

## INPUTS FOR THE CHILDREN’S THIRD AMENDMENT BILL

### SUBMISSION No. 2 FROM SMARTSTART – ONE CHAPTER FOR ECD

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#### Introduction

This is the second of two submissions from SmartStart. It sets out a different approach to the regulation of early childhood development (ECD) in the Children’s Act (‘the Act’), with a single registration process and a single set of registration requirements and norms and standards for all types of ECD programmes. **An overview of this approach has been set out in a separate position paper, which has been endorsed by 42 organisations working in the ECD sector across South Africa.** This approach was also discussed at the National Child Care and Protection Inter-Sectoral Forum meeting in July 2018 and at the Western Cape provincial consultation on the Act in August 2018.

This submission presents only the amendments required to create a unified regulatory system for ECD programmes. **SmartStart’s response to the government’s proposed amendments and our proposals on how to make a two-Chapter approach to ECD regulation work, are all included in our first submission.**

It should be noted that of the two approaches, the one set out in this submission is more straightforward 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 childminders 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

It is proposed instead that the Act deals with ECD programmes in an integrated and holistic way, with a one-step registration process and a single set of norms and standards. 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 new integrated Norms and Standards for ECD programmes 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:

- Chapter 5 is deleted and all aspects of ECD programmes are dealt with in a unified and streamlined system in Chapter 6;
- the Act’s definition of ECD programme encompasses premises, provider and provision in line with the definition in the National Integrated ECD Policy (NIECDP);
- there are appropriate exclusions to the definition of ECD programme;
- only ECD programmes with more than six children *must* register, while smaller 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;
- there is a single set of registration requirements and a single set of integrated norms and standards for all ECD programmes, with differentiation within for different modalities;
- 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.

The proposed amendments have been developed and consulted on over the last eighteen months, and have gone through two major sets of revisions emerging from consultations with the ECD sector.

CLAUSE COMMENTED ON	PROPOSAL	MOTIVATION
Section 1 – subsection (j)	<p>(j) ‘early childhood development centre’ means a partial care facility <del>that provides an early childhood programme</del> for children from birth until they enter Grade R/formal school <del>to school going age</del>, <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>	<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"> <li>- it is operated in rooms or spaces that are not used for domestic purposes at other times;</li> <li>- children attend for at least 16 hours per week.</li> </ul> <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>
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>

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		<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>
<p>Chapter 5 Sections 76 - 90</p>	<p>Delete Chapter 5 (Sections 76-90)</p>	<p>This amendment removes Chapter 5 entirely from the Act.</p> <p>The current dual registration process for ECD centres means that the site and the programme content are dealt with separately, creating a conceptual framework that neither reflects practical reality nor is comprehensible to those who most need to understand it. Most ECD providers conceive of their offering as a single entity.</p> <p>By dealing with premises (health and safety), provider and provision together, the Act would make possible a clear and simple legal framework and one-step registration process. This in turn would have substantial benefits in terms of improving compliance of providers, and would also result in significant cost savings to government.</p> <p>Dealing with ECD under one chapter was the approach originally proposed by the South African Law Reform Commission, in their first draft of the current Act.</p> <p>It would enable the government to achieve the vision set out in the 2012 Buffalo City Declaration which committed the government to, 'A comprehensive review and harmonisation of policy and legislation within the ECD sector moving towards universal access' and to 'Streamlining of registration processes'.</p> <p>Practically, the existing three categories of partial care would then be dealt with as follows:</p> <ul style="list-style-type: none"> <li>- ECD centres covered under Chapter 6 (ECD programmes);</li> <li>- after-school services and temporary respite day-care covered under Chapter 14 (Drop-in centres).</li> </ul> <p>Sections 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 90 are all mirrored in Chapters 6 and 14.</p> <p>Section 87 (Record and inspection of partial care facility) is covered in Chapter 14 but needs to be added to Chapter 6. However the provisions in this section that relate to strategy and provision duplicate the provisions of Section 92 and are therefore not needed. Instead, the</p>

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		<p>proposed title of the new section is 'Monitoring and quality assurance of ECD programmes'.</p> <p>Section 89 (Serious injury, abuse or death of child in partial care facility) is covered in Chapter 14 but needs to be added to Chapter 6.</p> <p>These consequential amendments are proposed below.</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.</u> <del>to school going age or, in the case of a child with developmental difficulties and disabilities, until the year before the child enters school.</del></p>	<p>'School going age' 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 91 – NEW SUBSECTION (3A)	<p><u>(3A) Early childhood development programmes do not include-</u></p> <p><u>(a) care provided in:</u></p> <p><u>(i) a child and youth care centre;</u></p> <p><u>(ii) a hospital or other medical facility as part of medical treatment provided to the child;</u></p> <p><u>(iii) a homeless shelter;</u></p> <p><u>(iv) a women's refuge;</u></p> <p><u>(b) care provided for a child by a person with parental responsibility for the child.</u></p>	<p>New subsection (3A) reflects and expands on the exclusions currently in Section 76.</p>
Section 92 – Subsection (2)(a)	<p>(2)(a) maintain a record of all the early childhood development programmes <del>registered</del> 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 PDSs 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> . <del>(a) be provided in accordance with this Act; and</del> <del>(b) comply with the prescribed national norms and standards contemplated in section 94 and such other requirements as may be prescribed.</del>  (3) <del>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.</del>	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.  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 <del>may</del> <u>must</u> prioritise and fund early childhood development programmes-  <del>(a) in poverty declared wards in the province, taking into consideration the national and provincial strategies contemplated in section 92</del> 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 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

