

PROPOSALS: CHILDREN'S THIRD
AMMENDMENT BILL [B-2018]

INPUTS FOR THE CHILDREN'S THIRD AMENDMENT BILL

COMPILED BY : Equal Education Law Centre

CONTACT DETAILS : Nurina Ally, nurina@eelawcentre.org.za, 0718620076

DATE : 10 September 2018

Introduction

The Equal Education Law Centre (EELC) is a public interest law centre utilising legal advocacy, research and strategic litigation to advance the right to education. The EELC regularly represents or works with children and is an organisation committed to advancing the best interests of children.

The EELC has endorsed aspects of the submission by SmartStart, particularly in relation to their overall approach to securing a single registration system, the need for differentiation between different types of ECD programmes, and the onerous and inappropriate registration requirements. In addition to the comments and recommendation submitted in that submission, the EELC makes the following observations and submissions.

Norms and Standards

The link between the funding of partial care facilities and ECD programmes and their registration status, which in turn is linked to their ability to meet the required norms and standards is problematic if the norms and standards are set at the highest attainable standard. Conditional registration thus plays an important role in assisting non-conforming facilities and programmes to progressively meet these standards. It is therefore concerning that the draft bill is not clear on the language

of conditional registration. The consequence of insufficient provision for conditional registration will be that many facilities and programmes will be unable to register, and therefore unable to access the funding and assistance necessary to develop. There are also a number of limitations to the process of conditional registration which in practice mean that a large number of ECD providers will inevitably fall outside of the regulatory net, and the benefits of funding and assistance. It is therefore imperative that the norms and standards are framed to accurately reflect the reality of South Africa as a developing nation where a majority of ECD is provided by private persons in poor and vulnerable circumstances.

Registration requirements

The current process of registration is overly burdensome in that it requires compliance with the norms and standards as well as any other requirements (including local by-laws) merely to be able to register as a partial care facility or ECD programme. If the norms and standards are sufficiently comprehensive there should be no need for parallel requirements. Instead the process must be streamlined so that the norms and standards are the only standard to meet for the purposes of registration.

There is also a significant disparity between the local by-laws in different provinces and this ought not to affect the ability of ECD facilities and programmes to register. The Act must specifically require that all by-laws be brought in line with the norms and standards within a specified time frame in order to (1) streamline the governance and provision of ECD in the provinces and (2) simplify the registration process for ECD facilities and programmes.

