter concerning the child”.</p> <p>The greatest proportion of ECD services are provided by private providers on private property. According to the last ECD audit, it was estimated that about 55 per cent of partial care provision is provided by private providers. There are a wide range of infrastructure problems faced by South African ECD centres and most – especially those that service the poorest areas – are in need of investment and support.</p>

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		<p>This amendment therefore means that the majority of poor children are likely to be excluded from receiving funding to ensure that they are cared for in safe and healthy environments.</p> <p>It is our view that such exclusions will be constitutionally impermissible for the following reasons:</p> <ul style="list-style-type: none"> - Any policy or law that excludes the majority of poor children from any funding assistance cannot be rational or reasonable. - Any law, policy or development plan must prioritise the most marginalised and place considerable weight to the best interests of children (Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC 19). - The state must legislate in a manner that ensures the safety and protection of children. As many children attend ECD programmes in private facilities, it is incumbent upon the government to ensure that these facilities are safe. - The state must legislate in a manner that ensures the dignity of the child and promotes equality. The rights to equality and dignity are preeminent values in the Constitution and are of pivotal significance in a developing society like ours. For true dignity and equality to be achieved, a child’s early development and learning are vital. The state may not therefore legislate in a way that has the potential to further marginalise the most vulnerable, by impeding their access to quality ECD. -The state must legislate in a manner that considers the child’s “precise real-life situation” (S v M [2007] ZACC 18 para 24).
Section 79 – Subsection (1)		<p>We welcome the proposal that the norms and standards should be differentiated and specific to the type of partial care.</p> <p>It is unclear what is meant by ‘private hostels’, particularly when ‘full-time care’ has been excluded from the scope of partial in the proposed amendment to Section 76.</p>
Section 79 – Subsection (2)	<p>(2) The national norms and standards contemplated in subsection (1) must relate to the following:</p> <p>(a) <u>minimum health and safety standards</u> a safe environment for children;</p>	<p>By streamlining and amending the headings, it will be possible to create simpler and clearer norms and standards.</p> <p>It is also important to emphasise that DSD’s central role/duty is in relation to the care and stimulation of children. At the moment, the</p>

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	<p>(b) proper care for sick children or children that become who are ill; (c) adequate space and ventilation<u>separation of age groups;</u> (d) safe drinking water; (d) hygienic and adequate toilet <u>and ablution</u> facilities; (f) safe storage of anything that may be harmful to children; (g) access to refuse disposal services or other adequate means of disposal of refuse generated at the facility; (h) a hygienic area for the preparation of food for children; (i) measures for the separation of children of different age groups; (j) the drawing up of action plans for emergencies; and (k) the drawing up of policies and procedures regarding health care at the facility. (e) record-keeping; (f) support for children with disabilities; (g) qualifications, skills and training.</p>	<p>norms and standards focus solely on health and safety, which is a municipal responsibility (under the National Health Act). So while minimum health and safety standards should be covered here, they should be balanced with wider programmatic standards (see new subsection (2A) as well).</p> <p>Notes on headings/norms:</p> <ul style="list-style-type: none"> - Current headings (d), (f), (g), (h) and (j) can all be covered under (a). - Current heading (k) is covered under (b). - Current heading (i) is combined with (c). - The rights and needs of children with disabilities are not adequately addressed under the existing N&S and the introduction of new heading (f) will help to deal with this (in line with section 94(3) of the Act). - Record-keeping is introduced as a new heading (e). This is currently covered in Regulation 18 but for the purposes of clarity and transparency (making all standards visible to programme owners) it is more appropriately situated in the norms and standards.
Section 79 – NEW SUBSECTION (2A)	<p><i>Insert new subsection after subsection (2):</i> <u>(2A) An ECD centre must, in addition to the national norms and standards contemplated in subsection (2):</u> <u>(a) comply with national norms and standards relating to:</u> <u>(i) nurturing environments that provide protection, support and security;</u> <u>(ii) appropriate and adequately resourced environments for play and learning;</u> <u>(iii) support and information for parents and caregivers; and</u> <u>(iv) group size and ratios.</u> <u>(b) secure that their early childhood development programme meets the learning and development requirements of the National Early Learning and Development Standards and the</u></p>	<p>In order to create a one-step registration system for partial care under Chapter 5, a comprehensive set of norms and standards are required that cover programme content as well as health and safety. This will represent significant improvement over the current system under which partial care facilities have to register their site and programme separately. It will also better reflect DSD’s central function/duty which is in relation to the care and stimulation of children.</p> <p>It is therefore proposed that new subsection (2A)(a) pulls across relevant standards from the Norms and Standards for ECD Programmes.</p> <p>In respect of proposed new subsection (2A)(b), when the Children’s Act was originally drafted these key documents did not exist. They now provide the statutory framework for the content of all ECD programmes. It is essential therefore that they are properly cross-referenced on the face of the Act.</p>