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		<p>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.</p> <ul style="list-style-type: none"> <li>- 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).</li> <li>- 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 PDSs to prioritise funding in these communities.</li> <li>- 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.</li> <li>- 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.</li> </ul> <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 – Subsections (5) and (6)	<p><del>(5) An early childhood development programme may be provided</del>  <del>(a) in non-center based setting for any children up to school going age</del>  <del>(b) a child and youth care centre which has in its care any children up to school-going age.</del></p>	<p>Subsection (5) is deleted in line with the reconceptualisation of ECD programmes in Section 91 above (specifically the clarity that different ECD modalities are an ECD programme).</p> <p>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)	<p>(6) Any other person or organisation not disqualified in terms of section 97(3) may provide early childhood development programmes, provided that those programmes</p>	<p>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.</p>

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	<p><del>are registered or conditionally registered</del> <u>comply with the prescribed national norms and standards contemplated in section 94 and such other requirements as may be prescribed.</u></p>	
Section 94 (1)	<p>(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.</p>	<p>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 government amendment 103(dA).</p>
Section 94 (2)	<p>(2) The prescribed national norms and standards contemplated in subsection (1) must relate to the following:</p> <p><del>(a) The provision of appropriate developmental opportunities;</del></p> <p><del>(b) programmes aimed at helping children to realise their full potential;</del></p> <p><del>(c) caring for children in a constructive manner and providing support and security;</del></p> <p><del>(d) ensuring development of positive social behaviour;</del></p> <p><del>(e) respect for and nurturing of the culture, spirit, dignity, individuality, language and development of each child; and</del></p> <p><del>(f) meeting the emotional, cognitive, sensory, spiritual, moral, physical, social and communication development needs of children.</del></p> <p><u>(a) minimum health and safety standards;</u></p> <p><u>(b) proper care for children who are ill;</u></p> <p><u>(c) adequate space and separation of age groups;</u></p> <p><u>(d) hygienic and adequate toilet and ablution facilities;</u></p> <p><u>(e) record-keeping;</u></p> <p><u>(f) support for children with disabilities;</u></p> <p><u>(g) qualifications, skills and training;</u></p> <p><u>(h) nurturing environments that provide protection, support and security;</u></p>	<p>In order to create a comprehensive regulatory system for all ECD modalities under Chapter 6, a single set of norms and standards are required that cover basic health and safety as well as programme content. It is therefore proposed that the headings for the new integrated Norms and Standards for ECD Programmes should combine and streamline the existing headings in Sections 89 and 94.</p> <p>It is important that the headings for the norms reflect the fact that DSD's central role/duty is in relation to the care and stimulation of children and that health and safety is primarily a municipal responsibility (under the National Health Act). So while minimum health and safety standards should be covered here, there should be a better balance with wider programmatic standards (see new subsection (2A) as well).</p> <p>Specific standards under each heading in the new N&amp;S for ECD Programmes may differ depending on the modality. In other words, there will be differentiation within a single set of norms and standards.</p> <p>Notes on headings/norms:</p> <ul style="list-style-type: none"> <li>- New (2)(a) covers various current headings in Section 79.</li> <li>- The standards covered under current heading 94(2)(c) can be covered under new headings (2)(a),(b),(d) and (k).</li> </ul>

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	<p><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:</u></p> <p><u>(a) ECD centres must secure that their early childhood development programme meets 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> <p><u>(b) all other early childhood development programmes must have due 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"> <li>- 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.</li> <li>- The rights and needs of children with disabilities are not adequately addressed under the existing N&amp;S and the introduction of new heading (2)(f) helps to deal with this (in line with section 94(3) of the Act).</li> <li>- 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).</li> <li>- New (2)(i) addresses resources and the learning environment, a crucial area not covered in the current headings.</li> </ul> <p>In respect of proposed new subsection (2A), when the Children's Act was originally drafted these statutory guidelines 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>
Section 94 – NEW SUBSECTION	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.	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.