Please complete columns 1-4

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|---------------------------|---------------------------|---|--|
| Section 76 - Partial care | Supported in part | 76(1): reject the change from “more than” to “six <u>or more</u> ”. | Under the current definition a practitioner working with six or fewer children is not required to register. The effect of saying “six or more” changes the cut off number requiring registration to five or fewer. This will disrupt a whole sector that has built itself based on the number six. Further this amendment contradicts the definition of “child minder” which has been inserted by the proposed amendment under section 1. It is not clear what the rationale for this change is. |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|---------------------------|--|--|
| | | 76(2)(a)- <u>early childhood development centre as contemplated in section 1;</u> | The phrase “as contemplated in section 1” under 76(2)(a) is confusing as section (1) does not contemplate an ECD centre nor does it define it. |
| | | 76(2) Partial care facilities include- (d) <u>private hostels for children including children with disabilities</u> | We support the inclusion of the types of partial care facilities in the Act, particularly if it means that other ECD services not amounting to an ECD centre will not be required to register as both. However this section does not refer to “private hostels” which are later included in the proposed insertion at section 79(1). |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|---------------------------|------------------------------|--|
| | | Reject the addition of 76(3) | <p>It is not clear why the draft bill carves out an exception to the “six or more” requirement for partial care facilities operated or managed by government. If the intention of this section is to allow for voluntary registration for those facilities that have six or fewer children, then this should extent to all facilities. In addition, in order to avoid arbitrariness in the registration of facilities with six or fewer children, this must be made subject to generally applicable requirements.</p> <p>Note that the reference to “six or more” is not in line</p> |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|---|---------------------------|--------------------|---|
| | | | <p>with the proposed amendment of “six or fewer” in section 76(1).</p> <p>This addition should not be included under the definition of “partial care”. If it remains in the draft bill it should be moved to section 82 – consideration of application.</p> |
| Section 77 - Strategy concerning partial care | Supported | | |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|--|---------------------------|---|--|
| Section 78 - Provision of partial care | 78(3) Supported in part | <p>78(3) [The owner or manager of a partial care facility or provider of a partial care service]</p> <p><u>Subject to section 78(3A), a partial care facility</u> only qualifies for funding contemplated in subsection (1) if such [owner, manager or provider] facility complies with the prescribed national norms and standards contemplated in section 79 and such other requirements as may be prescribed.”;</p> | <p>The word “only” limits the provision of funding to facilities that comply with the norms and standards and other prescribed requirements. While we understand that the insertion of section 78(3A) below is intended to address the limitation of 78(3), we propose new wording “Subject to...” so as to make it clear that these two sections should to be read together .</p> <p>This would also make sense of the cross reference to section 78(3) in section 82(5), which encompasses</p> |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|---------------------------|--------------------|--|
| | | | registration and conditional registration. |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|---------------------------|---|--|
| | Supported in part | “(3A) A conditionally registered partial care facility qualifies for funding notwithstanding only partial compliance with the prescribed national norms and standards <u>contemplated in section 79 and such other requirements as may be prescribed</u> ”; | We propose the addition to the end of section 78(3A) in order to maintain uniformity with 78(3). |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|---------------------------|---|---|
| | 78(4) Not supported | Section 78(4) [The funding of partial care facilities must be prioritised] The MEC for social development [may] <u>must</u> prioritise, and fund partial care facilities and services”; | The change of wording in section 78(4) from “must” to “may” turns the obligation to prioritise the most vulnerable facilities into a discretionary action. However, according to South African case law, the MEC has a legal obligation to prioritise the needs of the vulnerable, which means this cannot be amended to be discretionary. This amendment is therefore anti-developmental and unlawful. |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|---------------------------|--|--|
| | | <p>78(4)(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>It is unclear what a “poverty declared ward” means in section 78(4)(a), as it is not defined in the Act, nor is it a standard term used in the legislation. We propose that the wording be removed. Alternatively, we propose that a definition of “poverty declared ward” be included in the draft bill and that it be defined in a way that is inclusive of as many poor and vulnerable facilities as possible.</p> |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|---------------------------|---|--|
| | 78(4)(e) Not supported | Reject the proposed insertion of section 78(4)(e) | <p>The consequences of the amendment to this section would be that partial care facilities that are private homes, business properties or any property not owned by an NGO, are excluded from the MECs obligation to fund or assist. This would exclude funding for almost all of the more informal partial care facilities, at least relating to their internal infrastructure.</p> |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|--|---------------------------|--|--|
| Section 79 - National norms and standards for partial care | Supported in part | 79(1) The Minister, after consultation with [interested persons and] the Ministers [of] <u>responsible for</u> Education, Finance, Health, Provincial and Local Government, [and] Transport <u>and any other relevant Ministers,</u> <u>relevant stake-holders and relevant civil society organisations,</u> must determine national norms and standards specific to [for partial care] <u>partial care,</u> early childhood development centres, after school care services, private hostels, and temporary respite care services by regulation.”; | This amendment replaces the reference to partial care with a more detailed description of various partial providers. This is not strictly necessary, as the term is defined in section 76, and creates uncertainty as the two definitions are not identical. Also, the draft bill refers throughout to partial care. For clarity, therefore, we propose that the reference to norms and standards specific to partial care be retained. This will also ensure consistency throughout the draft bill. |

| | | | |
|--|--|--|---|
| | | <p><u>79(2A)(a) The development of the national norms and standards contemplated in subsection (1) shall constitute the complete list of requirements that partial care facilities must comply with for purposes of registration, and will take precedence over any conflicting provincial laws or municipal by-laws.;</u></p> | <p>We reiterate the points made in our introduction and propose additional wording for this section. First, there needs to be only one set of requirements that facilities must comply with, which are the norms and standards for partial care. The draft bill should, by express requirement, streamline the municipal requirements relating to ECD. Requiring that the municipal requirement be brought into line with the norms and standards will have the effect of (1) reducing the gulf between requirements in different municipalities and (2) simplifying the registration</p> |
|--|--|--|---|

| | | | |
|--|--|--|--|
| | | | and monitoring process of partial care facilities. |
|--|--|--|--|