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	<p><u>National Curriculum Framework for Children from Birth to Four.</u></p>	<p>These documents mean that there is no longer a need for existing standards that relate to ECD programme content under headings 94(2)(a),(b),(d),(e) and (f). Such standards are undesirable because they create a third tier of regulation for the same thing and cause unnecessary confusion. Instead, the Act and its regulations need to provide clarity on the relationship between registration requirements and NELDS and the NCF.</p> <p>(See as well Section 94 rationale on specific headings.)</p>
<p>Section 79 – NEW SUBSECTION</p>	<p>79(2B) (a) The norms and standards contemplated in subsection (2) must harmonise and provide the authoritative list of requirements for registration of partial care facilities.</p> <p>(b) The development of the national norms and standards contemplated in subsection (2) must account for the inclusion of partial care facilities that serve poor communities.</p> <p>(c) The norms and standards contemplated in subsection (2) may differentiate between partial care facilities with different characteristics.</p>	<p>It is important to make clear that the requirements for registration should not be added to at provincial or municipal levels as this creates both inconsistencies and barriers to registration. Amendment (2B)(a) achieves this by providing that the norms and standards are the authoritative list of requirements for registration.</p> <p>(2B)(b) emphasises the need for the norms and standards to be realistic and context-appropriate in order to pull as many partial care facilities as possible into the regulatory net.</p> <p>(2B)(c) recognises that for some standards, it will be appropriate to differentiate between partial care facilities that have different characteristics (e.g. the types of premises that they are offered for). This is likely to be important in order to fulfil subsection (b).</p>
<p>Section 80 – Subsection (1) and (2)</p>	<p>(1) Any person or organisation may establish or operate a partial care facility provided that <u>if the facility is attended by more than six children it-</u></p> <p>(a) is registered with the provincial government of the province where that facility is situated; <u>and</u></p> <p>(b) is managed and maintained in accordance with any conditions subject to which the facility is registered.</p> <p><u>(1A) In order to be registered, a partial care facility must comply with the prescribed national norms and standards contemplated in section 79 and such other requirements as may be prescribed by regulation.</u></p> <p>(2) The Minister may by regulation exempt any person or organisation or any category of person</p>	<p>As discussed above, minimum size is not relevant to the definition of partial care facility but is relevant to the requirement to register. In line with the current regulatory framework, it is therefore proposed that only facilities with more than six children <i>must</i> register.</p> <p>However, it is important that partial care facilities with six or fewer children or that are exempt from registration under subsection (2) are not excluded from the regulatory and funding frameworks and can register voluntarily. Section 80(2A) therefore introduces voluntary registration for facilities that are exempt from compulsory registration.</p> <p>Facilities may choose to register voluntarily in order to provide reassurance to parents that they meet minimum standards and/or to access funding. Voluntary registration is used for certain categories of ECD programmes in other countries, including the UK and New Zealand, and widens the scope of regulation and access to funding,</p>

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	<p>or organisation from the requirement to register on such conditions as may be prescribed.</p> <p><u>(2A) A person or organisation operating a partial care facility which is exempt from the requirement to register, may voluntarily register the facility with the provincial head of social development of the province where that facility is operated, in which case it must be:</u> <u>(a) registered with the provincial government of the province where that facility is situated;</u> <u>(b) managed and maintained in accordance with any conditions subject to which the facility is registered; and</u> <u>(b) comply with the prescribed national norms and standards contemplated in section 79 and such other requirements as may be prescribed.</u></p>	<p>but using an enabling rather than a compulsory approach in order to prevent regulatory over-reach.</p> <p>We strongly oppose the government's proposal to reduce the registration threshold from 6 children to 5 children through their amendment to Section 76. This will have a significant impact on the sector as many childminders care for the current maximum of six children and will struggle to meet the higher requirements of partial care registration. Childminders often serve poor communities and so this will have a disproportionately negative impact on under-resourced communities.</p> <p>In addition, we propose that subsection (1) should be separated out to make clear that compliance with norms and standards and other prescribed requirements <i>is a pre-requisite for registration</i>. This is currently implied in the Act but not made clear.</p> <p>'by regulation' is added in (1A), to make clear that the 'other requirements as may be prescribed' specifically means prescribed under this Act. Currently it is unclear whether this provision effectively engages all other applicable law for the purposes of registration, which should not be the case.</p>
Section 82 – Subsection (1)(a)	<p>82. (1) The provincial head of social development must-</p> <p>(a) within three six months of receiving the application consider an application for registration or conditional registration or for the renewal of registration and either reject the application or, having regard to subsection (2), grant the registration or renewal with or without conditions;</p>	<p>The current time-frame for the determination of applications is too long and leaves partial care facilities in an uncertain legal position. The long time-frame also places children at greater risk. The time-frame should therefore be reduced.</p> <p>The reference to 'with or without conditions' is unclear because it could refer to full registration with conditions (e.g. pertaining to the size of the programme) or to conditional registration (i.e. registration where a partial care facility is not yet fully compliant with registration requirements). It is also not needed – see Section 82(5A) and response to Section 83 below.</p>
Section 82 – Subsection (1)(c)	<p>(c) state in the certificate of registration <u>or conditional registration</u> the period for which the registration will remain valid.</p>	<p>This amendment helps to reduce repetition and is consequential to the amendments proposed to Section 83 below.</p>
Section 82 – Subsection (1)(d)	<p><i>New subsection (d):</i> <u>(d) state in a certificate of conditional registration:</u> <u>(i) measures required to achieve compliance;</u></p>	<p>The existing provisions relating to conditional registration are unclear (see also response to Section 83 below).</p>

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	<u>(ii) the period within which compliance must be achieved.</u>	This is the correct part of the Act in which to specify what must be included in a certificate of conditional registration.
Section 82 – Subsection (5)	(5) Notwithstanding section 78 (3) a provincial head of social development may assist the owner or manager of a partial care facility where registration with conditions was granted , to comply with the prescribed national norms and standards contemplated in section 79 and such other requirements as may be prescribed.	<p>We consider this amendment to be regressive. The government has deleted the comparable amendment to Section 95 and should remove this amendment too.</p> <p>While the assistance power is likely often to be used to support conditionally registered facilities to achieve full compliance, PDSDs should also have the discretion to support facilities that have not yet received conditional registration where there is no risk to the safety and wellbeing of children (i.e. where the PDSD does not have to close down the facility under Section 84). The government's amendment as proposed is likely to undermine the ability of PDSDs to support and scale up ECD provision in poor communities.</p>
Section 82 – NEW SUBSECTION	<p><i>New subsection (5A):</i> <u>(5A) The registration or renewal of registration of a partial care facility may be granted on such stipulations as the provincial head of social development may determine, including stipulations specifying the type of partial care that may or must be provided in terms of the registration.</u></p>	<p>This subsection is based on current wording in Section 83 and seeks to make clear the distinction between a) full registration with conditions and b) conditional registration. To help make this distinction clearer, we propose that for a), conditions should be called 'stipulations'. See also rationale for Section 83 below.</p> <p>The subsection is not concerned with conditional registration but with the process of granting registration and is therefore properly situated in Section 82.</p>
Section 83 - Conditional registration	<p>Conditional registration Conditions relating to Registration</p> <p><u>83. (1) Conditional registration may be granted by the provincial head of social development where a partial care facility is not compliant with the norms and standards contemplated in Section 79 and such other requirements as may be prescribed, but meets the minimum prescribed standards contemplated in subsection (2).</u></p> <p><u>(2) The Minister may prescribe minimum standards for conditional registration.</u></p> <p>The registration, or renewal of registration of a partial care facility may be granted on such</p>	<p>This section currently conflates two different things and will continue to work against the progressive use of conditional registration in the regulatory system. The following two types of registration must be kept distinct:</p> <ol style="list-style-type: none"> 1. Full registration with no areas of non-compliance but conditions attached (e.g. pertaining to the size or hours of the programme). This is 'registration with conditions' and not conditional registration. Facilities that have this type of registration receive full registration and do not have to make changes within a certain time-frame, because the conditions relate to <i>the ongoing parameters of operation</i>. 2. Conditional registration is given where there are areas of non-compliance with the norms and standards and other registration requirements, and therefore certain changes must be made within a specified time-frame.