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	<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>(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>
<p>Section 95 – Subsections (1) and (2)</p>	<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 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 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>(a) <u>register the programme with the provincial head of social development of the province where that programme is provided;</u></p> <p>(b) <u>provide the programme in accordance with any conditions subject to which the programme is registered; and</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> <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>(1) <i>where no child attends the programme for more than two hours per day and more than four hours total per week;</i></p> <p>(2) <i>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></p>

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	<p><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>(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><b>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.</b></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>
<p>Section 97 – Subsection (1)(a)</p>	<p>(1) The provincial head of social development must-  (a) within <del>six</del> three months of receiving the application consider an application for registration or for the renewal of registration, and either reject the application or, having regard to</p>	<p>The current time-frame for the determination of applications is too long and leaves many ECD programmes in an uncertain legal position. The long time-frame also places children at greater risk. The time-frame should therefore be reduced.</p>

CLAUSE COMMENTED ON	PROPOSAL	MOTIVATION
	subsection (2), grant the registration or renewal <del>with or without conditions;</del>	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 motivation for 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)(dA)	<i>New subsection (dA):</i> (d) state in a certificate of conditional registration: (i) <u>measures required to achieve compliance;</u> (ii) <u>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) <del>the applicant has the prescribed skills, training, funds and resources available to provide the early childhood development programme as applied for; and</del> (d) <del>the early childhood development programme meets the emotional, cognitive, sensory, spiritual, moral, physical, social and communication development needs of the children to whom the programme will be presented.</del>	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.
Section 97 – NEW SUBSECTION	<i>New subsection (7A):</i> (7A) <u>The registration or renewal of registration of an early childhood development programme</u>	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

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	<p><u>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>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><u>Conditional registration</u> <del>Conditions relating to registration</del></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><del>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-</del></p> <p><del>(a) conditions specifying the type of early childhood development programme that may or must be provided in terms of the registration;</del></p> <p><del>(b) a specification of the period within which the conditions must be complied with; and</del></p> <p><del>(c) any other matters that may be pre-scribed.</del></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"> <li>1. Full registration with no areas of non-compliance but conditions attached (e.g. pertaining to the size or hours of the programme). <b>This is ‘registration with conditions’ and not conditional registration.</b> 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>.</li> <li>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.</li> </ol> <p><b>Point 1. should be dealt with in Section 82 (see proposed new subsection 97(7A)) and kept separate to provisions for conditional registration.</b></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 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</p>

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		<p>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><del>(a) there is a direct and immediate risk to the health, safety or wellbeing of children;</del></p> <p><del>(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;</del></p> <p><del>(b) any condition subject to which the registration or renewal of registration was issued is breached or not complied with;</del></p> <p><del>(c) the registration holder contravenes or fails to comply with a written Notice of Enforcement as contemplated in Section 100; provision of this Act;</del></p> <p><del>(d) the registration holder becomes a person who is not a fit and proper person to provide an early childhood development programme; or</del></p> <p><del>(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.</del></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), (e) or (e)-</p> <p><del>(a) suspend the cancellation for a period to allow the registration holder to correct the cause of the cancellation; and</del></p> <p><del>(b) reinstate the registration if the registration holder corrects the cause of the cancellation within that period.</del></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 the inspection and monitoring system or a Notice of Enforcement 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"> <li>1. monitoring and inspection regime (written report telling facility what changes are needed)</li> <li>2. Notice of Enforcement (as per Section 100)</li> <li>3. cancellation of registration</li> </ol> <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 99(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 100.</p>

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	<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><del>(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.</del></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>Subsection (4) is no longer needed because of earlier 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><del>(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;</del></p> <p><del>(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 national norms and standards and other requirements within a period specified in the notice; or</del></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>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>(b) a person or organisation operating <del>who provides</del> 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 operating <del>the provision of</del> 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> <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</p>

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		<p>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 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</p>

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		<p>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>  <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</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>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>
Section 213 - Drop in Centres	<p>213. (1) A drop-in centre is a facility providing basic services aimed at meeting the emotional, physical, <u>educational</u> and social development needs of vulnerable children.</p> <p>(2) A drop-in centre must offer any of the following basic services:  (a) Provision of food;  (b) <del>school attendance</del> social, emotional or educational support;  (c) assistance with personal hygiene; or  (d) laundry services.</p> <p>(3) A drop-in centre may offer any of the following programmes appropriate to the developmental needs of the children attending that centre:  (a) Guidance, counselling and psychosocial support;  (b) social skills and life skills;  (c) educational programmes;  (d) recreation;  (e) community services;  (f) school holiday programmes;  (g) primary health care in collaboration with the local health clinic;  (h) reporting and referral of children to social workers or social service professionals;  (i) promotion of family preservation and reunification;  (j) computer literacy;  (k) outreach services; <del>and</del></p>	<p>These amendments bring after-school care services and temporary respite day-care for older children within the scope of drop-in centres. Both of these services are currently considered a type of partial care. However, it is proposed that these services are more appropriately understood as a type of drop in centre and dealt with under Chapter 14.</p>

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	<p>(l) prevention and early intervention;  <u>(m) temporary respite day-care for children including children with disabilities; and</u>  <u>(n) 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.</u></p>	