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|---|---------------------------|--|--|
| Section 81 - Application for registration and renewal of registration | Not supported in part | <p>Section 81 of the principal Act is hereby amended—</p> <p>By the substitution of the heading of the following heading: “Application for registration, <u>conditional registration</u> and renewal of registration”</p> <p>Section 81(1) An application for registration [or conditional registration] <u>or conditional registration</u> of a partial care facility or [for the reinstatement or] renewal of registration must-”;</p> | <p>The draft bill must include the requirements for conditional registration otherwise there will be no clarity on the process. We propose that all references to “conditional registration” throughout this section be retained, and that the heading be amended to accurately reflect the content of this section.</p> |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|---|---------------------------|---|--|
| Section 82 - Consideration of application | Not supported in part | 82(4) The provincial head of social development must consider the report contemplated in section 81(c)(i) of a social service [professional] <u>practitioner</u> before deciding an application for registration [conditional registration] <u>conditional registration</u> or renewal of registration. | The report is equally relevant to an application for conditional registration, in light of our proposed changes to section 81. |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|---------------------------|--|--|
| | | <p>82(5) Notwithstanding section 78(3) a provincial head of social development may assist the owner or manager of a partial care facility where conditional registration was granted, to comply with the prescribed national norms and standards contemplated in section 79 and such other requirements as may be prescribed.”.</p> | <p>The addition of section 78(3A) already makes it express that funding can be provided to facilities with conditional registration. In keeping with a progressive developmental approach, we propose that this section not be limited or linked to conditional registration, so as to ensure that assistance can also be provided to the poorest facilities, that are not yet able to obtain conditional registration. This is particularly important given that the assistance is discretionary.</p> |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|---------------------------------------|---------------------------|---|--|
| Section 83 - Conditional registration | Not supported | Reject the proposed amendment to the heading of section 83. | <p>This amendment creates uncertainty regarding the purpose of this section. It is important to remain clear that registration may be granted conditionally, where there is not full compliance with the norms and standards. We therefore propose that the bill retains the language of “conditional registration” and (1) provides a definition of conditional registration, (2) empowers the promulgation of regulations regarding conditional registration, and (3) ensures that there is a maximum time period set for the satisfaction of any conditions, so as to avoid</p> |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|------------------------------------|---------------------------|--|---|
| | | | facilities remain “conditionally registered” for unreasonable long periods. |
| | | By the insertion after paragraph (b) of the following paragraph (c) <u>a specification of the requirements that must still be complied with;</u> | It is important for partial care facilities seeking full registration to have instructions regarding which requirements are still outstanding. |
| Section 85 - Notice of enforcement | Not supported | “(5) <u>Where an</u> [The] owner, manager or organisation operating a partial care facility [who or which had] <u>has</u> been instructed or ordered to stop operating such facility, <u>the MEC</u> must ensure that suitable alternative arrangements are made for the children in | The obligation to secure suitable alternative arrangement for children in a partial care facility that has been instructed to stop operating must fall on the municipality not on an owner of the partial care facility. It is impractical for those who have failed to |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|---|---------------------------|---|--|
| | | such facility, where necessary.”. | maintain a facility to then be responsible for arranging suitable alternatives. Also, the MEC has overall responsibility for the well-being of the children within the province. |
| Section 87 - Record and inspection of and provision for partial care facility | Support | | |
| Section 88 - Assignment of functions to municipality | Support | | |
| Section 89 - Serious injury, abuse or death of a child in a partial care facility | Support in part | “(1) If a child is seriously injured or abused while in partial care or following an occurrence at a partial care facility, the person operating the partial care facility or a person employed at the partial care facility must | 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. |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|---------------------------|---|---------------------|
| | | <p>immediately report such injury or abuse to the provincial head of social development <u>in accordance with section 110(1)</u>, who must [cause an investigation to be conducted into the circumstances of the serious injury or abuse] <u>act in accordance with the provisions of section 110(5).</u>"</p> | |

| | | | |
|---------------------------------|--------------------------|---|--|
| <p>Section 90 - Regulations</p> | <p>Supported in part</p> | <p>By the insertion after paragraph (h) of the following paragraphs:</p> <p>(i) the procedure to be followed for facilities being assisted to comply with norms and standards;</p> <p>(j) the procedure to be followed for a quality improvement programme;</p> <p>(k) <u>the maximum period for which conditional registration is valid; and</u></p> | <p>The regulations must allow for the MEC to provide detail on the processes required for the progressive realisation of norms and standards in an authoritative and clear way.</p> <p>The MEC must also prescribe a maximum time that a facility may receive funding on the basis of conditional registration, to avoid such facilities continuing not to satisfy the norms and standards for unreasonable periods of time.</p> |
|---------------------------------|--------------------------|---|--|