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	<p>conditions as the provincial head of social development may determine, including [conditions]—</p> <p>(a) — conditions specifying the type of partial care that may or must be provided in terms of the registration;”;</p> <p>(b) — [stating] a specification of the period [for] within which the [conditional registration will remain valid] conditions must be complied with; and”; and</p> <p>(c) — [providing for] any other matters that may be pre-scribed.”..</p>	<p>Point 1. should be dealt with in Section 82 (see proposed new subsection 82(5A)) and kept separate to provisions for conditional registration.</p> <p>There is currently no definition of conditional registration in the Act, despite the use of the term. This means that some provinces do not use conditional registration at all, while others have differing interpretations of the threshold for conditional registration, resulting in significant inconsistencies between provinces. In order to promote consistent interpretation and implementation, conditional registration needs to be defined. The definition is proposed in new 83(1).</p> <p>Furthermore, minimum standards for conditional registration should be established nationally and not set province by province. This is necessary in order to a) minimise the risk of harm to children, b) promote consistency and fairness, c) ensure a level playing field for funding. It is therefore proposed that a new duty is placed on the Minister to determine minimum standards for conditional registration by regulation.</p> <p>Existing subsection (b) is dealt with in the amendment to Section 82(1)(c) above and should be deleted.</p>
Section 84	<p>84. (1) The provincial head of social development may cancel the registration or conditional registration of a partial care facility by written notice to the registration holder if-</p> <p><u>(a) there is a direct and immediate risk to the health, safety or wellbeing of children;</u></p> <p>(b) any condition subject to which the registration or renewal of registration was issued is breached or not complied with;</p> <p>(b) the registration holder or the management of the facility contravenes or fails to comply with a <u>Notice of Enforcement as contemplated in Section 85 a provision of this Act;</u></p> <p>(d) the registration holder becomes a person who is not a fit and proper person to operate a partial care facility; or</p> <p>54</p>	<p>Sections 85 and 86 are not entirely consistent at present, providing for both cancellation of registration and enforcement notices as enforcement mechanisms - remedies which are substantially different and could lead to significant variations in how compliance is enforced.</p> <p>Cancellation of registration for non-compliance with norms and standards is a severe response and in practice rarely happens. It should only be the first line response if there is an immediate risk to the health and safety of children. In other cases, officials should either use a notice of enforcement or the inspection and monitoring system to enforce compliance. It is not appropriate to cancel registration if a Notice of Enforcement has not first been issued and children are not at risk.</p> <p>In other words for safe but non-compliant programmes the stages of enforcement should be:</p> <ol style="list-style-type: none"> 1. monitoring and inspection regime (written report telling facility what changes are needed)

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	<p>(e) a person who is not a fit and proper person to assist in operating a partial care facility is employed at or engaged in operating the facility.</p> <p>(2) The provincial head of social development may in the case of the cancellation of a registration in terms of subsection (1) (a), (b), (c) or (e)-</p> <p>(a) suspend the cancellation for a period to allow the registration holder to correct the cause of the cancellation; and</p> <p>(b) reinstate the registration if the registration holder corrects the cause of the cancellation within that period.</p> <p>(3) 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 noncompliance with those national norms and standards, conditions, requirements or provision.</p>	<p>2. Notice of Enforcement (as per Section 85)</p> <p>3. cancellation of registration</p> <p>The proposed amendments to Section 84 should therefore be read in conjunction with the proposed amendments to Section 85. In particular, the scenarios in which registration can currently be cancelled in subsections 84(1) are covered under new 85(1) and become scenarios in which a Notice of Enforcement should be issued. It follows from the provision that non-compliance with a Notice of Enforcement can be the basis for cancellation of registration (new 84(1)(b) that all of these circumstances can lead to the cancellation of registration after due process has been followed.</p> <p>Subsection (1)(d) is not required because this is assessed for the purposes of registration. Subsection (1)(e) is moved to Section 85.</p> <p>Subsection (2) is no longer required because the PDSO will have first used a Notice of Enforcement to provide time for the facility to correct the problem.</p> <p>These amendments will together create a more coherent, transparent and consistent enforcement regime.</p>
Section 85 – Subsection (1)	<p>85. (1) A provincial head of social development may by way of a written notice of enforcement instruct-</p> <p>(a) a person or organisation operating an unregistered partial care facility-</p> <p>(i) to stop operating that facility; or</p> <p>(ii) to apply for registration in terms of section 81 within a period specified in the notice;</p> <p>or</p> <p>(b) a person or organisation operating a registered partial care facility otherwise than in accordance with the provisions of this Act or any conditions subject to which the registration was issued, to comply with those provisions or conditions;</p> <p><u>(c) a person or organisation operating a partial care facility to cease employing a person who is</u></p>	<p>These amendments should be read in conjunction with the proposed amendments to Section 84. Their purpose is to create a clear and logical enforcement regime.</p> <p>85(1)(b) is amended to make clear that a Notice of Enforcement can also be used to instruct an unregistered partial care facility to comply with the provisions of the Act. This might for instance be used where a partial care facility is not considered to pose an immediate risk to children but has not met the threshold for conditional registration – i.e. the PDSO wants to give the facility the opportunity to comply before taking steps to close it down.</p> <p>Subsection (c) gives effect to the provision in Section 84(1)(e).</p> <p>Subsections (3) and (4) relate to the cancellation of registration. It is therefore recommended that the government considers moving these provisions to Section 84.</p>

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	<p><u>not a fit and proper person to assist in operating a partial care facility; or</u> <u>(d) a person or organisation operating a partial care facility to stop operating that facility in the circumstances contemplated in Section 84(1).</u></p>	
Section 90 – Subsection (j)		<p>We support the explicit power given to the Minister to regulate the inspection and monitoring of partial care facilities. However, for the sake of coherence it is recommended that there is a unified process/system for the inspection of ECD centres and ECD programmes (including ECD centres) – it would not be desirable or practical to have parallel systems.</p> <p>We propose therefore that the government introduces an additional amendment to make subsection (j) speak to subsection 103(d).</p>
Section 90 – New subsection	<p><i>New subsection (eA)</i> <u>(eA) the requirements that the different types of partial care facilities have to comply with for conditional registration;</u></p>	<p>This new subsection gives effect to the amendment proposed above to Section 83(2).</p>
Section 91 – Subsection (1)	<p>(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 <u>until they enter Grade R/formal school. to school going age or, in the case of a child with developmental difficulties and disabilities, until the year before the child enters school.</u></p>	<p>‘School going age’ is not a legal concept and is likely to create some confusion. It is proposed that the reference is instead to entering ‘Grade R/formal school’.</p> <p>Children with developmental difficulties and disabilities have the right to start school at the same age as all other children, with appropriate provision to meet their needs. This amendment suggests that these children are not the responsibility of DBE at age 5 in the same way as all other children are.</p> <p>If the intention of the amendment is to indicate that DSD might have ongoing responsibilities to children with difficulties and disabilities, <i>in addition to</i> DBE’s responsibilities, then this amendment should be worded differently and without reference to school.</p>
Section 92 – Subsection (2)(a)	<p>(2)(a) maintain a record of all the early childhood development programmes registered in the province with specific mention of inclusive programmes; and</p>	<p>It should be the responsibility of provincial DSDs to identify <i>all</i> ECD programmes in their province, not only registered ECD programmes. This is important in terms of ensuring that all ECD programmes are pulled into the regulatory net. It also enables PDSDs to fulfil their enforcement duties under Section 100.</p> <p>‘Inclusive’ must be defined in subsection (2)(a).</p>

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Section 93 – Subsection (1)	(1) The MEC for social development must set aside money for early childhood development from the monies appropriated by the relevant provincial legislature and may, from such money appropriated fund early childhood development programmes <u>and services</u> for that province.	It is also proposed that an explicit enabling power is added for MECs to fund <i>ECD services</i> . In practice, ECD services (in particular NGOs supporting ECD programmes) <i>are</i> receiving provincial government funding and it would be preferable for the legal basis for this to be made clear. This will also help to give proper status to the work done by these services.
Section 93 – Subsections (2) and (3)	(2) An early childhood development programme only qualifies for funding contemplated in subsection (1) if it is <u>registered or conditionally registered</u> . (a) be provided in accordance with this Act; and (b) comply with the prescribed national norms and standards contemplated in section 94 and such other requirements as may be prescribed. (3) The provider of an early childhood development programme only qualifies for funding contemplated in subsection (1) if such provider complies with the prescribed national norms and standards contemplated in section 94 and such other requirements as may be prescribed.	The existing provisions in subsection (2) and (3) are unnecessarily complex. The general requirement to register is in Section 95 and only needs to be repeated here insofar as it relates to eligibility for funding. The registration process is the process that ensures the fulfilment of existing subsections (2)(a) and (b). There is no mechanism for establishing that these subsections are fulfilled other than the registration process, so the purpose of subsections (2) and (3) as currently drafted is unclear. The approach should be that: 1. S95 establishes that an ECD programme must be registered and must comply with the norms and standards and such other requirements as may be prescribed; 2. S93 establishes that an ECD programme is only eligible for funding if it is registered or conditionally registered. In this section, it is not necessary to repeat point 1. It therefore creates clearer law and process for this section simply to refer to registration or conditional registration as the prerequisite for funding.
Section 93 – Subsection (4)	(4) The MEC for social development may <u>must</u> prioritise and fund early childhood development programmes- (a) in poverty declared wards in the province, taking into consideration the national and provincial strategies contemplated in section 92 and in communities where families lack the means of providing proper shelter, food and other basic necessities of life to their children;	We are very concerned that the government is proposing abolishing the duty to prioritise the funding of ECD programmes in poor communities. The proposed amendments to section 93(4) turns the obligation to prioritise the most vulnerable ECD programmes into a discretionary action. This amendment works against the government's overarching pro-poor goals and will also undermine progress towards universal access to ECD. It is our view that this amendment is impermissible because: - It is a regressive amendment enacted without any public policy justification, and therefore will likely be unconstitutional. When the state

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		<p>takes away existing rights they are under an obligation to provide reasons that ought to be scrutinised at a higher threshold.</p> <ul style="list-style-type: none"> - The rights to education and the rights of the child are some of the most significant rights in the Constitution. Both section 28, entitled “Children”, and section 29, entitled “education” of the Constitution are known as “immediately realisable” rights. This means that a state’s capacity and resources must be adjusted to meet the identified need; the identified need cannot be ignored or excluded from the state’s attention for reasons of resourcing. - It is anti-developmental. Any law, policy or development plan must prioritise the most marginalised and place considerable weight to the best interests of children (Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC 19). - The state must legislate in a manner that ensures the safety and protection of children. As children in poor communities are more likely to attend ECD programmes that are unsafe, it is incumbent on PSDSs to prioritise funding in these communities. - The state must legislate in a manner that ensures the dignity of the child and promotes equality. The rights to equality and dignity are preeminent values in the Constitution and are of pivotal significance in a developing society like ours. For true dignity and equality to be achieved, a child’s early development and learning are vital. - This amendment is unlawful in light of the MEC’s obligation to prioritise the needs of the vulnerable. According to case law, the MEC has a legal obligation to prioritise the needs of the vulnerable, which means this duty cannot be amended to be discretionary. <p>The proposed changes to subsection (4)(a) introduce unnecessary confusion. The term ‘poverty declared wards’ has no meaning in law. Therefore it is more straightforward to leave this subsection unamended.</p>
Section 93 – Subsection (5)	<p>(5) An early childhood development programme includes non-centre based ECD programmes as contemplated in Section 1. may be provided (a) in non-center based setting for any children up to school going age (b) a child and youth care centre which has in its care any children up to school-going age.</p>	<p>We understand the purpose of these proposed amendments to be to remove the current requirement for partial care facilities to register an ECD programme as well as their facility. We fully support any move towards one-step registration for partial care.</p> <p>However, we believe that the proposed amendments to Section 91 (specifically the clarity that settings <i>are</i> an ECD programme) mean that</p>