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|--|---------------------------|--|---|
| Section 92 - Strategy concerning ECD | Supported in Part | | We support the incorporation “inclusiveness” into the strategy concerning ECD however there is no definition of “inclusive” in the draft bill. We therefore suggest that a definition be included section 1, that is in line with the National ECD Policy regarding children with disabilities. |
| Section 93 - Provision of ECD programmes | 93(3) and (3A) Supported | Substitution of section 93(3) for the following- (3) <u>Subject to section 93(3A)</u> , the provider of an early childhood development programme only qualifies for funding | We support the principle behind the inclusion of 93(3A), however we propose an addition to section 93(3) that ensures that the two sections are read together as a whole. |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|---------------------------|---|--|
| | | <p>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.</p> | |
| | 93(4) Not supported | <p>(4) The MEC for social development [must] may <u>must</u> prioritise and fund early childhood development programmes</p> | <p>Similarly to section 78(4), the change of wording in section 93(4) from “must” to “may” turns the obligation to prioritise the most vulnerable facilities into a discretionary action, which is anti-developmental and unlawful in light of the MEC’s obligation to prioritise the needs of the vulnerable.</p> |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|--|---|---|
| | | | |
| | 93(4)(a) Supported in part | | See commentary on 78(4)(a) |
| | 93(4)(aA) Supported in part | | It is not clear why this section has been inserted in respect of ECD programmes but not in respect of partial care facilities. The proposed amendment to section 93(4)(a) is sufficient to address prioritisation. In addition, there is no definition for “rural areas” which may cause uncertainty in practice. |
| 93(5) Not supported | (5) An early childhood development programme | The MEC must ensure that ECD programmes are provided, particularly in light | |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|---------------------------|--|---|
| | | <p>[must] may must be provided by-</p> | <p>of the proposed change to the list from “and” to “or”. The MEC must ensure that programmes are provided by at least one of the proposed facilities listed in section 93(5) or (6).</p> |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|--|---------------------------|--|--|
| | 93(6) supported in part | (6) Any other person, organisation, <u>Department, provincial department of social development or municipality</u> not disqualified in terms of section 97(3) may provide early childhood development programmes, provided that those programmes [comply with the prescribed national norms and standards contemplated in section 94 and such other requirements as may be prescribed] <u>are registered or conditionally registered.</u> | We support the inclusion of government provided ECD programmes. However, in order for such programmes to be registered or conditionally registered, they must satisfy the necessary requirements for registration or conditional registration. |
| Section 94 - National norms and standards for ECD programmes | Supported in part | Insertion of the following after (f) | The section appears to provide a closed list. We propose that it be left open |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|---|---------------------------|--|--|
| | | <u>(g) any other matter as may be prescribed by the Minister</u> | to additional focus areas which may come to light. |
| Section 96 - Application for registration and renewal of registration | Not supported | (1) An application for registration [or conditional registration] <u>or conditional registration</u> of an early childhood development programme or for the renewal of registration must- | The draft bill must include the requirements for conditional registration to provide clarity on the process. If the intention behind this change is that application must always be made for registration but that conditional registration may be granted, then the draft bill must provide guidance regarding under which conditions such conditional registration may be granted. |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|---|---------------------------|--|---|
| Section 97 - Consideration of application | Not supported | Notwithstanding the provisions of section 93(3), a provincial head of social development may assist a person providing an early childhood development programme where conditional registration was granted , to comply with the prescribed national norms and standards contemplated in section 94 and such other requirements as may be prescribed | This amendment unnecessarily limits the power of the provincial head of social development to assist persons providing ECD programmes to comply with the norms and standards and other requirements. Under the current section any such person may be assisted but the amendment limits this to only those that have been conditionally registered, which is unnecessary given that the power to assist is discretionary, and that there may be persons providing ECD programmes that require assistance prior to |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|---------------------------------------|---------------------------|---|--|
| | | | being conditionally registered. |
| Section 98 - Conditional registration | Not supported | Reject the proposed amendment to the heading of section 98. | <p>Similarly to our commentary on section 83, we propose that the bill retains the language of “conditional registration” as it is well-known and is clear regarding the conditions relating to conditional registration.</p> <p>We also propose that the Minister promulgate regulations pertaining to conditional registration, including maximum periods for which an ECD programme can receive</p> |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|---|---------------------------|---|---|
| | | | funding under conditional registration. |
| Section 100 - Notice of enforcement | Not supported | <u>Where a</u> person providing an early childhood development programme [who] has been instructed to stop the provision of that programme, <u>the MEC</u> must ensure that suitable alternative arrangements are made for the children attending such programme, where necessary. | See our commentary on section 85 which applies equally to this section. |
| Section 102 - Assignment of functions to municipality | Supported | | |
| Section 103 - Regulations | | By the insertion after paragraph (d) of the following paragraphs: | The regulations must allow for the MEC to provide detail on the processes |

| Amendment of section | Supported / Not Supported | Proposed amendment | Reasons / Rationale |
|----------------------|---------------------------|--|--|
| | | <p>(e) the procedure to be followed for early child development programmes being assisted to comply with norms and standards;</p> <p>(f) the procedure to be followed for a quality improvement programme;</p> <p>(g) <u>the maximum period for which conditional registration is valid; and</u></p> | <p>required for the progressive realisation of norms and standards in an authoritative and clear way.</p> <p>The MEC must also prescribe a maximum time that an early child development programme may receive funding on the basis of conditional registration, to avoid such facilities continuing not to satisfy the norms and standards for unreasonable periods of time.</p> |