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		<p>the government's proposed amendment needs re-wording to avoid confusion.</p> <p>In addition, any requirement for a child and youth care centre to provide ECD should be framed as a requirement to provide 'structured early learning and development opportunities in line with NELDS and the NCF for Birth to Four' not the provision of an ECD programme. This should be written into Chapter 13 and not dealt with here.</p>
Section 93 – Subsection (6)	(6) Any other person or organisation not disqualified in terms of section 97(3) may provide early childhood development programmes, provided that those programmes <u>are registered or conditionally registered</u> comply with the prescribed national norms and standards contemplated in section 94 and such other requirements as may be prescribed.	This amendment is proposed to make clear that the key legal requirement is registration. It is the registration process that establishes compliance with the norms and standards and other requirements.
Section 94 (1)	(1) The Minister must determine national norms and standards for <u>different types of</u> early childhood development programmes by regulation after consultation with the Ministers responsible for Education, Finance, Health, Cooperative Governance and Traditional Affairs, Transport and any other Ministers, the MEC for social development and stakeholders.	This amendment is proposed to make clear the presumption that the Minister will provide differentiation within the norms and standards to reflect the different circumstances and purpose of different types of ECD programmes. This is in line with amendment 103(dA).
Section 94 (2)	(2) The prescribed national norms and standards contemplated in subsection (1) must relate to the following: (a) The provision of appropriate developmental opportunities; (b) programmes aimed at helping children to realise their full potential; (c) caring for children in a constructive manner and providing support and security; (d) ensuring development of positive social behaviour; (e) respect for and nurturing of the culture, spirit, dignity, individuality, language and development of each child; and	<p>In order to create a comprehensive regulatory system under Chapter 6 for ECD programmes, a comprehensive set of norms and standards are required that cover <i>health and safety</i> as well as programme content. This is a significant gap in the present system for ECD programmes that register under Chapter 6, and presents difficulties for PSDS as they do not have the right tools/standards to assess health and safety at these programmes.</p> <p>It is therefore proposed that the headings/norms in Chapter 6 should mirror those proposed for ECD centres (see rationale for amendments to Section 79 above). In the regulations, the standards under each heading may differ depending on the modality.</p> <p>Notes on headings/norms (see also rationale for S79):</p> <p>- New (2)(a) covers various current headings in Section 79.</p>

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	<p>(f) meeting the emotional, cognitive, sensory, spiritual, moral, physical, social and communication development needs of children.</p> <p><u>(a) minimum health and safety standards;</u> <u>(b) proper care for children who are ill;</u> <u>(c) adequate space and separation of age groups;</u> <u>(d) hygienic and adequate toilet and ablution facilities;</u> <u>(e) record-keeping;</u> <u>(f) support for children with disabilities;</u> <u>(g) qualifications, skills and training;</u> <u>(h) nurturing environments that provide protection, support and security;</u> <u>(i) appropriate and adequately resourced environments for play and learning;</u> <u>(j) support and information for parents and caregivers; and</u> <u>(k) group size and ratios.</u></p> <p><u>(2A) In addition, non-centre based ECD programmes must have regard to the learning and development requirements of the National Early Learning and Development Standards and the National Curriculum Framework for Children from Birth to Four.</u></p>	<ul style="list-style-type: none"> - The standards covered under current heading 94(2)(c) can be covered under new headings (2)(a),(b),(d) and (k). - Record-keeping is introduced as a new heading. This is currently covered in Regulation 18 but for clarity and transparency it is more appropriately situated in the norms and standards. - The rights and needs of children with disabilities are not adequately addressed under the existing N&S and the introduction of new heading (2)(f) helps to deal with this (in line with section 94(3) of the Act). - Key standards under current headings 94(2)(a),(b),(d),(e) and (f) can be covered under headings (h),(i) and (j), and new subsection (2A). - New (2)(i) addresses resources and the learning environment, a crucial area not covered in the current headings. <p>In respect of proposed new subsection (2A), when the Children’s Act was originally drafted these key documents did not exist. They now provide the statutory framework for the content of all ECD programmes. It is essential therefore that they are properly cross-referenced on the face of the Act.</p> <p>These documents mean that there is no longer a need for the current level of detail under existing standards that relate to ECD programme content under headings 94(2)(a),(b),(d),(e) and (f). Such detail is undesirable because it creates a third tier of regulation for the same thing and causes unnecessary confusion. Instead, the Act and its regulations need to provide clarity on the relationship between registration requirements and NELDS and the 0-4 NCF.</p> <p>It is proposed that non-centre based ECD programmes should have to show that they have <i>had regard to</i> NELDS and the NCF. A duty to implement these frameworks in full is not necessarily appropriate for these programmes which are constrained by space and facilities (in the case of home-based childcare) and may legitimately be focused on just one or two areas of learning and development (in the case of some sessional and outreach programmes).</p>

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Section 94 – NEW SUBSECTION	<p>94(2B)(a) The norms and standards contemplated in subsection (2) must harmonise and provide the authoritative list of requirements for registration of early childhood development programmes.</p> <p>(b) The development of the national norms and standards contemplated in subsection (2) must account for the inclusion of early childhood development programmes that serve poor communities.</p>	<p>It is important to make clear that the requirements for registration should not be added to at provincial or municipal levels as this creates both inconsistencies and barriers to registration. Amendment (2B)(a) achieves this by providing that the norms and standards are the authoritative list of requirements for registration.</p> <p>(2B)(b) emphasises the need for the norms and standards to be realistic and context appropriate in order to pull as many ECD programmes as possible into the regulatory net.</p>
Section 95 – Subsections (1) and (2)	<p>95. (1) A person or organisation providing an early childhood development programme <u>that is not an ECD centre and that is attended by more than six children must-</u></p> <p>(a) register the programme with the provincial head of social development of the province where that programme is provided; <u>and</u></p> <p>(b) provide the programme in accordance with any conditions subject to which the programme is registered.</p> <p>(1A) <u>In order to be registered, an early childhood development programme must</u> comply with the prescribed national norms and standards contemplated in section 79 and such other requirements as may be prescribed <u>by regulation.</u></p> <p>(2) The Minister may by regulation exempt any person or organisation or any category of person or organisation from the requirement to register on such conditions as may be prescribed.</p> <p>(2A) <u>A person or organisation providing an early childhood development programme which is exempt from the requirement to register, may voluntarily register the programme with the provincial head of social development of the province where that programme is provided, in which case it must:</u></p>	<p>Because ECD centres fall under the scope of the definition of ECD programmes, it is necessary to make clear here that they are not expected to register as ECD programmes as well.</p> <p>As discussed above, minimum programme size is not relevant to the definition of ECD programme but is relevant to the requirement to register. In line with the current regulatory framework, it is therefore proposed that only ECD programmes with more than six children <i>must</i> register.</p> <p>However, it is important that ECD programmes with six or fewer children or that are exempt from registration under subsection (2) are not excluded from the regulatory and funding frameworks and can register voluntarily. 95(2A) introduces voluntary registration for programmes that are exempt from compulsory registration. Programmes may choose to register voluntarily in order to provide reassurance to parents that they meet minimum standards and/or to access ECD programme funding. Voluntary registration is used for certain categories of ECD programme in other countries, including the UK and New Zealand, and widens the scope of regulation and access to funding, but using an enabling rather than a compulsory approach in order to prevent regulatory over-reach.</p> <p>In order to tackle the problem of regulatory over-reach and to ensure that regulatory authorities focus resources and capacity where they will bring most benefit to children, it is also proposed that the regulations would set out the following exemptions from compulsory registration:</p>

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	<p><u>(a) register the programme with the provincial head of social development of the province where that programme is provided;</u> <u>(b) provide the programme in accordance with any conditions subject to which the programme is registered; and</u> <u>(c) comply with the prescribed national norms and standards contemplated in section 94 or section 78 as appropriate and such other requirements as may be prescribed.</u></p>	<p><i>'xx. The following types of early childhood development programme are exempt from compulsory registration in terms of section 95 of the Act:</i></p> <p><i>(1) where no child attends the programme for more than two hours per day and more than four hours total per week;</i> <i>(2) where children attend the programme for four hours or less per day and more than half the children attending have their parent or caregiver present in the same area as them at the same time;</i> <i>(3) where the programme is offered on an ad hoc basis and children attend for four hours or less per day for the convenience of parents and caregivers who intend to remain on the premises or within their immediate locality;</i> <i>(4) where children of up to two sets of parents are cared for completely or mainly in one or both sets of parents' homes.'</i></p> <p>Subsection (1) would cover drop-in programmes such as library sessions as well as settings such as Sunday Schools.</p> <p>Subsection (2) would cover programmes attended by parents and caregivers. These types of programme were previously excluded from the regulatory net by the definition of partial care in section 76.</p> <p>Subsection (3) is envisaged to cover creches provided at shopping centres, sport centres, conferences, etc. – i.e. where there is no longer-term commitment on the part of either the provider or the client.</p> <p>Subsection (4) would covered nanny and au pair arrangements.</p> <p>It should be noted that programmes that are exempt from registration as ECD programmes will still have to comply with other aspects of the Children's Act – in particular, the provisions of chapter 7 relating to child protection.</p> <p>In addition, we propose that subsection (1) should be separated out to make clear that compliance with norms and standards and other prescribed requirements <i>is a pre-requisite for registration</i>. This is currently implied in the Act but not made clear.</p> <p>'by regulation' is added in (1A), to make clear that the 'other requirements as may be prescribed' specifically means prescribed under this Act. Currently it is unclear whether this provision effectively</p>

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		engages all other applicable law for the purposes of registration, which should not be the case.
Section 97 – Subsection (1)(a)	(1) The provincial head of social development must- (a) within six three months of receiving the application consider an application for registration or conditional registration or for the renewal of registration, and either reject the application or, having regard to subsection (2), grant the registration or renewal with or without conditions ;	The current time-frame for the determination of applications is too long and leaves ECD programmes in an uncertain legal position. The long time-frame also places children at greater risk. The time-frame should therefore be reduced. The reference to ‘with or without conditions’ is unclear because it could refer to full registration with conditions (e.g. pertaining to the size of the programme) or to conditional registration (i.e. registration where an ECD programme is not yet fully compliant with registration requirements). It is also not needed – see Section 97(5A) and response to Section 98 below.
Section 97 – Subsection (1)(c)	(c) state in the certificate of registration <u>or conditional registration</u> the period for which the registration will remain valid.	This amendment helps to reduce repetition and is consequential to the amendments proposed to Section 98 below.
Section 97 – Subsection (1)(d)	<i>New subsection (d):</i> <u>(d) state in a certificate of conditional registration:</u> <u>(i) measures required to achieve compliance;</u> <u>(ii) the period within which compliance must be achieved.</u>	The existing provisions relating to conditional registration are unclear (see motivation for Section 98 below). This is the correct part of the Act in which to specify what must be included in a certificate of conditional registration.
Section 97 – Subsection (2)	(2) When considering an application, the provincial head of social development must take into account all relevant factors, including whether- (a) the early childhood development programme complies with the prescribed national norms and standards contemplated in section 94 and such other requirements as may be prescribed; (b) the applicant is a fit and proper person to provide an early childhood development programme; (c) the applicant has the prescribed skills, training, funds and resources available to provide the early childhood development programme as applied for; and (d) the early childhood development programme meets the emotional, cognitive, sensory,	Subsections (c) and (d) are not required as they are assessed under subsection (a) (covered in Section 94). The reference to ‘funds and resources’ is unclear. Many ECD programmes in poor communities do not have adequate funds and resources but this should not preclude them from registration, but instead make them a priority for government funding, as envisaged in Section 93.

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	<p>spiritual, moral, physical, social and communication development needs of the children to whom the programme will be presented.</p>	
<p>Section 97 – NEW SUBSECTION</p>	<p><i>New subsection (7A):</i> <u>(7A) The registration or renewal of registration of an early childhood development programme may be granted on such stipulations as the provincial head of social development may determine, including stipulations specifying the type of early childhood development programme that may or must be provided in terms of the registration.</u></p>	<p>This subsection is based on current wording in Section 98 and seeks to make clear the distinction between full registration with conditions attached and conditional registration. To help make this distinction clearer, we propose that conditions should be called ‘stipulations’. See also rationale for Section 98 below.</p> <p>This subsection is not concerned with conditional registration but with the process of granting registration and is therefore properly situated in Section 97.</p>
<p>Section 98 - Conditional registration</p>	<p>Conditional registration Conditions relating to registration</p> <p><u>98. (1) Conditional registration may be granted by the provincial head of social development where an ECD programme is not compliant with the norms and standards contemplated in Section 79 and such other requirements as may be prescribed, but meets the minimum prescribed standards contemplated in subsection (2).</u></p> <p><u>(2) The Minister must determine minimum standards for conditional registration by regulation.</u></p> <p>The registration or renewal of registration of an early childhood development programme may be granted on such conditions as the provincial head of social development may determine, including-</p> <p>(a) conditions specifying the type of early childhood development programme that may or must be provided in terms of the registration;</p> <p>(b) a specification of the period within which the conditions must be complied with; and</p> <p>(c) any other matters that may be pre-scribed.</p>	<p>This section currently conflates two different things and will continue to work against the progressive use of conditional registration in the regulatory system. The following two types of registration must be kept distinct:</p> <ol style="list-style-type: none"> 1. Full registration with no areas of non-compliance but conditions attached (e.g. pertaining to the size or hours of the programme). This is ‘registration with conditions’ and not conditional registration. Programmes that have this type of registration receive full registration and do not have to make changes within a certain time-frame, because the conditions relate to <i>the ongoing parameters of operation</i>. 2. Conditional registration is given where there are areas of non-compliance with the norms and standards and other registration requirements, and therefore certain changes must be made within a specified time-frame. <p>Point 1. should be dealt with in Section 82 (see proposed new subsection 97(7A)) and kept separate to provisions for conditional registration.</p> <p>There is currently no definition of conditional registration in the Act, despite the use of the term. This means that some provinces do not use conditional registration at all, while others have differing interpretations of the threshold for conditional registration, resulting in significant inconsistencies between provinces. In order to promote</p>

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		<p>consistent interpretation and implementation, conditional registration needs to be defined. The definition is proposed in new 98(1).</p> <p>Furthermore, minimum standards for conditional registration should be established nationally and not set province by province. This is necessary in order to a) minimise the risk of harm to children, b) promote consistency and fairness, c) ensure a level playing field for funding. It is therefore proposed that a new duty is placed on the Minister to determine minimum standards for conditional registration by regulation.</p> <p>Existing subsection (b) is dealt with in the amendment to Section 97(1)(c) above and should be deleted.</p>
Section 99	<p>(1) A provincial head of social development may cancel the registration or conditional registration of an early childhood development programme by written notice to the registration holder if-</p> <p>(a) there is a direct and immediate risk to the health, safety or wellbeing of children;</p> <p>(a) the programme is not run in accordance with the prescribed national norms and standards contemplated in section 94 and such other requirements as may be prescribed;</p> <p>(b) any condition subject to which the registration or renewal of registration was issued is breached or not complied with;</p> <p>(c) the registration holder contravenes or fails to comply with a written Notice of Enforcement as contemplated in Section 100; provision of this Act;</p> <p>(d) the registration holder becomes a person who is not a fit and proper person to provide an early childhood development programme; or</p> <p>(e) a person who is not a fit and proper person to provide or assist in the provision of an early childhood development programme provides or assists in the provision of such a programme.</p> <p>(2) The provincial head of social development may in the case of the cancellation of a</p>	<p>Sections 99 and 100 are not entirely consistent at present, providing for both cancellation of registration and enforcement notices as enforcement mechanisms - remedies which are substantially different and could lead to significant variations in how compliance is enforced.</p> <p>Cancellation of registration for non-compliance with norms and standards is a severe response and in practice rarely happens. It should only be the first line response if there is an immediate risk to the health and safety of children. In other cases, officials should either use a notice of enforcement or the inspection and monitoring system to enforce compliance. It is not appropriate to cancel registration if a Notice of Enforcement has not first been issued and children are not at risk.</p> <p>In other words, for safe but non-compliant programmes the stages of enforcement should be:</p> <ol style="list-style-type: none"> 1. monitoring and inspection regime (written report telling facility what changes are needed) 2. Notice of Enforcement (as per Section 100) 3. cancellation of registration <p>The proposed amendments to Section 99 should therefore be read in conjunction with the proposed amendments to Section 100. In particular, the scenarios in which registration can currently be cancelled in subsections 99(1) are covered under new 100(1) and become scenarios in which a Notice of Enforcement should be issued. It follows from the provision that non-compliance with a Notice of Enforcement can be the basis for cancellation of registration (new</p>

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	<p>registration in terms of subsection (1) (a), (b), (c) or (e)</p> <p>(a) suspend the cancellation for a period to allow the registration holder to correct the cause of the cancellation; and</p> <p>(b) reinstate the registration if the registration holder corrects the cause of the cancellation within that period.</p> <p>(3) A provincial head of social development may assist a registration holder to comply with the prescribed national norms and standards contemplated in section 94 and such other requirements as may be prescribed or any provisions of this Act where the cancellation was due to non-compliance with those national norms and standards, requirements, conditions or provisions.</p> <p>(4) The cancellation of the registration or conditional registration of an early childhood development programme in terms of subsection (1) does not affect the registration or conditional registration of a partial care facility or a child and youth care centre.</p>	<p>99(1)(b)) that all of these circumstances can lead to the cancellation of registration after due process has been followed.</p> <p>Subsection (2) is no longer required because the PDSD will have first used a Notice of Enforcement to provide time for the programme to correct the problem.</p> <p>Section (4) is no longer needed because of amendments to Section 93.</p> <p>These amendments will together create a more coherent, transparent and consistent enforcement regime.</p>
Section 100 - Notice of enforcement	<p>100. A provincial head of social development may by way of a written notice of enforcement instruct-</p> <p>(a) a person operating or managing a partial care facility or a child and youth care centre which does not provide an early childhood development programme, to comply with section 93(5) within a period specified in the notice;</p> <p>(b) a person operating or managing a partial care facility or a child and youth care centre which does provide an early childhood development programme but of a standard that does not comply with the prescribed national norms and standards contemplated in section 94 and such other requirements as may be prescribed, to comply with those</p>	<p>These amendments should be read in conjunction with the proposed amendments to Section 99. Their purpose is to create a clear and logical enforcement regime.</p> <p>The proposed changes to Section 93 mean that 100(a) and (b) are no longer needed.</p> <p>New subsection (a) is added and reflects the existing similar provision for partial care.</p> <p>Subsection (c) gives effect to the provision in Section 99(1)(e).</p>

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	<p>national norms and standards and other requirements within a period specified in the notice; or</p> <p><u>(a) a person or organisation operating an unregistered ECD programme to apply for registration in terms of section 96 within a period specified in the notice;</u></p> <p>(b) a person or organisation operating who provides an early childhood development programme which does not comply with the prescribed national norms and standards contemplated in section 94 and such other requirements as may be prescribed-</p> <p>(i) to stop the operating provision of that programme; or</p> <p>(ii) to comply with those national norms and standards and other requirements within a period specified in the notice.</p> <p><u>(c) a person or organisation operating an ECD programme to cease employing a person who is not a fit and proper person to assist in operating an ECD programme.</u></p>	
<p>Section 101A – Monitoring and quality assurance of ECD programmes</p>	<p>(1) The Minister must determine by regulation a national system for the monitoring and quality assurance of early childhood development programmes.</p> <p>(2) The provincial head of social development must ensure that a quality assurance process is conducted in respect of each early childhood development programme in the manner and at the intervals prescribed.</p> <p>(3) A provincial head of social development may assist an early childhood development programme to meet the requirements of the quality assurance system.</p>	<p>The Act needs to include clear and specific provisions relating to monitoring and quality assurance. The central goals should be a) ensuring consistency in monitoring and quality assurance nationally; b) raising overall standards by incentivising good practice.</p> <p>At present, while the assessment and compulsory monitoring of ECD programmes is listed in the areas for which the minister can make regulations in Section 103(d) (and such regulations are included in Regulation 28), there are not specific provisions earlier in Chapter 6 that make clear the nature and purpose of assessment and compulsory monitoring.</p> <p>As a result, the current system is poorly understood and inconsistently implemented. In particular, it is not understood whether Form 21 should be used when assessing ECD programmes for registration or whether it should only be used for the ongoing assessment of registered programmes. If it is for the former as well, then the Form generates considerable confusion because it does not speak to the Norms and Standards for ECD Programmes.</p>

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		<p>New subsection (1) gives the Minister the power to prescribe the key features of a national monitoring and quality assurance system and process. Initially this would have a two-pronged focus – a) initial registration processes, and b) ongoing monitoring processes. Over time, the Minister could strengthen the system to, for example, include a rating system that helps parents and caregivers to understand and compare different ECD programmes.</p> <p>Crucially, this approach would enable a proper distinction between enforcing basic minimum standards and supporting continuous improvement and best practice.</p> <p>At present, good practice standards have become conflated with basic minimum standards. Part of the reason for this is the absence of a national quality assurance regime to oversee and leverage progress towards higher quality standards. In the absence of an alternative mechanism, the default has therefore been to define good practice standards as minimum standards. And the effect of this has been to create regulatory over-reach in the norms and standards and to put registration out of reach of many ECD programmes</p> <p>In the absence of a quality assurance regime that can support sub-standard but safe ECD programmes, the law will continue to require that many ECD programmes must be closed down. This works directly against the government’s central goal of achieving universal access to ECD programmes. It is also an unusual process when compared with other countries, where closure of programmes is an extreme measure that results from serial non-compliance with basic standards.</p> <p>As noted in Cornerstone Economic Research’s report for National Treasury (2013), current inspection activities focus on governance and fund usage, with less emphasis on programme quality. Furthermore, the current inspection regimes differ from province to province, and do not provide public accountability through the publication of outcomes/ratings.</p> <p>DSD’s national audit of ECD centres (2014) proposed: <i>‘The DSD should take the lead in the development of a suitable national rating scale or quality assurance instrument against which</i></p>

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		<p><i>ECD centres could measure their standard of services and performance.'</i></p> <p>Creating a national statutory quality assurance regime would introduce a new level of public accountability into ECD programme provisioning and provide a transparent measure for parents to understand and compare the quality of programmes. This would create a powerful lever for improving programme quality, by harnessing parents' 'purchase power' in the drive to raise standards</p> <p>A national statutory quality assurance regime would also enable a move towards permanent ECD programme registration. In other words, registration would become permanent subject to ongoing compliance with standards, enforced through the quality assurance system.</p> <p>The current requirement for ECD programmes to renew their registration creates a substantial bureaucratic burden for provinces and municipalities. By using a quality assurance regime to monitor compliance with norms and standards (and to issue notices to improve or to close programmes in extreme circumstances), time and resources could be focused on improving quality rather than processing renewal paperwork. Permanent programme registration was a further recommendation of Cornerstone Economic Research's 2015 report to National Treasury.</p>
<p>Section 102A – Serious injury, abuse or death of child in an early childhood development programme</p>	<p><u>(1) If a child is seriously injured or abused while in an ECD programme or following an occurrence at an ECD programme, the person operating the ECD programme or a person employed at the ECD programme must immediately report such injury or abuse to the provincial head of social development in accordance with section 110(1), who must act in accordance with the provisions of section 110(5).</u></p> <p><u>(2) If a child dies while at an early childhood development programme or following an occurrence at the programme, the person operating the programme or a person employed at the programme must immediately after the child's death report such death to-</u></p>	<p>This new section replicates the current provisions of Section 89, for partial care facilities, so that they apply to ECD programmes.</p> <p>Reporting must be done in line with section 110(1). Section 110(5) cross refers to subsection (1) and therefore the reporting should be in line with this section.</p>

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	<p><u>(a) the parent, guardian or care-giver of the child;</u> <u>(b) a police official; and</u> <u>(c) the provincial head of social development.</u></p> <p><u>(3) The police official must cause an investigation into the circumstances surrounding the death of the child to be conducted by the South African Police Service, unless the police official is satisfied that the child died of natural causes.</u></p>	
Section 103 - Regulations	<p><i>New subsection (dA)</i> <u>(dA) minimum standards for conditional registration with which early childhood development programmes must comply;</u></p>	<p>This new subsection gives effect to the amendment proposed above to Section 98(2).</p> <p>Subsections (d) and (i) appear to duplicate.</p>